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## What's Wrong with Langdell's Method, and What to Do About It

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# What's Wrong with Langdell's Method, and What to Do About it

*Edward Rubin\**

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## INTRODUCTION

Here we are, at the beginning of the twenty-first century, using a model of legal education that was developed in the latter part of the nineteenth. Since that time, the nature of legal practice has changed, the concept of law has changed, the nature of academic inquiry has changed, and the theory of education has changed. Professional training programs in other fields have been redesigned many times to reflect current practice, theory, and pedagogy, but we legal educators are still doing the same basic thing we were doing one hundred and thirty years ago. Many law professors are conscientious and devoted teachers, and quite a few are inspired ones, but their efforts are constrained and hobbled by an educational model that treats the entire twentieth century as little more than a passing annoyance.

There has, of course, been a certain amount of lower-level change in the model of legal education during this period. Law schools have added, although not integrated, clinical programs into the remainder of the curriculum. They have also introduced courses reflecting new developments in law, although they rarely have penetrated the sacrosanct first year. Moreover, the demographics of law schools have kept pace with those of other university departments. Law schools' treat women, minorities, and gays is just as well, and sometimes better than other graduate school programs. Further, discrimination against Jews, which was rampant when the law school program was developed, is barely an institutional memory at present.<sup>1</sup> Law school buildings have been regularly refurbished or rebuilt and are often some of the most modern and opulent facilities on campus; they are filled with up-to-date libraries, state-of-the-art audio-visual equipment, and sleek internet terminals. But the basic educational approach that law schools use remains essentially unchanged from the one that C.C. Langdell introduced at Harvard in the years following the Civil War.

Few contemporary legal educators even attempt to offer a rationale for this situation.<sup>2</sup> What one sometimes hears is that the current law school curriculum teaches students to "think like

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1. See DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 52-59 (1997) (noting that the representation of Jews in the American legal academy is quite extensive relative to their proportion of the general population, so much so that any shift away from current means of selection in the direction of proportional representation would be highly disadvantageous to them).

2. See Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 547-61 (1991) (canvassing justifications for the case method, almost all written prior to World War II). Weaver himself is critical of the case method. *Id.* at 561-96.

lawyers.”<sup>3</sup> Any systematic demonstration that such an outdated approach to legal education develops skills that are central to the very different world of modern legal practice would be interesting to see, but no such demonstration has been offered. More often, the justification for resisting change—if not in print then certainly in faculty meetings and hallway conversations—is this: “If it ain’t broke, don’t fix it.” Apparently, the primary indication that law schools are not “broke” is that they have managed to place themselves astride the entrance to a highly prestigious, influential, and lucrative profession, and thus can teach whatever they want and maintain their economic viability. However, this fortunate position hardly justifies the retention of an educational approach that has not been re-thought for a century, and that undermines the best efforts of its practitioners, including those who attempt to defend it.

The great irony of modern legal education is that it is not only out of date, but that it was out of date one hundred years ago. The 1880s and 1890s were a period of enormous social and intellectual change in the United States and, more generally, Western society. New modes of governance, concepts of law, academic disciplines, and theories of education all made their appearances at this time, each shaping and inspiring the modern era. Langdell’s design for legal education, although innovative in its own time and on its own terms, is more closely connected to modes of thought that prevailed in the Renaissance, the Middle Ages, and ancient Greece and Rome than to our current ways of thinking. Admittedly, it may be unreasonable to expect people to be entirely *au courant*. New developments do not always last, and new ideas do not always prevail; events that seem significant when viewed through that marvelous instrument that doctors call a retrospectroscope often seem unreliable or insignificant at the time they first appear. Yet by 1914, a reasonable date for the beginning of the modern era,<sup>4</sup> legal educators knew, or at least should have known, that all of the premises of the approach they were using had been overturned some twenty or thirty years before. And here we are, over one hundred years into that modern era, still wedded to—

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3. Charles Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 523-24 (1920); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 582-83 (1987); Weaver, *supra* note 2, at 549.

4. In August of 1914, with Europe sliding rapidly into war, Sir Edward Grey, “watching from the windows of the Foreign Office the lights springing out in the dusk, said to a friend, ‘The lamps are going out all over Europe; we shall not see them lit again in our lifetime.’ ” JOHN BUCHAN, *THE PEOPLE’S KING, GEORGE V: A NARRATIVE OF TWENTY-FIVE YEARS* 98 (1935). See generally ROBERT MUSIL, *THE MAN WITHOUT QUALITIES* (Sophie Wilkins trans., 1995) (novel about the onset of the modern era, set in 1913-14).

perhaps enchanted by—that same approach. We are trapped inside a pedagogic fossil, marvelously preserved from a vanished era by the adamantine rock of a licensed monopoly.

Recent scholarship about legal education includes several efforts to rehabilitate Langdell. A number of authors argue that he was more sophisticated than his traditional image as the arch-formalist, or ur-formalist, would suggest, more cognizant of the evolving character of law, more concerned with the realities of practice, more flexible in his interactions with his students.<sup>5</sup> In fact, Langdell does not need rehabilitation; his legacy as a path-breaking legal educator is secure. Langdell, together with Harvard President Charles Eliot,<sup>6</sup> established law school as a three-year graduate program, required an undergraduate education as a prerequisite, imposed admissions standards, divided the curriculum into discrete courses, initiated the use of primary sources as pedagogic materials, and demanded regular examination of the students.<sup>7</sup> None of these features are likely to change, and there is little argument for changing them, since they are consistent with the structure of professional training in virtually every other field.

The problem lies with Langdell's substantive innovations—the case method, the so-called Socratic style of teaching, and the common law curriculum. These were also path-breaking, and generally well-suited to the period immediately following the Civil War. Like his structural innovations, they placed Harvard Law School on a course that distinguished it from all other law programs of its day. By about 1914, these substantive innovations had displaced other approaches to legal education and achieved a dominance that has continued to the

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5. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 466-72 (3d ed. 2005) (more sophisticated); WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION* 55-78 (1994) (more concerned with the realities of practice); Bruce Kimball, "Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": *The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1883*, 17 *LAW & HIST. REV.* 57, 66-77 (1999) (more flexible); Anthony Sebok, *Misunderstanding Positivism*, 93 *MICH. L. REV.* 2054, 2078-87 (1995) (more cognizant of the evolving character of law); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 *VT. L. REV.* 1, 3 (1980) (more sophisticated, more cognizant of the evolving character of law).

6. See Anthony Chase, *The Birth of the Modern Law School*, 23 *AM. J. LEGAL HIST.* 329, 332-39 (1979) (arguing that Eliot was primarily responsible for the development of the Harvard Law School approach). This would not be surprising; Langdell was a New York lawyer at the time of his appointment, but Eliot was one of the leading educators of the entire era.

7. WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 26-27 (1982); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 35-50 (1983).

present.<sup>8</sup> Unfortunately, the case method, Socratic teaching, and the common law curriculum were all seriously out-of-date by the time of their triumph. They no longer comported with the practice of law or the theories of law, society and education. To rely on the Langdellian approach by 1914 was educationally irresponsible, a failure to keep pace with current events and current thinking; it was not even true to the spirit of the Langdell's own innovations, which had been entirely *au courant* when they were devised in the 1870s.

Nearly one hundred years have passed since 1914, of course, and we still rely on Langdell's substantive innovations. Why has there been so little curricular change over such a long and eventful period of time? One can understand that law schools in the early decades of the twentieth century, having just adopted the Harvard model as a thrilling innovation in legal education, would be reluctant to admit that it had fallen out of date and would be institutionally incapable of undertaking another broad revision of their teaching program. But how can we explain the continued survival of a professional training program that is so obsolete, so discontinuous with the profession that it allegedly prepares its students to enter?

One explanation, ironically, is its very obsolescence. If the standard law school curriculum were merely out-of-date, if it had been created forty or sixty years ago, for example, its age would count against it. In fact, the Langdellian model weathered a sustained attack that the Legal Realists and others mounted between forty and sixty years after its creation.<sup>9</sup> Continuing on for another seventy years or so, it has ceased to be viewed as a particular approach to legal education—as last generation's innovation—and has become a venerable institution that gains gravity and prestige from its antiquity. As such, this approach has the remarkable capacity to make suggested changes seem jejune and to reduce reform initiatives to quixotic ventures that can be dismissed with knowing guffaws from its wiser, more experienced supporters. We are generally not a society

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8. CHASE, *supra* note 7, at 41-76; FRIEDMAN, *supra* note 5, at 470-71; LAPIANA, *supra* note 5, at 79-109; STEVENS, *supra* note 7, at 73-91; Weaver, *supra* note 2, at 541-43.

9. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 100-07 (Anchor Books 1970) (1930) (attacking formalism and Langdellian curriculum as pseudo-science); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-34 (1935) (attacking formalism and Langdellian curriculum as arid conceptualism); William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673, 674-76 (1928-29) (same, specifically in business law). On the legal realistic movement generally, and the reasons for its ultimate demise, see generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

that venerates tradition,<sup>10</sup> but Langdell's approach is so old,<sup>11</sup> and has been so immutable, that it seems less a tradition than a fact of nature.

The structure of the modern law school provides a second explanation for the continued survival of the Langdellian curriculum. Law schools make enough money that they often subsidize their parent institutions, and they rarely make demands on their resources. They do so while paying their faculty members salaries that are positively bountiful by academic standards. Why mess with an institution that corresponds so closely to the average university administrator's definition of success? And if institutional incentives for the university discourage educational change, the personal incentives for the faculty discourage education in general. All of the earthly rewards that a faculty member can obtain—salary raises, summer grants, chaired professorships, competing offers, speaking engagements, and conference invitations—depend on scholarly production, not on teaching. The super-heated competition that *U.S. News & World Report* has engendered among law schools only exacerbates this trend.<sup>12</sup> Under these circumstances, why should a faculty member devote time or mental energy to changing a familiar

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10. See PETER L. BERGER, *THE HERETICAL IMPERATIVE: CONTEMPORARY POSSIBILITIES OF RELIGIOUS AFFIRMATION* 12-26 (1979) (contrasting modernity with traditional pre-modern society); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 323-27 (1992) (describing the decline in traditional community brought on by the rise of liberal capitalism); 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* 188-89 (5th ed. rev. 1966) (1945) (construing the rise of philosophy as a process of questioning previous theories and traditions). See generally 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1984) (viewing the modern world view as the rationalization of traditional modes of thought and social practice); Anthony Giddens, *Living in a Post-Traditional Society*, in ULRICH BECK, ANTHONY GIDDENS & SCOTT LASH, *REFLEXIVE MODERNIZATION: POLITICS, TRADITION AND AESTHETICS IN THE MODERN SOCIAL ORDER* 56 (1994) (describing the advent of a global post-traditional world at the end of the twentieth century). This so-called detraditionalization has been questioned by some observers. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 277-307 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) (1960) (arguing that reason can coexist with authority and tradition). See generally Paul Heelas, *On Things Not Being Worse, and the Ethic of Humanity*, in *DETRADITIONALIZATION* 200 (Paul Heelas, Scott Lash & Paul Morris eds., 1996) (claiming that the development of an "ethic of humanity" has compensated for the reduced influence of tradition in modern society).

11. Many traditions are not particularly old. See generally *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terrence Ranger eds. 1992) (collection of essays examining the appearance and establishment of traditions, particularly those practices popularly regarded as "traditions" which have a brief history or were consciously created).

12. See Symposium, *The Next Generation of Law School Rankings*, 81 *IND. L.J.* 1 (2006); David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 *SUFFOLK U. L. REV.* 249, 251 (1997).

and expected approach to teaching? And why should a law school dean encourage any faculty member to do so?

There is at least one more explanation for legal education's lack of change, and this explanation serves as the starting point for this Article. It involves our interpretation of the past. When we look back at something created in a prior period, it often acquires a false appearance of modernity because we interpret it according to our current understandings. This phenomenon does not occur with something truly alien to us, like Babylonian mythology or Mayan architecture, but it often happens in relation to ideas and institutions to which we are connected by a continuous historical experience. As classical scholars have pointed out, texts from ancient Greece are more foreign to our sensibility than they seem to be because their authors possessed an unfamiliar concept of honor,<sup>13</sup> or because they relied on an unfamiliar concept of virtue,<sup>14</sup> or even because their brains functioned in different ways.<sup>15</sup> We tend to overlook or underestimate these differences because the stories are so familiar; they have been told almost continuously during the period that separates us from their originators. Similarly, when we look back at the law school curriculum that Langdell instituted in the 1870's and 1880's, it seems more contemporary, more relevant than it actually is, because we interpret its antiquated features in modern terms. The continuous historical experience is particularly intense in this case because we still use this same curriculum. Our failure to progress paints the Langdellian original with false colors of modernity, misleading us into thinking that the rationales for this curriculum correspond to our current understanding of law, society, and education.

The first three Parts of this Article attempt to reestablish the historical and conceptual distance between late nineteenth century America and the present time. They demonstrate how distant Langdell's conception is from our current sensibility, how outdated his understanding of the law and legal pedagogy has become in the intervening one hundred and thirty years or so. Part I discusses common law, first describing its importance in the legal system of the 1870s and its subsequent decline as a result of the administrative state, and then describing the concept of common law that prevailed in the 1870s and the refutation of this concept through historical

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13. M.I. FINLEY, *THE WORLD OF ODYSSEUS* 113-22 (2d. rev. ed. 1979).

14. ALASDAIR MACINTYRE, *AFTER VIRTUE* 121-45 (2d ed. 1984).

15. JULIAN JAYNES, *THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND* 69-83, 255-92 (1976).



analysis. Part II addresses Langdell's and Eliot's claim that law is a form of natural science, and contrasts this contention with the currently accepted view that law is more closely related to the social sciences. Part III details Langdell's conception of education, comparing it with the educational thinking that developed in the succeeding decades. Having shown that the Langdellian model is severely out-of-date on many different fronts, the Article, in Part IV, offers some preliminary suggestions for a law school curriculum that would be relevant to the twenty-first century practice of law, and thus a more effective means of both professional training and academic inquiry.

The point of all of this is not to excoriate Langdell, but to interrogate ourselves. Langdell was up-to-date in his time and indeed a true visionary in several areas; he cannot be blamed for his failure to fully anticipate subsequent historical and conceptual developments. But the events that lay twenty or forty years in his future now lie a hundred years in our past. Had Langdell devised a curriculum in 1870 that failed to recognize that the United States was an independent country, or taught his students the land law of the feudal system, he would have been open to the same criticism that can be applied to the current model of legal education.

### I. LAW AND COMMON LAW

To Langdell, law meant common law, and he originally organized the entire curriculum as a set of mandatory courses devoted to different bodies of common law doctrine. By the 1880s he had retrenched—showing the flexibility that some modern scholars would attribute to him—and limited the mandatory program to the first year, where it remains to this day.<sup>16</sup> The elective character of the upper-class curriculum gradually allowed the introduction of non-common law courses, but Langdell insisted that real law was common law, and that only “real” law should be allowed in the crucial first-year program. The story of Ernst Freund's exclusion from the “Harvardized” University of Chicago Law School is illustrative.<sup>17</sup> When President William Rainey Harper of Chicago decided to add a modern law school to his university in 1902, he appealed to James Barr Ames, Langdell's successor and loyal acolyte, who was then the Dean of Harvard. Ames agreed to delegate one of his acolytes, Joseph Beale, to take Chicago in hand, but hesitated when he learned that

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16. CHASE, *supra* note 7, at 32.

17. *Id.* at 47-59; STEVENS, *supra* note 7, at 39-40.

Freund, already on the faculty, harbored the outrageous belief that the law school should teach international law in the first year and offer electives on taxation, constitutional law, and jurisprudence. Harvard could not possibly entrust Chicago with so valuable a Langdellian as Beale, Ames insisted, until the law school banished Freund and taught only real law; that is, English and American common law.

These events occurred in 1902. Since then, both the law and our understanding of law have changed enormously. Statutory enactments have displaced much of the common law, while the mythology of common law has been displaced by a genuinely historical account of its origins. Judicial decisions are no longer the primary source of law in our legal system, nor are they regarded as the essence of what law should be. This is not to say that common law is not important, or that students can ignore it. But other forms of law are now more important, and students should not ignore those either, or treat them as conceptually inferior. If we continue to describe ourselves as possessing a common law system, it is because most other advanced industrial nations do not rely on common law at all, not because common law occupies the central pragmatic and conceptual position that it did in Langdell's day.

#### *A. Common Law and the Advent of the Administrative State*

When Langdell developed his curriculum in the 1870s and early 1880s, his assumption that American law consisted essentially of common law was tenable. It remained so until 1887, when Congress passed the Interstate Commerce Act, creating the first federal regulatory agency.<sup>18</sup> The Act was triggered by the severely disadvantageous contractual terms that railroads imposed upon businesses, particularly small-town businesses, which they were able to impose as a result of their enormous economic power. Congress remedied this disadvantage by displacing the common law in the area of railroad shipping rates with regulatory price-setting.<sup>19</sup> Of course, the significance of this Act was not necessarily apparent at the time.<sup>20</sup>

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18. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of at 49 U.S.C.).

19. See FRIEDMAN, *supra* note 5, at 329-40; THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 60-65 (1984); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, 121-60 (1982); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1197-1208 (1986).

20. In 1897, the Supreme Court eviscerated one section of the Act in *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897). But in the first decade of the twentieth century, Congress

By 1914, however, the Antitrust Acts, the Federal Trade Commission Act, the Federal Reserve Act, and a wide range of similar federal enactments cut increasingly wider swaths out of the common law.<sup>21</sup> These statutes were products of the Progressive Movement in the United States, and it should have been apparent even at this time that they had changed the landscape of American law in a manner that would not be easily reversed.<sup>22</sup> To be sure, the Supreme Court bridled at these developments and attempted to cut them back them in a few discrete areas,<sup>23</sup> but by 1914, it was clear to everyone that the regulation spawned by the Progressive Movement would define the contours of the American legal system for a long time to come.<sup>24</sup>

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enacted no fewer than three separate laws (with more to follow subsequently) that expanded the Interstate Commerce Commission's authority—the Elkins Act of 1903, ch. 708, 32 Stat. 847 (repealed), the Hepburn Act of 1906, ch. 3591, 34 Stat. 584 (repealed), and the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539 (repealed). MCCRAW, *supra* note 19, at 62-63. This is not to suggest that all this regulation was effective in disciplining the railroads. It may have worked to their advantage. *See generally* GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916* (1965) (arguing that, since the railroads did not have control over the economy, they benefited from the protection of the federal government that came with regulation). But whatever their effect, statutes and their implementing regulations had definitively displaced common law in the railroad industry by 1914.

21. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C. (2006)); Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2006)). For a general discussion, see generally RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955) (examining the primary American reform movements occurring from the 1890s until the end of the New Deal).

22. For discussions of the Progressive Movement in various policy areas, see SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920* (1964) (scientific management); SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959) (natural resource policy); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (rev. ed. 2002) (1980) (criminal justice, juvenile justice and mental health).

23. *See, e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hours law for bakers). Even during the heyday of the substantive due process era, however, much Progressive legislation survived. *See, e.g.*, *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum hours laws for manufacturing); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hours law for women). For general discussions of the Court's rationale, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 100-08* (4th ed. 2005) (1960); ARTHUR S. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM 18-71* (1968).

24. In fact, this account may be overly generous to Langdell. As Jerry Mashaw points out, administration was a feature of American government from its inception. *See generally* Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 *YALE L.J.* 1256 (2006) (challenging the conventional vision that federal administrative law begins in 1887 with the establishment of the Interstate Commerce Commission). *See* FRIEDMAN, *supra* note 5, at 329-49 (discussing the rise of administrative law and its regulation of business). In its early years, Congress established the Departments of War, Foreign Affairs and Treasury,

If American law began to diverge from Langdell's common law curriculum in 1887, and if it had become palpably distinct from that curriculum by 1914, the gap between the two is even greater today, when the legislation of the Progressive Era has been followed by the New Deal, the civil rights, environmental, and consumer protection movements, and the passage of a wide range of additional statutes. The advent of the administrative state in and of itself is one of the most important events in legal history and, indeed, of world history in general.<sup>25</sup> It has displaced the larger part of common law at both the federal and state levels. The national law that Harvard and other leading law schools aspire to teach now consists of federal statutes, supplemented by the generally extensive regulations of federal administrative agencies. These statutes often preempt state law and sometimes induce or compel states to draft parallel legislation. But the obsolescence of the Landgellian curriculum does not depend on the any strong assertion regarding the decline of federalism<sup>26</sup> because states have been as assiduous as the federal government in displacing common law with administrative statutes. To the extent that a national law school wants to teach the consensus view among state jurisdictions, it should be teaching the typical or model provisions of state statutes and regulations, not the common law.

The advent of the administrative state has changed much more than the content of the law, however. It has also changed the identity of the lawmaker and the underlying conception of law itself. Judges

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and struggled to define the President's removal power for the officers of those departments; it established the Post Office as an operational executive agency, and the Patent Office as an essentially independent one. *Id.* at 1276-77. During the course of the nineteenth century, state administrative activity became sufficiently prevalent to receive generalized treatment from a national law school in the same manner as the common law. CHASE, *supra* note 7, at 47-52. The Progressive Era legislation thus represents an increase in the level and salience of the administrative state, rather than a complete break with the past.

25. See REINHARD BENDIX, *NATION-BUILDING AND CITIZENSHIP: STUDIES OF OUR CHANGING SOCIAL ORDER* 129-39 (2d ed. 1977) (comparing aspects of the modern administrative state with the patrimonial structure of medieval Western Europe); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212-99, 956-1002 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978). See generally HENRY JACOBY, *THE BUREAUCRATIZATION OF THE WORLD* (Eveline L. Kaner trans., 1976) (examining the development and growth of government bureaucracy throughout the history of Western civilization); WOLFGANG J. MOMMSEN, *THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER* (1974) (discussing the central issues of Max Weber's political and sociological works, particularly his concern with the future of liberal societies in the face of rapidly expanding bureaucracies).

26. I'm happy to advance such assertions, however. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 149-203 (1998); Edward L. Rubin & Malcolm M. Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994).

make the common law, at least as it exists in the Anglo-American tradition. Thus, a student who wants to consult a primary source for common law, whether that source makes or articulates law, would look to judicial decisions. In the administrative state, however, the leading lawmaker is the legislature, and the most important subsidiary lawmakers are the administrative agencies that implement these statutes. Langdell's idea of teaching law from primary source materials was an excellent one, but to follow that idea for a modern administrative state would mean having students read statutes and regulations, not cases. In addition, administrative agencies, not judges, have become the most important interpreters of statutes. This is in part because they carry out many more adjudications under the aegis of these regulatory statutes than the judiciary does, but even more importantly because the agencies themselves interpret the governing statutes through their regulations. In a 1984 decision, *Chevron, Inc. v. National Resources Defense Council*,<sup>27</sup> the Supreme Court instructed reviewing courts to defer to agency regulations unless they clearly violated the language of the statute. Yet even without *Chevron*, the agency would remain the most important interpretive body because most of its regulations never reach the courts; there are too many of them, they are too complex, and regulated parties often conclude that suing the agency is an unproductive strategy. Thus, the institutional features of legislatures and agencies, not the institutional features of courts, have become crucial to understanding the modern legal system.

In addition to changing the identity of the decision maker, the modern administrative state has changed our conception of law and our understanding of its purposes and functions. Legal philosophers have described this process as the positivization of law,<sup>28</sup> but for purposes of legal education, it is necessary to be somewhat more concrete. As is often observed, judges promulgate common law by means of analogical reasoning; that is, by comparing a particular legal problem with similar problems that have arisen in the past.<sup>29</sup> Of course, this comparison must be guided by principles that are at least

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27. *Chevron, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

28. See 1 HABERMAS, *supra* note 10, at 243-71; WEBER, *supra* note 25, at 217-26, 839-76; see also NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (Elizabeth King-Utz & Martin Albrow trans., 1985); Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987 (1998).

29. MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 50-96 (1988); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-64 (1981); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 62-100 (1996). See generally KARL N. LEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

implicit in the process, and often consciously available to the decision maker. Those principles, moreover, are regarded as embedded in the inherited pattern of decisions over long periods of time, generally by the operation of collective rationality or secondarily by cultural development. Thus precedent, or *stare decisis*, serves as a basis for rational decisionmaking as well as a source of legal authority. The Socratic method that Langdell developed is based on this conception of law; in essence, the professor asks the student to engage in the same sort of analogical reasoning that judges do: to state the facts of the case under consideration and then to explain how that case should be resolved by equating it to, or distinguishing it from, prior cases on the basis of the principles that guided the prior decisions.<sup>30</sup> In the process, the student is supposed to discern, again through reasoning, the embedded principles that animate our legal system.

Statutory law and its implementing regulations are based on a distinctly different conception of law. To begin with, prior laws, whether enacted as statutes or developed by common law, are not a source of authority in enacting a new statute or regulation. A new statute displaces all prior statutes that address its subject matter, and the most important jurisprudential question in this area is whether a legislature can ever be deemed to have bound its successor.<sup>31</sup> In addition, statutory law also displaces, at least presumptively, regulations enacted pursuant to its predecessor. Newly enacted regulations displace prior regulations, subject only to questions about their fidelity to the authorizing statute. Perhaps more importantly, the concept of rationality in drafting statutes or regulations does not depend on analogical reasoning, but rather on an entirely separate mode of thought generally described as policy analysis. Its elements, as traditionally identified, are to define the problem, specify a series of potential solutions, test each solution to determine the one that solves the problem best, and implement that best solution.<sup>32</sup> As a practical matter, both legislatures and agencies often adopt less comprehensive

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30. STEVENS, *supra* note 7, at 51-56; Weaver, *supra* note 2, at 532-33; see also LAPIANA, *supra* note 5, at 97-99 (discussing competing views on the transition to the case method at Columbia Law School); Kimball, *supra* note 5, at 71-77 (deriving Langdell's method through examining his handwritten teaching notes).

31. See H.L.A. HART, *THE CONCEPT OF LAW* 61-66 (2d ed. 1994) (1961) (act of legislation is authoritative; statutes persist if, but only if, subsequent legislation does not repeal them).

32. JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* 144-56 (1987) (tracing the history of policy analysis); CARL V. PATTON & DAVID S. SAWICKI, *BASIC METHODS OF POLICY ANALYSIS AND PLANNING* 52-65 (2d ed. 1993) (identifying the steps of the policy analysis process); EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 5-7 (1978) (establishing a framework for policy analysis). See generally STUART S. NAGEL, *POLICY EVALUATION: MAKING OPTIMUM DECISIONS* (1982).

methodologies, and they often take political considerations into account. Even with these compromises and modifications, however, the basic mindset in drafting positive law differs distinctly from the mindset of a common law decisionmaker. This brings us back to the threadbare rationalization that the common law curriculum teaches students to “think like lawyers.” Perhaps it does teach students to think like nineteenth century common law lawyers, but it does not teach them how to think like lawyers in the contemporary administrative state.

Significant as the advent of the administrative state may be, it does not exhaust the list of substantive changes that have occurred in our legal system since the development of the Langdellian approach to legal education. One enormously important trend is globalization. Although international commerce certainly existed in the nineteenth century, the legal work connected with it was sufficiently limited in scope to justify the exclusively domestic focus of Landgell’s curriculum. Now all large, and most mid-sized, American firms in all large, and most mid-sized, American cities do business involving international transactions. International human rights, essentially unknown in Langdell’s day, serve as a major political issue and as an increasing source of litigation. Law firm size has changed as well: ten lawyers constituted a large firm when Langdell developed his curriculum; a large firm today employs about one hundred times as many lawyers.<sup>33</sup> In the nineteenth century, discovery was a minor prelude to dramaturgical courtroom confrontations; today trials result only when settlement negotiations based on the data gathered in discovery fail to produce a resolution of the controversy.<sup>34</sup>

The first-year, common-law curriculum simply does not reflect the impact of the administrative state and these substantive changes, among others. The failure to integrate these topics and their attendant issues into that curriculum disconnects it from the basic character of modern legal practice in a manner that betrays that curriculum’s original intention; namely, the valid expectations of students, and the efforts of the faculty members who conscientiously work within its boundaries.

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33. FRIEDMAN, *supra* note 5, at 483-95; MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947* (1948).

34. See generally CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* (6th ed. 2002).

*B. Common Law and the Advent of Systematic History*

## 1. Langdell's Mythology

Langdell's decision to base the law school curriculum on common law went beyond his belief that common law was the primary component of the legal system, both pragmatically and conceptually. It also arose from his commitment to a more general conception of law itself and a common law mythology extending back at least two hundred fifty years. Law, according to Langdell, must be coherent; its provisions must fit together in a logical structure. Common law displayed that quality of coherence in his view, and was, in fact, the only type of law that did so. It alone was drawn from, and indeed embodied, the enduring legal principles that constituted the rational spirit of the Anglo-American legal system.

Apart from its philosophical appeal, this belief about the common law served the important purpose of political justification. Why should judges possess the authority to articulate legal rules that the legislature has not enacted? And why, having been given this authority, should they work so hard to fit their decisions into a coherent pattern instead of dispensing what they regard as justice in a given situation?<sup>35</sup> The answer that occurs most readily to us is that they are appointed by democratically elected officials, and that they strive to make their decisions coherent because they must replace the discipline of being answerable to the electorate with the discipline of being constrained by legal principles.<sup>36</sup> This answer obviously is an afterthought—the concept of common law decisionmaking was established long before democracy prevailed in the Western world. Rather, the justification was that underlying principles were the essence of the common law, and, that common law judges, in reaching their decisions, derived both their authority and their decisional constraints from the principles themselves.

Medieval thought regarded such principles as the work of God. As such, judges, in applying those principles to specific cases, acted with divine authority. This is well known as St. Thomas Aquinas's

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35. This approach is sometimes referred to as Kadi-justice. WEBER, *supra* note 25, at 976-78.

36. RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Owen Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982); Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399 (1985); Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633 (1995).



theory of natural law,<sup>37</sup> but it is important to recognize the sophistication of his construct. St. Thomas did not assert that all legal rules were derived from natural law; natural law may tell us that theft is a crime, but it cannot draw the exact line between theft and conversion, nor prescribe the particular penalties that should be imposed. These more detailed, pragmatic rules are human law, not sacred but mundane.<sup>38</sup> However, they are not merely arbitrary exercises of power; the Universe is ruled by reason and human beings, endowed by God with rationality, are both naturally inclined and morally required to use reason to produce those purely human laws.<sup>39</sup> Custom, which Aquinas defined as actions repeated over time, partakes of this same rationality and possesses the additional advantage of familiarity, so that there exists a presumption against altering it except by legislative enactment.<sup>40</sup>

The secularization of philosophy and legal theory that resulted from the Reformation and the Enlightenment undermined the notion that divinely established principles guided the law,<sup>41</sup> but the idea that common law was based upon the collective rationality of people acting over time survived.<sup>42</sup> Common law was thus regarded as containing embedded principles reflecting the inherited wisdom of a nation's legal culture. By the early seventeenth century, as J.G.A. Pocock points out, "English lawyers were prepared to define common law as custom,"<sup>43</sup> with all the claims to rationality that Aquinas had advanced. As a result, the idea developed that there was such a thing as general common law; that is, common law not tied to any particular jurisdiction but derived from principles embedded in the entirety of the Anglo-American legal system.<sup>44</sup> Whether one wanted to link this

37. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. I, Q. 90, Art. 4, at 995 (Fathers of the English Dominican Province trans., Christian Classics 1981); see OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 75-76 (Frederic Maitland trans., Beacon Press 1958) (1900).

38. 2 AQUINAS, *supra* note 37, at Pt. I, Q. 91, Art. 3, at 997-98. Of course, although they cannot be derived from natural law alone, they must not conflict with natural law or they are not laws at all. *Id.* at Pt. I, Q. 95, Art. 2, at 1014.

39. *Id.* at Pt. I, Q. 91, Art. 3, at 997-98, Pt. I, Q. 95, Art. 2, at 1014.

40. *Id.* at Pt. I, Q. 97, Art. 3, at 1023.

41. 1 HABERMAS, *supra* note 10, at 243-71; J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 141-66 (1998).

42. J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30-41 (1987). This view is advanced not only for the common law, but for law in general, see EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 197-203 (2005).

43. POCOCK, *supra* note 42, at 32.

44. See William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1979: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516-27 (1984); Stewart Jay, *The Origins of Federal Common Law*, 133 U. PA. L. REV. 1003 (1985).

wisdom to God-given natural law was optional, and increasingly unimportant, because few post-Reformation thinkers thought that the embedded principles of a common law system could be accessed by faith. Instead, they viewed these principles as discernable through reason, and if these principles happened to correspond with divine commands, it was because the universe was rational, and reason was an alternative and equally valid path to knowing God.<sup>45</sup>

This rather widespread view acquired a particular political valence and emotional intensity in England. The English monarchy was discontinuous because William the Conqueror had displaced the prior succession of Anglo-Saxon monarchs in 1066.<sup>46</sup> Since the common law embedded the collective decisions of English legal culture in its entirety, it extended back before the monarchy itself into the Anglo-Saxon era.<sup>47</sup> Sir Edward Coke invoked this notion to declare the common law independent of, and superior to, the Stuart monarchy.<sup>48</sup> Nineteenth century Americans regarded Coke as the originator of judicial review and one of the authors of English and American

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45. This is not dramatically different from St. Thomas' view, since he also believed in the rationality of the universe and its accessibility to human reason. The biggest difference is that he also believed that principles of natural law, that is, trans-cultural rules for human conduct, could be discerned directly, whereas later legal theorists, Blackstone, for example, thought that rationality-driven principles were entirely embedded in the common law of a particular culture, and could only be discerned through the legal products of that culture. This, and not a belief in human rationality, continues to distinguish those who believe in natural law, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1988); ROBERT GEORGE, *IN DEFENSE OF NATURAL LAW* (1999); JACQUES MARITAIN, *NATURAL LAW: REFLECTIONS ON THEORY AND PRACTICE* (William Sweet ed., 2001); LLOYD WEINREB, *NATURAL LAW AND JUSTICE* (1987), from those who reject it.

46. FRANK BARLOW, *THE NORMAN CONQUEST AND BEYOND* (1983); DAVID DOUGLAS, *WILLIAM THE CONQUEROR: THE NORMAN IMPACT UPON ENGLAND* (1964); FRANK STENTON, *WILLIAM THE CONQUEROR AND THE RULE OF THE NORMANS* (Barnes & Noble 1967) (1908).

47. POCOCK, *supra* note 42, at 41-55.

48. See *Dr. Bonham's Case*, (1610) 8 Rep. 113b; 7 James I (Hilary Term) (C.P.), *reprinted in* 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 264 (Steve Sheppard ed., 2003) (Parliamentary restriction on medical licenses contrary to common law and is therefore void); see also *Jentleman's Case*, (1583) 6 Rep. 11a; 25 Eliz. I (Easter Term), *reprinted in* SHEPPARD, *supra*, at 157 (King cannot abolish common law courts and cannot control decisions of judges he has appointed); *Penal Statutes*, 7 Rep. 36b, 2 James I (Hilary Term) (1605), *reprinted in* SHEPPARD, *supra*, at 241 (Queen cannot release person from burdens of penal statute contrary to common law); *The Case of the Tailors of Habits & c. of Ipswich*, (1614) 11 Rep. 53a, 12 James I (Michaelmas Term), *reprinted in* SHEPPARD, *supra*, at 390 (royal charter prohibiting tailor from practicing his trade conflicts with common law and is therefore void). Coke wrote a book about William's succession whose theme, according to the custom of the day, is summarized in its title: *A seasonable treatise wherein is proved that King William (commonly call'd the Conqueror) did not get the imperial crown of England by the sword, but by the election and consent of the people: to whom he swore to observe the original contract between king and people* (1689). In other words, Coke not only argued that the monarchy was discontinuous, but that William owed his very ability to rule on his explicit agreement to preserve the common law.

liberty.<sup>49</sup> Thus common law was seen as the repository of principles that transcended politics and provided citizens with adamant rights that could withstand the political vicissitudes of any given era. This mindset served as the conceptual basis of the substantive due process doctrine that flourished in the United States during the late nineteenth and early twentieth centuries. Undoubtedly the Supreme Court justices, in articulating this doctrine, were motivated in part by purely political preferences.<sup>50</sup> However, they also believed that the common law was based on embedded legal principles that protected people's liberties, and that the Constitution, through its Due Process Clause, forbade the legislature from intruding upon the operation of these principles.<sup>51</sup>

In basing the law school curriculum on common law, and in doggedly resisting any effort to incorporate constitutional or statutory law, Langdell was not only motivated by the dominance of common law, but also by the reverential attitude that common law commanded, the belief that it was the repository of both collective rationality and Anglo-American liberty.

## 2. Pollack & Maitland's History

This mythology of common law did not become obsolete in 1886 with the advent of the administrative state, but remained intellectually au courant until 1895, when Frederick Pollack and Frederick Maitland published *The History of English Law Before the Time of Edward I*.<sup>52</sup> Applying contemporary historical methods, Pollack and Maitland discovered that the common law did not date back before the time of William the Conqueror at all. Instead, it owed its origin to the Angevin monarchy, and specifically to the monarchy's efforts to assert its control over both the Anglo-Saxon and Norman lords.

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49. WILLIAM NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000); SHEPPARD, *supra* note 48, at xxix-xxxi; Allen Boyer, "Understanding, Authority, and Will": *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43 (1997); Louis Jaffe & Edith Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 LAW Q. REV. 345 (1956).

50. See, e.g., CHARLES BEARD & MARY BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 299-302 (1960); ALFRED KELLY, WINFRED HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (7th ed. 1991); MILLER, *supra* note 23.

51. GILLMAN, *supra* note 23; Charles McCurdy, *The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y 20; William Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

52. FREDERICK POLLACK & FREDERICK MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2nd ed. 1968).

Throughout the Middle Ages, law was largely a local matter. Each manor, town, barony, or county had its own law, while the Church had a completely different law. Landowners regarded their ability to establish the law within their domains and, not unimportantly, to collect the fines for that law's violation, as one of their most important rights. Virtually everyone—from the peasant on the manor to the greatest noblemen of the realm—regarded the right to be judged by his own law as equally important.<sup>53</sup> After William conquered England, he and his immediate successors were content to leave the legal situation as it was. Following the twelfth-century civil war between Stephen and Maude, however, Henry II, first of the Angevin kings, decided to suppress dissension by displacing local law in England with a system of royal justice that would be common to the entire realm—a common law.<sup>54</sup> To achieve this, he enacted a series of statutes, or assizes, such as the Assize of Clarendon, the Assize of Novel Disseisin, and the Assize of Northampton, as well as a number of more informal, but nonetheless effective, instructions.<sup>55</sup> These statutes were almost exclusively procedural;<sup>56</sup> they established a new system of writs that required the defendant to appear in court, brought land disputes within the ambit of the courts, created the jury system for indictment and evidence, and established a new set of remedies. As Pollock and Maitland state:

If we try to sum up in a few words those results of Henry's reign that are the most durable and the most fruitful, we may say that the whole of English law is centralized and unified by the institution of a permanent court of professional judges, by the frequent mission of itinerant judges throughout the land, by the introduction of the "inquest" or "recognition" and the "original writ" as normal parts of the machinery of justice.<sup>57</sup>

Henry was willing to let the judges develop the substantive rules of law, provided that the law was uniform, that the monarchy imposed this uniformity, and that the monarchy received the fines.<sup>58</sup>

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53. See MARC BLOCH, *FEUDAL SOCIETY* 109-16 (L. A. Manyon trans., Routledge & K. Paul 1961) (1939); F. L. GANSHOF, *FEUDALISM* 158-60 (Philip Grierson trans, 3rd ed., 1964); FRANCES GIES & JOSEPH GIES, *LIFE IN A MEDIEVAL VILLAGE* 172-94 (1990); POLLOCK & MAITLAND, *supra* note 52, at 13-15 ("In a famous, if exaggerated sentence, Bishop Agobard of Lyons has said that often five men would be walking or sitting together and each of them would own a different law."); W.L. WARREN, *HENRY II* 317-20 (1977).

54. HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 440-45 (1983); POLLOCK & MAITLAND, *supra* note 52, at 136-38.

55. BERMAN, *supra* note 54, at 445-57; POLLOCK & MAITLAND, *supra* note 52, at 136-73; WARREN, *supra* note 53, at 324-61.

56. POLLOCK & MAITLAND, *supra* note 52, at 136; R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 40-44 (2nd ed. 1988); WARREN, *supra* note 53, at 339-46, 360-61.

57. POLLOCK & MAITLAND, *supra* note 52, at 138.

58. BERMAN, *supra* note 54, at 458; POLLOCK & MAITLAND, *supra* note 52, at 153-61

As a result, the common law of England, although it owed its existence to royal decree, obtained its content from the cumulative decisions of judges.<sup>59</sup>

Pollack and Maitland's work, though, did not entirely invalidate Langdell's specific beliefs about the common law. Even if the common law did not extend back into the Anglo-Saxon era, it was still some seven hundred years old, which is a lot of time for the accumulation of collective wisdom. And even if Lord Coke's claims about the common law's antiquity were mythological, rather than historical, he truly was the conceptual founder of judicial review, and the common law truly had been an instrument for the protection of individual liberty.

What Pollock and Maitland did was domesticate common law, denying it the status of being qualitatively different from other forms of law and thus entitled to a distinctive position in the law school curriculum as the very essence of law. Conscious governmental policy, their work revealed, produced both statutory law and common law.<sup>60</sup> Common law's long gestation period and incremental development by conscientious judges might lend some coherence, but it also might lead to obsolescence, to a failure to reflect the policy preferences of the electoral democracies that had more recently arisen. The common law articulated and developed certain political liberties, but it came to be recognized as far less important, at least in the United States, than positive legal enactments, such as the Constitution or various statutes such as the Civil Rights Act of 1867,<sup>61</sup> the Civil Rights Act of 1964,<sup>62</sup> and the Voting Rights Act of 1965.<sup>63</sup>

Supreme Court doctrine gradually reflected Pollock and Maitland's demotion of common law. That common law had some preferred status under the Constitution, that there was such a thing as freedom of contract, for example, rapidly came under intellectual

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59. These developments were summarized at the time, probably between 1187 and 1189, in RANULF DE GLANVILLE, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND* (G.D.G. Hall ed., 1965). Whether Glanville, the chief justiciar under Henry II, actually wrote "Glanville" is an open question; in all likelihood, he did not. See BERMAN, *supra* note 54, at 457-59; POLLOCK & MAITLAND, *supra* note 52, at 162-67; WARREN, *supra* note 53, at 298 n.1, 330. Berman thinks it was Hubert Walter, Glanville's nephew and Archbishop of Canterbury under Richard I. For present purposes, the important point is that Henry's contemporaries perceived his reforms as sufficiently significant and comprehensive to have elicited a major restatement of English law.

60. See HANS KELSEN, *A PURE THEORY OF LAW* 193-278 (Max Knight trans., Univ. of Cal. Press 1967) (1934).

61. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

62. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

63. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

attack within the legal academy and from the Progressive wing of the Court itself. Because it served the political purposes of the Court's conservative majority, the substantive due process doctrine that was based upon this view survived another four decades; it was definitively put to rest, however, in the 1937 case of *West Coast Hotel v. Parrish*,<sup>64</sup> and the 1938 case of *United States v. Carolene Products*,<sup>65</sup> the latter of which advanced a new approach to constitutional interpretation.

The idea that common law is embedded in our legal system, to be discerned by judges as an exercise of their essential role, came under an equally vigorous attack. Justice Holmes was particularly clear and eloquent in noting that the common law was not some "brooding omnipresence in the sky" but rather the exercise of governmental authority to make law in a given area.<sup>66</sup> He may not have needed Pollock and Maitland to reach this conclusion, but he was fully aware that their insights supported it. In *Erie Railroad v. Tompkins*,<sup>67</sup> for example, the Court held that law must issue from a governmental source that has jurisdiction in that subject matter. If the subject matter of common law, such as torts and contracts, belonged to the states, then only state judges could make substantive law in those areas, and the notion of a general common law that could be declared by federal judges as readily as state judges must be rejected.<sup>68</sup> The Court decided *Erie* in 1938, the same year as *Carolene Products*. That was quite a long time after the conceptual obsolescence of both substantive due process and general common law, but it was also quite a long time ago. If there was some justification for retaining the predominant focus on the common law in the fifty-odd years between the creation of Langdell's curriculum and 1938, there is much less justification for doing so in the nearly seventy years that have followed.

Recent scholarly efforts to rehabilitate Langdell have pointed out that he himself did not subscribe to the Court's substantive due process doctrine, and that he had a full appreciation of the

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64. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (holding a state minimum wage law for women constitutional and overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Morehead v. Tipaldo*, 298 U.S. 587 (1936)).

65. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938). The famous Footnote 4 articulates this theory.

66. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

67. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

68. See Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231 (1985) (tracing the historical roots of the common law controversy); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805-09 (1989) (discussing the Supreme Court's jurisprudence on federal versus state common law).

legislature's authority to enact statutes that displaced the common law.<sup>69</sup> But to regard him as a positivist on this account, like Austin, Weber, or Kelsen, is misleading. Here again, the passage of time is obscuring the context in which a statement was made and making it appear more modern. The understanding that judge-made law can be displaced by the sovereign was widespread in the Middle Ages. Virtually all legal scholars of that era recognized that a potential conflict existed between will, as represented by the sovereign's command, and reason, as represented by the gradual development of judge-made law, and that the latter must yield to the former.<sup>70</sup> This conceptual framework, which had important theological implications, continued into the late nineteenth century. Because Langdell was thinking in these terms, he could accept, and indeed endorse, legislative superiority while rejecting positivism and insisting that the common law curriculum not be besmirched by the study of statutes or the Constitution. The reason is that the pre-modern view, in identifying statutes and constitutions as projections of the sovereign's will, denied them the status of law.<sup>71</sup> Law was limited to rules for human conduct that were based on reason and that possessed a logical coherence by virtue of that origin. Of course, only law was worthy of study in a university law school. Acts of sovereign will could displace the law, but so could bribery, revolution, and social movements that led to constitutional amendments. Like statutes and constitutions,

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69. See LAPIANA, *supra* note 5, at 74-78 (noting Langdell's distinction between law as it is, which is the concern of lawyers, and law as it should be, which is the purview of legislators); Sebok, *supra* note 5, at 2078-87.

70. ANTONY BLACK, *POLITICAL THOUGHT IN EUROPE 1250-1450*, at 148-56 (1992); BLOCH, *supra* note 53, at 109-20; JOSEPH CANNING, *A HISTORY OF MEDIEVAL POLITICAL THOUGHT 300-1450*, at 21-25 (1996); Kenneth Pennington, *Law, Legislative Authority, and Theories of Government, 1150-1300*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350-C. 1450*, at 424 (J.H. Burns, ed., 1988).

71. While this may seem odd, we have not fully liberated ourselves from the medieval view even today. Perhaps the leading jurisprudential work of the post-War era, Hart's *Concept of Law*, defines law as a set of rules for the governance of human conduct. HART, *supra* note 31, at 38-41. This is modern enough to include statutes, but Hart is after all a positivist, and he is willing to relinquish the idea of law as reason to that limited extent. *Id.* Note, however, that Hart's definition excludes such basic statutes of an administrative state as an appropriations bill, the creation of an institution such as a national park or a military base, and a government subsidy to a specific industry or corporation. *Id.* For Hart, as for Aquinas or Ockham, these statutes are simply not law. Ronald Dworkin, writing after Hart, is even more restrictive. Law, he says, is what a judge decides. DWORKIN, *supra* note 36, at 1. This enables him to realign the law with reason, reverse Hart's partial modernity, and return to the medieval point of view. About midway through the book, he realizes that he has forgotten about statutes, and comes up with the Procrustean idea that statutes cannot count as law unless they display the coherence of judicial doctrine. *Id.* at 176-84; see also EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 197-203* (2005).

these were worthy of study by political scientists, but they did not belong in law school.

It was only after Pollack and Maitland's work, after the debate about substantive due process, after the absorption of European jurisprudence, and after the development of an indigenous school of genuine positivism, that American legal scholars came to recognize that statutes and common law both counted as law, that they were both projections of governmental authority that differed in the mode of promulgation and development, but not in their essential character. This took some time, but by 1937, if not before, the medieval linkage between law and reason had been broken.<sup>72</sup> Legal scholars recognized that statutes and the Constitution were as worthy of study as the common law. This realization, although now widely accepted at the theoretical level, has only slowly penetrated the quotidian practice of scholarship, perhaps because judicial decisions are simply easier for a law-trained person to study, or because, to paraphrase Holmes, logic is so much more intellectually satisfying than experience.

In any event, whatever mental effort the legal academy has applied to modernizing legal scholarship has been applied much more intermittently to legal education, and hardly at all to the crucial first-year curriculum. Upper-class courses deal with statutes, but often only by studying judicial interpretations of them. And the first-year curriculum remains captive to the refuted glorification of the common law.

## II. LAW AS NATURAL SCIENCE AND SOCIAL SCIENCE

### A. *Law as Natural Science*

As is widely known, Langdell and Eliot did not justify their approach to legal education solely on the ground that it corresponded to the prevailing common law system of their day. The common law system established the relevance and practicality of the curriculum, in their view, but it did not justify its status a graduate-level university program. Even the common law's claim to an internal logic that

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72. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *United States v. Carolene Prods.*, 304 U.S.144 (1938). These cases, ironically, established the "rational basis" test, perhaps a final act of obeisance to the notion that law must be ruled by reason. Here, however, "rational" does not refer to a coherent system based on general principles, but whether, as the Court said in *Carolene Products*, "any state of facts either known or which could be reasonably assumed, affords support" for the statute. *Id.* at 154. As is widely recognized, this means that there is essentially no review of legislation absent some additional factor such as one of those described in Footnote Four. *Id.* at 152.



reflected age-old Anglo-American principles of law was not enough, for those principles were the ones that any good judge would apply and that any good, apprenticeship-trained attorney would argue. Thus, this idea belonged as much to the ordinary practice of law as to legal theory, and was certainly the prevailing view at Harvard Law School before Langdell arrived.<sup>73</sup> Langdell's and Eliot's claim was that the approach to law embodied in the Harvard curriculum was a form of natural science.<sup>74</sup> One might be tempted to interpret this somewhat startling assertion to mean only that it used the methodology of natural science, but since Langdell saw this methodology as a means of discerning general, objectively identifiable principles of law, he really seemed to believe that his approach was natural science itself.

Langdell and Eliot meant a number of different things by "science"; the word possessed a kind of magic in the 1870s that it has not quite lost, even today. As Thomas Grey points out, one aspect of their claim was the view, described above, that law was a system whose specific rules could be derived from a relatively small number of general principles that formed a coherent whole.<sup>75</sup> In the Introduction to his casebook, Langdell declared that "[t]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension."<sup>76</sup>

To qualify Grey's insight, the idea that the law was a coherent system based on general principles was the standard view, and certainly not original with Langdell and Eliot. What they added was the idea that this view allowed legal education to adopt the same approach as natural science; that is, an inquiry that would disclose the principles that were the source of its coherence. Langdell also recognized that these principles, like the principles of natural science, could not be perceived directly. The legal scholar could only discern them by studying their particular manifestations, just as the natural scientist could only discern the universal law of gravitation by observing the behavior of specific falling objects. Thus, a second aspect

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73. LAPIANA, *supra* note 5, at 7-28; STEVENS, *supra* note 7, at 35-64.

74. CHASE, *supra* note 7, at 27-31; LAPIANA, *supra* note 5, at 55-78; STEVENS, *supra* note 7, at 52-59; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13-39 (1983); Howard Schweber, *The 'Science' of Legal Science: The Model of Natural Sciences in Nineteenth Century American Legal Education*, 17 LAW & HIST. REV. 421, 455-464 (1999); Speziale, *supra* note 5; Weaver, *supra* note 2, at 527-31.

75. Grey uses the term "conceptual order" for this feature, and defines it as the idea that law's "substantive bottom-level rules can be derived from a small number of relatively abstract principles and concepts, which themselves form a coherent system." Grey, *supra* note 74, at 8.

76. CHRISTOPHER LANGDELL, *CASES ON CONTRACTS* viii-ix (2d ed. 1879).

of the legal science was that it was empirical; as Anthony Sebok points out, legal principles were to be discerned by inductive, not deductive reasoning.<sup>77</sup> Since Langdell believed that the only real law—the only law that merited study as a science—was common law, this empirical evidence was to be found in judicial decisions that had been published in court reporters. As he famously declared, “the library is the proper workshop of [law] professors and students alike; . . . it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.”<sup>78</sup>

This effort to depict the study of law as a form of natural science is sometimes attributed to Darwin's influence.<sup>79</sup> Doing so, however, once again confers a misleading sense of modernity on Langdell's thought, and on the curriculum it generated. While Darwin's theory of evolution was clearly one of the greatest scientific achievements of the entire era, there is no direct evidence that Langdell was familiar with it. If Langdell had a source for his conception of natural science, it was probably not Darwin but Louis Agassiz. Agassiz, who had come to America from France in 1848, was teaching at Harvard when Langdell arrived in 1870.<sup>80</sup> He was an academic superstar, perhaps the most famous university professor of his day,<sup>81</sup> and his ideas were probably more familiar to Americans than the relatively recent discoveries of a reclusive Englishman. Indirect evidence supports this speculation, because Langdell's ideas bear a much closer relationship to Agassiz's than they do to Darwin's.

Agassiz was an empiricist; he believed that nature's secrets were unlocked by scrupulous examination of physical evidence. For one class in his invertebrate biology course, he required every student to hold and examine a grasshopper, and when one student's grasshopper hopped away, he stopped the class and waited patiently until it was retrieved.<sup>82</sup> Langdell's idea that the library should be the

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77. Sebok, *supra* note 5, at 2083-87.

78. Christopher Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123, 124 (1887). As Grey points out, this did not prevent Langdell from criticizing judicial decisions; once the general principle was discerned, a particular decision could be treated as an inaccurate application of that principle to the facts of the case. Grey, *supra* note 74, at 20. It was more difficult, however, for Langdell to reconcile such a critique with the principle of stare decisis that, after all, lay at the center of the common law method. *Id.* at 24-27.

79. See Speziale, *supra* note 5, at 2-4.

80. EDWARD LURIE, LOUIS AGASSIZ: A LIFE IN SCIENCE 351-90 (1988).

81. LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 97-116 (2002); see also Schweber, *supra* note 74, at 436 (“Agassiz may have been the greatest institution builder, publicist, and fundraiser for science this nation has ever known.”).

82. MENAND, *supra* note 81, at 100.

law student's laboratory springs from a closely related perspective, and one can readily perceive the similarity between the students in his classes holding their books of reported cases and the students in Agassiz's classes holding their grasshoppers. But Agassiz could not accept the idea that the empirical evidence he valued so highly would reveal a stochastic, malleable world of the sort that Darwin has depicted, and indeed, he remained a vociferous opponent of Darwin's theory until his death in 1873. Instead, he insisted that the biological world was composed of fixed, unchanging forms that had been specially created, and he believed that empirical examination of particular plants and animals would reveal the essential features of those forms.<sup>83</sup> Langdell's conception of science reiterated this ancient and outmoded concept. By examining cases, he believed, the student would come to perceive the enduring principles of Anglo-American law that lay behind them.

To be sure, there are a few statements by Langdell indicating that he thought legal principles had evolved over time.<sup>84</sup> In this way, he differed from Agassiz, and he was somewhat more sophisticated; but to take these occasional references to evolution as evidence that Langdell thought of law as malleable or continually changing once again gives his ideas a false modernity by interpreting them out of context. Agassiz believed that the fixed forms of the biological world had been created by God, and that species of plants and animals were God's thoughts manifested in the material world.<sup>85</sup> Lawyers and legal scholars in the generation prior to Langdell held similar beliefs about the principles of Anglo-American common law, but Langdell, like his post-Civil War contemporaries, adopted a more secular perspective. He regarded the principles of common law as humanly created, and this means that they had necessarily evolved; obviously, they had not prevailed in Britain at the time the Celts painted themselves blue and danced with the druids, or even during the centuries of Roman rule that followed. But these principles had developed, as Aquinas suggested, by the cumulative operation of human reason over long periods of time, and having done so, they were fixed and permanent in the legal culture that had created them. Howard Schweber has described this attitude toward science as "Protestant Baconism":

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83. *Id.* at 126-28; Schweber, *supra* note 74, at 446. This itself may be little more than a restatement of Aristotle's theory of biology, for Aristotle had taken Plato's unchanging, supra-sensible forms out of the heavens and embedded them in the material world.

84. LAPIANA, *supra* note 5, at 70-78.

85. MENAND, *supra* note 81, at 128.

inductive reasoning from empirical observation to known principles.<sup>86</sup> Langdell's views thus differed from Agassiz's, but only to the extent necessary to acknowledge the difference between enduring biological forms and enduring legal ones.

Langdell's notions about natural science were rather antiquated by the standards of his own era, but this does not do justice to the true obsolescence of his conceptual framework. Even if his ideas about natural science had been the most advanced of his time; indeed, even if these ideas had been equivalent to our own, his claim that law was a form of natural science, or the milder claim that it should employ the methodology of natural science, no longer makes sense. No contemporary legal scholar would advance such claims. Some scholars draw on natural science as a way to explain the human behavior that law attempts to channel or control,<sup>87</sup> and of course legal rules in technical areas must take account of scientific knowledge, but the claim that law itself is natural science can be consigned to the same intellectual dust bin as phrenology, astrology and iatrochemistry. Only rejecting natural science's claim to objective, or mind-independent knowledge, as Kuhn and Feyerabend have suggested,<sup>88</sup> would rehabilitate this notion and Langdell obviously did not have this in mind.

### B. Law as Social Science

As discussed above, the idea that law is a type of natural science is obsolete in its entirety. It became obsolete at the same time that Langdell's beliefs about the centrality and significance of the common law became obsolete, namely, the decades that followed immediately after the Langdellian curriculum assumed its final form and began dominating American legal education. The agent of its obsolescence, in this case, was not the advent of the administrative

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86. Schweber, *supra* note 74, at 459 (Langdell "retained the constrained inductivism of an earlier period"). Schweber points out that this approach to science regarded it as part of a unified system of knowledge that would confirm the truth of God's creation, as presented in the Bible. *Id.* at 447.

87. See SEMIR ZEKI & OLIVER GOODENOUGH, LAW AND THE BRAIN (2006) (applying the new science of neurobiology to the law); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005) (arguing that legal thinkers should seek a greater understanding of human behavior); Owen D. Jones, *Sex, Culture and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999) (examining scientific perspectives of sexual aggression and how they can impact the legal model of rape).

88. See, e.g., PAUL FEYERABEND, AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE (1978); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

state or the discovery of common law's true history, but a related and essentially contemporaneous phenomenon: the development of social science. We now recognize that the social sciences—economics, political science, sociology, anthropology, and psychology—provide the most useful analogies for the academic study of law in the sense, that they, like law, are “human sciences.” Moreover, the insights of these fields can be applied directly to extensive areas of law, which is not true for the natural sciences. This combination of methodological affinity and substantive overlap has spawned the current style of interdisciplinary research, which is rapidly becoming the leading approach among American academics.

Underlying these important academic developments is the more basic one that our entire conception of law has become essentially sociological. Rather than being seen as a reflection of trans-cultural or philosophic norms, as in the natural law tradition, most scholars now regard the law as a product of culture, constructed by a particular society and drawing its value from the role it plays in that society. It is seen as the study of human beings, with all the complexity, normativity, and subjectivity that this study necessarily implies.

The reason Langdell failed to adopt this modern perspective—the reason he tried to assimilate law to natural science rather than social science—is not that he was obdurate or ignorant, but because he was a product of his times. When he devised the Harvard curriculum in the 1870s and 1880s, there was virtually no social science in the United States. The first significant American scholarship recognized as modern social science, like the very first federal administrative agencies and the very first historical analysis of common law, was the product of the 1880s and 1890s. This is true for economics, political science, sociology, and a variety of related disciplines.

Prior to 1870, economics, or political economy, was generally regarded as a branch of moral philosophy. Francis Bowen, Alford Professor of Natural Religion, Moral Philosophy, and Civil Polity was Harvard's only faculty member in this field during the two decades before Langdell's appointment. According to Bowen, Smith's invisible hand reflected divine intervention in society:<sup>89</sup> “[God] turneth [men's] natural selfishness to good; and ends which could not be accomplished by the greatest sagacity . . . are effected directly and incessantly, even

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89. PAUL BUCK, *SOCIAL SCIENCES AT HARVARD, 1860-1920* 24-25 (1965); Byrd L. Jones, *A Quest for National Leadership: Institutionalization of Economics at Harvard*, in *BREAKING THE ACADEMIC MOULD: ECONOMISTS AND AMERICAN HIGHER LEARNING IN THE NINETEENTH CENTURY*, 95, 96-100 (William J. Barber, ed., 1988).

through the ignorance, the willfulness, and the avarice of men.”<sup>90</sup> In 1869, Eliot appointed the first faculty member recognizable as an economist in the modern sense, Charles Dunbar. Dunbar, who began teaching the year after Langdell, separated the Department of Political Economy from philosophy in 1879.<sup>91</sup> In 1876, he issued a well-known condemnation of “economic science in America,” excoriating his compatriots for having been so fixated on the acquisition of wealth that they had contributed nothing to the growth of knowledge in this area.<sup>92</sup> A new generation of scholars began to remedy this situation in the 1880s and 1890s, and economics became a real academic discipline in the United States. But this work was limited to macro-economic questions such as trade policy, savings rates, the proper balance between capital and wages, and the sustainability of human populations.<sup>93</sup> The powerful tools that microeconomics would provide for analyzing commercial and legal relationships would not be developed for many years, and even the more modest insights of institutional economics, lay several decades in the future.

Sociology and political science equally were undeveloped at the time when Langdell and Eliot designed the common law curriculum. To be sure, Herbert Spencer, a social theorist of sorts, just then was taking America by storm.<sup>94</sup> Whether this event should count as the primordial appearance of political science and sociology in the United States is uncertain; Talcott Parsons began *The Structure of Social Action* with a quote that nobody reads Spencer any more.<sup>95</sup> The

90. Jones, *supra* note 87, at 98 (quoting FRANCIS BOWEN, AMERICAN POLITICAL ECONOMY 18 (1870)).

91. BUCK, *supra* note 89, at 25-32.

92. Charles Dunbar, *Economic Science in America, 1776-1876*, 122 N. AM. REV. 124, 124 (1876).

93. MICHAEL O'CONNOR, THE ORIGINS OF ACADEMIC ECONOMICS IN THE UNITED STATES (1944).

94. Spencer toured the United States in 1882, and “was greeted everywhere with lavish hospitality and accorded celebrity status.” DAVID WILTSHIRE, THE SOCIAL AND POLITICAL THOUGHT OF HERBERT SPENCER 92 (1978).

95. TALCOTT PARSONS, THE STRUCTURE OF SOCIAL ACTION (vol. 1) 3 (1968) (quoting CRANE BRINTON, ENGLISH POLITICAL THOUGHT IN THE NINETEENTH CENTURY 226-27 (1962)). While Spencer's evolutionary theory of society can be regarded as a positive, rather than normative, approach—something he seems to have learned from Comte—his empiricism was of a very general nature, and his concept of evolution owed more to Lamarck than to Darwin. J.D.Y. PEEL, HERBERT SPENCER, THE EVOLUTION OF A SOCIOLOGIST 141-46 (1971); WILTSHIRE, *supra* note 94, at 192-216. Spencer enthusiastically embraced Darwin's survival of the fittest, but his theory was formulated before well before *The Origin of Species* was published, and Spencer never abandoned the notion that acquired characteristics could be inherited. *Id.* In any case, the normative implications of his work, specifically his evangelical faith in laissez-faire governance, seem to have been responsible for much of his influence.

concept of sociology, as a distinctive academic field that pursued a positive and empirically-based analysis of ordinary people's behaviors and structural relationships, seems to have emerged in the United States during the 1880s and 1890s, in part as a result of Spencer's influence. Lester Ward's first major book, *Dynamic Sociology*, used Spencer's ideas about evolution, although Ward vehemently disagreed with the lessons that Spencer drew from those ideas.<sup>96</sup> William Graham Sumner was a self-conscious disciple of Spencer's, and he shared his laissez-faire predilections, but Sumner was more of an academic, and certainly more knowledgeable and meticulous in documenting social behavior.<sup>97</sup> With Franklin Giddings,<sup>98</sup> who published *Principles of Sociology* in 1896, the field seems to have progressed beyond Spencer and acquired the contours of a truly empirical social science. The process was a rather slow one, however; in 1891, Harvard taught its first course with the word "sociology" in the title (an economics course), but it did not create a sociology department for another forty years.<sup>99</sup>

While the study of society as a distinctive academic discipline was arguably new in the nineteenth century, the idea of studying politics and government obviously was not; political theory was nearly as old as the Western intellectual tradition. A staple of Greco-Roman thought, it was well represented in college courses, and educated people were probably more familiar with the political works of Plato, Aristotle, Cicero, Plutarch, and Polybius than with the political writers of their own time.<sup>100</sup> But the empirical study of political

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96. LESTER WARD, *DYNAMIC SOCIOLOGY: OR, APPLIED SOCIAL SCIENCE, AS BASED UPON STATICAL SOCIOLOGY AND THE LESS COMPLEX SCIENCES* (Greenwood Press 1968) (1883).

97. WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* (Ginn & Company 1940) (1907); WILLIAM GRAHAM SUMNER, ALBERT KELLER, & MAURICE DAVIE, *THE SCIENCE OF SOCIETY* (1927) (edited version of Sumner's lecture notes). Sumner was an influential teacher at Yale during the 1880s and 90s, although the publication of his work came somewhat later.

98. FRANKLIN GIDDINGS, *THE PRINCIPLES OF SOCIOLOGY: AN ANALYSIS OF THE PHENOMENA OF ASSOCIATION AND OF SOCIAL ORGANIZATION* (The Macmillan Co. 1914) (1896). Giddings's first textbook came two years later, see FRANKLIN GIDDINGS, *THE ELEMENTS OF SOCIOLOGY: A TEXT-BOOK FOR COLLEGES AND SCHOOLS* (The Macmillan Co. 1908) (1898). His best-known and most comprehensive works were not produced until the 1920s, however. See FRANKLIN GIDDINGS, *STUDIES IN THE THEORY OF HUMAN SOCIETY* (1922); FRANKLIN GIDDINGS, *THE SCIENTIFIC STUDY OF HUMAN SOCIETY* (1924).

99. BUCK, *supra* note 89, at 19.

100. See ARISTOTLE, *POLITICS* (Benjamin Jowett trans., Franklin Library 1977) (1905); MARCUS TULIUS CICERO, *THE REPUBLIC; AND, THE LAWS* (Niall Rudd trans., Oxford University Press 1998); PLATO, *The Republic, in COMPLETE WORKS* 971 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., 1997); PLUTARCH, *LIVES OF TEN NOBLE GREEKS AND ROMANS* (Edmund Fuller ed., Grolier 1968); POLYBIUS, *THE RISE OF THE ROMAN EMPIRE* (Ian Scott-Kilvert trans., Penguin 1979).

activity—the sort of work that forms the major part of modern political science—was essentially unknown. Once again, the 1880s and 1890s saw the gradual development of something we recognize as modern political science. Perhaps the first American academic to accept the idea that politics should be studied by gathering empirical data about actual human behaviors, rather than by moralizing about general trends or structures, was John Burgess. Burgess left Amherst College, an institution guided by the principle that truth “was contained in the Bible,” and became Professor of History, Political Science, and International Law at Columbia.<sup>101</sup> His *Political Science and Comparative Constitutional Law* joined Woodrow Wilson’s *Congressional Government* and W.W. Willoughby’s *Government and Administration in the United States* as the earliest examples of political science scholarship in this country, despite the somewhat moralistic tone that pervades these works.<sup>102</sup> A truly empirical approach to politics and government, however, may not have appeared in this country until Lord Bryce replaced Herbert Spencer as the political scientist’s favorite Englishman, and scholars such as Arthur Bentley, Charles Merriam, and A. Lawrence Lowell came to characterize the field.<sup>103</sup> Lowell succeeded Eliot as President of Harvard, and his social science background, as opposed to Eliot’s in natural science, gave him greater insight into the real sources of data for the human sciences. In his 1910 speech to the American Political Science Association, he said:

We are inclined to regard the library as the laboratory of political science, the storehouse of original sources . . . But for the most purposes books are no more original sources for the physiology of politics that they are for geology or astronomy. The main laboratory for the actual working of political institutions is not the library, but the outside world of public life. It is there that phenomena must be . . . observed at first hand.<sup>104</sup>

Thus, students of politics learned a great many lessons in the forty years after 1870, among them the idea that the real world, and not a library, is the true laboratory of the human sciences. Legal academics needed another seventy years or so to learn this, and they have not yet applied those lessons to the law school curriculum.

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101. BERNARD CRICK, *THE AMERICAN SCIENCE OF POLITICS: ITS ORIGINS AND CONDITIONS* 26 (1959).

102. JOHN BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (London, Ginn & Co. 1893); W.W. WILLOUGHBY, *GOVERNMENT AND ADMINISTRATION OF THE UNITED STATES* (Baltimore, The Johns Hopkins Press 1891); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (Meridian Books 1956) (1885).

103. See CRICK, *supra* note 101, at 95-155.

104. Quoted in *id.* at 104.



*C. Curricular Effects of Viewing Law as Science*

From our present vantage point, it is not easy to envision the conceptual landscape that existed in Langdell and Eliot's day, before the advent of social science; indeed, our intellectual tools for understanding any era in the past are themselves a product of our social science orientation.<sup>105</sup> The implications of this essential difference in outlook likely manifest themselves in a variety of unexpected ways. One of the most readily apparent differences, however, is that Langdell and his contemporaries tended to regard law as a body of rules, rather than as a social practice. For them, the law consisted of a set of definitive statements that could be found in authoritative sources, specifically the Constitution, statutes and judicial decisions. To determine the law meant to consult these sources. To study the law, according to the curricular innovations that Langdell introduced, meant to discern the principles that determined good decisions and gave those decisions coherence. To improve the law meant to alter or overrule judicial decisions that conflicted with those principles so that the totality of decisions formed a conceptually coherent unit. This framework permitted the analogy between the study of law and the study of natural science.

In contrast, social science has taught us to regard law as a social practice. It is a sub-system within society, populated by a group of trained professionals who possess a distinctive conceptual framework and set of discursive strategies. While law, which is itself a pre-modern concept, may be understood as definitive statements by authoritative sources, legal practice is the total set of behaviors that are prevalent among those trained professionals. To study legal practice, according to a modern social science orientation, is to observe the totality of these behaviors. To improve the law means to alter it so that it implements social policies determined by the empirical study of society in general. Thus, it is important not only to know the case law

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105. An illustration of how central social science insights are to a modern view of law is provided by one of Langdell's critics, John Chipman Gray. In 1883 Gray wrote that "law [is] not at all like the natural sciences whose 'truths' and the best means of applying them are independent of opinion. . . . [I]n law the opinions of judges and lawyers as to what the law is *are* the law." LAPIANA, *supra* note 5, at 19. This struggles with the idea that law is socially constructed and is best understood as a social practice. It states a naïve positivism, but, even more weirdly, positivism in which judges and lawyers are the sovereign authority, not an executive or a legislature. No theory of jurisprudence, at the time or afterwards, would support this view. Gray is right, of course, that law is not natural science, but wrong to say that it is created by judges and lawyers. What he meant to say was that law is a social practice, that the observed behaviors of lawyers and judges are one aspect of our legal system. But this is a social science insight and Gray, like other Americans of his day, was incapable of such an insight because American social science was only beginning to develop.

regarding torts, but also to know how lawyers interpret that law, how the law and the lawyers' interpretations affect businesses and private actors, and what effects are best for society as a whole. It is important not only to know the language of a regulatory statute, but also to know how that language is interpreted by implementing agencies, private attorneys, and the regulated parties, as well as the effect it produces on those parties, and whether those effects are best for society according to some policy objective. All these issues are central to the study of law once we adopt the modern view that this study is a mode of social science, a methodology that did not exist, but was about to be discovered, when Langdell and Eliot developed the Harvard curriculum.

One consequence of Langdell's lack of a modern, social science orientation is the absence of transactional law from the traditional law school curriculum. Non-lawyers tend to be astonished to learn that in the well-known first-year course on contracts (it was Professor Kingsfield's course, after all),<sup>106</sup> the students never read, draft, or negotiate a single contract.<sup>107</sup> It is equally astonishing to realize that upper-class courses typically do not fill this lacuna and that students graduate from law school without any exposure to this basic area of law in which large numbers of them ultimately will practice. This feature of the traditional curriculum cannot be attributed to a change in substantive law since Langdell's time. Unlike administrative law or international law, transactional law was just as prevalent in his day as it is in ours, just as basic a component of the practice for which he was preparing the students. But transactional practice was invisible to Langdell because it is a social practice, not a set of authoritative rules. He and his compatriots were simply unable to perceive the features of a practice as an appropriate subject for study in a university curriculum.

Rules, of course, do apply to transactional law. In Langdell's day, although not now,<sup>108</sup> they were common law rules, and these common law rules constituted the first-year contracts course—Langdell's own subject, as well as Kingsfield's—as they continue to do to the present day. Learning these rules is of some value, but the rules

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106. JOHN J. OSBORN, JR., *THE PAPER CHASE* (1970).

107. Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 *SAN DIEGO L. REV.* 55, 55-56 (2004).

108. Since Langdell and Eliot's time, much of the law governing contracts has been statutory, largely the result of the Uniform Commercial Code that was adopted throughout the nation during the 1960s. See Robert Braucher, *Legislative History of the Uniform Commercial Code*, 58 *COLUM. L. REV.* 798, 798-99 (1958); William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 *U. MIAMI L. REV.* 1, 2 (1967).

have only a background or tangential relation to the realities of transactional law practice. One can spend an entire career as a transactional lawyer, for example, without ever seeing an offer, acceptance, or consideration case, topics that loom large in the traditional curriculum. The great bulk of transactional practice occurs within the broad limits set by authoritative rules and consists of the techniques and strategies by which lawyers negotiate agreements, the patterns that these agreements assume, and the ways in which they are subsequently interpreted and modified. To Langdell and his contemporaries, these were grimy details which could only be taught through a series of how-to prescriptions that did not belong in university courses. The social science approach to law reveals them as important professional behaviors that can be studied with the powerful methodologies of economics and sociology. Legal scholars have adopted this approach, and the empirical study of transactional law probably is more common at the present time, and certainly more conceptually important, than the doctrinal study of contract rules. But legal pedagogy, still in thrall to the Langdellian worldview, has failed to recognize this change.

One readily can recount other gaps in the curriculum resulting from the failure to recognize that law is social science, not natural science. Law schools do not study the contexts of legal practice, for example—there are few courses that focus on law firms, corporate counsel's offices, or government lawyering. Here again, the Langdellian model suggests that such inquiries are beneath the notice of university programs because they do not involve authoritative rules; however, any modern idea of studying law would recognize the centrality of these concerns and would provide the economic or sociological methodologies for teaching about them in an intellectually rigorous manner. Similarly, statutes are underemphasized, particularly in the first year, because they do not yield to the sort of doctrinal analysis still prevalent in law school; again political science, economics, and other social science disciplines provide the best approach to this increasingly important area of law.

Strikingly, legal scholarship has largely, if not fully, come to perceive social science as the most relevant analogy for law and the most productive source of methodological tools for its investigation. The field remains heavily normative or prescriptive, to be sure,<sup>109</sup> but

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109. See George Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 995-97 (1981); Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-65 (1988); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 179-81 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 808 (1991); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1208-15 (1981).

its prescriptions are generally perceived as ways of changing an embedded social system, not as abstract exercises in moral philosophy. While it would be incorrect to claim that legal scholarship is social science *per se*, a social science understanding of the legal system underlies the field's descriptive and normative efforts. Its substance and its personnel reflect this perspective. Substantively, legal scholarship is increasingly interdisciplinary, deploying social science methodology or insights in place of the doctrinal analysis that prevailed during the half century after Langdell. Indeed, one finds an increasing number of descriptive empirical studies in law reviews. Among more traditional, prescriptive pieces, it is almost impossible to write cutting-edge scholarship in any business or commercial field without a working knowledge of economics, and it is increasingly rare to approach public law topics without addressing political science insights about the relevant institutional context. Not surprisingly, legal academics find social science training increasingly important;<sup>110</sup> in the last few years, a significant proportion of the entry level faculty members hired by the thirty top-ranked schools have had a Ph.D. in a social science field.<sup>111</sup> Thus, scholarship in law schools has recognized the intellectual events of the past century and incorporated a new, social science-based approach to law. Legal education, however, lags behind.

### III. EDUCATION AND LEGAL EDUCATION

One of the most obvious, and apparently uninformative, things one might say about the Langdellian system is that it was designed as a means of education. In fact, "education" is a far from self-evident concept. Langdell meant something entirely different than we do when he used that term, and his notion is sufficiently foreign to our modern sensibility that it requires something of an imaginative leap to recapture it. For Langdell, the student's rationality served as the basis for education, so that the educational process consisted primarily of developing a capacity for reasoning.<sup>112</sup> He recognized other mental capacities as important, such as will, memory, or imagination, but he

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110. For a criticism of this process, see Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (arguing that the emergence of what he calls the "law and" legal movements (e.g., law and economics), though serving important legal functions, has produced side effects detrimental to legal education and practice because many "law and" scholars "are generally disdainful of the practice of law").

111. *Id.* at 51; see MICHAEL O'CONNOR, *THE ORIGINS OF ACADEMIC ECONOMICS IN THE UNITED STATES* (1944).

112. See THEODORE BRAMELD, *PHILOSOPHIES OF EDUCATION IN CULTURAL PERSPECTIVE* 321-36 (1955).

regarded these as the servants of rationality. The particular version of this approach that developed in the nineteenth century was known as the "doctrine of mental discipline."<sup>113</sup> It held that the mind was a kind of muscle, and that exposure to certain subjects best trained the mind and, more specifically, its capacity for rational thought.<sup>114</sup> Those subjects, as it turned out, were the ones that had always been taught, such as Latin, Greek, and mathematics, and the techniques used to teach them were the familiar ones of drill and recitation.

It is easy to dismiss the mind-as-muscle notion as nineteenth century pseudo-science, like phrenology,<sup>115</sup> and to see the doctrine of mental discipline as a post hoc rationalization for educators to do the same thing they had always done. In fact, the idea that the human mind operates like a muscle probably was recognized as a metaphor at the time, and in any case, made about as much sense as any theory could have prior to the twentieth-century development of neurology and electrical engineering. Although those who championed the mental discipline model in the early nineteenth century advanced the unsubstantiated claim that only traditional subjects provided the requisite level of training,<sup>116</sup> late nineteenth-century proponents were more thoughtful in designing a curriculum that would achieve their goals. Preeminent among these was Charles Eliot, who was appointed chair of the National Education Association Committee in 1892 to assess the course of study in American elementary and secondary schools.<sup>117</sup> Eliot, who besides initiating graduate legal study at Harvard had introduced the elective system for undergraduates, believed that mental discipline could be achieved through a variety of substantive studies and need not be restricted to the classics.

While the mental discipline movement may have used the mind-as-muscle notion as a place-holding metaphor, and was willing to contemplate curricular modernization, it took its definitive stand on the assertion that education was a process directed toward the student's rationality. In criticizing the traditional curriculum, Eliot declared that "there has been too much reliance on the principle of

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113. *Id.*

114. HERBERT KLIBARD, *THE STRUGGLE FOR THE AMERICAN CURRICULUM, 1893-1958* 4-5 (2d ed. 1995).

115. See Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997) (arguing that Langdell's idea of "law as science" has flourished academically, though it was developed and implemented in much the same way as was the now-rejected field of phrenology).

116. For an effort to provide a philosophical link between mental discipline and traditional subjects, see BRAMELD, *supra* note 112, at 287-314 (suggesting that "the perennialist reacts against the failures and tragedies of our age by regressing or returning to the axiomatic beliefs about reality, knowledge, and value that he finds fundamental to a much earlier age").

117. KLIBARD, *supra* note 114, at 8-11.

authority, too little on the progressive and persistent appeal to reason."<sup>118</sup> Thus, the notion that a law school need not teach contemporary law, that it can rely on an obviously outmoded course of study because it is teaching students to "think like lawyers," is not a contemporary rationale. Rather, it is the doctrine of the nineteenth-century mental discipline movement, ensconced by Langdell and Eliot in the law school curriculum when they created it in the 1870s, and preserved by modern legal educators who repeat this mantra without recognizing its origin or reevaluating its underlying premises.<sup>119</sup>

The doctrine of mental discipline came under sustained attack, a few decades after Langdell and Eliot had relied on it, from a rival approach that became known as the child development movement. The central idea of the child development movement was that education should not be designed in light of the information that one wants to convey, or by mental habits, such as reasoning ability, that one wants to develop, but rather in light of the persons who were being educated—that is, children. The leading proponent of this approach in the 1880s was G. Stanley Hall, one of the founders of American psychology,<sup>120</sup> a prescient thinker but also an elitist and a pastoralist,<sup>121</sup> whose work probably owed as much to Rousseau as to anything recognizable as psychology in its modern sense.<sup>122</sup> It was John Dewey who combined the insights of the child study movement with the idea of providing students with the educational content

118. Charles Eliot, *Wherein Popular Education Has Failed*, 14 FORUM 411, 425-26 (1892), quoted in KLIEBARD, *supra* note 114, at 9.

119. The actual classroom approach that Langdell initiated is generally described as the Socratic method. In actual fact, it displays only a vague resemblance to the method that appears in Plato's Socratic dialogues, but the use of this term accurately reflects the fact that this approach is more closely allied to modes of thought that prevailed two thousand, five hundred years ago than those of most contemporary educators. See ARISTOTLE, *Politics*, in 2 THE WORKS OF ARISTOTLE 445, 536-44 (Benjamin Jowett trans. 1952). Aristotle does include physical education and music appreciation in his educational program, however.

120. ERNEST KEEN, *A HISTORY OF IDEAS IN AMERICAN PSYCHOLOGY* 67-68 (2001).

121. *E.g.*, G. STANLEY HALL, *ASPECTS OF CHILD LIFE AND EDUCATION* (1921); see also KLIEBARD, *supra* note 114, at 11-1421.

122. Rousseau's major statement about education is *EMILE, OR ON EDUCATION* (Allan Bloom trans., Basic Books 1979) (1762). For an analysis of *EMILE*, see ALEXANDER MEIKLEJOHN, *EDUCATION BETWEEN TWO WORLDS* (1942). Although Rousseau is certainly not a psychologist in the modern sense, and probably not even a founder of the field, he is certainly one of the first thinkers to realize that children are essentially different from adults, and that they gradually develop, rather than suddenly becoming rational beings who must then be trained and informed. See generally PHILIP ARIES, *CENTURIES OF CHILDHOOD* (1962) (arguing that pre-modern people had no separate conception of childhood). This notion had still not penetrated into American education at the time Langdell developed the Harvard curriculum.

necessary for the modern world.<sup>123</sup> Dewey, one of America's most distinguished philosophers, supported this approach to education with a comprehensive epistemology,<sup>124</sup> based on pragmatism and coincidentally paralleling Husserl's phenomenology.<sup>125</sup>

For Dewey, as for Hall, education is a developmental process, closely linked to the development of the individual's capacities.<sup>126</sup> He also agreed with Hall—and with Rousseau—that children are not merely uneducated adults who can be brought to intellectual maturity through either the infusion of information or mental discipline; rather, they are beings at different stages of life whose capacities, interests, and conceptual ability vary with particular stages. While he accepted the important role that nature played in education, Dewey rejected Rousseau's idea that education was a natural process. In fact, one could say that while Dewey's psychological approach treats education as a developmental process, it also treats development as an educational process.<sup>127</sup> The mind, Dewey wrote, is not something "complete in itself, ready to be directly applied to present material."<sup>128</sup>

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123. See JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916); JOHN DEWEY, *EXPERIENCE AND EDUCATION* (1938); JOHN DEWEY, *LECTURES IN THE PHILOSOPHY OF EDUCATION* (Reginald Archambault ed., 1966); JOHN DEWEY, *MORAL PRINCIPLES IN EDUCATION* (1909); JOHN DEWEY, *PHILOSOPHY & EDUCATION IN THEIR HISTORIC RELATIONS* (Elsie Clapp, transcriber, 1993); JOHN DEWEY, *THE CHILD AND THE CURRICULUM AND THE SCHOOL AND SOCIETY* (4th ed. 1959); JOHN DEWEY, *THE WAY OUT OF EDUCATIONAL CONFUSION* (1931).

124. In addition to the works cited in note 120, *supra*, see JOHN DEWEY, *ART AS EXPERIENCE* (1934); JOHN DEWEY, *HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS* (1933).

125. See VICTOR KESTENBAUM, *THE PHENOMENOLOGICAL SENSE OF JOHN DEWEY: HABIT AND MEANING* (1977). For a general statement of phenomenology, see EDMUND HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (W.R. Boyce Gibson trans., Collier-Macmillan 1962) (1931). Even closer to Dewey's thought is the posthumously published EDMUND HUSSERL, *EXPERIENCE AND JUDGMENT: INVESTIGATIONS IN A GENEALOGY OF LOGIC* (James S. Churchill & Karl Ameriks trans., Northwestern Univ. Press 3d ed. 1992) (1973). Cf. JOHN DEWEY, *EXPERIENCE AND NATURE* (1929). Husserl and Dewey were exact contemporaries; both were born in 1859, and produced their major works during the same time, although Dewey lived somewhat longer (not surprisingly—he died at the age of 93). There was some contact between these two schools of thought—Husserl was familiar with WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (1918), for example, see Hilary Putnam, *Pragmatism and Realism*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 37, 39 (Morris Dickstein ed., 1998) — but they remain relatively separate even at the present time.

126. Systematic analysis of the child's mind and conceptual abilities would not occur until the work of Piaget, the earliest of which date from the 1920s. See, e.g., JEAN PIAGET, *THE CHILD'S CONCEPTION OF THE WORLD* (Joan & Andrew Tomlinson trans., 1929); JEAN PIAGET, *THE CONSTRUCTION OF REALITY IN THE CHILD* (Margaret Cook trans., Basic Books 1954); JEAN PIAGET, *THE LANGUAGE AND THOUGHT OF THE CHILD* (Routledge & Kegan Paul 3rd ed. 1971) (1932).

127. DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 123, at 130-38.

128. *Id.* at 156.

Rather, it is a capacity that develops as a result of the educational process and in interaction with that process. From this, it follows that the educational program needs to change as the student develops his or her capacities, and it needs to change in ways that take account of the particular developments the student has previously experienced.

Still another feature of Dewey's theory of education is the interaction between the student and the subject matter. The subject matter of education, in his view, is not a passive body of preexisting facts that the student is required to absorb. "Abandon the notion of subject-matter as something fixed and ready-made in itself, outside the child's experience," he urged.<sup>129</sup> This is directly connected to his overall epistemology:

"Perception is an act of the going-out of energy in order to receive . . . . To steep ourselves in a subject-matter we have first to plunge into it. When we are only passive to a scene, it overwhelms us and, for lack of answering activity, we do not perceive that which bears us down."<sup>130</sup>

Thus, according to Dewey, "it is only in experience that any theory has vital and verifiable significance. . . . [A] theory apart from an experience cannot be definitively grasped even as a theory."<sup>131</sup>

Dewey's epistemology and psychology combine to emphasize the crucial role of motivation in the educational process. It is not merely that knowledge will not be acquired unless it is meaningful to the student; something will not even constitute knowledge unless it possesses such meaning: "Only by wrestling with the conditions of the problem at first hand, seeking and finding his own way out, does [the student] think."<sup>132</sup> Moreover, "knowledge will not be meaningful, and the student will not wrestle with the conditions of the problem, unless he or she is interested in it; that is, unless he or she becomes actively engaged with the problem because it connects to some life purpose,

129. JOHN DEWEY, *The Child and the Curriculum*, in *THE CHILD AND THE CURRICULUM AND THE SCHOOL AND SOCIETY*, *supra* note 123, at 1, 11; *see also* JOHN DEWEY, *The School and Society*, in *THE CHILD AND THE CURRICULUM AND THE SCHOOL AND SOCIETY*, *supra* note 123, at 30, 31-34 (arguing that the child, rather than the teacher or the course material, should be the "center of gravity" in the classroom, and therefore criticizing "uniformity of curriculum and method"); DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 123, at 158 (arguing that "[s]tudy is effectual in the degree in which the pupil realizes the place of the [course material] he is dealing with in carrying to fruition activities in which he is concerned," and that "[t]his connection of an object and a topic with the promotion of an activity having a purpose is the first and the last word of a genuine theory of interest in education").

130. DEWEY, *ART AS EXPERIENCE*, *supra* note 124, at 53.

131. DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 123, at 169. The parallel with phenomenology is notable: Husserl begins his introduction to phenomenology with the statement that "[n]atural knowledge begins with experience and remains within experience." *See* HUSSERL, *supra* note 125, at 45 (emphasis omitted); KESTENBAUM, *supra* note 125, at 25-40.

132. DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 123, at 188.



some sense of its inherent possibilities.”<sup>133</sup> Thus, education is the very opposite of mental discipline, which suggests an effort to overcome the learner’s will, to compel the learner to absorb material that seems uninteresting or uncongenial.<sup>134</sup> Dewey further noted, “The problem of instruction is thus that of finding material which will engage a person in specific activities having an aim or purpose of moment or interest to him, and dealing with things not as gymnastic appliances but as conditions for the attainment of ends.”<sup>135</sup>

While Dewey’s approach to education—and to epistemology for that matter—has been a matter of controversy,<sup>136</sup> the basic insights that underlie his approach are central to nearly all theories of pedagogy in the twentieth century. To rely on a model of education that was designed in the 1870s, therefore, as the traditional approach to legal education does, denies us the benefit of the entire range of modern thought about the educational process and of the entire field of modern psychology that informs this area.

One problem that results from reliance on such an antiquated pedagogic approach is that legal education is not designed as a developmental process. Each course begins with a definition of its subject matter—whether torts, civil procedure, corporations, or bankruptcy—then proceeds down to a fairly refined level of doctrinal detail, and finally stops short of intensive inquiry into any specific topic that would bring students to the advancing edge of scholarship or practice. In effect, we are teaching three years of second-year courses. Not surprisingly, to reiterate the familiar bromide, the students are terrified in the first year, interested in the second year, and bored by the third year.<sup>137</sup> Although law students, unlike elementary school students, are no longer developing in either their physical or mental capacities, they generally arrive in law school with almost no knowledge of the legal system and leave ready to begin highly compensated and reasonably responsible work as professionals. Thus, a substantial amount of intellectual development occurs during the course of their three years. Virtually all modern theories of education strongly recommend that the educational program should

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133. *Id.* at 146-50.

134. *Id.* at 156-57.

135. *Id.* at 155.

136. See LAWRENCE ARTHUR CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957* (1961); MERLE CURTI, *THE SOCIAL IDEAS OF THE AMERICAN EDUCATORS* (1935); PATRICIA ALBJERG GRAHAM, *PROGRESSIVE EDUCATION: FROM ARCADY TO ACADEME* (1967); KLIEBARD, *supra* note 114; “SCHOOLS OF TOMORROW,” *SCHOOLS OF TODAY: WHAT HAPPENED TO PROGRESSIVE EDUCATION* (Susan F. Semel & Alan R. Sadovnik, eds., 1999).

137. Weaver, *supra* note 2, at 561-62.

change in basic methodology to guide and keep pace with a developmental process of this sort.

A second problem is that the Langdellian notion of education treats its subject matter as a pre-established set of rules or methodologies that exists "out there" in a passive realm separate from and independent of the students. This notion is entirely inconsistent with the now generally accepted fact that what law schools teach is a human product, something that it is socially constructed.<sup>138</sup> Even more importantly for present purposes, this notion is inconsistent with the learning process, which, as Dewey noted, is primarily experiential. A basic understanding of legal practice and even legal theory can be achieved only by actually performing legal tasks or observing legal behaviors. Students who have never tried to draft a contract, or who have never seen one being negotiated, have not merely failed to receive training in a particular skill; they will not be able to understand what a contract means, what purposes it serves, or how it should be read by either the parties or an adjudicator. The traditional curriculum provides students with one experience—intensive questioning about the reasoning of judicial decisions. Law schools have readily incorporated research seminars into the curriculum in the sense that such courses are taught by the same faculty and given the same weight as the Langdellian classes, but they have only awkwardly tacked on other types of legal experiences, in the form of skills training and clinical education. The self-contained, rule-based Langdellian curriculum has closed them off from the twentieth-century insight that learning comes from experience, and is itself an experience.

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138. The idea that the subject matter of legal education is socially constructed may sound like a rejection of natural law. That would not be much of a problem for the approach suggested here, since natural law is generally out of favor these days, but it is not even necessary to go that far. The topic of this discussion is legal education, not law itself, and thus the statement about social construction of law school's subject matter is one that any proponent of natural law can readily agree with. Natural law, as Aquinas pointed out, consists of the moral principles that any rational person can understand, and that God promulgates (since all law must be promulgated to be valid) through human reason. 2 AQUINAS, *supra* note 37, at 997-98 (I-II, Q. 91, A.2). Clearly, there is no need to teach something of that sort in law school. What needs to be taught in a graduate professional program is human law, the complex rules of management and implementation that few would regard as being dictated by natural law.

For a modern version of this relationship, see Paul Robinson, Robert Kurzban & Owen D. Jones, *Origins of Shared Intuitions of Justice* (Univ. of Pa. Law School, Public Law Working Paper No. 06-47, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952726](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952726), which discusses reasons why people, at least in the modern world, rate the relative seriousness of crimes in such similar ways. Again, shared instincts of this sort, which may be inherent in our mental framework, are not something law schools need to teach. What they need to teach are the complex doctrines that implement these instincts.

Finally, law schools have experienced difficulty motivating their students, and engaging them intellectually by teaching in a manner that makes sense to them, as Dewey and his successors recommended. Of course, students have no lack of motivation generally; they are highly motivated to enter the prestigious, lucrative, and influential field of law, and law schools can draw upon this motivation because their degree is a requirement for entrance into the profession. This produces highly assiduous first-year students, who want to earn grades that will provide them with the most desirable employment opportunities and to reassure themselves that they can function effectively as lawyers. Once these desires have been satisfied (or frustrated), however, their motivation dwindles. Faculty members often complain that all students want is a credential, that once students have a job offer they lose interest in their courses. But this is not surprising when law school curricula have no rationale, particularly after the first year, exhibit no effort to design programs that fit particular students' interests, provide very little academic advising, and, as stated above, demonstrate no noticeable progression from one year to the next. Only the degree "connects to some life purpose, some sense of its inherent possibilities." The result is that the students are motivated to get the degree, but not to study the law.

#### IV. PROPOSALS FOR A TWENTY-FIRST CENTURY LAW SCHOOL CURRICULUM

Some useful ideas for reshaping legal education follow naturally from the foregoing discussion regarding the obsolescence of its existing model. The momentous developments of the 1880s and 1890s were not a temporary disturbance or a passing fad, but rather harbingers of a new era, the modern era in which we live. The twentieth century did, in fact, occur. Those decades saw the exponential growth of a national administrative state, the displacement of common law, the recognition that common law simply projects state authority, a new conception of human beings and human society, vast bodies of social science scholarship based on that understanding, new theories of learning, and new approaches to education based upon those theories. The prescription for an up-to-date, well-designed approach to legal education, simply put, takes cognizance of these developments, rather than ignoring them or rationalizing them away.

This is not a call for radical reform. It does not require that legal education be reduced to two years, or increased to four, or re-

unified with legal practice in some new form of apprenticeship. It does not demand any change in the internal structure of the law school curriculum; the mandatory first year and elective second and third years remain. It does not require higher teacher-student ratios or any other change that would affect the present financial structure of the law school. It is merely a call to reassess the content of the present program, to institute moderate changes that only sound extreme when compared to the rigidity of the existing program. Of course, change always involves costs, financial as well as psychic, but once the transition is complete, a more relevant and theoretically defensible curriculum will not require any more effort or financial resources to deliver than the present one. This final Part outlines some of the changes that would follow from a recognition of the economic, social and conceptual developments that have occurred since the Langdellian curriculum was implemented in the 1870s.

*A. The First-Year Curriculum Should Cover the Modern Legal System*

The mandatory first-year curriculum should provide students with an introduction to the modern legal system. This sounds obvious, but it requires fairly substantial changes in subject matter from the existing curriculum. To be sure, students should understand the nature of the common law and of judicial adjudication. But, at the barest minimum, the advent of a national administrative state suggests that students should also understand the operation of the regulatory law, while the advent of globalization suggests that it is important for them to be alerted, at the very least, to the existence of international law. Additionally, a social science approach to the study of law suggests that students need to understand the transactional practices that do not appear in judicial decisions but form such a large part of the lawyer's work. They also should appreciate the way in which the regulatory state and transactional law combine in the regulation of American business. If one were to walk into a middle- or large-sized law firm these days (one of the sort that employs the majority of law school graduates) one would find approximately one-third of the lawyers engaged in litigation, only some of which involves common law matters, another one-third engaged in purely transactional work, and the last one-third engaged in regulatory work. An up-to-date first-year curriculum should reflect that basic reality.

A revised curriculum of this sort, not the existing curriculum, justifies the famous post hoc rationalization of teaching students to "think like lawyers." Common law reasoning, admittedly, represents a distinctive mode of thought, and one that students must learn, but its

very distinctiveness signals its insufficiency. Such reasoning can be described as an analogical approach that builds incrementally on previous decisions, guided by general principles discerned from the totality of those previous decisions.<sup>139</sup> But legal practice involves at least two other equally legal and arguably more important areas: regulatory law and transactional law. Regulatory law reasoning is based on policy analysis—one must define the problem, identify alternatives, choose the most promising alternative, implement that alternative, and evaluate the results.<sup>140</sup> Agencies employ this mode of thought, or at least assert that they employ it, and lawyers must be familiar with it in order to represent an agency, or to represent a private firm or individual who is dealing with that agency. Helping a business decide how to comply with an agency regulation is more likely to reiterate the agency's mode of thought than to employ common law reasoning.<sup>141</sup> Transactional law consists of what Ronald Gilson has called transaction cost engineering.<sup>142</sup> The lawyer determines how to implement an exchange between the client and another party so that the surplus motivating the exchange is divided in a manner most beneficial to the client and minimizes the client's transaction costs.<sup>143</sup> This exchange involves a wide range of trade-offs, transactionally-based techniques, and negotiating stratagems. It rarely results in litigation, and, in fact, a large part of the lawyer's role is to eliminate the uncertainties that generate litigation, or to place the client in a situation where it can obtain the benefit of the bargain by self-help or default, rather than by going to court.<sup>144</sup>

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139. See sources cited *supra* note 29.

140. See sources cited *supra* note 32.

141. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984).

142. Gilson, *supra* note 141.

143. See Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 *STAN. L. REV.* 927 (1990); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 *VA. L. REV.* 757 (1995); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 *AM. ECON. REV.* 519 (1983).

Another set of questions that a transactional perspective can address more effectively involves the fairness of consumer contracts. See Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 *U. MIAMI L. REV.* 1263 (1993); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 *HARV. L. REV.* 529 (1971).

144. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 *J. LEGAL PLURALISM* 1 (1981); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. POL. ECON.* 615

These additions to the curriculum not only will better prepare students for the practice of law, but also will offer a number of other advantages for both the students and the legal system as a whole. Susan Sturm has described the current litigation-oriented curriculum as the "gladiator model" of law, an approach where students are taught that the lawyer's only role is as a litigator, and that courtroom pyrotechnics are the pinnacle of professional achievement.<sup>145</sup> A revised curriculum would benefit students in their careers by signaling to them that litigation is not necessarily the favored form of legal action. The lawyer who is overly eager to sue the client's suppliers, distributors, or regulatory agency does not do the client much of a service and is not a very good lawyer. The introduction of regulatory and transactional law into the first-year curriculum also serves a career counseling function. That is, since many students are not inclined toward litigation and will ultimately end up as regulatory or transactional lawyers, it makes sense to introduce them to these areas in their first year, rather than misrepresenting our legal system as predominantly litigation-driven and leaving them to find their preferred professional roles by trial and error.<sup>146</sup>

From the perspective of the legal system as a whole, Robert Kagan and others have pointed out that American lawyers adopt an unusually adversarial, litigation-prone stance compared to their counterparts in other industrial nations.<sup>147</sup> It is not implausible to attribute the unusual combativeness of American lawyers to their training, and specifically to the first year of their training, which inaccurately treats the law suit as the defining event in the legal system.

Of course, there are other explanations for the adversarial behavior that Kagan observes. These include the delayed development of the American regulatory state, the American tolerance for

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(1981); L.G. Tesler, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27 (1980); Williamson, *supra* note 143.

145. Susan P. Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy and the Legal Profession*, 49 DUKE J. GENDER L. & POLY 119 (1997). See also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

146. Despite the litigious character of American society, the majority of lawyers, even in large firms famous for their litigation practice, are not litigators. In a 1993 survey, large firms reported that the proportion of their work constituting litigation varied from twenty-two percent (for Shearman & Sterling LLP) to forty-four percent (for Gibson, Dunn & Crutcher LLP). GLENDON, *supra* note 145, at 40-41.

147. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001). See David G. Litt, Jonathan R. Macey, Geoffrey P. Miller & Edward L. Rubin, *Politics, Bureaucracies, and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan*, 139 U. PA. L. REV. 369 (1990).

structured conflict, and the good old Turner thesis.<sup>148</sup> Even if the cause lies in factors that are entirely exogenous to the legal system, however, such as fluoridated water, law schools might better serve our society if they moderated America's legal adversarialism, rather than inciting it.

A revised first-year curriculum also highlights the centrality of social policy in the American legal system. We rely on law to achieve many of our collective purposes, including economic regulation, social justice, and national security, but we do not necessarily rely on litigation in these areas. Rather, we address these issues through legislation and administrative action and look to lawyers' skills as policymakers, planners, and implementers. A first-year curriculum that focuses almost exclusively on common law necessarily underemphasizes or ignores these social policy functions. Though they appear to some extent in upper-class courses, their absence from the mandatory first-year program signals to the students that they are not real law, that devising and implementing social policy programs is not as important as litigating common law cases. Since we rely so heavily on those with training in the law for our social policy programs, underemphasizing the legal skills required for this task represents a serious gap in our educational system.

A natural question, which would occur to non-lawyers as well as lawyers, is the fate of the famous—or infamous—Socratic method in a revised first-year curriculum.<sup>149</sup> This is ultimately a choice of classroom technique that each faculty member needs to make, and the suggested expansion of the first-year curriculum need not dictate that choice. It is certainly true, however, that the Socratic method is closely associated with Langdell's conception of common law as based on the enduring but implicit verities of the Anglo-American legal system. As described above, this conception is no longer plausible as a theory of law, but its empty shell can still serve as the basis for a classroom strategy, particularly considering the fact that few professors still use the unalloyed, hairy-chested<sup>150</sup> version that characterized its earlier incarnations. It seems unlikely, however, that this approach could be extended to courses that did not center on allegedly coherent lines of

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148. FREDERICK J. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1921) (existence of the frontier had a decisive impact on the development of American civilization). Adversarialism could be seen as part of the combative, individualistic spirit that flourished in frontier settings.

149. On the role of the Socratic method in the Langdellian curriculum, see sources cited *supra* note 30.

150. It is my impression, based on my older colleagues' recollection of their legal education, that the famous Socratic teachers of the past were particularly hard on women when they first began to appear in law school classes.

judicial decisions, such as a course introducing the regulatory state or transactional law. This does not mean, of course, that teachers in courses devoted to these subjects would need to abandon the question and answer format that gives large classes their lively, interactive character, but only that their questions would involve different kinds of analytic skills.<sup>151</sup>

Of greater significance, perhaps, than the Socratic method, is Langdell's reliance on appellate cases as teaching materials; that is, on primary sources rather than secondary sources such as treatises. This turned out to be a brilliant innovation: it replaced the treatises that characterized European legal education and contributed even more than the Socratic method to the liveliness of law school classes by enabling students and faculty to experience legal decision making first hand, and to question its wisdom or coherence.<sup>152</sup> Langdell's explanation that cases are the law student's laboratory no longer makes sense, but this is one of the rare instances where an existing practice truly can be justified by a new rationale. Modern pedagogic theories, such as Dewey's, strongly support exposure to primary sources as a learning experience. What would change in a reformed curriculum is the range of such materials used. The primary sources for regulatory law and transactional law, as well as for international law, modern litigation, and various other topics, are obviously not limited to decided cases. One way of stating this is that students who complete the traditional first-year program have learned to read a judicial decision; students who complete the reformed curriculum suggested here will have learned to read a case, a statute, a regulation, a contract, a lease, a complaint, an interrogatory, and a treaty.

### *B. The Upper-Class Curriculum Should Be Coherently Organized*

While most law schools prescribe the first-year curriculum in detail and the faculty collectively decides even minor changes in credit or coverage, the organizing principle for the upper-class curriculum is generally as follows: a bunch of courses. These courses are typically

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151. As Kristen Dauphinais has pointed out, this notion of fostering different analytic skills connects to another important theme in modern learning theory—Howard Gardner's concept of multiple intelligences. Kristen Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 1 (2005). For an account of Gardner's theory, see HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983); HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE TWENTY-FIRST CENTURY* (1999).

152. Kimball, *supra* note 5.



determined by negotiation between individual faculty members and the associate dean for academic affairs. Faculty members display a variety of motivations in these negotiations that include teaching the course for which they have written a casebook, teaching a survey course that will help them stay abreast of their field, teaching a boutique seminar in their area of research, or making sure all their classes meet between Tuesday afternoon and Thursday morning. The associate dean generally wants to obtain coverage of a certain set of courses that are deemed essential, largely based on student demand, or of a list of such courses that was maintained by the previous associate dean and handed down to the present one. Law schools regularly require only one course in the second and third years, professional responsibility, a generally resented requirement imposed by the American Bar Association.<sup>153</sup> Many schools require a few other courses that they regard as standard, but here as well, the bunch-of-courses strategy prevails; law schools almost never combine the required courses into a program with any element of coherence.<sup>154</sup>

We live in an era of legal specialists, and social science suggests that the best way to learn law, after an introductory first year, is to study the practices of those specialists. Langdell's idea that American law was a unified body of doctrine that could be explained by legal principles whose number "is much less than commonly supposed" is simply wrong in our contemporary era; legislation, regulation, globalization, and complex business practices have produced a tremendous multiplicity of legal rules and strategies that cannot be fit into any simple, overarching pattern. Thus, after the first year, students should be given the opportunity to study one area in depth. They should be offered a series of courses that connect to one another and combine into a coherent presentation of the area under consideration. Each law school should offer a range of such concentration programs, perhaps six to ten different choices depending

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153. ABA Standard 301(a)(5): "A law school shall require that each student receive substantial instruction in . . . the history, goals, structure, duties, values, rules and responsibilities of the legal profession and its members." A.B.A., SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, 2005-06 EDITION 18-19 (2005), available at <http://www.ahanet.org/legaled/standards/2005-2006standardshook.pdf>.

154. A.B.A., SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA 15-17 (2004). The survey reports that apart from Professional Responsibility, the most common required courses among American law schools in the upper-class curriculum were Constitutional Law (52.8% of law schools), Evidence (46.4%), Business Associations (21.5%), Federal Tax (16.9%), Criminal Procedure (14.3%), Trusts and Estates (13.8%), Commercial Law (11.1%), and Trial Practice (7.8%). Since these are all in different areas of law, and the last one in the list is required by only 7.8% of law schools, it suggests that very few schools—fewer than 7.8% in fact—have even two required courses in the same area.

on the size of the school. The point is not to prepare students to function as business lawyers, international lawyers, litigators, regulatory lawyers, environmental lawyers, or intellectual property lawyers the day they leave law school. Rather, a coherent presentation of one area would be designed to give students a sense of the way that modern law functions, of what lawyers do in their actual practices. Broad introductions have their place, particularly in the first year, but to keep introducing one area after another, reaching the same level of detail, and never going beyond the fairly rudimentary level of understanding achieved within the compass of a one-semester course, is to misrepresent the complexity of modern legal practice, not only in one area but in its entirety. Concentration programs of this sort need only occupy approximately half of the upper-class student's coursework. The remainder could be devoted to bar-oriented courses, general courses in other areas, secondary interests, passing fancies, or courses in other departments. But students should be given the opportunity to study one area in depth and be encouraged to do so.

A coherently organized upper-class curriculum not only follows the social science model of allowing students to study an area of practice, but also allows the law school to incorporate the substance of social science into its courses. There is, at present, a vast amount of learning about the subject matter of law available in the work of economists, political scientists, sociologists, anthropologists, psychologists and scholars in related fields. By contrast, law as an autonomous discipline, generating insights by analyzing the internal coherence of judicially created legal doctrine, has largely run aground. Offering students a coherent course of study in a given area of practice will enable them to go beyond the mastery of legal rules and to explore the insights that other disciplines provide. For example, in regulating commercial behavior, law depends heavily on an understanding of economics. In being implemented by institutions and attempting to control the actions of institutions it depends on sociological, political science, and economic insights about organizational behavior. In being implemented by individuals, and attempting to control the actions of individuals, it demands on sociological, anthropological, and psychological explanations of individual behavior. Finally, as a branch of governance, it relies on political science. Yet students can only pursue these insights in a serious, productive manner when one field of law is pursued in depth.

Interdisciplinary education is sometimes regarded as an abstruse, theoretical excursion that legal academics, who chose to avoid practicing law, impose on students with very different motivations. In fact, social science is not only a means of studying law,

but its subject matter is increasingly a component of legal practice. Modern lawyers are not simply doctrinal specialists but knowledge brokers; they translate complex bodies of information into legal terms. The massive fact-gathering enterprises of contemporary litigation, for example, involve information about the economic realities of a business enterprise, or the behavioral realities of individuals and organizations, and not only about legal rules. The contemporary transactional lawyer facilitates a complex business deal, which often requires detailed knowledge of the deal and the underlying enterprise of the participants. Regulatory lawyers must understand the rationale and process for government intervention in areas such as the environment, resource management, employment relationships, financial intermediation, health, energy, and a wide variety of other fields to represent either the government or the group of private enterprises that are subject to governmental regulation, which is to say, all of them. The danger of a specialized, interdisciplinary course of study in the upper years is not that critics will perceived it as too academic, but that it will be perceived as too practical. While such a curriculum will prepare students to practice in a given area much better than the current approach, the primary point is to teach students about law in general by enabling them to pursue one area with the intensity and depth that is required to go beyond the level of current one-semester year courses.

*C. The Curriculum Should Progress from the First Year to the Third*

Implicit in the foregoing recommendations is the idea that the law school curriculum should progress from the first year to the third. Instead of teaching three years of second-year courses—that is, courses at the same level of detail—law schools should apply the insight of Dewey and other progressive educators that education is a developmental process. The first year should be broadly contextual; it should provide students with a general picture of the legal system, expose them to basic legal materials, and introduce them to the basic modes of legal thought. Doing so not only introduces them to the content of the modern legal system but also initiates a developmental process that will carry through the remainder of their law school education. One can, if one chooses, call this thinking like a lawyer—and certainly a program that includes regulatory law, transactional law, and international law is more entitled to advance this claim than one limited to common law. But it may be more accurate to describe this as learning to think like a law student; that is to say, to begin a

developmental process that will produce a well-trained professional at the end of the three year course of study.

Broader, more contextual first-year courses should serve two functions for the upper-class program: a foundation and comprehensive coverage. The traditional first-year curriculum claims to be foundational because it teaches students a mode of thought—that is, common law reasoning. Apart from the limited value of this mode of thought for many upper-class courses, the claim is highly abstract and overly conceptual. In terms of substance, the traditional curriculum is uniform and non-developmental; first-year classes are devoted to topics, such as contracts, torts, and property, that students typically do not take again in any recognizable form. Instead, the first year should provide introductions to broad areas of law that will be examined in greater detail by upper-class courses. Thus, a course on the regulatory state would be designed explicitly as a foundation for administrative law, environmental law, securities law, and a variety of other courses on specific regulatory regimes. A course on transactions would prepare students for a series of more detailed transactional courses such as mergers and acquisitions, international business transactions, negotiation, and advanced contract drafting. A litigation-oriented civil procedure course would not only provide a foundation for complex litigation and federal courts, but would also introduce the institutional features of the process that are relevant to a wide range of corporate and public law courses in the upper-class curriculum.

These same courses can provide comprehensive coverage of a given field for students who have no interest in it and do not choose to take any upper-class courses in that field. For example, constitutional law courses in the first year often focus on structural constitutional law (federalism, separation of powers, the commerce clause, and so forth) and leave the Fourteenth Amendment and the Bill of Rights to the second and third years. Again, this reflects a non-developmental approach, where courses in each year cover a unique topic at the same level of detail. Instead, a first-year constitutional law course should provide a general introduction to the entire field that will not only provide a framework for students who take upper-class courses, but will also leave students who choose not to take any further constitutional law courses with a general picture of the entire document. To take another example, a first-year course on the regulation of business, which introduces students to basic concepts of property, money, capital, corporations, securities, bankruptcy, antitrust, and tax policy, would serve as a foundation for upper-class business courses. Students often take corporations in their third

semester and learn a lot of rules about forming a corporation, exercising voting rights, and piercing the corporate veil. But how meaningful is all of this if the student does not have some preliminary knowledge of bankruptcy and securities law? Why would anyone want to create a corporation in the first place were it not for the functions of raising money and avoiding liability? On the other hand, students who have no interest in business law, and who took no other courses in the area, would graduate with at least a rudimentary understanding of the basic concepts and bodies of doctrine in this area.

In the upper-class years, the developmental approach emphasizes the importance of organized, coherent concentration programs that enable the student to pursue a particular subject area in depth. It further suggests that these concentration programs should progress from the second year to the third. The second year of a concentration program could consist of a set of familiar-looking courses in the field under consideration, typically one or two required courses (administrative law in a regulatory law program, corporations and securities in a corporate law program, criminal procedure in a criminal law program, and so forth), plus a choice from among a list of other relevant courses. By the third year, the program should progress to offering students a more intensive experience of some kind. Such a sequence could include a year-long research seminar; a course where students are trained, carry out a real-world activity and discuss what they have learned in a classroom setting; or a course in which they are participant observers of a real world setting and simultaneously analyze what they are observing. Courses of this kind are sometimes called capstone courses because they come after students have taken a set of specified second-year courses; the students can thus build on a well-developed knowledge base. To be a properly intensive experience, a capstone course should occupy between one-third and one-half of the student's time during the third year.

It is no secret that law schools have lost the attention of their third-year students. In informal conversations, law professors typically attribute this phenomenon to the fact that many students have received job offers after their second summer and simply are biding their time in law school until they can graduate and start work. This may be true, but educators should not succumb to fatalism of this sort without trying alternative approaches. A third-year program that consists of the same type of passive learning courses that the students have been offered for two previous years can be predicted to induce ennui. In addition, it is aberrant in educational terms. No other graduate level program uses a passive learning model for third-year students; medical students are in the hospital by their third year,

Ph.D. students are working on their dissertations, and business students have already graduated. Law students are tempted to sleepwalk through their third-year courses because such courses are too easy for them by that time, and they are induced to do so because the format is uninteresting. Capstone courses, which give students an opportunity to carry out some advanced project in an area of interest, represent a more serious effort to hold the students' interest.

The result of this approach is that the courses in each year of law school would look different. Visiting a class, one could immediately tell, independent of the subject matter, whether it was being offered to first-, second-, or third-year students. This is a developmental approach to education, one that incorporates, rather than ignores, the preceding century or so of thought about education and the learning process.

#### *D. Experiential Learning Should Be an Integral Part of the Curriculum*

Another central tenet of Dewey's educational approach, reiterated by phenomenology and amply confirmed by modern psychology, is the experiential character of learning and, indeed, of thought in general.<sup>155</sup> This is a very general point, applicable to the most abstract thought processes.<sup>156</sup> It has a specific application to the learning process, in that learning itself is an experience and must be treated as such if it is to be done effectively. This leads to the conclusion, discussed above, that learning is an essentially developmental process. But it also has the more concrete, literal implication that real-world experiences provide a vivid and visceral aid to learning, that many lessons are best learned by being observed or applied in the settings where they will ultimately be used.<sup>157</sup> The

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155. This view is not limited to phenomenological accounts, *see, e.g.*, ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS* (1999), but also informs mechanistic and cognitive accounts, *see* PATRICIA CHURCHLAND & TERRENCE SEJNOWSKI, *THE COMPUTATIONAL BRAIN* (1992); DANIEL DENNETT, *CONSCIOUSNESS EXPLAINED* (1991); STEPHEN KOSSLYN, *IMAGE AND MIND* (1980). Even psychological theories that emphasize the biological basis of thought do not claim that we inherit, or can instinctively perceive, ideas, as Plato thought, but rather that biology predisposes us to learn from and respond to experience in specific ways. *See, e.g.*, STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2002); MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* (1996).

156. For Husserl's phenomenological account of scientific thought, *see* EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* 21-68 (David Carr trans., Northwestern Univ. Press 1970) (1954).

157. In fact, recent studies of the brain reveal the surprising existence of "mirror neurons." These are neurons that fire when "an individual performs simple goal-directed motor actions, such as grasping a piece of fruit. The surprising part was that these same neurons also fire when

University of Chicago Laboratory School that Dewey designed was famous for its use of vocational skills to teach even abstract concepts.

Langdellian legal education, set in place before the development of modern educational theory, restricted all of its activities to classroom lectures. This virtually precluded experiential learning. To be sure, the intense interrogation of a lawyer about doctrinal arguments that characterizes appellate procedure can be duplicated, at least to some extent, in the classroom setting, but this is probably a post hoc rationalization for the Langdellian method, and in any case, applies only to the this one, relatively rare aspect of legal practice. As time went on, and the modern understanding of the learning process became prevalent, legal educators sought ways of incorporating the insights of educational theorist such as Dewey into their educational program. The introduction of skills training and clinical education resulted from this effort. Skills training is generally delivered through classroom simulations, such as a mock trial, a mock negotiation, or a drafting exercise.<sup>158</sup> Clinical education typically involves the provision of legal services to people who cannot afford to purchase them and who consider themselves fortunate to receive it even from novice practitioners.<sup>159</sup>

These experiential programs have been developed and refined over time, often by teachers who take their educational mission very seriously. However, these programs are not integrated with the lecture classes, and they have been marginalized by their later

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the individual sees someone else perform the same act.” Giacomo Rizzolatti, Leonardo Fogassi & Vittorio Gallese, *Mirrors in the Mind*, SCIENTIFIC AMERICAN, Nov. 2006, at 54, 56. The authors suggest that this correspondence may be the feature that allows an individual to comprehend the actions of another individual, thus facilitating the learning process, and they specifically note that it tends to confirm phenomenology. *Id.*

158. See, e.g., STEVENS, *supra* note 7, at 213-15; Marshall W. Houts, *A Course in Proof*, 7 J. LEGAL EDUC. 418 (1955); Howard L. Oleck, *The “Adversary Method” of Law Teaching*, 5 J. LEGAL EDUC. 104 (1952). This approach seems to date from the 1950s, at least as an explicit educational strategy.

159. See, e.g., CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (Edmund Kitch, ed., 1969); PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION (1998); STEVENS, *supra* note 7, at 214-16; Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604 (1983); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974); Philip C. Kissam, *Lurching Toward the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1993-2000 (1999); Charles H. Miller, *Clinical Training of Law Students*, 2 J. LEGAL EDUC. 298 (1950); Spiegel, *supra* note 3.

The concept of clinical education gained currency in the 1930s. See John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933). Implementation did not begin on a significant scale until the 1940s and 50s however. See SCHRAG & MELTSNER, *supra*, at 3-7; STEVENS, *supra* note 7, at 215-16.

introduction into the curriculum and by the norms of the professoriate. Typically, full-time clinical or skills educators are not tenure-track faculty, while tenure-track faculty, under increasing pressure to publish, rarely can devote the necessary time to preparing and teaching a skills course or to running a live client clinic. Still more problematically, the subject matter of skills and clinical courses is not integrated with traditional lecture courses.<sup>160</sup> The clinic is a separate physical facility in most law schools, often located off-site to be more accessible to the clients. Most faculty members have only a vague idea of what the clinic is teaching and how those experiences might relate to their own materials. Skills courses, although physically located in regular law school classrooms, are often taught by practitioners who are equally isolated from the regular faculty. Externship programs, where students spend a semester in a real-world legal setting, are even more isolated from the rest of the curriculum; they are regarded as individual experiences, and most of the faculty has no contact with, or knowledge of, any student's externship activities. This isolation sends a clear signal that students have no difficulty perceiving: skills courses, clinical courses, and externship programs are separate from and often secondary to their "real" legal education.

A modern approach to legal education would integrate experiential learning into the regular educational program. Every first-year course could have a skills component. When students study transactions, they could draft and negotiate, as well as read, a contract; when they study regulatory law, they could be asked to put a simple initiative into statutory language and then draft an implementing regulation; when they study civil procedure, they could draft a complaint and an interrogatory. These are simple exercises, corresponding to the generality of the first-year program. They are not intended to produce the level of skill needed for practice, or even to teach the skill itself, but rather to reify the classroom material. It is one thing to decide, after reading a contract, that the language is ambiguous, or that the judge misinterpreted ambiguous language; it is quite another to try to express a simple transaction in unambiguous contractual language of one's own.

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160. In 1992, the American Bar Association issued the results of an extensive study regarding legal education. A.B.A., SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992). The "MacCrate Report," so named for the Chairperson of the Task Force, Robert MacCrate, strongly recommended that law schools substantially increase skills training. Remarkably, it did not deal with the relationship between the recommended skills training and the remainder of the curriculum. Indeed, it appears largely innocent of any contact with educational theory, and almost other-worldly in its focus on a set of defined, low-level practice skills.



More elaborate simulations or real world experiences probably would not fit into the first year and could not be accommodated conveniently into a standard upper-class course. The most promising means of achieving this integration would be through the concentration programs described above. Instead of trying to integrate a clinic or more elaborate skills training into a single course, concentration programs could be designed to include these experiences as part of a coherent educational plan. For example, a concentration that focused on regulatory law might include semester-long placements of students in state or local government agencies, with a simultaneous or subsequent classroom course that analyzed the students' experiences. A litigation concentration might include a live client clinic where students represent clients in criminal or civil cases, or a business law concentration might include a clinic where students assisted small businesses in obtaining corporate charters. In each case, the concentration might also include a course preparing students to carry out these representations and then following up their experience by having them assess it. Sophisticated clinical programs already provide for preparation and follow-up of this sort. But these functions should be carried out by courses that are integrated into a larger concentration program, a program that treats experiential learning as an integral part of its overall design.

#### CONCLUSION

The natural tendency to interpret past events in contemporary terms has lent a misleading modernity to the law school curriculum that C.C. Langdell initiated in the 1870s. This Article argues that this curriculum is actually as antiquated as its date of origin suggests, and that its underlying premises are truly alien compared with those that nearly all of us maintain today. When Langdell developed his approach to legal education, our national government carried out few regulatory functions and our economy was largely self-contained. The level of understanding about the origins of common law was not much better than a troglodyte's understanding of the origins of the sun and moon. There was no social science in the United States apart from a superficial admiration for the now-abandoned views of Edmund Spenser. People conceived of education in roughly the same terms as Plato and Aristotle did, as a process that was exclusively addressed to the student's rational facilities. One cannot blame Langdell for this; he was working with what he had. But why should we model our system on principles that are so seriously out of date? We live in a regulatory state and a globalized economy. We have historical accounts indicating

that the common law was a creation of the twelfth century English state. Social science is now available for use as a methodological model and as a source of substantive insights. We have pedagogic theory and educational psychology that tells us how students actually learn.

This Article recommends that law schools respond to these changes by creating a modified first-year program that corresponds to the contours of contemporary legal practice and a new upper-class curriculum that offers coherent, inter-disciplinary programs in specific areas of law. It further recommends that the entire three years should be designed so that the curriculum progresses from one year to the next and incorporates experiential learning into its general structure. These recommendations are only tentative, and there certainly are other possible responses to the changes that have occurred since the introduction of the Langdellian curriculum. The underlying point is that legal education needs to change. It is time to incorporate all of these developments, and the insights that they have produced, into the law school curriculum. It is time to develop a law school curriculum for the twenty-first century.

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