

BOOK REVIEW

REASON AND SENTIMENT: THE MORAL WORLDS AND MODES OF REASONING OF ANTEBELLUM JURISTS

HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA

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REVIEWED BY ALFRED L. BROPHY**

[It is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling.]

[We must not be led astray by their authority. Whether they were dupes

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** Visiting Professor of Law, Indiana University–Indianapolis and Professor of Law, Oklahoma City University. I have been the beneficiary of an extraordinary group of colleagues and friends, who have generously commented on this Essay. They are Mary Sarah Bilder, Jennifer S. Byram, Richard Coulson, Christine Fitzgerald, Shuba Ghosh, Daniel Hamilton, Daniel J. Hulsebosch, Timothy Milford, Norman Rosenberg, and, especially, Arthur G. LeFrancois. In addition, Lisa Cardyn, Christine Desan, James W. Ely, Dean Grodzins, and, especially, Alan Heimert, loaned me their expertise on specific questions discussed here. The Woodrow Wilson Foundation's Mellon Fellowship in the Humanities and OCU's Robert S. Kerr Faculty Research Fund supported the writing of this Essay. This Essay is dedicated to the memory of Alan Heimert (1928-1999), whose magisterial work Religion and the American Mind from Great Awakening through Revolution addressed the tension between reason and sentiment in early American history. Professor Heimert nurtured my interest in use of literary evidence in recovering the major themes of legal thought. His teaching motivates many of the questions I ask about American thought and the way I answer them.

1 The Rapid, 12 U.S. (8 Cranch) 155, 164 (1814) (Johnson, J.).

1161
of opinions that they did not care to investigate too captiously, or honest fanatics, or sphenetic partizans, who praised from hatred more than from love, it is time we should assert our own independent judgment, and act and think for ourselves. Some, perhaps, from a pious desire to reconcile the affections of their countrymen to their own laws, have referred them to such high antiquity, and, as it were, divine origin, after the example of the great lawgivers of antiquity, who dared not to trust their ignorant and superstitious subjects with the truth, and therefore feigned traditions, and fabulous communications with nymphs and goddesses. But with us, such mummeriy is out of date: the People know that their law is the creature of their power: the work of their own hands; and that, if it is not good, it is to have their own shame; and that canting and ranting will never make it better.

INTRODUCTION .......................................................... 1163
I. KARSTEN'S MODEL OF HEART VERSUS HEAD .................. 1165
II. REASON AND SENTIMENT ........................................... 1168
   A. Colleges Explore Reason and Sentiment ....................... 1169
      1. Moral Philosophy Treatises ................................. 1169
         a. The Grammar of Moral Philosophy ....................... 1169
         b. Utilitarian Calculations ................................. 1171
      2. Antebellum College Lectures and the Division of Heart and Head .................................. 1172
   B. Distinction Between Reason and Sentiment .................... 1175
      1. Charles Grandison Finney and the Evangelical Definition of Heart .................................. 1176
      2. Democratic Sentiments ....................................... 1177
      3. Distinguishing Reason and Sentiment in the Judiciary .... 1178
   C. The Convergence of Reason and Sentiment ..................... 1182
   D. The Divergence of Heart and Head in Anti-Slavery Discourse .... 1184
III. KARSTEN'S INTERPRETATION OF THE MAIN CURRENTS OF ANTEBELLUM LEGAL THOUGHT ........................................ 1187
   A. Drawing the Line Between a Jurisprudence of Sentiment and the Antebellum Common Law Method ........................................ 1187
      1. The Overlap of Religious and Legal Thought ............... 1188
      2. Distinguishing the Evangelical "Jurisprudence of Sentiment" from Legal Reasoning ...................... 1189
   B. The Non-Explanatory Power of Sentiment ....................... 1193
   C. The Adoption of Middle Class Values .......................... 1196
   D. The Need to Attend to An Judges' Ideologies ................. 1200
   E. Karsten's Reading of Cases: The Example of Ancient Lights ... 1201
      1. The Traditional Story of the Development of Ancient Lights ........................................ 1201
      2. Karsten's Alternative Reading of Ancient Lights ......... 1203

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INTRODUCTION

In his 1965 book *The Life of the Mind in America from the Revolution through the Civil War*, Perry Miller classified the American intellect along the axis of head and heart. According to Miller, lawyers were motivated by the head, or reason; their opponents were evangelical ministers, who inhabited the domain of the heart, or sentiment. More than thirty years later, Peter Karsten employs Miller's categories, but he adopts an interpretation at odds with Miller. Miller believed that lawyers reasoned differently from Unitarian and certain evangelical ministers. Karsten locates the division between head and heart within the legal profession itself; he finds that the impulses of the heart were so strong that "the propensity of nineteenth-century American jurists to alter common-law rules in order to aid the weak and the poor is so clear that I marvel that someone else has not written this book before me." Karsten seeks to replace what he calls the "reigning paradigm"—that of Morton Horwitz's 1977 *Transformation of American Law*.

This Essay analyzes Karsten's thesis in the antebellum era. Part I summarizes Karsten's argument for his classification scheme of head and heart. Part II clarifies the nature of the head-heart dichotomy. Part III suggests

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3 Perry Miller, *The Life of the Mind in America from Revolution through Civil War* 105 (1965) ("Almost as soon as the lawyers of the young Republic began to mobilize the forces of the Head against the anarchic impulse of the American Heart, they found themselves further embarrassed by a hostility, even more deeply ingrained in the American mentality, to any and every use of the English Common Law.").

4 See id. at 121 ("[T]he lawyers' real controversy with their society was that they stood for the Head against the Heart.").

5 See id. at 59-66 (discussing attempts of the 19th century religious leaders to guide the hearts of followers).


7 See Miller, supra note 3, at 118 ("It soon became evident that the rationalism of the lawyer was a different business from the widely advertised Law of Nature."). Contrary to Miller's assertion, it appears that the majority of lawyers and ministers employed similar modes of reasoning. The differences and similarities between their modes of reasoning are treated in Daniel Lord's 1851 oration to the Yale Phi Beta Kappa Society. See Daniel Lord, On the Extra-Professional Influence of Lawyers and Ministers 14-15 (1851) (referring to "modes of reasoning").

8 See Karsten, supra note 6, at 3.

9 See id. at 298-301 (discussing Morton J. Horwitz, *The Transformation of American Law*, 1780-1860 (1977)).

10 Karsten's book covers the entire nineteenth century, but this Essay focuses on legal thought before the Civil War.
some difficulties with this scheme. First, Karsten's dichotomy between head and heart is sometimes confusing. In attempting to explain decisions by judges, he relies too heavily upon the duality of heart versus head. It is inadequate to explain the complex interactions of legal doctrine with ideology. Moreover, it is difficult to determine whether a decision is pro-heart or pro-head. The flexibility of the terms allows Karsten to classify some decisions as heart, which others might justifiably place in the head classification. Karsten attributes too much power to sentiment in reshaping the cold logic of the law. Nor does he pay sufficient attention to the powerful, conservative elements that were part of American law in the nineteenth century, further skewing his interpretation of what judges were doing at that time. I also raise some question about his examples. Part IV of this Essay provides an alternative interpretation, which emphasizes the growth of rational, economically efficient rules that advance economic development while simultaneously appearing neutral.

From the end of the eighteenth century until the Civil War, American jurists faced a burgeoning economy, and the law had to grow in sophistication to accommodate the changes in society and economy. Thus, while the economy was growing, American legal thought recognized that common law rules had to adapt to American conditions. Chancellor Kent captured the changing nature of American law:

> Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time.

During this adaptation, common law rules were modified or rationalized. The process made the law serve American needs, as defined by the jurists. The dominant modes of thought favored economic development and were directed toward stable principles of law that increased the ability to predict outcomes.

That process of rationalization made the law more predictable and more

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11 See Horwitz, supra note 9, at xvi ("During the eighty years after the American Revolution, a major transformation of the legal system took place, which reflected a variety of aspects of social struggle.").

12 JAMES KENT, COMMENTARIES ON AMERICAN LAW 445-46 (1826).

13 See Horwitz, supra note 9, at 1-2 (stating that during the antebellum period "common law judges brought about the sort of far-reaching changes that would have been regarded earlier as entirely within the powers of the legislature").

14 See id. at 2 ("As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.").

15 See id. at 25 (discussing the change in common law rules to fit "post revolutionary functionalism").
economically efficient; it did not generally emphasize sentiment. While certain hard cases played on judges’ sentiments, those should not be made the basis for large-scale generalizations about American law’s formative era. This Essay advances an interpretation of antebellum modes of reasoning that hews to the reigning paradigm, which emphasizes the role of economic thought in shaping judicial decisions. It proposes a synthesis of the postulates of such diverse scholars as Morton J. Horwitz, William Fisher, William Lapiana and Richard Posner. Together, these scholars indicate that common law decisions were based on the judges’ own ideas about economy, society and religion. Such rules promoted economic growth while also casting an image of fairness.

I. KARSTEN’S MODEL OF HEART VERSUS HEAD

Karsten advocates a “heart versus head model,” which he proposes as an alternative paradigm to the reigning “economic determinist paradigm” represented by Morton Horwitz. Horwitz’s paradigm has two key tenets.

16 See Horwitz, supra note 9, at 3 (characterizing legal thought after 1820 as increasingly preoccupied “with using law as an instrument of policy”).
18 See William Lapiana, Logic and Experience: The Origin of Modern American Legal Education 6 (1994) (attempting “to place the history of the formative years of modern American legal education in as complete a context as possible”).
20 See discussion infra Part IV.
21 Karsten, supra note 9, at 8-11. Horwitz’ instrumentalism argument recognizes that law changes as society changes and that judges are a part of that process of evolution, even though judges self-consciously told their audiences that they were merely expounding, rather than making, the law. See, e.g., Flint River Steamboat Co. v. Foster, 5 Ga. 194, 208 (1848) (Lumpkin, J.) (“These terms may be onerous, but this is purely a question of expediency, and one which must, from its very nature, address itself exclusively to the law maker.”). Often, one suspects judges made such statements because they had some uneasiness with the decision they announced. Such uneasiness testifies to the constraints that law placed upon them.

Direct evidence for a conception of instrumentalism comes primarily from the critics of the common law, who depicted the judges as changing the law to comport with their own ideas about a correct outcome. See, e.g., Henry Dwight Sedgwick, An Anniversary
First, that judges had an instrumental conception of the law that taught them that they might self-consciously mold the law to comport with their ideas of economy, society and religion. Second, that as judges remade American law they did so in a way that facilitated economic growth.

At the core of Karsten’s response is the belief that “[t]he interaction of power and culture sometimes produces offspring. Among the seats of power are those of supreme court benches, and those who occupied them in the nineteenth century were the creatures of their culture, a culture that became increasingly egalitarian and humanitarian.” This paradigm draws upon several key elements. First, when jurists altered common law rules, they did so in ways that favored poor litigants. Indeed, the instrumentalism present in American law was “far ‘kinder and gentler’ to those suing corporations, or being sued by creditors, than the reigning paradigm has maintained.” Those changes were driven by jurists’ reliance upon deep-seated ideology, based largely on their religious beliefs.

Karsten also draws upon the “new ethnocultural interpretation of nineteenth-century American politics and society” to suggest that factors other than class interests dominated American political thought at the time. From the important insight that voters were often more drawn to issues of morality than class, Karsten concludes that “[b]oth the republican spirit of the age and the
evangelical faith in the perfectibility of man inspired the jurists of the nineteenth century.” 29 Karsten concludes that the jurists were affected by the “policy of christian civilization” being debated around them. 30

Karsten’s model may be reduced to this. First, most judges employed the formalistic approach of the “head,” which meant following precedent and the cold, legal logic of the law. 31 When judges fully explored the policy and legal reasons underlying their decisions, they set the framework for future generations. 32 But when judges broke free of precedent, they were motivated by sentiments of the heart. 33 Those sentiments led jurists to fashion rules “to aid those who had been hurt by the course of that economic growth, those who lay wounded in its wake.” 34 Oddly, then, Karsten seems to accept much of the most controversial part of Horwitz’ argument: that judges employed an “instrumental” conception of the law. 35 He supports his argument by sampling changes in law of property (Ancient Lights and spendthrift trusts), 36 tort (attractive nuisance and limitation of contributory negligence) 37 and contracts (third party beneficiary, employees who breach employment contracts and permitting contingency fee contracts) 38 and by looking at jury behavior in tort

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29 Karsten, supra note 6, at 10.
30 Id. at 11.
31 See id. at 294 (concluding that the power of precedent “was far more important in the early nineteenth century than has been reported”). The vast majority of cases were foreclosed by precedent. Even those seeking a break with the past are bound by it. “[S]o deep is the foundation of the existing social system, that it leaves no one out of it . . . . The past has baked your loaf, and in the strength of its bread you would break up the oven.” Ralph Waldo Emerson, The Conservative, in Ralph Waldo Emerson: Essays and Lectures 173, 178 (Joel Porte ed., 1983) [hereinafter Emerson’s Essays]. Careful readings of those advancing instrumentalism disclose that most of the cases were decided according to already existing rules. See, e.g., William E. Nelson, The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 121 (1974) (“Prerevolutionary rules regulating competition among resource users . . . were reaffirmed in the half century after the Revolution.”); Cf. Mark Tushnet, Swift v. Tyson Exhumed, 79 Yale L. J. 284, 308 (1969) (The American common law had never “been the creature of cold logic, as some of its advocates, as well as some of its critics, had imagined”).
32 See Karsten, supra note 6, at 31.
33 See id. at 148 (offering the jurisprudence of the heart as an explanation for the propensity to make changes in the law).
34 Id. at 294.
35 See id. at 33 (concluding that it is plausible to read the judges’ opinions as understanding “the common law to be a mere instrument in the hands of a jurist to achieve whatever end he and his colleagues sought”).
36 See id. at 132-34, 147-56.
37 See id. at 201-54.
38 See id. at 157-99.
cases, particularly railroad and personal injury cases.\textsuperscript{39}

Karsten believes that "[t]he tension between Heart and Head is the central
story of the common law in nineteenth-century America, and Heart won out
over Head in such contests as it entered as often as it lost."\textsuperscript{40} The next section
of this Essay turns to an examination of what "head" and "heart" meant to
antebellum Americans, with the goal of creating a framework for evaluating
Karsten's model and for understanding how jurists weighed the merits of
sentiment and reason.

II. REASON AND SENTIMENT

Antebellum moral philosophers created detailed maps of how they believed
their minds worked. Those maps divided the intellectual world into the
spheres of reason and sentiment.\textsuperscript{41} Those maps appear in vivid detail in moral
philosophy treatises and in lectures to college literary societies. The lectures,
which were frequently delivered by judges and lawyers, also located law
within a larger context of intellectual progress.\textsuperscript{42} They illuminated how
contemporaries believed law was changing.\textsuperscript{43} Often reason and sentiment
reinforced each other, with moral impulses (sentiment) lending moral force to
cold calculations of reason.\textsuperscript{44} But on some occasions there was a divergence
between reason and sentiment; that divergence occurred most starkly in the
abolitionists' arguments, based frequently on appeals to sentiment.\textsuperscript{45} The
people who advocated a jurisprudence of sentiment, what one might call a
jurisprudence of the heart, rarely occupied a place within the established legal
order.\textsuperscript{46} Much more frequently, they were outsiders.\textsuperscript{47}

\textsuperscript{39} See id. at 255-91.

\textsuperscript{40} Id. at 7.

\textsuperscript{41} \textit{See John T. Brooke, The Legal Profession: Its Moral, Nature, and Practical
Connection with Civil Society} 14 (1849) (discussing the distinction between legal and
moral justice).

\textsuperscript{42} See id. at 10 (claiming that inventions and improvements of the 19th century gave a
"new impulse to the cause of popular education, stimulated inquiry into human rights, and
awakened a zeal for improvement in almost every leading department of life"). \textit{See also
Alfred L. Brophy, Progress and Law in Antebellum Phi Beta Kappa Lectures} (U. of Ill.
Faculty Workshop, November 12, 1999).

\textsuperscript{43} See Brooke, supra note 41, at 10 (claiming contemporary progress led to "proposing
hasty and injudicious reforms").

\textsuperscript{44} \textit{See Jasper Adams, Elements of Moral Philosophy} 11 (1837) (discussing the
influences of "passions" on "reason").

\textsuperscript{45} \textit{See Bertram Wyatt-Brown, Conscience and Career: Young Abolitionists and
Missionaries Compared, in Yankee Saints and Southern Sinners} 42, 42 (1985) (discussing "popular and academic opinion about the fanatical and destructive nature of the
[abolitionist] cause").

\textsuperscript{46} \textit{See infra} text accompanying notes 156-81.

\textsuperscript{47} \textit{See id.}
A. Colleges Explore Reason and Sentiment

1. Moral Philosophy Treatises

College moral philosophy texts provide one method to examine how judges decided cases since the texts are comprehensive manuals that discuss the factors governing moral choices. Moral philosophy encompassed the "science which treats of the motives and rules of human actions, and of the ends of which they ought to be directed." \(^{48}\) Moreover, these texts recognized that the "whole system of culture," religious, legal and educational institutions, shaped national characteristics. \(^{49}\) While one would not necessarily expect a single course in moral philosophy to exert continuing influence over students years later when they occupied benches across the nation, the texts are illustrative of the factors that decision-makers take into account. This section looks at moral philosophy as a way of glimpsing the factors that antebellum judges might have taken into account in deciding cases.

a. The Grammar of Moral Philosophy

Francis Lieber's *Encyclopedia Americana* concluded that all of moral philosophy revolved around two questions. \(^{50}\) The first was "What is virtue?" \(^{51}\) Moral philosophers answered, "benevolence, or prudence, or propriety." \(^{52}\) The second question was "How is [virtue] recommended to us?" \(^{53}\) The answer was "self-love, or reason, or a moral sense." \(^{54}\) Judges faced with deciding cases where precedent did not bind them turned to one, and in some instances several, of those components.

The dominant mode of moral philosophy in the nineteenth century divided the human mind into reason and sentiment. \(^{55}\) It believed that humans had an

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\(^{48}\) See *Moral Philosophy, Encyclopedia Americana* 31, 33 (Francis Lieber, ed. 1833). Moral philosophers in particular celebrated what one might call the constructed conscience—the use of reason, moral instruction, and revelation to arrive at a correct, moral decision. See *Adams*, supra note 44, at 28 ("To insure safe decisions, the mind must be kept free from prejudice and passion, and, above all, the conscience must be guided, regulated, and enlightened.").

\(^{49}\) Thomas R. Dew, *A Digest of the Laws, Customs, and Manners of the Ancient and Modern Nations* 74 (1853) (asking "in what light must we regard Sparta in order to form a just idea of her whole system?").

\(^{50}\) Moral Philosophy, supra note 48, at 33 ("In all of morals, two questions arise... ").

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.

innate moral sense, which told them right from wrong.\textsuperscript{56} That innate sense might be refined, or instructed, by reason; at the same time, the innate sense might be overwhelmed by passions.\textsuperscript{57} Thus, Unitarian minister William Ellery Channing spoke of the influence of Christianity in breathing charity into rigid rules of religion.\textsuperscript{58}

Moral philosophers seemed to concur on basic principles.\textsuperscript{59} Sentiment might be unduly influenced by passion or prejudice,\textsuperscript{60} but once it was enlightened and freed from passion, one might decide rightly.\textsuperscript{61} Or, as Jasper Adams emphasized, "[t]he Conscience, therefore, of every individual is to him the supreme and ultimate rule of duty;—but, to insure safe decisions, the mind must be kept free from prejudice and passion, and, above all, the conscience must be guarded, regulated, and enlightened."\textsuperscript{62} Whatever the approach used, moral philosophy treatises taught the importance of obedience to the law.\textsuperscript{63} The world of moral philosophy was conservative—teaching obedience to settled forms, precedent and intricate reasoning.\textsuperscript{64}

\textsuperscript{56} See \textit{id.} at 154 ("God seems to have given [people] no strength of passion, except sensibility.").

\textsuperscript{57} See \textit{id.} at 153 (citing Channing who claimed "affection is as essential to our nature as thought, [and] that the union of reason and sensibility is the health of the soul"). Transcendentalists posited a different structure of thought—that humans ought to be actively intuitive about moral law. See \textit{Nature, in Emerson's Essays, supra} note 31, at 9 (contending for a more direct relationship with God, while observing that "[t]he foregoing generations beheld God and nature face to face; we, through their eyes").

\textsuperscript{58} See \textit{Howe, supra} note 55, at 153 ("The 'sensibility' which Channing sought to unite with reason was a very special type of emotional sensitivity, a combination of religious affection and moral taste.")

\textsuperscript{59} See \textit{Adams, supra} note 44, at 10 (quoting William Rawley's statement "that moralists, from whatever different principles they set out, commonly meet in their conclusions").

\textsuperscript{60} See \textit{id.} at 26 ("We have seen, that the decisions of conscience may be perverted by prejudice and passion.")

\textsuperscript{61} See \textit{id.} ("Our consciences must be enlightened by knowledge, and we must bring to their full aid, full, calm, and honest inquiry.").

\textsuperscript{62} \textit{Id.} at 28.

\textsuperscript{63} See \textit{id.} at 31-32 ("Still, as the law of the land is, in general, binding on the conscience, the citizen is not justifiable in refusing compliance with its requisitions. . . . ")

\textsuperscript{64} See \textit{William Gaston, An Address Delivered Before the American Wigm and Cliosophic Societies of the College of New Jersey, September 29, 1835} 11 (1835). Gaston noted:

Order is heaven's first law, and there can be no order without subordination. A deliberate breach of law shows profligacy and folly, the ferocity of an untamed, or the ignorance of an uninformed nature; but a cheerful submission to wise rule is the highest evidence of that reasoning energy and decision of purpose which are among the noblest attributes of an intellectual being.

\textit{Id.}
Utilitarian Calculations

Salient among the factors drawn upon by moral philosophy was a utilitarian calculus. William Paley’s *Moral and Political Philosophy*, one of the leading college texts in moral philosophy in the antebellum era, stated boldly that “the utility of a moral rule constitutes its obligation.”

Paley’s advocacy of expediency, a benign form of utilitarianism, met with substantial opposition. Antebellum Americans were so wary that the introduction to the 1834 American edition cautioned that “Dr. Paley says, ‘whatever is expedient is right.’ But then, it ‘must be expedient on the whole, at the long run, in all its effects, collateral and remote, as well as in those which are immediate and direct.’” The *Encyclopedia Americana* feared that the idea of utility had too much power in antebellum society and commented, “[t]he idea of utility has even encroached upon the province of morality as if our age could not love and do good for its own sake.” Similarly, Henry David Thoreau advocated a reliance upon humanity for guidance in determining legal rules. Thoreau criticized Paley in his 1847 essay *Civil Disobedience*, saying, “Paley appears never to have contemplated those cases to which the rule of expediency does not apply, in which a people, as well as an individual must do justice, cost what it may.”

Utilitarian arguments offered the promise of avoiding references to sentiment. Jasper Adams wrote

> By this theory, the jurisdiction of conscience is abolished, her decisions are classed with those of the superannuated judge, and determination of moral causes is adjourned from the interior tribunal of the breast to the noisy forum of speculative debate. Nothing is yielded to the suggestions of conscience, nothing to the movements of the heart; every thing is dealt out with a sparing hand, under the stint and measure of calculation.

Adams recognized that utilitarian principles might serve some subordinate role in determining proper action, but urged a return to

> the safe and sober paths of our ancestors, adhering, in all moral questions,

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65 *Paley’s Moral and Political Philosophy as Condensed by A.J. Valpy* 56 (Uriah Hunt 1835).
66 See id. at 56-57 (discussing Dewar’s theory that expediency cannot be the law of conduct and Dymond’s belief that utility, while important, is not “the expression of the divine will”).
67 Id. at 2.
68 *Utilitarians*, 12 *Encyclopedia Americana* 490. See also *The American Bar*, 28 U.S. Mag. & Demo. Rev. 195, 196 (1851) (“The three learned professions, law, medicine, and divinity, have seen their ancient monopolies and cherished mysteries subjected to the tests of scrutiny and utility set up by those who somewhat irreverently take nothing for granted, and demand that everything shall be proved.”).
70 *Adams, supra* note 44, at 15.
to the dictates of conscience, regulated and otherwise enlightened; happy to enjoy, instead of the sparks of our own kindling, the benefit of that light, which, placed in the moral firmament by an Almighty hand, has led, in the way of safety, all who have been willing to trust to its guidance.\textsuperscript{71}

Such attention to inward moral principles led in the direction of correct decisions.\textsuperscript{72} R.H. Rivers' \textit{Moral Philosophy} relied less upon sympathy than others. "Sympathy is too changing to be set up as the arbiter of right."\textsuperscript{73} "Let virtue consist altogether in sympathy, and nothing is in itself good; ... Good and evil become relative, and are precisely as each one feels them to be."\textsuperscript{74}

Once the utility of a new rule appeared, it might sweep the old away. Calvin Colton told his English audience that American society (and law in particular) did not have the same respect for precedent that English society possessed. A respect for utility existed in its place:

No matter where a thing, a custom, a law, or a principle, comes from—whether from the remotest period of man's history, or from heaven itself—there must be a satisfactory reason, resulting from a consideration of its intrinsic value and practical importance, to insure its adoption.\textsuperscript{75}

Such was the intellectual world that the antebellum jurists inhabited, in which decisions about practical ethics were often based on calculations of utility in conjunction with reasoning from innate moral principles as instructed by history and experience.\textsuperscript{76} American law had its own internal logic, and each judge weighed for himself the relative importance of utility calculations, instructed conscience and precedent.\textsuperscript{77} But in thinking about the internal structure of American law it makes sense to draw upon the example of moral philosophy.

2. Antebellum College Lectures and the Division of Heart and Head

College lectures depict some of the key modes of thought of antebellum Americans. Because the orators sought to explain major themes in American culture, such as the law’s relationship to progress and the influence of America

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{See id.} at 15-16.

\textsuperscript{73} R.H. RIVERS, \textit{MORAL PHILOSOPHY} 136 (Thomas O. Summers ed., 1861).

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} CALVIN COLTON, \textit{A VOICE FROM AMERICA TO ENGLAND} 52 (1839).

\textsuperscript{76} ADAMS, supra note 44, at 29 ("The law of a country is the combined reason, sentiment, and wisdom of the citizens of such country, so far as it relates to the subjects embraced by the law, and therefore, aside from its binding character as law, is entitled to the respect of the citizens.").

\textsuperscript{77} Cf. Alan Watson, \textit{The Transformation of American Property Law: A Comparative Law Approach}, 24 GA. L. REV. 163, 221 (1990) (showing continuity of water law and concluding that "in the on-going struggle between the need for certainty ... and the need for rationality ... we still cannot say that rationality has prevailed in the context of property rights of riparian landowners").
on the mind and because the lectures were often given by lawyers or jurists, they offer an excellent starting point for analysis of the main currents of American legal thought. As observers on the scene, the orators have the power to illuminate legal thought, and its connections to the ways that Americans progressed from European modes of thinking and acting, in ways that we cannot do independently today.

Joseph Story’s 1826 lecture to Harvard’s Phi Beta Kappa society, “Science and Letters in Our Day,” illustrates how lecturers linked legal thought to larger patterns of American thought and, particularly, how jurists reasoned. It may prove best to phrase the Americanization of the common law in terms of the progress of law and institutions. Despite the conservative nature of law, American law was changing:

In jurisprudence, which reluctantly admits any new adjunct, and counts in its train a thousand champions ready to rise in defence of its formularies and technical rules, the victory has been brilliant and decisive. The civil and the common law have yielded to the pressure of the times, and have adopted much, which philosophy and experience have recommended, although it stood upon no text of the Pandects, and claimed no support from the feudal policy. Commercial law, at least so far as England and America are concerned, is the creation of the eighteenth century. It started into life with the genius of Lord Mansfield, and gathering in its course whatever was valuable in the earlier institutes of foreign countries, has reflected back upon them its own superior lights, so as to become the guide and oracle of the commercial world. If my own feelings do not mislead me, the profession itself has also acquired a liberality of opinion, a comprehensiveness of argumentation, a sympathy with the other pursuits of life, and a lofty eloquence, which, if ever before, belonged to it only in the best days of the best orators of antiquity.

A decade later Ralph Waldo Emerson, in his “American Scholar” address, constructed a picture of the optimistic American, who broke from the restraints of old modes of thought. “Each age, it is found, must write its own books; or rather each generation for the next succeeding. The books of an older period will not fit this.” When he told the Dartmouth Phi Beta Kappa society in


80 Id. at 48-49.

81 The American Scholar, in Emerson’s Essays, supra note 31, at 31.

82 Id. at 56-57.
1841, "Do not believe the past. I give you the Universe, a virgin to-day," Emerson expressed an extreme version of the rejection of irrational authority of which Story spoke. The scholar bore a striking resemblance to the jurist, who continually re-tested old assumptions:

Whatsoever oracles the human heart, in all emergencies, in all solemn hours, has uttered as its commentary on the world of actions,—these he shall receive and impart. And whatsoever new verdict Reason from her inviolable seat pronounces on the passing men and events of to-day,—this he shall hear and promulgate.

American judges came to believe, with Emerson, that "t[here are new
lands, new men, new thoughts." It was natural, then, for them to "demand our own works and laws and worship." Perhaps because the jurist who sought to ground his conclusions in mere precedent might be disappointed, there was a tendency to return to first principles. Or, as Theodore Parker characterized the American people, "[T]here is a philosophical tendency, distinctly visible; a groping after ultimate facts, first principles, and universal ideas. We wish to know first the fact, next the law of that fact, and then the reason of the law." The resemblance between the Transcendentalists' ideal scholar and the judge who worked in the "grand style" is strong enough that a follower of Emerson might be tempted to refer to the "Transcendentalization of American Law."
Other lectures by jurists and lawyers explored similar themes, looking to the role of progress in American thought and linking it to change in legal thought. Professor Timothy Walker of the Cincinnati Law School, author of one of the most important antebellum textbooks for law students, An Introduction to American Law, told the Harvard Phi Beta Kappa society in 1851 about "The Reform Spirit of the Day" from the perspective of a moderate reformer. Walker's oration identifies the restless impulses behind the legislative reforms and maps the changes sought by the popular mind. Walker supported reform. He saw humanity and justice as the guiding principles:

I look upon the change everywhere going on in the legal condition of woman, whereby she is admitted to something like an equality with man, as one of the very best reforms of the age; and I trust it will not stop here. For I can see neither policy, justice, nor humanity, in many of the doctrines which still exist.

Walker urged moderation; he wanted to rationalize, not to radically reform law. Radical actions were too risky. "[T]he great want of the age is MODERATION. The lesson we should draw, from the survey we have taken, is neither to be obstinately conservative, nor rashly progressive." The outmoded English rules were rejected or modified. American judges replaced them with their own rules, although substantial continuity with the past remained. As Catherine Sedgwick wrote, "[t]he future lives in the present. What we are, we owe to our ancestors, and what our posterity will be, they will owe to us."

B. Distinction Between Reason and Sentiment

The division into head and heart, or reason and sentiment, was a strong part of American culture. Thomas Jefferson wrote of the heart-head distinction in his letter to Maria Cosway, a woman he loved, when she departed from him in occasion, reform and progress, to the foundations upon which rest the sacred rights of person and property." John C. Lord, The Progress of Civilization and Government, in LECTURES ON THE PROGRESS OF CIVILIZATION AND GOVERNMENT AND OTHER SUBJECTS 9, 34-35 (1851).

See Walker, supra note 89, at 36-37.

See id. at 15-18, 26-30 (discussing changes in women's rights, constitution-making, criminal punishment, and institutionalization of the mentally ill).

Id. at 16.

Id. at 36-37.

Even if one concludes that there were few changes in the common law, the story of why Americans thought that the changes were significant may illuminate important currents in American thought. See Ingersoll, supra note 87, at 38-42 (cataloging changes in American law). Then the question arises: How many more changes could one reasonably expect?

Catherine Sedgwick, Redwood, A Tale xi (1824).
1786. The letter conducts a dialog between Jefferson's head and heart over her loss. The dialog illustrates the attempt that Jefferson, a prime representative of Enlightenment rationalism, made to control his heart with reason and the joys and sorrows brought to him by the heart. At one point the head laments that he could not study a public marketplace in France because the heart had plans to see friends. The heart asked, "If our country, when pressed with wrongs at the point of the bayonet, had been governed by [its] heads instead of [its] hearts, where should we have been now?" Jefferson's heart concluded that "morals were too essential to the happiness of man to be risked on the uncertain combinations of the head. She laid their foundation therefore in sentiment, not in science." This "dialogue" between head and heart reflects the division of moral philosophy into reason and sentiment.

1. Charles Grandison Finney and the Evangelical Definition of Heart

The divisions of moral philosophy into reason and sentiment, or head and heart, appeared frequently in ministers' sermons, often with conflicting views concerning which was the higher faculty, the mind or the sentiment. One of the earliest sermons by lawyer-turned-revivalist Charles Grandison Finney, "Sinners bound to change their own hearts," took as its text Ezekiel's admonition "Make you a new heart and a new spirit." Finney described "the spiritual heart" as "the fountain of spiritual life ... that deep seated but voluntary preference of the mind, which lies back of all its other voluntary affections and emotions, and from which they take their character." He urged his audience to change their hearts in order to reform themselves. But there was difficulty understanding what heart meant. Its meaning changed:

Sometimes it means the whole mind, and sometimes the understanding, and sometimes the conscience; in some places it seems to mean the constitutional propensities which belong to human nature, whether holy or sinful; sometimes it refers to the social or relative affections; often it expresses all the affections or exercises of the mind ... 

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96 See Letter from Thomas Jefferson to Maria Cosway (Oct. 12, 1786), in THOMAS JEFFERSON: WRITINGS 866, (Merrill Peterson ed., 1984) ("[T]he following dialogue took place between my Head & my Heart.").

97 See id. at 868 ("My visit to Legrand & Melinos had public utility for its object ... yet it was] sacrificed, that you might dine together.").

98 Id. at 875. "Hanging on a gallows" was the answer. Id.

99 Id. at 874.

100 Ezekiel 18:31.

101 REVEREND C.G. FINNEY, SINNERS BOUND TO CHANGE THEIR HEARTS, IN SERMONS ON VARIOUS SUBJECTS 3, 6 (1934).

102 Id. at 6-7.

103 ASA RAND, THE NEW DIVINITY TRIED, BEING AN EXAMINATION OF A SERMON DELIVERED BY THE REV. C.G. FINNEY ON MAKING A NEW HEART I (1832) (paraphrasing Finney's exploration of the meanings of "heart").
Such distinctions illustrate the pervasive concern with affections and the ways that sentiments of the heart might lead to proper behavior. This concern was a ground of frequent contention for antebellum Americans.

Finney wanted to make religion understandable and accessible. He recalled that students at seminaries were not taught to preach before lay people, but learned preaching by delivering sermons to their classmates and professors. In contrast, Finney felt “real eloquence . . . naturally flows from an educated man whose soul is on fire with his subject, and who is free to pour out his heart to a waiting and earnest people, they have none of it.” When Unitarian minister Theodore Parker delivered a sermon on “justice and conscience” in the wake of the Fugitive Slave Act of 1850, he spoke of the “moral faculty”—the conscience—through which one is able to “perceive the [moral] law directly, by intuitive perception thereof, without experience of the external consequences of keeping or violating it, and more perfectly than such experience can ever disclose it.” The distinction was between the inner guide of conscience and other guides, such as reason and experience.

2. Democratic Sentiments

Americans’ division of the heart and mind appeared in political ideology as well as religious thought. George Bancroft, an advisor to Andrew Jackson and one of the leading American intellectuals of his time, gave a Fourth of July oration at Springfield, Massachusetts in 1836 that summarized Democratic thought. The 1836 oration began with a celebration of the principles of democracy. Bancroft contrasted democracy with the two previous theories of government: “the Tory theory of the Divine right” and the Whig theory which “regards society as established by a compact, which, when once formed, is held to be irrevocable, and incapable of amendment.” The former has at its root “a great contempt for the human species,” whereas “[i]t is the prerogative of humanity to make progress; to gather up the experience of the past, to husband the truths which time and opportunity discover.”

Bancroft’s oration attacked Tory political thought and modes of reasoning.

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104 See Charles Grandison Finney, Memoirs of Rev. Charles G. Finney 90 (1876) (“[S]tudents are required to write what they call sermons, and present them for criticism; to preach, that is, read them to the class and the professor.”).
105 Id.
108 Id. at 4.
109 Id. at 6.
110 Id. at 4.
111 Id. at 5.
“Such is toryism:—founded on a contempt for the common man, exerting superior strength to engross the benefits of society, invoking superior strength to delude and corrupt the public mind, and impiously pleading for its defense the will of God, the order of Providence.”

But his oration also criticized the Whig theory of government—the compact. “This system regards liberty as the result of a bargain between the government and the governed; and as measured by the grant. The methods of government being once established are therefore esteemed fixed forever... Instead of saying, It is right, it says, It is established.” Bancroft further perceived that the system of original compact is hardly one step of an advance towards a truly liberal system. It regards every injustice, once introduced into the compact, as sacred; a vested right that cannot be recalled; a contract that, however great may be the pressure, can never be cancelled. The whig professes to cherish liberty, and he cherishes only his chartered franchises. The privileges that he extorts from a careless or a corrupt legislature, he asserts to be sacred and inviolable... He professes to adore freedom, and he pants for monopoly.

Later in the oration Bancroft expresses the principles of the Democratic party. He believed that Democrats and Whigs were at opposite ends of a spectrum, which had love at one end and contract at the other. Or, as Emerson wrote in his journal, “The view taken of Transcendentalism in State Street is that it threatens to invalidate contracts.” Karsten correctly identifies the centrality of the head and heart values that circulated in American political thought—the question next becomes how those values correlated with what happened in the judiciary.

3. Distinguishing Reason and Sentiment in the Judiciary

Courts, too, understood the importance of sentiment, but carefully cabined the room for sentiment. In *The Rapid*, an admiralty case arising from the

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112 Id. at 6.
113 BANCROFT, supra note 107, at 6. See also Constitutional Law, 23 U.S. MAG. & DEMO. REV. 444, 444 (1848):
There is no maxim of the common law, of which courts and judges are so fond, as of that old conservative maxim, *stare decisis*. It is a very convenient and comfortable maxim for an ignorant or lazy judge, as it saves him the trouble and labor of investigating a case and forming his own opinion.

Id.

114 BANCROFT, supra note 107, at 7.
115 See id. at 9-11 (contrasting the principles and values of Toryism, Whigism and Democracy).
116 See id. at 8-11 (contrasting Democratic concern with the conscience against the Whig inclination towards the inviolable compact).
117 EMERSON IN HIS JOURNALS, supra note 89, at 264.
prohibition of trading with the enemy, Justice William Johnson faced the question whether an American vessel that was bringing back English goods purchased before the war was subject to capture.\footnote{See The Rapid, 12 U.S. (Crand) 155, 164 (1814).} Johnson acknowledged that neither the ship owner nor the cargo owner knowingly violating "the duties which a state of war imposed upon them."\footnote{Id. at 163.} But he concluded that the law had been violated and refused to consider the harshness of the law: "[I]t is the unenvied province of this [C]ourt to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling."\footnote{Id. at 164.}

Chief Justice John Marshall made frequent references to the separation of law and sentiment. In The Antelope, he addressed the question whether The Antelope, a ship, and the Spanish and Portuguese slaves it was carrying should be returned to its owners, even though it was apparently engaged in importing slaves to the United States.\footnote{See The Antelope, 23 U.S. (10 Wheat.) 66, 66-68 (1825).} He understood the stark conflict between the "sacred rights of liberty and property," but he cautioned that the "[c]ourt must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law."\footnote{Id. at 114. I am indebted to Judge Michael Hawkins, who alerted me to Marshall's reference to duty, feelings, and law.} Despite understanding that public sentiment condemned the slave trade, he returned a large portion of the slaves to Spain and Portugal.\footnote{See id. at 115. The Court stated: [W]hile the detestation in which [the slave trade] is held is growing daily . . . it is not wonderful that public feeling should march somewhat in advance of strict law, and that opposite opinions should be entertained on the precise cases in which our own laws may control and limit the practice of others. Indeed, we ought not to be surprised, if, on this novel series of cases, even Courts of justice should, in some instances, have carried the principles of suppression farther than a more deliberate consideration of the subject would justify.}

In many cases judges expressed their concern about their inability to change the law to comport with their sentiments. Thus, courts frequently differentiated sympathy and the cool logic demanded by law. Justice Saffold of Alabama, for instance, distinguished the "sympathy of the philanthropist" from the role of courts.\footnote{Id. at 114.} In deciding on the jurisdiction over Native American land, he hoped that the Legislative and Executive departments of our governments, (though exposed to party contests,) have proceeded, and will continue to act, on similar subjects, with due regard to moral obligation, as well as political
duty; and that the Judiciary, more especially, whose situation may be more favorable to quiet research and cool reflection, and whose decisions are of the greatest consequence to the cause of justice, and the harmony of society, will be found capable of discharging their solemn functions, on this as well as other questions, from the dictum alone of profound reflection and included judgment.\textsuperscript{125}

In evaluating rules, courts asked whether they were consistent with the "civilized world."\textsuperscript{126} Judges, however, placed limits on the ability of the law to progress. Conservative thinkers argued that the law should never try to advance beyond what the people it governed were able to accept, or disastrous consequences, such as the French Revolution, might result.\textsuperscript{127} Judges did not permit sentiment to override the Constitution.\textsuperscript{128} For example, Justice Story noted that

[It is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.\textsuperscript{129}

In both opinions and speeches, the judges distinguished moral from legal justice. During a meeting of literary societies at Princeton, Justice William

\textsuperscript{125} Id. at 344-45. A similar distinction between head and heart was that between letter and spirit. See Abel Abbot Livermore, The Letter and the Spirit, in Discourses 96 (1857) ("There are two methods of interpreting the word of God: one of the letter, the other of the spirit; one literal and verbal, the other liberal."). A dispute over the interpretation of Georgia's fraudulent transfer statute can also be used to explore the distinction:

although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly in its words. . . . But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provisions to the case would be so monstrous, that all mankind would, without hesitation, write in rejecting the application.


\textsuperscript{126} See, e.g., Leitensdorfer v. Webb, 61 U.S. (20 How.) 176, 177 ("The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.").

\textsuperscript{127} See generally Dew, supra note 49, at 579-82.

\textsuperscript{128} See, e.g., Gaines v. Buford, 31 Ky. 481, 485 (1833) (invalidating a legislative act deemed unconstitutional although it was passed as a result of appeals to the sympathy of the legislature); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 88-89 (1810) (declaring that a state may not pass a law impairing the obligations of a contract because such a law would be unconstitutional).

\textsuperscript{129} Fletcher, 10 U.S. (6 Cranch) at 138.
Gaston of the North Carolina Supreme Court, a conservative Whig, told his audience not to look for perfect justice.\textsuperscript{130} He noted that those who revolt against the law justify their actions by saying, "there are evils which the law cannot cure,"\textsuperscript{131} but cautioned that it was not realistic to expect perfection from the law, for "all human things and human institutions are necessarily imperfect."\textsuperscript{132} Gaston feared mobs, which often acted as appeals courts in "those difficult and delicate cases, which the ordinary provisions of the law cannot reach."\textsuperscript{133} He felt that challenges to the supremacy of the law led to great danger and talked of the problems that followed when reason loses control to passion.\textsuperscript{134} He further stated that history teaches the dire consequences of this loss of control.\textsuperscript{135} Gaston’s speech portrays the relative roles played by reason and sentiment as understood by a participant in the legal system and represents the view that the logical legal mind must control against the heart.\textsuperscript{136}

Judges frequently separated law from morals in their opinions and used the language of moral philosophy in their opinions.\textsuperscript{137} They told litigants that they must look to the legislature for their rights and divided the obligation of contracts according to law, refusing to enforce mere moral obligations.\textsuperscript{139}

\textsuperscript{130} See Gaston, supra note 64, at 33-34 (“Let the perfect man throw the first stone against the imperfect state.”).

\textsuperscript{131} Id. at 33.

\textsuperscript{132} Id. at 34.

\textsuperscript{133} Id. at 35.

\textsuperscript{134} See id. at 35 (“As every act of rebellion against the supremacy of conscience weakens its power until the whole man becomes the slave of wickedness, so every instance of successful revolt against the state’s collected will, impairs its beneficent sway, until finally the state itself sinks into political servitude.”).

\textsuperscript{135} See Gaston, supra note 64, at 36 (“Liberty becomes licentious, and bursts the bounds of law. Factions rage and war against each other. The war of factions is succeeded by a confiscating and sanguinary anarchy. Anarchy is superseded by tyranny.”).

\textsuperscript{136} See id. at 31 (“There can be no freedom without law. Unrestrained liberty is anarchy.”).

\textsuperscript{137} See, e.g., Lapsley v. Brashears, 14 Ky. (4 Litt.) 46, 53-55 (1823) (distinguishing the moral from the legal obligations of contract).

\textsuperscript{138} See, e.g., Gaines v. Buford, 31 Ky. 481, 485 (1833) (appealing to the sympathy of the legislature).

\textsuperscript{139} See Lapsley, 14 Ky. (4 Litt.) at 53-55 (distinguishing the moral from the legal obligations of contract). John Brooke argued that these moral and legal obligations can come into conflict:

The best legal systems which the wisdom of man can devise, will occasionally bring legal rights into conflict with natural justice. For example: under the testamentary system, a father may, from mere whim or caprice or other wicked motive, devise his whole estate from his own family to a worthless stranger, and the court would be bound to enforce the unnatural will... Now the general principles of law, under which such occasional hard cases occur, are not mere technical rules or artificial regulations. They are, on the whole, wise and wholesome, if not indispensable to the general security of
Judges talked of the imperious duty that the law imposed on them.\textsuperscript{140} Yet, moral sentiment provided the foundation for the judges’ “whole system” of thought.\textsuperscript{141} For example, John Catron of the Tennessee Supreme Court cautioned that “[t]he injustice of forcing our freed negroes on our sister states without their consent, when we are wholly unwilling to be afflicted with them ourselves, is so plain and direct a violation of moral duty as to inhibit this court from taking such a step.”\textsuperscript{142} Chief Justice Bibb of the Kentucky Court of Appeals explained, in a case addressing the constitutionality of retrospective laws, that judges could find guidance in “that universal sentiment which nature has engraved in the heart of every man, a desire of property, a desire to separate and distinguish that which belongs to him, from that which belongs to his fellow man, and to preserve that which is his own.”\textsuperscript{143} It was by the “force of this moral sentiment” that “retrospective laws aimed at the destruction of private rights and vested interests, are denounced as generally oppressive and unjust, and as only to be tolerated under urgent and imperious circumstances of public interest.”\textsuperscript{144}

\textbf{C. The Convergence of Reason and Sentiment}

\textit{Nor can the influence of this all-pervading power of opinion be kept out of the legal profession or the courts of justice. Pressed on all hands and from all points by its action, they cannot avoid it, however they may desire to do so; and, notwithstanding they are supposed and affect to be governed by the lex scripta, they are borne on the bosom of an imperceptible tide, like a ship on the gulf stream, which may seem to be acted upon only the wind that fills the sails. The lawyer consults his tomes, reads his authorities, and brings out his facts; the court delivers its opinion, or its sentence; the jury return with their verdict;—all in the}

the rights of property.


\textsuperscript{140} See, e.g., Jones' Executors v. Lightfoot, 10 Ala. 17, 27 (1846) (“We feel it our imperious duty, to enforce this statute recording to its spirit, as well as its letter, and thus make it what it was intended to be, a final limitation of suits, after the period provided for has lapsed.”); cf. Grayson v. Lilly, 23 Ky. (7 T.B. Mon.) 6, 12 (1828) (“[T]he calamities incident to society, will, at some times imperiously demand [bankruptcy legislation], although it relieves no calamity but that of debt . . . and brings a calamity, at the same time, on all creditors.”).

\textsuperscript{141} \textit{Dew}, supra note 49, at 74.

\textsuperscript{142} Fisher’s Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 129 (1834).

\textsuperscript{143} Beard v. Smith, 22 Ky. (6 T.B. Mon.) 430, 476 (1828).

\textsuperscript{144} Id. at 477 (upholding a Kentucky law that altered the method of establishing title to land when there were conflicting claimants). \textit{See also} Vance v. Crawford, 4 Ga. 445, 459 (1848) (“Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation; to give our slaves their liberty at the risk of losing our own.”) (invalidating will provision for emancipation of slaves and transportation to Africa).
presence and under the hints of this all-seeing and ever-watchful power. The advocate, the juryman, and the judge, are launched on the same current and borne away in company.\textsuperscript{145} While ministers debated which took precedence, reason or sentiment, lawmakers often appealed to both at the same time.\textsuperscript{146} During debates over constitutional reform in Virginia in 1829 and 1830, representatives spoke both of the sentiments of the community and of reason.\textsuperscript{147} For example, Representative Giles, referring to the critical state of Virginia when the 1776 constitution was adopted, asked, “did not this state of mind afford the strongest incentives for calling into action every feeling of the heart, and every dictate of the head, to the perfection of their great work, with one united voice?”\textsuperscript{148} Furthermore, Representative Barbour noted that sentiment supplements practical experience, observing that gentlemen “will be guided by experience, rather than follow the lights of the French Revolution.”\textsuperscript{149} He further remarked that people could take the opportunity to learn from more recent events.\textsuperscript{150} Stressing that sympathy promised a basis for Virginia society, Mr. Mercer asked, “[A]re not these natural affections“ of patriotism and filial love “at the foundation of all the moral rights and duties of man.”\textsuperscript{151} “Sympathy, is it not as natural to man as to the gregarious animals whom he gathers around him? Out of these feelings, spring the elements of society.”\textsuperscript{152}

\textsuperscript{145} COLTON, supra note 75, at 50-51.
\textsuperscript{146} See PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30 236 (1830) (employing both the language of reason and sentiment) [hereinafter PROCEEDINGS AND DEBATES].
\textsuperscript{147} See id. at 236 (stating that Virginians must use both “heart” and “head” to create a successful society).
\textsuperscript{148} Id. at 236.
\textsuperscript{149} Id. at 138.
\textsuperscript{150} See id. at 384 (“[T]hough our present government was the best production of nearly six thousand years, experience and the progress of political light have discovered some defects in it.”).
\textsuperscript{151} PROCEEDINGS AND DEBATES, supra note 146, at 192.
\textsuperscript{152} Id. Virginians looked to law to reconcile reason and sentiment and to bring order to society. See id. at 264. The debates encompassed a broad range of opinion. For example, John Cooke stated that he did not believe that property should be the basis for suffrage and apportionment of representation, for religious affections rather than property promoted patriotism:

But we are asked to believe that all these natural feelings, all these social affections, all these monitions of conscience, all these religious impressions, al these Christian charities, all these hopes of future rewards and fears of future punishments, are dead, and silent, and inoperative in the bosom of man. The love of property is the great engrossing passion which swallows up all other passions, and feelings and principles, and this not in particular cases only, but in all men. The poor man is fully and inevitably the enemy of the rich, and will wage a war of rapine against him, if once let loose from the restraints of the fundamental law. A doctrine monstrous, hateful and incredible!
Sentiment might remake manners where laws cannot. The judiciary supported the argument that the sentiments of masters offered more protection than law. Sentiment was believed to be an important part of human institutions; without support in the sentiment of the public, law could not operate. Thus, William Greene explained in an 1851 lecture at Brown that if lawmakers

enact a law in opposition to the public sentiment, there are two ways of meeting the difficulty: first, by direct resistance to the law; and, second, by patiently awaiting its repeal, by the election to power of a new and more faithful set of men. The first is rebellion, which in resisting one law, violates all. The second, in due time, breaks up the law and maintains the government.

Arguments about the inability of the law to oppose public sentiment appeared frequently in debate over the Fugitive Slave Act of 1850, wherein Senator Rhett stated that “a law to have its practical effect must move in harmony with the opinions and feelings of the community where it is to operate.”

There remains the question of the extent to which sentiment influenced the development of legal thought. That concern addresses the main currents of legal thought and the ways that such thought developed autonomously from the influences of society and how it resisted the impulses of the evangelical heart, and cold legal logic retained its hold over legal minds. The next section examines antislavery thought for evidence of what heart jurisprudence might look like, in order to determine whether Americans had such a jurisprudence.

D. The Divergence of Heart and Head in Anti-Slavery Discourse

In the nineteenth century some people advocated an alternative jurisprudence of sentiment. These people, however, rarely occupied the bench. Those urging an alternative view came from outside, most frequently from the evangelical and Unitarian religious traditions. The most well-articulated alternative jurisprudence appeared in the abolitionist literature, which was rarely congruent with the law as articulated by judges.

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Id. at 60.


154 WILLIAM GREENE, SOME OF THE DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT: DISCOURSE, PRONOUNCED BEFORE THE RHODE ISLAND ALPHA OF PHI BETA KAPPA 22 (1851). See also Lapsley v. Brashears, 14 Ky. (4 Litt.) 46, 93 (1823) (commenting that the conscience of men can be shaped by political institutions).


156 See e.g., WILLIAM E. CHANNING, SLAVERY 1, 29 (1835) [hereinafter SLAVERY] (rejecting the notion that slavery is moral because it is sanctioned by the law).

157 See id. at 6 (using religion to argue against slavery).

158 Compare id. at 29 (stating that slavery is immoral regardless of the fact that it is
the fullest developments of that jurisprudence came from Harriet Beecher Stowe; others came from William Ellery Channing and Ralph Waldo Emerson.

Non-lawyers proficiently formulated a jurisprudence of sentiment because they could explain most fully what a decision based on the heart might look like. William Ellery Channing, a leading Unitarian minister and Transcendentalist, attacked the law as he attacked nothing else. For Channing, human sentiment controlled. "The world is governed much more by opinion than by laws. It is not the judgment of courts, but the moral judgment of individuals and masses of men, which is the chief wall of defence round property and life."

Channing's book Slavery, published in 1835, illuminates a sophisticated moral philosophy of sentiment, which had direct application to legal treatment of slaves. Channing began by distinguishing absolute right from expediency. To determine absolute right, he looked to "the great interests of humanity," saying that "there are times when the assertion of great principles is the best service a man can render society." Channing wrote in terms reminiscent of Henry David Thoreau's rejection of legal precedent. Channing sought principles of action based on humanity and asserted that the reasoning process, rigorous though it was, was driven by humanity.

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legal), with Vance v. Crawford, 4 Ga. 445, 459 (1848) (refusing to enforce a provision of a will allowing for the emancipation of owners' slaves).


See SLAVERY, supra note 156, at 1-3 (asserting morality as a means of solving the problem of slavery).

See EMERSON IN HIS JOURNALS, supra note 89 at 358 ("[S]lavery is the question of property and no property.").


See SLAVERY, supra note 156, at 2-3 ("The following remarks...are designed to aid the reader in forming a just moral judgment of slavery.").

Id. at 1 ("The first question to be proposed by a rational being is, not what is profitable, but what is right.").

Id. at 4.

Id. at 4.

See Henry D. Thoreau, Resistance to Civil Government, in WALDEN AND RESISTANCE TO CIVIL GOVERNMENT 226-227 (William Rossi ed., 2nd ed. 1992) ("It is not desirable to cultivate a respect for the law, so much as for the right.").

See SLAVERY, supra note 156, at 7 ("Let no man touch the great interests of humanity who does not strive to sanctify himself for the work by cleansing his heart of all wrath and uncharitableness, who cannot hope that his is in a measure baptized unto the spirit of
Christianity provided the source of Channing’s humane principles:
We have a power mightier than armies, the power of truth, of principles,
of virtue, of right, of religion, of love. We have a power, which is
growing with every advance of civilization, before which the slave-trade
has fallen, which is mitigating the sternest despotisms, which is spreading
education through all ranks of society, which is bearing Christianity to the
ends of the earth, which carries in itself the pledge of destruction to every
institution which debases humanity.\textsuperscript{170}

Indeed, “Christian philanthropy” had great power.\textsuperscript{171} Channing challenged the
pro-slavery arguments about property and rights, opposing them with ideas
about the inherent equality of humans.\textsuperscript{172} These ideas were based on reasoning
from seemingly universal sentiments.\textsuperscript{173} He began his argument with the
observation that “if one may be held as property, then every other man may be
so held.”\textsuperscript{174} From that point, he urged every reader to ask, “could I... be
rightfully seized, and made an article of property; be made a passive
instrument of another’s will and pleasure; be subjected to another’s
irresponsible power...?”\textsuperscript{175} Channing expected an immediate, intuitive reply
that property rights in another human was wrong.\textsuperscript{176} Slavery represented the
humane and sentiment-based critique of law and it suggested the proper
response of the heart to cold law. In opposing the argument that the law
sanctions the holding of slaves, Channing argued that “[i]njustice is never so
terrible, and never so corrupting, as when armed with the sanctions of law.”\textsuperscript{177}

The fact that slaves are humans offered a separate reason for rejecting their
ownership because “[e]verything else may be owned in the universe; but a
moral, rational being cannot be property. Suns and stars may be owned but not
the lowest spirit.”\textsuperscript{178} Although Channing’s consciousness of rights could help
jurists direct the appropriate legal response, it rarely did.\textsuperscript{179} Nevertheless, it
provided a coherent plan for deciding cases, for the “great end of government

\textsuperscript{170} Id. at 6.
\textsuperscript{171} See id. at 7 (“It is God himself acting in the hearts of his children. It has an ally in
every conscience, in every human breast, in the wrong doer himself. The spirit has but
begun its work on earth. It is breathing itself more and more through literature, education,
institutions, and opinion.”).
\textsuperscript{172} See id. at 16 (“[W]e cannot rightfully be made another’s property.”).
\textsuperscript{173} See id. (“The consciousness of indestructible rights is a part of our moral being.”).
\textsuperscript{174} Id. at 14.
\textsuperscript{175} See SLAVERY, supra note 156, at 15.
\textsuperscript{176} See id. at 16-17 (stating that humans instinctively feel that they cannot be owned).
\textsuperscript{177} Id. at 29.
\textsuperscript{178} Id. at 28.
\textsuperscript{179} See, e.g., Vance v. Crawford, 4 Ga. 445, 459 (1848) (invalidating a will provision that
called for the domestic emancipation of the testator’s slaves).
is to repress all wrong." Channing both understood the nature of the dominant modes of legal reasoning and offered an alternative. He asked, ""[i]s the General Good, then, the supreme law to which every thing must bow? . . . Must the Public Good prevail over purity and our holiest affections?"

III. Karsten's Interpretation of the Main Currents of Antebellum Legal Thought

Against that background of the antebellum Americans' division of the world into reason and sentiment, one can ask if Karsten's model accurately describes what judges were doing. Several tentative conclusions emerge. First, judges operated primarily in the domain of reason. While they did occasionally operate in the domain of sentiment, the "heart" had relatively small space for operation in antebellum American legal thought. Second, more frequently, the judges employed a combination of reason and sentiment, which drew upon their middle class values. Such values included a respect for families, care for the poor and a concern for those who strove for success in the economy. Third, a paradigm of the "heart" offers no way of predicting outcome, for "heart" could mean very different results depending on the sentiments of the individual judge. Moreover, the model's explanatory power is limited because the flexibility of the "heart" construct makes it difficult to determine whether or not a case is driven by the "heart." Given the importance of the judges' ideology to the outcome of a case, Karsten pays insufficient attention to the individual characteristics of judges. Finally, some of the cases Karsten uses are susceptible to multiple interpretations.

A. Drawing the Line Between a Jurisprudence of Sentiment and the Antebellum Common Law Method

To the extent that one wants to read cases along a head--heart axis, one must place the lawyers firmly in the head camp. Evidence abounds that people perceived lawyers as being governed by reason. Professor Henry St. George Tucker told law students at the University of Virginia in 1841 that lawyers are "bred to a love of order; a devotion to settled forms and the supremacy of the

180 William Goodell, Views of American Constitutional Law 36 (1845).
181 Slavery, supra note 156, at 40-41. He distinguished the public good from virtue: The supreme law of a state is not its safety, its power, its prosperity, its affluence, the flourishing state of agriculture, commerce, and the arts. These objects, constituting what is commonly called the Public Good, are, indeed, proposed, and ought to be proposed, in the constitution, and administration of states. But there is a higher law, even Virtue, Rectitude, the Voice of Conscience, the Will of God. Justice is a greater good than property; not greater in degree, but in kind. Universal benevolence is infinitely superior to prosperity.
182 Id. at 41.
183 See, e.g., Henry St. George Tucker, An Introductory Lecture Given to the Law Class at the University of Virginia 7-8 (1841) (stating that lawyers are partial to order and fixed rules).
law is one of their distinguishing characteristics. The ascertainment of fixed
and definite rules of property and principles of Jurisprudence is their hourly
occupation." Similarlv, Daniel Lord's 1851 oration to Yale's Phi Beta
Kappa society locates the similarities between mainstream legal and religious
thought and comments on the close connections between the modes of
reasoning of antebellum lawyers and ministers. Lord felt the education of
lawyers and ministers taught them the dangers of radicalism and they, in turn,
educated their audiences:

On the general influence, however, of both the pulpit and the bar on the
political interests of society;—their training in learning, the character of
their knowledge as derived, historic, traditionary knowledge, and their
intellectual habits of life... render them as classes eminently conservative.
And although both at times have headed revolutions, it has
been in favor of some time-honored principle of Religion, Liberty or
public Justice,... They are bulwarks to the sacredness of social ties, to
the weighty sanctions of the civil law, to the inviolability of contracts and
to the protection of every civil and social right!185

1. The Overlap of Religious and Legal Thought

In many important ways, legal and religious thought were similar during the
antebellum era. Similarities included reliance upon reason to take the mystery
out of religion and law. Ministers, like American judges, told people the

183 Id. at 7. But cf. Christine Ann Fidler, Young Limbs of the Law: Law Students, Legal
Ph.D. dissertation, U. of Cal. (Berkeley)) (portraying sentiment as an important part of
training of lawyers).

184 See LORD, supra note 89, at 12-13 (noting the similarities between lawyers and
ministers).

185 Id. at 12-13.

186 Thus, Nathan Hatch writes of the influence that the Democratic Process had on
American Christianity in The Democratization of Christianity (1989). The intellectual
history of Kent's Commentaries might be called "the understandable science of the law.
Powerful criticisms of the mysterious nature of the common law drove much of the reform
impulse. As William Sampson wrote,

These people, (it may be said,) long after they had set the great example of self-
government upon principles of perfect equality, had reduced the practice of religion to
its purest principles, executed mighty works, and acquired renown in arts and arms, had
still one pagan idol to which they daily offered up much smoky incense. They called
it by the mystical and cabalistic name of Common Law. A mysterious essences. Like
the Dalai Lama, not to be seen or visited in open day: of most indefinite antiquity;
sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still
the same that was, and was to be, and evermore to sit cross-legged and motionless upon
its antique alter, for no use or purpose but to be praised and worshiped by ignorant and
superstitious votaries.

WILLIAM Sampson, ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE OF THE COMMON
LAW, in, Sampson's Discourse 11-12 (Pishey Thomson, ed., 1824).
rules they needed to follow, and in doing so, put salvation within the reach of individuals.\textsuperscript{187} Charles Grandison Finney, for instance, revealed the steps by which one might attain salvation in lucid language, which his audience could understand.\textsuperscript{188} As Finney later wrote in his \textit{Memoirs},

Many Christians regarded those lectures as rather an exhibition of the law than the Gospel. But I did not, and do no, so regard them. For me the law and Gospel have but one rule of life; and every violation of the spirit of the law is also a violation of the spirit of the Gospel. But I have long been satisfied that the higher forms of Christian experience are attained only as a result of a terribly searing application of God’s law to the human conscience and heart.\textsuperscript{189}

In addition, William Ellery Channing testified to the similarities between law and religion in his sermon \textit{Unitarian Christianity}, stating that, “[W]e reason about the Bible precisely as civilians do about the Constitution.”\textsuperscript{190}

The idea that God’s law and human law are one authority found support in judicial opinions. For example, in deciding a homicide case against a master who killed one of his slaves, one Tennessee justice wrote that:

It is well said by one of the judges of N. Carolina, that the master has a right to exact the labor of his slave—that far, the rights of the slave are suspended; but this gives the master no right over the life of the slave. I add to this saying of the judge, that law which says thou shalt not kill, protects the slave; and he is within its very letter. Law, reason, Christianity and common humanity, all point one way.\textsuperscript{191}

Law was similar to religion, but the passionate thinking of religion was different from the process of legal thought.

2. Distinguishing the Evangelical “Jurisprudence of Sentiment” from Legal Reasoning

Jurists, like others, employed appeals to sentiment.\textsuperscript{192} However, it does not

\begin{itemize}
  \item \textsuperscript{187} See Finney, supra note 101, at 3 (discussing the meaning of the biblical requirement to make a new heart and spirit).
  \item \textsuperscript{188} See id. (defining the meaning of a biblical requirement in steps).
  \item \textsuperscript{189} Charles Grandison Finney, \textit{Memoirs} 339 (1876). Such reasoning might make religion “a bargain, a commercial transaction; so much salvation for so much faith; so much done by Christ to pay for so much that we have misdone; so much hope and interest in heaven for which he has paid such a ransom.” Livermore, supra note 125, at 403.
  \item \textsuperscript{190} William Ellery Channing, \textit{Unitarian Christianity}, in \textit{An American Reformation} 90, 94 (Sydney E. Ahlstrom & Jonathan S. Carey eds., 1985). I am indebted to Dean Grodzins for this reference.
  \item \textsuperscript{191} Fields v. Tennessee, 9 Tenn. (1 Yer.) 156, 165 (1834).
  \item \textsuperscript{192} Recent scholarship often emphasizes the ways in which considerations of expediency, legal logic, precedent, and considerations of humanity combined in antebellum jurisprudence. See Walter Johnson, \textit{Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery}, 22 \textit{Law & Soc. Inquiry} 405-33 (1997) (arguing
\end{itemize}
follow that jurists adopted a jurisprudence of the heart. The dominant mode of jurisprudence throughout the antebellum period was cold, legal logic, which incorporated precedent. When jurists expanded on, or departed from, precedent, they considered a rule’s expediency and, occasionally, its humanity. As Jared Ingersoll said,

[T]he law has been much simplified in transplantation from Europe to America... The brutal, ferocious, and inhuman laws of the feudists, as they were termed by the civilians... the arbitrary rescripts of the civil law, and the harsh doctrines of the common law, have all been melted down by the genial mildness of American institutions.

One thing that antebellum jurists tell us again and again is that considerations of humanity are unable by themselves to overrule law. Another way of gauging the limits of the evangelical heart’s sphere of influence is illustrated by Justice Story’s 1844 decision in Vidal v. Girard’s Executors. It tested the validity of the section of Stephen Girard’s will that established a school for orphan boys. Girard stipulated that no religion could be taught to the boys at the school since he desired “to keep the tender minds of the orphans... free from the excitements which clashing doctrines and sectarian controversy are so apt to produce.” Girard’s residual heirs hoped to invalidate the bequest and claim the entire seven million dollars left to the school. Their counsel, Daniel Webster, argued against its enforceability by relying on appeals to sentiment and asserting the adage that

that the law of slavery should be viewed from “the perspective of the immediate, contingent, and human manifestations of underlying economic and ideological structures”). Professor Fisher linked in specific ways the “vocabulary, images, formal defenses of slavery, and popular political debate” to the formal “rules that regulated the relations of masters and slaves.” William W. Fisher, Ideology and Imagery in the Law of Slavery, 68 Chi.-Kent L. Rev. 1051, 1080 (1993).

See Griffin v. Mixon, 38 Miss. 424, 451 (1860) (opining that “the crowning merit of legal science [is] that it measures its judgments by the test of reason; by established principles, having their foundation deep laid in the sanctions of the human mind and human heart”).

INGERSOLL, supra note 87, at 40.

When, for reasons of sentiment or passion, a court broke free of precedent, it was subject to censure:

We are reduced to that “miserable servitude where the law is vague and uncertain.” The conservative character of the court is broken down, and all confidence in the stability of its rules is destroyed in the minds of good citizens. Such a result is, in my judgment, scarcely less deplorable than abolitionism.

Mitchell v. Wells, 37 Miss. 235, 277 (1859) (Handy, J., dissenting).


See id. at 183-84 (discussing the provisions of the will detailing the plan and structure of the school).

Id. at 129.

See id. at 143-46 (setting out the heirs’ grounds for invalidating the will).
Christianity is part of the common law. Justice Story, distinguishing the 1820 case *Trustees of the Phila. Baptist Ass’n v. Hart’s Executors,* permitted the bequest based on a fine parsing of Pennsylvania charitable trust doctrine. *Girard College* appears as a direct counterexample to Karsten’s heart-based model, illustrating the limits of evangelical sentiment.

Karsten’s model becomes more confusing when he classifies cases in the 1850s that denied freedom to slaves who traveled in free states, as part of a jurisprudence of the heartless. That heartless jurisprudence occupies an odd place in Karsten’s model, somewhere between the head and heart; apparently it means legal decisions driven by politics, as opposed to internal doctrine.

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200 See id. at 172-76.
202 See *Girard’s Executors,* 43 U.S. at 192-202. Robert Ferguson argues that Story’s opinion represents the triumph of the legal mind over Webster’s emotionalism. See Robert Ferguson, *The Girard Will Case: Charity and Inheritance in the City of Brotherly Love,* in PHILANTHROPY AND AMERICAN SOCIETY 1, 9-10 (Jack Saltzman, ed., 1987). In Ferguson’s rendition, *Girard’s Executors* is anti-sentiment, in which the highly constructed, artificial common law triumphs: “Story and his colleagues on the Supreme Court removed Christianity as a potential restriction upon giving in American culture.” *Id.* at 10.

Ferguson interprets *Hart* as part of the legal attack on evangelical religion, in which Marshall strictly construed Pennsylvania law to prohibit a bequest for education of Baptist ministers. *See id.* at 3. But Story’s reversal in *Girard’s Executors* could be used to protect grants to religious institutions. Ferguson’s reading seems to want it both ways—Story was anti-evangelical in *Hart* and in *Girard’s Executors.* Much of the change might have occurred in the Pennsylvania Supreme Court, which approved charitable gifts to unincorporated associations in *Witman v. Lex,* 17 Serg. & Rawle 88 (1827). As late as 1844, the Tennessee Supreme Court invalidated a bequest to the Tennessee Methodist Episcopal Church on the ground that it was inconsistent with English (and also American) common law because the grant was for unspecified purposes. *See Green v. Allen,* 24 Tenn. 170, 208 (1844) (“We may, therefore, look for bills to establish charities for Roman Catholics, Jews, Mormons, Mahomedans, Universalists, Unitarians, Deists, et id omne genus, as far as the imagination of man may be enabled to invent new forms or creeds. The system is at war with our habits, our form of government, and indeed, we think we may add, with common sense and reason.”).

203 Story carefully parsed *Hart* to distinguish it from *Girard’s Executors,* although he recognized the shifting precedent and understanding of charitable uses dictated a different result. *See Girard’s Executors,* 43 U.S. at 192-93 (distinguishing *Hart* because it dealt with Virginia law, which abolished the Elizabethan statute providing for charitable uses and because it was a gift to an unincorporated association). Story concluded, “The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity.” *Id.* at 97. *See also Wade v. American Colonization Society,* 15 Miss. (7 S. & M.) 663, 695 (1846) (“in the late case of *Vidal* . . . that court modified very much, if it did not overrule, the case of *Hart’s Exrs*”).

204 See *Karsten,* supra note 6, at 16 (asserting that judges felt compelled to follow “the true rule” in slavery cases as found in English precedent).

205 See *id.* at 16 (“This Jurisprudence of the Heartless, or of the Fist, thus put on the mask
This construct is problematic since attempts to extract doctrine from ideology are generally unreliable.206

Legal historians are only beginning to uncover the sophisticated ideas of jurisprudence held by those outside the mainstream of American legal culture and to see similarities of those ideas to legal realism.207 The subtle interaction of ideology with doctrine is the basis of scholarly works such as William

of 'doctrinal' law (the Jurisprudence of the Head) in the service of slavery but was at its base quite political and should not be confused... with the more genuine... precedent and 'ancient legal doctrines' throughout the nineteenth-century.

206 See Morton J. Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEGAL HIST. 275-94 (1973) (exploring ways that historians characterize doctrine as neutral and the value choices that characterization entails). Karsten employs language about neutrality, which contemporaries understood masked important decisions about distributive justice. See, e.g., Edward Livingston and his Code, 9 U.S. MAG. & DEMO. REV. 211, 211 (1841) ("We cannot conceive a system, making pretension to rational principles, having anything to do with that absurd jumble of arbitrary rules— as much as war with the common sense of men, as it is with the dictates of justice...."). The article continues:

Expressed in language carelessly defined, or equivocally arranged, abounding in obsolete and technical terms, difficult to be understood, referring to usages that have long since expired, or depending on fictions which are absurd... often unjust and sometimes ferocious in spirit, it perplexes the acutest mind, and disgusts a liberal or refined habit of sentiment.

Id. at 215. See also What is the Reason?, 16 U.S. MAG. & DEMO. REV. 17-29 (Dec. 1845) (challenging the justifications advanced for inequality of wealth). Lawyers were seen by some as justifiers of the inequality. See Prospects of the Legal Profession in America, 18 U.S. MAG. & DEMO. REV. 26, 30 (1846) ("It is not the business of the lawyer to seek or to maintain abstract right... He has nothing to do with the right, but with the law, and when he finds what he esteems to be the law of his case, to maintain his position..... He lays down his weapons without having made a single conquest over error, or a single acquisition, except for the profit of John Doe, whom he happens to represent."). See also, The Abuses of Law Courts, 21 U.S. MAG. & DEMO. REV. 305, 309 (Oct. 1847) ("If Europe was once prieß-ridden by the Catholic clergy, American may now be said to be in the same state of vassalage to the legal profession. The labor of thought and inquiry is in a great measure removed from the common people, while full a tithe of their substance is abstracted to feed the voracious maws of these hungry disputants.").

Novak’s book on regulation of property, Ariela Gross’ article on breach of warranty cases involving slaves, Adriana Davis’ article on interpretation of slave-owners’ wills and Robert Bone’s article on nuisance law. Labeling the appearance of humanity in certain opinions a jurisprudence of sentiment does a great disservice to those who, like Channing, Stowe and Emerson, developed an alternative jurisprudence more completely governed by sympathy.

B. The Non-Explanatory Power of Sentiment

In recent years, sentiment has gained extraordinary popularity as an explanatory construct for nineteenth century culture in general and for antebellum law more specifically. The problem with using sentiment to explain law is that it does not predict results in particular cases, for sentiments can lead in many directions. For instance, both pro and anti-slavery ministers appealed effectively to sentiment in supporting their cause. Indeed some of the most persuasive pro-slavery writers were Southern evangelical ministers.


213 See Bertram Wyatt-Brown, YANKEE SAINTS AND SOUTHERN SINNERS 155-61 (1985) (examining the interplay between pro-slavery rhetoric and evangelical abolitionism). Laura Mitchell’s recent essay explores the complicated relationship between religious thought and support for the Fugitive Slave Act of 1850, 9 Stat. 462 (1850). See Laura L. Mitchell, “Matters of Justice Between Man and Man”: Northern Divines, the Bible, and the Fugitive Slave Act of 1850, in RELIGION AND THE ANTEBELLUM DEBATE OVER SLAVERY 134-
Or, as a Kentucky jurist explained, in some cases doctrine bound judges to antislavery results, even as their sentiments led them to favor pro-slavery results.\textsuperscript{214}

Moreover, it is often difficult to determine whether an individual decision is "heart" based. When Karsten writes about his model of the "heart," he classifies decisions as "pro-plaintiff" and "anti-corporate entrepreneur."\textsuperscript{215} Since Karsten criticizes the model of economic determinism, it is surprising to find him classifying cases along such rough lines. Where does Charles River Bridge, a case in which one corporation sued another, fit along the continuum of head and heart?\textsuperscript{216} Or, what happens when the case involves a state against a corporation as did Dartmouth College,\textsuperscript{217} or a state against a city, as did Mayor and Alderman of City of Savannah v. State ex rel Green?\textsuperscript{218} When, then, is it appropriate to classify a decision as based on the "heart"? Perhaps when it helps powerless plaintiffs.\textsuperscript{219} But often there is no identifiable class that benefits from a particular rule. In cases of mistaken improvers of real estate, for example, is it the true owner or the mistaken improver who gains sympathy?\textsuperscript{220} In bankruptcy cases, is the heart represented by the moral

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\textsuperscript{214} See Fisher's Negroes v. Dabbs, 14 Tenn. 119, 139 (1831) ("I feel satisfied that I have no sympathies which would have misled me in this matter; for when permitted to indulge my feelings and opinions as an individual, I find them in strong and direct hostility to all schemes for emancipating slaves under existing circumstances, in the bosom of our community.").

\textsuperscript{215} KARSTEN, supra note 6, at 294.

\textsuperscript{216} See, e.g., Stephen Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and Takings Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 37-40 (1986) (discussing the conflicting agendas in Charles River Bridge).

\textsuperscript{217} 17 U.S. (4 Wheat.) 518 (1819).

\textsuperscript{218} 4 Ga. 26 (1848) (permitting state to compel construction of wharves along Savannah River, despite concern that the wharves would destroy commerce). I am grateful to Michael Feshour, who alerted me to the importance of Green and several other Lumpkin opinions.

\textsuperscript{219} See KARSTEN, supra note 6, at 147 (asserting that judges were willing to aid poor people, children and Good Samaritans). References to "humane," "Christian," decisions "bottomed on justice" are too often too vague to have meaning. Id. at 8, 15-16.

\textsuperscript{220} See Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1827) (invalidating Pennsylvania statute providing for compensation to mistaken improvers). Contrast Green, 21 U.S. at 68, and Nelson v. Harris, 9 Tenn. 360, 370 (1830) (concluding that "the idea that the state authorizes a man to make extensive improvements on the land of another and, under these circumstances, sustain an action for the value of the improvements... is subversive of the clearest principles of natural right, in relation to property, and, consequently, of the constitution, which guarantees to every man the exclusive use of his property"); Nelson, 9 Tenn. at 371 (referring to sentiments and reasons to find "correct principles extracted on which the decisions are bottomed and well supported") with Bodley v. Gaiher, 21 Ky. 57, 58-59 (1825) (refusing to follow Green); SCOTT v. Mather, 14 Tex. 235, 239 (1855) (requiring payments to good faith improver).
obligation to pay debts or the relief of debtors, or both.\footnote{See Ogden v. Saunders, 25 U.S. 213, 282 (1827) ("[N]or is there any fundamental principle of justice, growing out of such relation, that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess.") (Thompson, J., dissenting); Marshall felt that "the rights of all must be held and enjoyed in subserviency to the good of the whole." Id. at 255 (Marshall, J., concurring in judgment).} Karsten interprets William Novak's study, The People's Welfare, explaining the prevalence of property regulations and the public interest, as demonstrating the persistence of "heart" in American property jurisprudence.\footnote{See Karsten, supra note 6, at 16.} It is not clear that Novak's findings fit along the axis of heart. The proposition that one cannot use property in a way inconsistent with the community is, arguably, consistent with reason. Decisions granting the government the right to regulate property were based on the need to restrain the uses of property. They may have been anti-developmental, but these decisions reflected a desire for a well-regulated society. Should restraints on slave holders' rights to dispose of their slave property be viewed as outgrowths of sentiment? If decisions granting manumission and restricting it are viewed as outgrowths of sentiment, then sentiment alone cannot explain outcome; the term is too fluid to have adequate explanatory power.\footnote{Karsten interprets the harsh manumission decisions of the 1850s as part of a jurisprudence of the fist, which "put on the mask of 'doctrinal law'." See Karsten, supra note 6, at 16. However, some of those opinions appealed to sentiment to deny manumission. Compare Mitchell v. Wells, 37 Miss. 235, 252 (1859) (Mississippi's "climate, soil, productions, and the pursuits of her people . . . all combine to sanction the wisdom, humanity, and policy of the system of slavery") and Cleland v. Waters, 19 Ga. 35, 43 (1855) (shall the owner "from an ignorance of the scriptural basis upon which the institution of slavery rests, or from a total disregard of the peace and welfare of the community . . . invoke the aid of the Courts of this State to carry into execution his false and fatal views of humanity") with Bridgewater v. Legatees of Pride, 33 Tenn. 195, 197 (1853) (Manumission "is a vexed and perplexing question, upon which public opinion . . . has been subject to much vibration between sympathy and humanity for the slave, and the safety and well-being of society"). If Karsten is correct that judges decided according to sentiment, that would tell us a great deal about the mechanisms by which they decided cases, although his classification scheme would not predict outcome. Such findings would, of course, have important implications for the investigation of the processes of judicial decision-making.} The jury box is one place where the heart analogy seems particularly apt. Emotional appeals appeared frequently in jury arguments.\footnote{See The Abuses of Law Courts, 21 U.S. Mag. & Demo. Rev. 205, 207 (Oct. 1847). The article discusses the effect of argumentation on juries: [T]he tendency of a sophistical course of argumentation is to perplex the jury, and to displace in the mind those natural feelings of right and wrong, which spontaneously arise on the contemplation of the facts and the law, and to substitute the ingenious, unnatural and specious conclusions of the speaker . . . . Id. Juries frequently occupied the attention of antebellum jurists. See, e.g., Flint River Steamboat Co. v. Foster, 5 Ga. 194, 197-99 (1848) (approving summary proceedings against}
surprising that when Stowe addressed the liability of a man who abused a slave in his custody in *Dred*, a jury found in favor of liability, even though the law precluded liability. As one lawyer commented about a powerful abolitionist lawyer, “I shall believe him while I hear him talk; so will you; so will all the rest of us.”

Another problem with Karsten’s construct is the difficulty of determining whether judges were motivated by head or heart. Take the example of the spendthrift trust, which allowed grantors to establish trusts for their relatives that could not be reached by creditors. While Karsten uses the spendthrift trust as evidence that judges had sympathy for incompetent heirs, most people look at the trust as favoring wealthy grantors and their profligate relatives at the expense of less-affluent creditors. Theorists are unable to reach a consensus on the main currents in antebellum legal thought in part because it is unclear whether the arrows of influence were pointing towards the head, the heart, or in some other direction.

C. The Adoption of Middle Class Values

While Karsten’s analysis is problematic, it hints at an important antebellum trend: the adoption of middle class values. Karsten claims to draw upon the findings of ethno-cultural historians whose subtle work has portrayed the importance of religion and ideology over class in the nineteenth century. Unfortunately, he merely replaces one simplistic model, that of Arthur Schlesinger’s *Age of Jackson*, with another. “Values mattered more to

steamboat owners, without jury trial, in part because “new forms may be erected, and new remedies provided, accommodate to the ever shifting state of society”). At one point Karsten lumps juries and judges together to support his argument that the legal system aided the weak. See Karsten, supra note 6, at 295-96 (asserting that judges affirmed excessive jury verdicts in favor of plaintiffs in personal injury cases). Given the gulf between judges and juries and the attempts to restrict jurors’ power, it may be inappropriate to link them.

225 See 1 STOWE, DRED: A TALE OF THE GREAT DISMAL SWAMP 377 (1856) (commenting that the outcome of the case will be unfortunate if “the case goes according to law”).


228 Karsten makes a strong case for considering trust beneficiaries as proper objects of sympathy. Given the ability to read spend-thrift trusts (or the rejection of them) as part of “heart”, it is difficult to argue sentiment could explain outcome. Compare Karsten, supra note 6, at 132-34; with JOHN CHIMPAHAN GREY, RERAINTS ON ALIENATION 169-74 (2nd ed. 1895) (outlining inter-jurisdictional disagreement about the enforceability of spend-thrift trusts).

229 See Karsten, supra note 6, at 8-9.

people than class or money.” Karsten tells us, with little recognition that values included ideas about the economy. Economic values so dominated the period that Charles Sellers was led to call his synthesis of Jacksonian America *The Market Revolution*. On many of the key values of economic development, the majority of Americans agreed.

Through his synthesis, Karsten alerts us to the interaction between the diverse ideas of liberalism that supported economic growth and a republican ideology that supported community values even when such values interfered with economic growth. However, this is a story we have known about, and struggled with, all along. Morton Horwitz depicts the conflict between liberalism and the emerging community standards of republicanism, in which law was seen “as constitutive and creative of political culture.” There were others, like Stowe, further outside mainstream thought who saw institutions like the law as constitutive of political culture but not “potentially positive and emancipatory.” For her, emancipation came when the individual was freed

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231 Karsten, supra note 6, at 9.


233 See, e.g., Thomas Hamilton, *Men and Manners in America* 166 (1833) (“At present, the United States are, perhaps, more safe from revolutionary contention than any other country in the world. But this safety consists in one circumstance alone. The great majority of the people are possessed of property; have what is called a stake in the hedge; and are, therefore, by interest, opposed to all measures which may tend to its insecurity.”).


The release of energy promoted by law might combine with concern for the preservation of the community in important ways. The resulting alloy sought to promote economic growth within the boundaries of protection of the community. One fine result of that alloy is Chief Justice Taney’s opinion in *United States v. Amy*, which permitted the prosecution of a slave for stealing mail, despite the owner’s argument that the slave’s imprisonment deprived him of his property. See *United States v. Amy*, 24 Fed. Cases 792, 794-95, 807-08, 810 (C.C.D. Va. 1859). Taney reasoned that punishment of a slave “for an offense committed by him” does not entitle the master to compensation “although the punishment may incidentally affect the property of another to whom he belongs.” Id. at 810.


236 Id. at 65.
from the restraints of institutions.237 The tension between law's release of energy and its protection of community appears frequently in Karsten's story.238

Karsten's theory draws on scholarship that analyzes the countercurrents to liberalism in American culture and demonstrates how ideas of equality and community mixed with liberalism.239 These studies explain the transformation of New York law in this period. Landlord-tenant law is one example. Claims of morality compelled New York to recognize a new doctrine that helped tenants in Dyett v. Pendelton.240 The New York Court of Appeals recognized a claim of constructive eviction when a family rented four rooms in a house where prostitution was taking place.241 Before Dyett, only tenants who had been physically ousted from their apartments by their landlords were excused from paying rent.242 Dyett extended that rule to include cases where the landlord made life so unpleasant that the tenants left.243 Senator Crary's description of the facts illustrates the court's concern for middle class morality. The prostitutes and men who visited frequently used "obscene and vulgar language so loud as to be understood at a considerable distance."244 The disturbances often continued all night and, perhaps most telling, "the practices aforesaid were matters of conversation and reproach in the neighborhood, and were of a nature to draw... odium and infamy upon the... house as being a place of ill fame."245 The tenant, "a person of good and respectable character" was effectively driven away.246 In dissent, one Senator stated that "if we were to decide this case according to the dictates of morality, we might be disposed to pronounce a judgment in his favor," but if the "moral law and the law of the land" vary "it is not for us, in our judicial capacity to reconcile them."247 Another Senator countered that the majority was applying "the principles and

237 See also Bruphy, supra note 159, at 1157-61 (discussing Stowe's critique of institutions). Horwitz cautions against identifying the "antilegalism of the abolitionist movement" with republicanism. Horwitz, supra note 235, at 69.

238 Karsten attributes juries' generous awards, for example, by reference to recent literature on Americans' attempt to limit and avoid pain and increase sympathy for those who were suffering. See Karsten, supra note 6, at 258-67 (explaining the rising price of pain in the mid-nineteenth-century).


240 8 Cow. 727 (N.Y. 1826).

241 See id. at 735-36.

242 Id. at 730-31.

243 Id. at 734.

244 Id. at 736.

245 Id.

246 Id.

247 Id. at 739. The lower court had rejected the tenant's defense of eviction based upon his "moral sense and feeling." Pendelton v. Dyett, 4 Cow. 581, 584 (N.Y. 1825).
reasons of law according to the justice of each case, without regard to the technical refinements and arbitrary and fictitious rules, which will always grow upon professional men," they were not making law, but "applying its familiar and elementary principles to a new case." Nonetheless, this doctrine was frequently limited in subsequent cases. Moral outrage might remake the law in some cases, but would not fundamentally alter either procedural or substantive law.

Similarly, at the level of economic development, Chancellor Kent's opinion in *Jerome v. Ross*, suggests the competing claims of property owners and canal builders. A company building part of the Erie Canal took rocks from a neighboring farmer who sought an injunction. Kent denied the injunction because there was an adequate remedy at law—payment of money damages. *Brick Presbyterian Church v. Mayor of New York* provides another illustration of the competing public roles regarding private property. Here, the court upheld a city regulation prohibiting further interments in the church cemetery against the church's claim of property rights. Like *Jerome*, *Brick Presbyterian Church* defies classification as either heart or head.

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248 Dyett, 8 Cow. at 734.
249 See, e.g., Ogilvie v. Hull, 5 Hill 52 (1843) (holding that there was no constructive eviction where the landlord tried to let the premises before the lease expired); Gilhooley v. Washington, 4 N.Y. Rep. 217, 219 (1850) (requiring tenant to pay rent, noting that no evidence suggested that the landlord was responsible for prostitution on the premises and that there is "no principle upon which the plaintiff can be made answerable for the wrong"). Cf. Etheridge v. Osborn, 12 Wend. 529, 532 (N.Y. Sup. Ct. 1834) (refusing to apply Dyett's liberal construction of eviction, noting that a "tenant cannot be evicted from that which he never possessed"). But see Lewis v. Payn, 4 Wend. 423 (1830) (applying Dyett to allow constructive eviction claim when landlord distrained goods for rent due on previous leases). See also ELIZABETH BLACKMAR, MANHATTAN FOR RENT, 1785-1860 at 227-31 (1989) (analyzing the effect of Dyett on doctrine of constructive eviction in New York). I am indebted to Travis Watkins, who shared his research with me.

250 7 Johns. Ch. 315 (1823).
251 See id.
252 See id.
253 5 Cowens 538 (1826).
254 Id.
255 See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 72-74 (1983) (classifying case as part of instrumentalism of the era). Asked another way, is Albert Taylor Bledsoe's emphasis on the preservation of the community from harm as a basis for pro-slavery political theory representative of head or heart? See Albert Taylor Bledsoe, Liberty and Slavery, or Slavery in the Light of Moral and Political Philosophy, in COTTON IS KING 269, 288 (E.N. Elliot, ed., 1859) ("The very law which institutes public order is that which introduces private liberty, since no secure enjoyment of one's rights can exist where public order is not maintained.").

At some level, it is a judgment call, on which reasonable minds may differ, whether Karsten's or the prevailing interpretation is correct. One may be disposed by nature to view judges as helping little people, or to see conspiracy. See Eben Moglen, The Transformation
D. The Need to Attend to Judges' Ideologies

Many legal traditions influenced judges' ideologies and approaches. For instance, the jurisprudence advanced by Harriet Beecher Stowe and William Ellery Channing differs from that advanced by James Kent, Henry St. Tucker, Henry Lumpkin and Louisa McCord. While Karsten's division into head and heart recognizes that judges differed in ideologies and approaches, he divides the country into regions that had different approaches to head and heart. Attention to judges' individual characteristics is frequently missing in the great middle of the book where Karsten is building his case. There, the recent work of historians addressing the importance of ideology in shaping people's thoughts may offer help in understanding judges' decisions.

If Karsten's thesis is recast as the hypothesis that judges took into consideration sentiment as well as reason, then we can turn to the question, why did judges differ in their outcomes? A model of American legal development such as Karsten's needs to explain how judges arrived at the conclusions they did—and particularly why they differed. Hence, one wonders why Heart versus Head contains so few references to the political affiliation of judges. Karsten shows that the terrain is occupied by diverse views. His next step should be to focus attention on individual judges in an attempt to link judges' ideologies with close attention to their modes of reasoning. William Fisher suggests that many of the doctrines of the antebellum era derived from Whig ideology—a provocative thesis, which one might hope Karsten would

of Morton Horwitz, 93 COLUM. L. REV. 1042, 1044 n.6 (1993) (observing that the "pronominal shift from Hurst's 'we' to Horwitz' 'they' was the icon of the historiographic confrontation" between consensus and neo-progressive historians). In that case, one's interpretation may turn on one's political bent. See Morton J. Horwitz, The Constitution of Change: Legal Educations without Fundamentalism, 107 HARV. L. REV. 32, 58-60 (1993) (attributing shifting attitudes towards Jacksonian Democracy to historians' attitudes towards democracy itself).

257 See KARSTEN, supra note 6, at 7 (dividing the country into regions—north, south and west).

258 In the conclusion, Karsten suggests that political ideology may have something to do with judges' decisions and provides some useful biographical sketches of jurists. See id. at 312-24.

259 See William W. Fisher, Ideology, Religion and the Constitutional Protection of Private Property, 1760-1860, 39 EMORY L. J. 68, 121 (1989). Emerson spoke of the differences when he portrayed the youth who rebelled at working for others: "I find this vast network, which you call property, extended over the whole planet. I cannot occupy the bleakest rag of the White Hills or the Allegheny Range, but some man or corporation steps up to me to show me that it is his." EMERSON'S ESSAYS, supra note 31, at 180. Gregory Alexander writes about the differences between Whigs and Democrats on vested rights in terms of "entrepreneurial republicanism" and "democratic entrepreneurialism." GREGORY ALEXANDER, COMMODITY & PROPRIETY 185-210 (1997). See also Alfred L. Brophy, Vested Rights and the Antebellum State Courts: The Intersection of Ideology and Reasoning Styles, 1820-1860 (unpublished manuscript, on file with the Boston University Law Review).
explore. Perhaps differences over reasoning styles are not the result of reason-
sentiment divide, but the result of political ideology. Both Democrats and
Whigs reasoned and felt, but they plugged different values into the ways they
reasoned and their natural sympathies flowed in different directions.

Analyses of conflicts over vested rights, for example, are more appropriately
analyzed along the lines of respect for the long-term uses of property versus
newer, short-term uses, instead of along the lines of the head versus heart
dichotomy. Some judges adopted a law in keeping with their middle class
morality—respect for property, protection of families against prostitution and
occasionally creditors and sometimes opposition to monopoly. The points
of contention, where judges dissented from one another, are the places to look for
competing visions of American law—head and heart (if those terms are
appropriate), Whig and Democrat, cold legal logic and warm evangelical
fervor, precedent-bound realists and Transcendentalists.

E. Karsten’s Reading of Cases: The Example of Ancient Lights

Part of the reason that Karsten finds so much heart jurisprudence hinges on
his odd reading of cases. Karsten uses many of the same texts that others have
interpreted as evidence of instrumentalism or economic efficiency, yet he
disagrees with the accepted readings of those texts.259 I believe he misreads
some of those texts. In a brief essay I cannot rebut each of Karsten’s
interpretations. He studied more than seventy doctrines and focused on
twenty-nine that were altered.260 For the sake of illustrating how I believe he
misreads cases, I shall examine in some detail a single doctrine—the doctrine
of Ancient Lights. As it came to America, people understood the doctrine of
Ancient Lights to provide that “window lights, which had become established
by the legal title of prescription, were entitled to be protected against
obstructions from neighboring walls.”261

1. The Traditional Story of the Development of Ancient Lights

Chancellor Kent discussed the contours of the rule in America in the second
edition of his Commentaries, published in 1840. While he acknowledged that
access to light “is evidence of much civilization and refinement in the
modifications of property,” he noted objections to it:

the doctrine is not much relished in this country, owing to the rapid
changes and improvements in our cities and villages. A prescriptive
right, springing up under the narrow limitation in the English law, to
prevent obstructions to window lights, and views, and prospects, or, on
the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with feeble and low buildings upon them.\textsuperscript{262}

Nevertheless, Kent believed that access to light should be protected, when such access had been established by use for “twenty years and upwards.”

Kent acknowledged that the 1838 New York Court of Appeals decision \textit{Parker v. Foote} considered the rule as “an anomaly in the law and not applicable to the condition of the cities and villages of this country.”\textsuperscript{263} But he was unwilling to abandon the rule entirely. Kent wanted to maintain at least some part of the doctrine, for it was “a reasonable right, contributing to the comfort and value of a person’s habitation.”\textsuperscript{264}

Courts evaluating Ancient Lights claims frequently looked to precedent. In 1838, for example, South Carolina Justice John Belton O’Neall adopted the English doctrine, apparently in full, in \textit{McCready v. Thomson}.\textsuperscript{265} In opposition to the argument that the rule was “unwise, and inapplicable to this country,” O’Neall responded that “[t]he law, as we find it, and not as we would have it, is to be our guide.”\textsuperscript{266} Subsequently, a Chancellor felt compelled to follow \textit{McCready}. He explained:

The case of M’Cready v. Thompson, gives us the law of this case, and however much I may be opposed, (and I sincerely am so,) to the converting of a gratuitous privilege into a right, against him who has generously allowed it, and however I may be opposed, on the ground of policy, to the prescription claimed in this case, I must obey that decision.\textsuperscript{267}

But precedent could not constrain forever. On appeal, the court decided that there must be evidence of substantial harm to the plaintiff.\textsuperscript{268} The record failed to disclose that level of interference and the court dissolved the injunction—an

\textsuperscript{262} Id.

\textsuperscript{263} Id. at 448. He thought that the claimant ought, at least, to have significant burdens to overcome, in showing continuous, adverse use for twenty years with notice to the defendant, and that even then a jury could decide whether there was an easement for access to light. \textit{See id.} (discussing \textit{McCready v. Thomson}, 23 S.C.L. (1 Duds.) 131, 133 (1838) (“Twenty years use of an easement creates a prescriptive right.”); \textit{Robeson v. Pittenger}, 2 N.J. Eq. (1 Green Ch.) 57, 65 (1838) (holding that an injunction against “stopping the lights” should be upheld because the lights had been “unmolested for thirty-five years”).

\textsuperscript{264} \textit{KENT, supra} note 261, at 448 n. m.

\textsuperscript{265} 23 S.C.L. (1 Duds.) 131, 132 (1838).

\textsuperscript{266} Id. at 134. O’Neall acknowledged his ability to disregard the common law “if any… principles did not comport with our political or civil institutions.” \textit{Id.} “But there is nothing in the principle now under consideration, which renders it unsuitable to our political or civil institutions.” \textit{Id.}

\textsuperscript{267} \textit{Wilson v. Cohen}, 14 S.C. Eq. (Rice Eq.) 80, 81 (1839).

\textsuperscript{268} \textit{See id.} at 83-84.
effective trimming of the Ancient Lights doctrine.269 A subsequent case270 further limited the doctrine by distinguishing between forest land and town land, protecting the rights of people who live in rural areas more than people in urban areas:

It will be seen how seriously improvements might be here hindered, by our deducing a proprietor's assent to a right, which would be a perpetual restraint upon his dominion over his own, from his neglect to obstruct windows for a time which would seem short to his retrospect, during all of which he had no occasion to occupy the space upon which they looked...circumstances which might subject valuable building ground to the extortionate demands, or ill natured control of, the owner of an adjoining lot.271

Thus, while South Carolina initially adopted the English rule, it subsequently restricted the rule for precisely the economic reasons that Horwitz posits.272 Kent's general protection of static, established property rights encouraged him to protect a long-term owner. In the end, however, Kent recognized the need to restrict the Ancient Lights doctrine.

2. Karsten's Alternative Reading of Ancient Lights

Karsten reads the cases differently. He concludes that

[the occasional appearance of pro growth dicta in a few American cases involving claims of ancient lights turns out to be utterly misleading. American jurists addressing this question remained largely doctrinal in their approach throughout... And when they did indicate that they felt the doctrine of ancient lights was not applicable in America, they often gave quite undevelopmental reasons for rejecting it.273

His conclusion is that the rule was rejected for its antisocial ramifications.

I have difficulty understanding Karsten's model of development. Remember that Kent said he favors the Ancient Lights rule, and it is part of civilized countries. Hence, I expect Karsten to say the rule arose and continued because of the domain of the heart. But instead the heart is used to explain the rule's demise. Thus, the heart could generate or reject a rule. Such

269 See id.
271 Id. at 321.
272 See HORWITZ, supra note 9, at 3 (1977) ("[T]he goal of free alienation of land in order to encourage economic development was... important.").
273 KARSTEN, supra note 6, at 148. Historians of property law—perhaps more so than those of contracts and tort—note the general concern of judges for the economic implications of their decisions and for reallocation of the burdens between individuals and society. See generally Daniel R. Coquillette, Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment, 64 CORNELL L. REV. 761-821 (1979) (examining three historic property cases as a source of ideas about history and justice).
a construct, which may be variously applied to explain the retention as well as rejection of a rule, is inadequate.

The cases studied by Karsten support the conclusion that judges rejected the doctrine largely for economic reasons, although considerations of sentiment also played a role. Karsten focuses on the leading case opposing the doctrine, the New York case of Parker v. Foote.\textsuperscript{274} The case addressed a claim by Parker, a homeowner, whose neighbor Foote built a store on his property line, thus blocking off light and air to Parker's home.\textsuperscript{275} The trial court judge concluded that there was an irrefutable presumption of a grant for access to light.\textsuperscript{276} The appeals court overturned the decision; the existence of a grant was held to be a question for the jury. The appeals court distinguished between a claim based on a grant and one arising from twenty years of adverse use.\textsuperscript{277} The former presented a question of fact for the jury; the latter was rejected for two reasons. First, the analogy to adverse possession required an adverse use, which could not be established by mere access to light.\textsuperscript{278} No cause of action could be filed against the adverse user of the light. Second, the Ancient Lights doctrine was inappropriate in America. No state had adopted the doctrine, for it could not "be applied in growing cities and villages of this country without working the most mischievous consequences."\textsuperscript{279} Justice Bronson's opinion rejected English precedent based on considerations of reason and utility.\textsuperscript{280}

But Karsten wants to read Parker as a case about antisocial behavior rather than economic development. Neighbors sometimes constructed walls to prevent the ripening of a prescriptive easement to light. Judge Bronson's statement that a wall designed solely to stop the acquisition of the right to light

\textsuperscript{274} 19 Wend. 309, 318 (N.Y. Sup. Ct. 1838) (asserting that the right to access to air and light forms no part of the American law).
\textsuperscript{275} See id. at 310.
\textsuperscript{276} See id.
\textsuperscript{277} See id. at 314.
\textsuperscript{278} See id. at 317.
\textsuperscript{279} Id. at 318.
\textsuperscript{280} See id. (rejecting the English rule as an anomaly in the law). See also Ward v. Neal, 37 Ala. 500, 502 (1861) ("How much land can thus be rendered useless to the owner, remains yet to be settled."); Ray v. Lynes, 10 Ala. 63, 66 (1846) (providing that the right to use one's window "could only be presumed from long acquiescence in its enjoyment which would thereby ripen into title, and presupposes a grant"); Pierre v. Fernald, 26 Me. 436, 441 (1847) (providing that the common law right of prescription in favor of ancient lights does not reasonably or equitably apply"); Klein v. Gehrhung, 25 Tex. 232, 240 (1860) (rejecting Ancient Lights on basis of principle and authority); Hubbard v. Town, 33 Vt. 295, 302 (1860) ("The establishment of a rule that would require a man to erect a building or wall, that he did not need on his own premises, for the sole purpose of excluding the light from his neighbor's windows, would lead to continual strife and bitterness of feeling between neighbors and result in great mischief."). But see Gwin v. Melmoth, 1 Freeman Ch. 505, 506 (Miss. 1841) (denying injunction, yet concluding that Ancient Lights is a possible claim).
by prescription is a "wanton act... calculated to render a man odious" provides evidence for Karsten's view that Parker was driven by concern for antisocial behavior. The wall, according to Karsten, was the subject of the court's reference to the rule's "mischievous consequences." Yet it seems that those "mischievous consequences" include both anti-development and antisocial consequences and a significant part of the antisocial consequences are putting the owner to an expense simply to stop the running of the statute of limitations.

William Noyes' speech to the Law Association of New York City in 1839 provides further insight into the American approach to Ancient Lights doctrine. Noyes represented the defendant in Parker and his speech was an attempt to clarify the contours of the doctrine and to establish through a demonstration of both precedent and reason that his position was correct. Horwitz used the speech as a small part of his evidence for the pro-development reasons for rejecting the Ancient Lights doctrine. Karsten, however, believes such a use "does little justice to Noyes' lecture." I disagree.

Noyes recognized that ambiguity was a common ground for criticizing law, and he explicitly rebutted that criticism. He addressed three bases for obtaining access to light, beginning with the prescriptive period that ran back before the Revolution. The first basis was an owner's established long-term access to light in ancient buildings that ran back before the Revolution. He did not question that doctrine, but that was an easy concession, for, as he admitted, there would be little possibility of establishing such long-term use in the newly formed United States. Noyes' focus on the rule's implications for development and the competing considerations of precedent, appeared when he said, "This rule would seem to be a fatal enemy to modern improvements in building, but it nevertheless is well settled upon principle and authority." Second, Noyes addressed prescription through twenty years' use, the most common basis for asserting claims to Ancient Lights. Noyes explored the unstable basis of the doctrine at English law, pointing out that the 1761

281 Karsten, supra note 6, at 153 (quoting Parker, 19 Wend. at 318).
282 Id. at 152-53.
283 See William Curtis Noyes, The Legal Rules Governing the Enjoyment of Light, 23 Am. Jurist 46, 48 (1840) ("I shall find it necessary in the course of this lecture, to give a history of the legal questions involved.").
284 Karsten, supra note 6, at 153. Horwitz devotes only one sentence on Noyes' speech: "The decision had the effect of overthrowing, as one contemporary put it, 'a fatal enemy to modern improvements in building.'" Horwitz, supra note 9, at 281 n. 62. I believe that single sentence captures the essence of the speech.
285 See Noyes, supra note 283, at 50 (describing the scenario where "the building is an ancient building, and the lights also ancient lights").
286 See id. ("In this country... such lights can hardly be said to exist.").
287 Id. at 52.
288 See id.
decision establishing the rule allowing a grant on the basis of twenty years’ adverse use, was made by a single trial judge. It was thus a “false analogy.” Noyes was distinguishing (or perhaps extinguishing), as a careful lawyer should, precedent. Certainly Karsten ought not to expect that jurors or lawyers will abandon doctrinal arguments in favor of policy. As part of the process of distinguishing precedent, Noyes quotes Kent’s concern over the inexpediency of the rule in cities: “By such a prescriptive claim, the value of vacant lots with old and low buildings upon them would be destroyed, if substantial buildings could not be erected on them, lest they might obstruct the lights . . . of some building on an adjoining lot which had stood twenty years.” Moreover, Noyes explored the incompatibility of a prescriptive right to Ancient Lights with the desire for settling titles to land, which characterize adverse possession cases:

[The ancient lights doctrine does not possess the characteristics of a typical adverse possession claim]. As has been shown, it is using nothing in the natural state of the soil, but what the party is entitled to; there is indeed no manual or pedal occupation; it is simply—if such a possession can be—merely ocular. The person whose grounds are overlooked cannot have a remedy by action for doing it—he has no means of preventing it, except by making a useless erection against the offensive window—and in short is wholly without any legal remedy whatever by action or otherwise.

Finally, Noyes addressed the issue of implied grants of an easement for light. The implied grant arose when a grantor sold an adjoining parcel of land. The grantor could not then act in a manner inconsistent with the grant. Noyes succeeded incataloguing the legal arguments for limiting the doctrine, as well as the considerations of expediency that lay behind the changes. Many

289 See id. at 55 (“T]he question seems never to have been deliberately argued and considered by the judges in bank [sic].”).
290 See Noyes, supra note 283, at 54 (quoting 3 Kent 446 (2nd ed. 1840)).
291 Id. at 54.
292 Id. at 56-57.
293 See id. at 59. See, e.g. Durel v. Boisblanc, 1 La. Ann. 407, 408 (1846) (finding implied reservation of easement for access to light when common owner of two adjacent lots sells one lot and adjoining house has access to light across the lot sold); Robeson v. Pittenger, 2 N.J. Eq. 57, 64 (1838) (“T]In a case of ancient lights, where they have existed for upwards of twenty years undisturbed, the owner of the adjoining lot has no right to obstruct those lights, and particularly so, if the adjoining lot was owned by the man who built the house at the time.”). In several places Karsten discusses implied reservation and implied grant cases along with Ancient Lights by prescription. See Karsten, supra note 6, at 387 n.18 (referring to Cherry v. Stein, 11 Md. 1, 21 (1858)); id. at 388, n. 29 (referring to Doyle v. Lord, 64 N.Y. 432 (1876)). Easements are easier to establish by implied reservation than by prescription. See Donahue, supra note 227, at 1084-95 (discussing implied reservations).
diverse strands come together in his argument, including careful parsing of precedent and considerations of policy. Noyes' arguments provided evidence of the utilitarian and flexible nature of American law, which respected economic development.

Karsten concludes that some jurists used pro-development language to support the rule and others used doctrinal reasons to avoid it. Many of the cases overruling or limiting Ancient Lights on "doctrinal" grounds cite Parker and thus, implicitly reject Ancient Lights for instrumental reasons. The utilitarian principle became the doctrinal reason for avoiding the rule. When judges were able to break free of precedent, the break was possible because of careful legal arguments supported by considerations of expediency, mostly the adverse impact on development.

IV. TOWARD AN UNDERSTANDING OF MODES OF REASONING AMONG ANTEBELLUM JURISTS

There is, however, a golden medium between these two extremes. It is that disposition of mind, which neither reveres what is old, nor admires what is new, merely on account of its being old, nor admires what is new, merely on account of its being new; but submits every question to the test of strict examination, upon its intrinsic merits.

In America, the ancient regimen of Europe as to its grand characteristics and fundamental principles, has been entirely subdued. Not a vestige of the monarchical, or of the hereditary aristocratic, remains. The revolution in society has been a complete upturn and overturn; and the whole of the new fabric has been based on the popular or democratic principle. The most perfect freedom of popular opinion has been admitted as a fundamental and all pervading element of the social state; and what is more, popular opinion reigns supreme and absolute. It is above law; it is law itself. Antiquity is nothing, and usage is nothing, when it comes in conflict with this power.

A picture emerges of judges following English and American precedent, while re-crafting the law to comport with both the American situation and with the judges' own economic and social visions. Judges wrote in grand terms, looking to precedent and reason, testing rules by experience as well as practicality and reasoning by analogy. Often such procedures led them to adopt the same rules that existed in England. At other times, they adopted different or more subtle rules. The American common law method required a

294 See Karsten, supra note 6, at 150-51 (discussing the variance among Ancient Lights cases).
296 Timothy Walker, Introduction to American Law 60 (1837).
297 Colton, supra note 75, at 41.
careful testing of rules to see whether they fit American needs.

Timothy Walker's 1837 *Introduction to American Law* represents a contemporary's understanding of the nature of the common law. His treatise, designed as an accessible introduction to law, contained simple explanations of complex ideas such as the idea of the "common law." Walker's treatise, originally delivered as lectures at the Cincinnati Law School, showed extraordinary honesty in his assessment of the law:

It is also called a collection of customs and traditions commencing in immemorial times, acquiesced in by the successive generations, and gradually enlarged and modified in the progress of civilization. The true account, however, is, that it is the stupendous work of judicial legislation. Theoretize as we may, it has been made from first to last by judges; and the only records it ever had, are the reports of their decisions, and the essays, commentaries and digests founded thereon. Walker's honesty allowed him to attribute a great deal of power and autonomy to judges. He recognized that despite legislation that limited judges' discretion, "judges even at this day exercise a far wider discretion under the common law, than is usually supposed by those not conversant with the subject."

Such candid statements about the nature of the common law set the stage for Walker's assessment of the sources of law and the ways that law evolved. Walker discovered that the existence of such varied sources led to uncertainty in the law. In urging codification, Walker pointed to the frequency with which judges departed from precedent: "For though in theory precedents are binding, yet in point of fact, judges do not regard precedents as absolutely imperative, like statutes, but rather as lights to aid their discretion and inform their judgment." "Ought we to depend," he asked, "to such an extent as this upon the discretion of any set of men?" Walker emphasized the fluid nature of the common law—its adaptation to changing circumstances and to the interpretations of individual judges.

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298 See Walker, supra note 296, at 53 ("It may sound strange to unpracticed ears that there should be such a thing as unwritten law; for if there be one thing, which above all others, demands all the certainty and precision which human ingenuity can attain, it is the law which governs us.").
299 Id.
300 Id. at 54.
301 See id. at 55 ("Where a question arises concerning which our written law is silent, we consult the reports, beginning with those of our own state. If none of these settle the question, we seek light from the civil law, or from any other source which can furnish it.").
302 Id. at 61.
303 Id.
304 Id. at 56 ("The only certainty, therefore, is, that we have something which we call common law, scattered at random over a vast surface. But precisely what it is, or how far it extends, is hidden in the breast of our judges, and can only be ascertained by experiment.").
Part of the reason the law was fluid, however, was that judges adapted it to society. As society advanced, the law was also becoming more complicated:

[Just in proportion as society advances in civilization, the importance of municipal law becomes greater, and its functions more complicated. Barbarians need few laws, because they have few interests to be regulated by law; but every step in the progress of improvement gives occasion for adding to the body of law, some new provision, until the aggregate becomes formidable to the boldest mind.305]

That vision of the common law as an evolving body of rules received wide promotion in the early nineteenth century. It appeared, for example, in an article written by Justice Story in the Encyclopedia Americana, the first American encyclopedia, printed in Boston in the 1830s.306 Through a series of essays in that encyclopedia, Story explained important principles of law to a generation of Americans. Story discussed the nature of the common law in general terms, describing it as “the law common to the realm.”307 It was of ancient origin; “[i]t probably began in the early customs of the aboriginal Britons, and was successively augmented, in different ages, by the admixture of some of the laws and usages of the Romans, the Picts, the Saxons, the Danes and the Normans . . . .”308 Story explained the growth of the law in a way that would lead readers to expect that the law should change to meet with contemporary society:

It was feeble and narrow at first; but, expanding with the exigencies of society and with the progress of knowledge and refinement, it has now become a very complex and intricate system, and presents a singular combination of the strict principles of the old feudal law, with the elegant reasoning of public and commercial jurisprudence, which are so much admired for their general equity.309

By its nature, the common law intertwined with society. The common law required judges to ask the question, “What does human experience prove to be the wisest rule which can be adopted?”310 To answer that question, judges had to take on functions that “bear a very close analogy with those of the law-making power.”311 The “exigencies of society” and the “ever varying forms into which the transactions of business are thrown” compelled judges to

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305 Id. at 15.
306 See Joseph Story, Common Law, in 3 Encyclopedia Americana 393 (Francis Lieber, ed., 1830).
307 Id.
308 Id. at 393-94.
309 Id. at 394.
311 Id. at 450.
conduct experiments. 312 Using experience, observation and a wide induction of facts, those experiments “contribut[e] to modify and to attenuate to a wonderful extent the rules which have been made and the principles which have already been adjudged,” wrote Fredrick Grimke in his 1847 Treatise on Free Institutions. 313 As American society progressed, so did the common law, which explains why cases of “first impression” were as numerous in Grimke’s time as when John Marshall and James Kent ascended to the bench in the early years of the nineteenth century. 314

In the formulation of those new and complex rules, judges had the opportunity to shift the law to comport with their social and economic views—a version of Horwitz’ instrumentalism. The instrumentalism was due in part to judges’ understanding of the law as a progressive science. There was a general sense that the culture was bringing forth new ideas, different from those prevailing in Europe. The belief in the progress of thought and the changes that it necessarily wrought in literature was similar to the conception of a changing common law. Catherine Sedgwick explained “[i]t is not a conclusive objection to a new book, that there are better ones already in existence.” 315 She justified new books on the basis of the changing understanding of society:

The elements of human nature and human society remain the same, but their forms and combinations are changing at every moment, and nothing can be more different than the appearances and effects produced by the same original principles of human nature as exhibited in different countries, or at different periods of time in the same country. 316

An important source of the judges’ alterations of the law was the understanding that society did change, borne of Americans’ experience with law reform at the time of the Revolution. 317 Thus, as society progressed, it brought changes in the law. Similar formulations of the nature of the common law appeared in many places, from public lectures to legal treatises. For instance, in his inaugural lecture at Harvard, Justice Story told his audience why the study of the common law is so difficult:

312 Id. at 449-50.
313 Id. at 450.
314 See id. at 458 (discussing the role of precedent in the development of the common law).
315 SEDGWICK, supra note 95, at 1.
316 Id.
317 While one may think the changes in doctrine were relatively few, they were important:

The innumerable opportunities offered in a new and growing country for bold enterprise and successful acquisition the general exemption of property from restraints upon alienation, the abolition of all hereditary distinctions, and the equal partition of estates among relatives in equal degree to the deceased owner, bring about a rapid circulation, and of course a rapid accumulation and dispersion of wealth.

GASTON, supra note 64, at 18.
It is, as has been elegantly said, "The gathered wisdom of a thousand years;" or, in the language of one of the greatest English judges, it is not "the product of the wisdom of some one man, or society of men in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men." It is a system having its foundations in natural reason; but at the same time built up and perfected by artificial doctrines adapted and moulded to the artificial structure of society.\footnote{Joseph Story, Inaugural Discourse, 29-30 (1828).}

There was a gap, however, between society’s progress and legal change. Many thought the law failed to keep up with new ideas. The Democratic Review explained the gap:

Old heresies in government and ethics have been exploded, and no one doubts the capability of the people to govern themselves— to select their own religion— to choose their own schools— to manage their own families, and, respecting their neighbors’ rights, to protect their own. The searching hand of reformation has winnowed away the rottenness, which mildewed public intelligence. The freshness of youth is around everything except the gnarled and misshapen trunk of Law.... Controlling it is the fell spirit of law-craft which borrows its spurious wisdom from the age in which witches were burnt— in which judicial combats decided right, and when kings held their crowns juro divino. It has no affinity with common sense— candor is its aversion, and simple truth its enemy. Its \emph{principles} are a confused mass of conflicting counts, pleadings, precedents, dicta, forms, mystery and jargon; its spoils, the money of the people, wrung from them by a system the pillage of which is utterly unparalleled in the history of taxation.\footnote{Law Reform, 21 U.S. Mag. & Demo. Rev. 477, 477-78 (1847).}

As American law expanded and became more stable, the sphere of sentiment declined. President Thomas Roderick Dew of William and Mary, a leading legal historian of the antebellum era, explained the differences between ancient and modern laws with reference to their sophistication:

\[1\] In the absence of law, the judge is left to decide the case according to his notions of natural equity. In such a state of things, the orator will have a much finer field for display. He may not only address himself to the understanding of his judges, but arouse the feelings. When, however, there is a law which will fit every case, the advocate is then reduced to the necessity of showing the application of the law. Every effort to arouse the passions is viewed with distrust—it is regarded as a species of trick to divert the mind from the true issue.\footnote{Dew, supra note 49, at 137-38.}

Americans’ experiences with the shifting law taught them about the mutability of precedent. Judges, thus, learned from individual struggles with
conflicting precedents321 and from sources like Simon Greenleaf’s collection of overruled cases, the lesson that law, like human thought more generally, differed among individuals.322 Americans then self-consciously separated themselves from English law and sought a uniquely American law, which would reflect and help to shape American values. The matrix of cultural values included ideas about law; those ideas permeated legal thought, so ideas developed in the culture became part of formal (judge-made) law. The picture emerges of a common law that adapts, perhaps because of the prejudices of the judges or perhaps because of the virtues of the judges. The question becomes how often and why.

CONCLUSION

Peter Karsten’s model of heart versus head, which is pitched as a dramatic challenge to the dominant model that judges shifted common law rules to promote economic growth, presents an opportunity to assess our understanding of the transformations that occurred in American law in the antebellum era. A unanimity of opinion seems to be emerging that judges in the nineteenth century viewed the common law as changing. The idea of progress, which was part of the American self-image, cut across a wide range of areas from technology to literature to common law. In the realm of common law, the changes made the law more rational, generally less concerned with established wealth and more concerned with entrepreneurs than before. Judges’ ideas about the ingredients of a just outcome as informed by precedent, considerations of utility and humanity drove these changes.

Karsten’s model, however, raises several questions. First, the division into heart and head is too simple to convey the complex interaction of logic, expediency, precedent and humanity on the antebellum legal landscape. Second, the model draws the line between head and heart in the wrong place, concluding that many cases that are, at best, a combination of “head” and “heart,” are part of a jurisprudence of the heart. Such a classification scheme slights the jurisprudence of sentiment advanced by abolitionists like Harriet Beecher Stowe as an alternative to the cold logic of the American legal system. Moreover, the “head-heart” model cannot predict outcomes in particular cases because sentiments of the heart might lead in different directions, depending on the values of judges. Finally, at least one of the doctrines that Karsten analyzes as part of the “heart” jurisprudence, the Ancient Lights doctrine, remains open to an alternative reading.

Karsten provides an important service to legal history by reminding us of the centrality of concerns other than utility and precedent in driving judges’

321 See, e.g., Green v. Allen, 24 Tenn. 170, 210 (1844) (providing an example of a judge balancing decisions from different jurisdictions).

322 See, e.g., Cases Overruled, Doubted, or Limited, N. Am. Rev. 65, 65-72 (July 1822) (portraying the vast range of differing decisions made by judges in the volumes of decided cases).
opinions; he does an even greater service by aiming for a synthesis of antebellum American legal thought. In an era when historians are frequently too timid to advance comprehensive models, Karsten’s aggressively argued tome will cause a rethinking of key positions in American legal history. We are indebted to Professor Karsten for providing one of the most comprehensive, fresh and synthetic accounts in the field since 1977.

Yet, Karsten fails to fundamentally alter the reigning paradigm. The dominant modes of analysis respected economic growth, middle class values and tradition. Now we may focus on the conflicts between judges as a way of tracing the influence of ideology on legal doctrine. The agenda ought to include a catalog of the ways that ideology affected doctrine, with the hope of creating a detailed model of the influences upon judges—ways the ideologies of Democrat and Whig parties and evangelical and other religious sentiments mixed with legal method to produce the American common law.

Questions remain about the fundamental nature of legal thought. How unified was it? How much did it follow one political ideology? How much did judges depart from tradition—or must we speak of American legal traditions even within the judiciary? How much did it vary by region? Some of those questions can be answered by correlating political ideology with judicial opinions, by comparing doctrinal decisions across individual jurists, states and regions, by close readings of texts for evidence of how judges and lawyers reasoned and by studies of individual jurists. We are beginning to learn a great deal about how judges reasoned. In the not too distant future, it may be possible to speak about a theory of the American common law method in the nineteenth century. And when that happens, we will all owe Peter Karsten a great deal for having infused important elements into the debate.