

COLLOQUIUM

LEGAL EDUCATION THEN AND NOW: CHANGING PATTERNS IN LEGAL TRAINING AND IN THE RELATIONSHIP OF LAW SCHOOLS TO THE WORLD AROUND THEM*

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PROFESSOR JAMES MAY: Welcome, one and all, to our week-long Centennial Celebration and to this morning's session on Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them. We're really honored this morning to have a truly terrific panel to speak to us on some of the most fundamentally contested issues in legal education, both past and present. Joining us this morning are Professor Jack Schlegel from the State University of New York at Buffalo School of Law; Professor Bob Gordon from Yale Law School; and Professor Joan Williams of the Washington College of Law ("WCL").

I'm Jim May, and I'll be moderating the session this morning. Before introducing the speakers, I would like to say a few brief words about the path that WCL has traveled these past 100 years to arrive here at our new home.

We have now moved into what is our lucky eleventh and best home for WCL since its beginning with the Woman's Law Class of 1896, but let me first back up and set the context for the founding of WCL. In 1873, Supreme Court Justice Joseph Bradley famously declared that women had no right to become lawyers because, he said, "The para-

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mount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."¹

Twenty-three years later, two exceptional attorneys and feminists in the nation's capitol, Ellen Spencer Mussey and Emma Gillett, established the Woman's Law Class to provide women with a greater opportunity for legal training.² The Woman's Law Class soon evolved into the Washington College of Law, which was designed primarily for women. In fact, at the time of WCL's 1964 groundbreaking for the Myers Building,³ a woman was the oldest living law graduate. Although the Law School was primarily for women, it was, from the start, open to men as well.⁴ Sadly, the School's inclusiveness in those early years was not universal. The new School, like all of the law schools in the nation's capital at that time except for Howard University Law School, was open only to whites.

The early teachers and students at WCL did not strive merely to communicate and absorb what they believed to be the relevant fundamentals of legal training within society as it then existed. Many of the early professors and students at WCL sought to change the legal rules of that society and society itself by joining prominently in the early twentieth century struggle for a women's suffrage amendment to the U.S. Constitution. Indeed, the first dean of the Law School, Ellen Spencer Mussey, suffered severely as a result of the attacks on the suffrage demonstrators who marched here in Washington, D.C. on the day before President Wilson's inauguration, and Mussey was

1. *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872).

2. Ellen Spencer Mussey and Emma Gillett began the Woman's Law Class in 1896 with three women as students. See Ronald Chester, *A Survey of WCL Women Graduates: The 1920s Through the 1940s*, 32 AM. U. L. REV. 627, 627 (1983) (discussing birth of WCL as response to difficulties women faced in late nineteenth century in pursuing careers in law); Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 633 (1998); Audrey Pia, *Founding of the Washington College of Law*, 32 AM. U. L. REV. 617, 617 (1983) (stating that WCL was established because no other law school in the District of Columbia except for Howard University admitted women into its program). "[C]lasses were held in Mussey's law offices, where she taught Constitutional Law, Contracts, and Personal Property, while Gillett taught Blackstone, Bills and Notes, and Domestic Relations." WASHINGTON COLLEGE OF LAW, WASHINGTON COLLEGE OF LAW: CELEBRATING A CENTURY OF EXCELLENCE 1896-1996, at 6 (1996) [hereinafter CELEBRATING A CENTURY]. Two years later, the school was incorporated as the Washington College of Law. See *id.* at 7.

3. The John Sherman Myers Law School Building was dedicated in 1964 on American University's main campus. Myers Hall remained home to WCL until January 1996. See WASHINGTON COLLEGE OF LAW, CELEBRATING A CENTURY—FACTS AND EVENTS 1896-1996 (1996) [hereinafter TIMELINE] (showing timeline of WCL's location, number of students, faculty and staff, admission requirements, number of degrees granted, curriculum, and tuition).

4. See CELEBRATING A CENTURY, *supra* note 2, at 7.

forced to step down as a result, to be replaced by Emma Gillett.⁵

The ultimately successful struggle for the Woman's Suffrage Amendment, of course, was waged by two major organizations, the National American Woman's Suffrage Association, headed by Carrie Chapman Catt,⁶ and the National Women's Party, the more militant of the two organizations, which Alice Paul headed.⁷ Alice Paul herself, of course, would come to WCL to add a law degree to the Ph.D. she already had from the University of Pennsylvania, and would graduate from the Law School in 1923, the same year that she would draft the initial version of the proposed Equal Rights Amendment.⁸

In 1920, the year that the Suffrage Amendment was added to the Constitution,⁹ WCL moved to 1315 K Street, N.W. Six years later, in 1926, we moved to a new building located at 2000 G Street, N.W. There, the law school would stay for almost the next forty years.¹⁰ As you can see from an early ad recruiting students, the tuition of fifty dollars a semester didn't quite stay unchanged, but the building did for many, many decades. And it was in that building that students gained a legal education during a time of tremendous change in the country.

In those four decades, law and legal education in the nation's capital and throughout the country would be substantially affected by the experience of the stock market Crash, the Depression, and the New Deal; then later by the concerns and perspectives resulting from the Cold War; and then in the 1960s by such changing concerns and developments as those associated with the Civil Rights Movement. Still later, by the early-to-mid 1960s, before WCL left its old building on G Street and moved to the Myers Building on the main campus, law and legal education were affected by the revival of the modern women's rights movement, which would build upon, and, in many respects, revisit the work of early twentieth century feminists such as Ellen Spencer Mussey, Emma Gillett, and Alice Paul.

5. See GRACE HATHAWAY, *FATE RIDES A TORTOISE: A BIOGRAPHY OF ELLEN SPENCER MUSSEY* 167 (1937).

6. Carrie Chapman Catt became President of the National American Women's Suffrage Association ("NAWSA") in 1916. See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 *UCLA WOMEN'S L.J.* 103, 188 (1994) (exploring Supreme Court's role in reinforcing dominance patterns by its support of laws preventing women from voting).

7. See SUSAN D. BECKER, *THE ORIGINS OF THE ERA: AMERICAN FEMINISM BETWEEN THE WARS* 4 (1981) (providing overview of suffrage movement and its players).

8. The Equal Rights Amendment was first introduced in Congress later that same year. Its straightforward text read: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." *Id.* at 19.

9. See U.S. CONST. amend. XIX.

10. See *TIMELINE*, *supra* note 3.

As we begin our experience with our wonderful new building, it's instructive to see how far we have come from WCL's earlier home at 2000 G Street, now two chapters behind in our institutional life. As you can see from the slide, the new building here isn't the first one to have a Classroom 101, seating about 100 people. The G Street building also boasted a spacious, air conditioned library with a front and back reading room, with table seating for more than sixty students. But by 1964 the Law School had outgrown its G Street facilities and moved to the main campus.

The building on the main campus that we've just left, with the separate library building that complemented it, like the building in which we're now sitting, heavily reflects the many contributions and bears the names of Dean John Sherman Myers and his wife, Alvina Reckman Myers. That on-campus site was the place where almost all of the current faculty and students of the Washington College of Law got their first sense of what it is, respectively, to be either a law professor or a law student.

After more than thirty years on that campus, however, we obviously began to bulge at the seams and searched throughout the surrounding area for a suitable, hospitable setting. Who can forget being lured by the Tenleytown neighborhood to the Immaculata campus and the good times and hijinks we (almost) had there? Or the brief time we (conceptually) spent at the Cassell Building before finally moving into our present new facility, after being wooed here by the neighbors of Spring Valley.¹¹

(Laughter.)

PROFESSOR MAY: Now, these very few and really highly selective aspects of the last 100 years suggest only a very small part of a much more involved history of experience lived by many generations of students, staff, and faculty at WCL.

The history of legal education at this law school or at any law school during the past 100 years is a complex reflection of both very localized, particular elements and developments, and much more widespread patterns and forces in the legal profession and in legal education in general, as well as in the society at large. The history of any law school powerfully reflects both change and continuity in thinking and practice over such a long span of time.

11. See, e.g., *Duke v. American Univ.*, 675 A.2d 26 (D.C. 1996) (involving attempt by neighborhood residents to enjoin American University from moving law school to Spring Valley location); *Spring Valley-Wesley Heights Citizen Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 434 (D.C. 1994) (affirming Board of Zoning Adjustment's decision that it lacked authority to prohibit American University from occupying commercially-zoned building in Spring Valley).

Indeed, the 100-year history of WCL is inseparably connected to the larger, complex story of legal education in America that spans still a longer period of time. Lawyers were trained in America long before the 1784 appearance of the rather modest, one-room facility of the first American law school, which was located in Judge Tapping Reeve's yard in Litchfield, Connecticut.¹² And law school training, of course, has had a long history in the country. Having said that, it nevertheless is the case that it is heavily from the late nineteenth century that we have to trace so many of the fundamental, recurring patterns and controversies in modern legal education at WCL and throughout the country. More particularly, we have to trace many of the issues that we still grapple with to nationally prominent figures such as Dean Christopher Columbus Langdell, who has haunted much of legal education since the 1870s.¹³

(Laughter.)

PROFESSOR MAY: It's not just Langdell that gave us a legacy from the late nineteenth and early twentieth century, but also prominent critics of tendencies associated with Langdell, such as Oliver Wendell Holmes¹⁴ and Louis Brandeis.¹⁵ Having said all of that, this larger story of change and continuity, of substantial consensus and recurring controversy in legal education, is the subject of the remarks of our speakers this morning. So, without further ado, let me turn the discussion over to the speakers.

PROFESSOR JOHN HENRY SCHLEGEL: Thank you for having us. I've come to believe, over time, that law school is best described as a disaster mitigated by students.

(Laughter.)

PROFESSOR SCHLEGEL: If we did not have such good students, law school would be even worse. I speak from this vantage point: I

12. Judge Tapping Reeve began teaching students the law through apprenticeship. In 1782, Reeve set out to develop a fifteen-month course of lectures, and two years later, he opened a small classroom next to his home. See Donald F. Melhorn, *A Moot Court Exercise: Debating Judicial Review Prior to Marbury v. Madison*, 12 CONST. COMMENT. 327, 328 (1995) (reviewing history of legal education with an eye to understanding origins of early debates on judicial review prior to *Marbury v. Madison*); see also Amy M. Colton, Note, *Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education*, 27 U. MICH. J.L. REF. 963, 964-75 (1994) (examining history of American law schools).

13. See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 35-42 (1983); John Henry Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1517-32 (1984) (book review); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 520-41 (1991) (discussing Langdell's contribution to study of law).

14. For recent accounts of Holmes' thinking, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 32-48 (1995); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 109-43 (1992).

15. See HORWITZ, *supra* note 14, at 182, 204-05.

went to the University of Chicago Law School in the mid-Sixties. It was probably the best legal education available at the time, but I surely didn't experience it as such. No, this is not another story about why I hated my legal education, a story which each of you could contribute to. To be quite honest, I didn't hate law school. Most of the time, I was just totally bewildered by the experience. Law school wasn't about anything. Oh, we spent a great deal of time talking and thinking about the rules of law, understanding their purposes, and trying to find out whether they were the right rules, rules supported by sound policy. But I am the grandson of a Chicago alderman and I knew from experience that law wasn't about rules, but about power, about who you know, and about how you do things.

Law school was very bewildering to me. I remember, in particular, a vivid discussion of an old habeas corpus case that may still be taught, *Henry v. Mississippi*.¹⁶ Aaron Henry was then president of the NAACP's Mississippi Branch. The question we debated in class was whether it was proper for the federal courts to interfere in the prosecution of Henry for something or other having to do with the NAACP at the time. I was totally flabbergasted at the discussion, and finally I just could not take it any more. I sat in the back of the class—I almost never spoke—but I screamed out loud, "The Supreme Court is not going to let Aaron Henry risk his life in a Mississippi jail!" Instead of the Shavian "universal applause" I craved, I was told that my comment was irrelevant to the question at issue: the proper scope of the habeas corpus clause.

I am just as bewildered by legal education today as I was then. I've spent much of my twenty-five years of law teaching trying to figure out how it came to be that what I knew to be law was not the center of what was discussed in law school. Much of this time has been devoted to a related topic: trying to understand how it is that law school, a piece of the university that developed at the same time as departments such as economics, political science, sociology, and from a common root stock, came to be the only one of these disciplines that was not taken over by the notion that it was an empirical science, the notion that the proper subject for research and study is the world out there—the law in action and not the law on the books.¹⁷

My study of this question spent a lot of time looking at empirical

16. 379 U.S. 443 (1965).

17. See generally WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 3-60 (1982) (exploring development of American law schools and legal education).

research done by American legal realists at Yale and Johns Hopkins during the 1920s and 1930s.¹⁸ They did a lot of interesting research, some about courts, some about divorce, some about auto accidents, some about parking, some about negotiable instruments—all of these inquiries into the way the world seemed to work at the time. Yet, I refer to all of the results as the invention of the square wheel.¹⁹

From time to time, lawyers go out, they look at the world, they say, "Oh, how interesting," and then it's forgotten. Then they'll think, "This is exciting, a new idea; we'll go out and look at the world again." And they get excited, they tell something, and, thunk, another turn of the square wheel.

My conclusion, that law school resisted empiricism because empirical inquiry into law undermined the professional identity of the law professor, an identity formed around the notion of law as rule, seems to have brought forth less outrage than I had hoped for when I began the project. So much for the satisfaction of having one's hypothesis confirmed by behavior in the world.

I get two responses from law professors. The first is that I do not understand that the "law is a normative enterprise pursued from an internal point of view, a view point that empirical science cannot accommodate."²⁰ This is, of course, in some sense true. It clearly describes how some participants in law see their enterprise. But in another sense it is astonishing, for it is just this understanding of law that was disputed by the Realists, and by me I might add. They believed that law could best be understood as a set of practices of human actors seen from an external point of view. One does not dispute their belief about how something is best understood (and taught?) by asserting that it is wrong.

The second and better response that I get is a somewhat hesitant suggestion that I should outline precisely just what I think law school would be like, how it would be better, if empirical study were at the center of research and teaching in law. Shades of a demand back in the heyday of Critical Legal Studies that we lay out in detail how we would reform a given area of law.

18. Legal realists believe that the principles of law must not be studied in a vacuum, but rather that they should be "located in the total context in which they are being used—in the community process in which people are using these doctrines to effect, or justify, some specific distribution of values." Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 *YALE L.J.* 1345, 1345 (1947). See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) (describing rise and fall of American legal realism).

19. See SCHLEGEL, *supra* note 18, at 211-57 (discussing square wheel theory and "reasons for the decline of the Realists' efforts at empirical legal research").

20. James E. Herget, Book Review, 39 *AM. J. LEGAL HIST.* 396, 397 (1995).

I am not as exasperated by the request as I was then—age and raising teenagers, I guess. So I wish briefly to answer the question, “well, what would you do with (though the implicit preposition is ‘to’) law school?” as if it were well-intentioned, as it is in the case of my friends, and not off-putting. In so doing, I wish to suggest what I think that this school should be like long before its next hundred years are up. To be direct, it would be a school where a Chicago alderman’s grandson would not be bewildered by what was going on.

I take my cue from two classic Realist documents. Edward S. Robinson, Thurman Arnold’s sidekick, distinguished between law books, books directed at the explication and justification (including criticism) of doctrine; and books about law, books directed at understanding how the people and ideas wielded by the people involved in doing law, work out in the world of contingent human actors.²¹ The distinction, of course, echoes similar ones made by Holmes²² and Pound²³ earlier and has been picked up by such later scholars as Max Rheinstein²⁴ and Richard Abel.²⁵ About the same time, Karl Llewellyn, not yet seeing the necessity of recanting his Bramble Bush assertion that, “what these officials do about disputes is, to my mind, the law itself,”²⁶ equally dogmatically posited that “not rules, but doing” is what law professors train students for.²⁷ I would put these two ideas together and suggest that law school ought to be training students to do the great range of things that law-trained individuals (not just practicing lawyers) do. Further, I would suggest that the focus of such an education ought to be on learning how those things are done, both by reading about how those things are done, reading the results of good, empirical research designed to develop usable theories about the doing; and by trying, in a neophyte’s way, to do those things as well.

Now one can, I think, argue that at least the second one of these two things was what Christopher Columbus Langdell was attempting to do from the start and what good law professors have done ever since. While teaching doctrine, or as he more accurately called it at the time, “principles,” he was trying to teach his students how to use principles by engaging in argument with them such as might be had

21. See EDWARD S. ROBINSON, *LAW AND THE LAWYERS* (1935).

22. Such as the “bad man” analogy in Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

23. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

24. See MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 7 (1972).

25. See Richard Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175 (1973).

26. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 3 (1930).

27. See Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 654 (1935).

between counsel or with a judge. And one may even suggest that Langdell was trying to do the first since he was surely using the techniques of argument common at the time as he knew from his own practice and from the library record of the appellate courts.

There are three problems with such an understanding. First, the truly relevant question is not what he was trying to do, but what his students were learning from his class discussion and most significantly, from his newly instituted exams. I think that they were learning to organize the rules in nice, easily-salable packages, as is surely the case today when a student is facing a so-called issue-spotting exam, or any other exam that does not require a student to exercise and explicitly defend a strategic choice as to what to do and say from among a range of plausible courses of action.

The other two problems are more interrelated. Arguing to a decision-maker or even another lawyer is not nearly all of what a law-trained individual does today (or even in 1870). It is this range of activities, and the subject matter specialties, that we should be training our students to undertake and, even to the extent that lawyers do make doctrinal arguments (or in the currently fashionable literature, use the rhetorics of law), there is a big difference between what Langdell and we today do in this direction. We should be making explicit those techniques, rather than teaching by means of what Llewellyn called "dog law": watching examples paraded in front of one's eyes and having one's nose swatted with a rolled-up newspaper when one does the job wrongly.

Put bluntly, at best, the contemporary law school looks at a ridiculously narrow range of legal practice, and even within that range presents almost no explicit theory about how those practices are accomplished. It acts as if law were a normative discipline that could be understood best from an internal perspective. It was precisely this perspective that was adopted by Paul Carrington when he suggested that those without such a perspective, namely some critical legal scholars, leave the law school for another piece of the academy.²⁸ Thus, all I advocate is the much-vaunted union of theory and practice, but explicit theory and very broad practice. By which I mean what?

My proposition is simply this. I believe that law-trained individuals acting as such when working for a client fuse three kinds of knowledge: knowledge of the rules of law and how they can be and are used; knowledge about the routine, and not so routine, activities of

28. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

lawyers, government functionaries, people, business entities, private associations, and government bodies; and, third, knowledge about the rich social, economic, and political world in which both the rules and the activities take place.

This is my theory—all intellectual historians are philosophers in disguise. I'm perfectly willing to see it disproved, or what is more likely, altered in emphasis depending on the specific practices of law-trained people that are in question, so long as the disproof or altering is based not on an assertion of what has always been the case in law schools, but, instead, based on careful, systematic—though most likely not quantitative—empirical research about what it is that these people do through the writing of books and articles about law.

What I'm not willing to concede is that law schools today do anything like this, even in the areas of doctrinal argument that they focus on. To do it right, to see law as would the Chicago alderman's grandson, one would, at the minimum, need to explicitly and equally avert to all three legs of the three-legged stool of rules, activities, and context. I say "at the minimum" because given the deep cultural understanding of law as rule-neutrally applied, we probably would have to work overtime on the activities and context legs to get a stool that would support any weight, but, for the time being, I'm willing to settle for equality.

Thus, I believe that if we want to train students to do law, we must see to it that we give students explicit theory and engage them in at least simulated practice throughout their curriculum. That is, unless schools start teaching their students to do something explicitly beyond "arguing," and unless this teaching is tied explicitly to the real practices of real law-trained individuals in real contexts—known, not through law professors who, as we all do, guess on the basis of talking to one lawyer and reading a few stories in *The New York Times*, *The Wall Street Journal*, or *The National Journal*, but through serious, systematic, and sustained research into what those practices and contexts are—we will continue to do little more than add tinsel to a tree that is best seen as the justification of state and private power to its acolytes. Yes, justification, for criticism justifies that which is not criticized.

What ought this research look like? What ought the teaching look like? If the practice in question is appellate argument, let this first scholar start by reading 200 briefs in the Tennessee Court of Appeals and then talk to a bunch of Tennessee lawyers and judges. On the basis of that information, tell us how lawyers make arguments, what kinds are effective, and why. Don't look at the fancy leading cases.

Look at what happens every day. Generate a theory about what's effective and explicitly teach students that theory so that if the students' experience proves our theory wrong, they can explicitly correct it and tell us. If the topic is the practice of criminal law, teach students the vast literature that explains who's prosecuted and how prosecution and defense attorneys act. Then gather readable data about how the few trials that take place are done, about the way that constitutional guarantees work in the process, and about the dozens of other questions that make criminal practice so simple and so complicated, and teach that explicitly, too. Teach theory based on knowledge about the world of practice and let students try out that theory through simulations or, when appropriate, through clinics that are an integral part of the classroom and not some "thing" that flits over at the side of the building where we let the poor people in through the back door.

If the practice is corporate transactions, which is my stuff, then talk to the players—corporate executives, investment bankers, government officials, mutual and hedge fund operators, bankers, and eventually lawyers—about the game and bring that total understanding back into the classroom wrapped up in a theory, an explanation of what is going on. Teach that theory explicitly to our students and make them play out the lawyer's piece right there in class. My guess is, exposed to practices like this in criminal law and appellate argument, students might—just might—not be so bored by the time they have been in the building for three semesters.

I'm always invited to these sorts of occasions and I always feel I'm about as welcome as a skunk at a garden party.

(Laughter.)

PROFESSOR SCHLEGEL: I have no idea why people keep telling me to come flagellate them for doing terrible things. It's a truly odd thing to do at a celebration.

So what I'm trying to say to you all is stop teaching law and start teaching about law and about doing law. Stop constantly attempting to justify the unjustifiable rules of law through empty exercises in logic, through fruitless attempts to derive agreed-upon premises of judgment from the top hat in which they are smuggled in, or through narratives that supposedly come with an obvious meaning. Instead, focus on the practices and the contexts that give the rules meaning or make them mostly irrelevant. Well, enough of the rantings of an old educational radical. Your turn, Bob.

PROFESSOR ROBERT W. GORDON: Thanks, Jack. This is clearly not a balanced panel because I'm in agreement with Schlegel

about so many of the basic propositions that he puts forward that it's almost not a fight at all, much less a fair fight. I wanted to say a little something historical because of the "Then" part of the "Then and Now" in the title of this session. One of the things I want to talk about a little bit is why, in legal education, there's a kind of magnetic north that the needle keeps swinging back to; that is, of all of the things that we could be teaching in legal education, why is it that so uniformly and continuously throughout the country, the curriculum centers so heavily, as Schlegel points out, on the teaching of private law doctrine? Why is that still the curricular core?

The curricular core at virtually every law school in the country is basically the same, despite enormous variation over time and historical circumstances, variation in local contexts, and the variation in the kinds of jobs that law graduates are being trained for at different schools. In my native Boston, for example, there are schools that train people largely for large firm, metropolitan corporate practice and there are schools that train students largely for the Suffolk County District Attorney Prosecutor's Office. Those two schools, and others like them with different objectives, have very much the same methods and same curricula.

This comes about despite an enormous diversity of origins. This law school, as Jim May was reciting, has an incredibly interesting and distinctive history. This is a school born out of the radical reform, progressive traditions of the nineteenth century. Ellen Spencer Mussey's family were abolitionists. They were temperance activists and they were feminists. Her husband, General Mussey, volunteered to command a regiment of African American troops in the Civil War. This is very much an institution begun by radical reform entrepreneurs. Partly for that reason, its original curriculum was not just conservative, it was positively reactionary. It considered the case method of Langdell and Harvard too advanced for its tastes and it went back to the lecture and textbook Blackstone method.²⁹ One very interesting innovation was making domestic relations law a required first-year course, where it remained until the 1930s. In the 1930s, it was shoved off into the second- and third-year elective curriculum, where it remains in most places. But even at this remarkable institution, the

29. Langdell's model was based on the theory that cases could be categorized and then studied to induce legal principles, whereas Blackstone's method called for an approach that was deductive in nature. "Blackstone . . . embraced a quasi-natural law model, in which legal conclusions were deduced from *a priori* principles of law." Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2086 (1995). For Blackstone, cases were used to support principles. See Simeon E. Baldwin, *The Study of Elementary Law, the Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 3 (1903).

story, on the whole, is one of increasing standardization and homogenization to the national product. One of the fascinating stories of legal education is how the Harvard private law, case method doctrinal-dominated education spreads like a deepening stain everywhere in the country.

(Laughter.)

PROFESSOR GORDON: It eventually colors all law schools exactly the same hue, and, as I say, despite enormous variations in local contexts and local needs. What are the alternatives? Schlegel, I think, has mentioned some of them in the working downwards from doctrine. There is clinical work and the study of practice, local law and practice, clinical skills, trials, transactional practice, and counseling and negotiation. There's the teaching of local contexts. There's the teaching of business practice skills and contexts, accounting, and corporate finance. Working away from the core, there is public and regulatory law, administrative law, public utilities and specific regulatory fields: commerce, food and drug, public land management, security, and so forth. The history of these fields in the law school curriculum is that, at first, in the Langdell model, they're completely excluded.³⁰

Public law, regulatory law, and taxation were not considered law and kept out altogether.³¹ Gradually, with the growth of the administrative state in the twentieth century, these subjects crept into the curriculum. Again, WCL is a good example. You can trace this in the school catalogs. Public Law subjects first come in as graduate courses, kept in a graduate ghetto, lest they contaminate the pure private law, the doctrinal core of the undergraduate law curriculum. Then, by incremental creep, they come into the second and third years as electives.

By the 1940s and 1950s, you have something like the law school curriculum as you know it today; that is, with nineteenth century common law ground rules as the core of the first year curriculum and the New Deal regulatory administrative state in the second and the third years. In the 1960s, another interesting creep begins to come in the form of a little community halfway-house between the ghetto of the graduate curriculum and the inner sanctum of the required curriculum. This is the seminar, the incredible proliferation of the small seminar, largely in subjects which the conservative law-

30. See John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 105 (1984) (detailing Langdell's model of legal education, which called for exclusion of political and economic theories).

31. See *id.*

yers of the 1960s contemptuously liked to label “social work,” i.e., family law, poverty law, welfare law and, at that time, environmental law. An interesting thing about those seminars, again, is how they have gradually made their way into the elective curriculum of the second and third years.

The major trend, besides standardization, has been the proliferation of electives. The Langdell first-year curriculum is still the first-year curriculum in virtually every law school in the country.³² There has been a proliferation of other approaches and courses in the second and third years.

Now, moving up and out from doctrine, one moves towards the study of context, and, as Schlegel says, of theory. Take legal theory. First of all, the theorizing of legal doctrinal fields and across them, doctrinal theoretical synthesis, this is what you get in the big, classic treatises: the analysis of elementary legal categories, contract, fault, and trusts. Moving upward from there, you get to jurisprudence and comparative law or to policy and the science of legislation: the studies of purposes and effects of legal regimes. Moving upward and outward from there, you get to social science: economics, political economy, and sociology, which are all handmaidens to the science of legislation. And finally, upward and way outward, mostly found in the seminars, you find the study of law from the outside: social science, history, theory, and so forth, whose job is not so much to improve the efficiency of the practices that we do as it is to try to understand and criticize those practices from the viewpoint of the external observer.

An interesting question is why does the needle keep swinging back to the magnetic north of the private law doctrine-dominated curriculum in the history of legal education? This is particularly striking because ever since the beginning, there has been an alternative track; a great alternative. I shouldn't actually say an alternative because it was a supplement. Nobody ever proposed, until Schlegel, actually doing away with the private law doctrinal curriculum. Actually, that's not true. Schlegel has some distinguished predecessors: the legal realists of whom he, himself, is a premier scholar.³³ But there have been proposals since the beginning of the Republic for supplementing the doctrinal private law education with an education that you could call—as it was called in the nineteenth century—the science of legislation, and what we would now, I think, call law as policy.

32. *See id.*

33. Realism has been a competing model with Langdell's Method. *See* SCHLEGEL, *supra* note 18, at 107 (noting that legal realists' model failed to supplant that of Langdell).

Now, what was this alternative? This notion that law schools should be primarily policy schools, instructors in the principles and practices of legislation—this has, as I say, long been the great alternative to doctrinal and black-letter education in law, just as policy studies of law have long been the great alternative to a strictly legal science, meaning the clarification and ordering of existing doctrines into legal categories.³⁴

The modern idea of law as a policy science was first and most brilliantly developed in the Scottish school of jurisprudence and the moral and political economy of Adam Smith, David Hume, Francis Hutcheson, Lord Kames, Adam Ferguson, John Millar, and their friends.³⁵ Remember that Adam Smith's great book, his great treatise on political economy, *The Wealth of Nations*,³⁶ started out as one of his lectures on jurisprudence. It was a lecture on the police power.

So you have in Scotland in the late eighteenth century, and particularly in the work of Adam Smith, a complete uniting of law and political economy as the proper subject for the study of law. To Smith's school, law was part of an aggressively reformist, interdisciplinary enterprise of improvement; a blend of moral philosophy, political economy, and the comparative historical sociology of legal practices and institutions.³⁷ It was a study which was designed to purge the governing legal regime of its obsolescence or its antique features and to reconfigure it to the needs and the ethical values of a modern society.³⁸

The project was picked up by Jeremy Bentham and by utilitarian reformers in the nineteenth century.³⁹ Despite this brilliant beginning, the science of legislation, as a preferred approach to training lawyers, tended to fizzle out in the nineteenth century.⁴⁰ The question is why the idea keeps running up against a brick wall, or rather a spongy wall, a wall that seems to give way only, again and again to push us back to where we were before.

Well, it seems to me that there have to be really two conditions that are satisfied in order for the idea to take hold. One is that there has to be some plausible set of jobs that graduates can do which will re-

34. See McDougal, *supra* note 18, at 1345 (calling for application of policy science to study of law).

35. See generally KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR* (1981).

36. ADAM SMITH, *THE WEALTH OF NATIONS* (Knopf ed., 1991) (1776).

37. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 144-75* (1989).

38. See *id.*

39. See *id.* at 241-90.

40. See STEFAN COLLINI, *PUBLIC MORALISTS: POLITICAL THOUGHT AND INTELLECTUAL LIFE IN BRITAIN, 1850-1930*, at 251-307 (1991).

quire the skills imparted by a training in law as policy, or the policy study and policy science. Indeed, wherever you see the idea flourishing, generally there are such jobs.

In America, the causes of revolution and constitution-framing provided a lot of political work for lawyers, many of whom were already trained for such work. As New England and New York lawyers, for example, represented either the Crown or colonial merchants or landowners against the Crown, quite often lawyers were themselves members of the Chesapeake landowning gentry who had learned law to engage in litigation with their neighbors and to serve in local legislatures.⁴¹

Harvard Law School, in the 1830s and 1840s, saw quite self-consciously that its role was sending young men primed with the principles of Federalist and Whig political science all over the country as legislators and members of political elites.⁴² When policy science comes into the law schools in the twentieth century, it was when careers opened up for graduates in the progressive movements and the New Deal.

Policy studies were strong again in the 1960s when graduates went on to service in the New Frontier and the new public interest law centers, and again at Chicago in the 1980s where young Federalist Society members could expect rapid promotion in the corridors of power in the Justice Department, other administrative agencies, or conservative think tanks.

So, law training has to open up opportunities for practice. There must be jobs and, preferably, careers. But besides that condition, another one has to be met. There needs to be professional receptivity to it, and this is always a problem because the study of policy has to be incorporated into the law without threatening the indigenous craft techniques or the ideology, autonomy, or neutrality of law—the idea of the rule of law as something distinct from politics.

Policy cannot be or be perceived to be mere politics. It has to seem to possess an objective or scientific character. Yet, to the extent that its objective or scientific character is imparted through study of another discipline, for example, sociology or economics, it isn't law.

41. See, e.g., Clement Eaton, *A Mirror of the Southern Colonial Lawyer*, 8 WM. & MARY L.Q. 533 (1951); Milton M. Klein, *From Community to Status: The Development of the Legal Profession in Colonial New York*, 60 N.Y. HIST. 136 (1979); John Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT (Stanley N. Katz & John M. Murrin eds., 1983).

42. See R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, in THE CONSTITUTION AND AMERICAN LIFE 154-75 (David Thelen ed., 1988).

To the extent that the policy sciences developed in other disciplines are contentious, as they all are, borrowing from them means importing that contentiousness into the legal culture. So, over and over again, lawyers have found that to resolve quarrels within the law, they will turn to history, economics, sociology, or political science to find an objective and neutral basis for lawmaking. What do they find? Just more quarrels, often the same ones, couched in slightly different language.

Well, the American story is complicated and because I don't want to take up much more time, I'm not going to relate many of its complexities. The bottom line about the story is, again, a little bit of a surprise. Many, many experiments have been tried from the beginning of the Republic. First, there was Thomas Jefferson's own plan for teaching law at the University of Virginia, where he called for a curriculum of the common and statute law; the law of chancery; the law's feudal, civil, mercatorial, and maritime aspects; the law of nature, and of nations; and also the principles of government and political economy.⁴³ Education in the principles of legislation remained a general aspiration of the elite bar until the end of the nineteenth century.⁴⁴

Yet, again and again, attempts to institutionalize legal education fell flat. Columbia in 1857 is entirely typical. It planned a jurisprudence curriculum including modern history, political economy, natural and international law, and civil and common law. By the following year, it was clear that to attract any students, the curriculum would have to be pruned back to those branches of municipal law usually appropriately pursued for obtaining a license to practice, with the hope that occasional lectures in the extra studies might be offered as an extra sweetener once students were enrolled.⁴⁵

The progressive movement and the New Deal seemed to help answer the question of what lawyers could do with their policy training, particularly here in a city like Washington, D.C. By 1939, there were

43. See STEVENS, *supra* note 13, at 4-5, 71 n.86 (explaining Thomas Jefferson's approach to legal education at University of Virginia, where he sought to create statesmen, legislators and judges in Southern tradition through liberal teaching approach broader than that of northern schools). Under Jefferson's approach, law was taught as a "liberal and liberating study," whereas the northern approach emphasized law as a "technical and professional study." See *id.* at 5.

44. See *id.* at 57-58 (assessing 1891 American Bar Association report attacking Langdell's case method for causing increased litigation and arguing that lawyers should concentrate on knowing rules of law and keeping clients out of court).

45. See JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 27-29 (1955) (explaining Columbia's proposal for broad curriculum and problems with attracting students desiring courses more applicable to practice and passing bar exam).

over 5000 lawyers in federal government service.⁴⁶ In the four years between 1938 and 1942, the legal staff in the Antitrust Division of the Justice Department alone went from 111 to 583.⁴⁷ In the 1940s, a flood of articles pointed out these developments and the private lawyer's role, as a practical statesman, in the architecture of private-ordering structures that had to serve clients' long-run purposes and comply with regulatory statutes.⁴⁸ The law schools needed to prepare people to master the substantive regulatory fields and the administrative processes of their new craft to realize long-term social effects. New Dealers returned to staff the law schools.⁴⁹

What impact did they have? Surprisingly little. New Deal statutes were brought into the curriculum, where they were rapidly assimilated into the common law model of doctrinal analysis.⁵⁰ The first-year curriculum remained the domain of nineteenth century baseline common law rules. The upper years were reserved for the New Deal statutes, but then case law glosses on the statutes became the subjects. Only at a few places—and I think one has to give Chicago some credit for this—was the mold broken.⁵¹

Well, what's the situation today? The law schools, as they are now, probably represent the most ambitious attempts to integrate law and policy since the Scottish Enlightenment,⁵² though the integration is

46. See Emery J. Woodall, *Career Service for Federal Lawyers*, 4 FED. B. ASS'N J. 235, 235 (1941) (detailing changing role of government lawyers and maintaining that as of 1939, more than 5000 legal positions existed in federal government).

47. See Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 POL. SCI. Q. 338, 339 (1943). Appropriations for this same time period similarly increased from \$473,000 to \$2,325,000. See *id.* In 1943, however, World War II brought a decrease in the Division's staff to 496 members, while funding fell to \$1,800,000. See *id.*

48. See, e.g., Karl N. Llewellyn, *Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 167-95 (1946) (discussing legal approaches to commercial transactions, including problem-solving role of attorneys as counselors in non-legal situations); Karl N. Llewellyn, *Crafts of Law Revalued*, 28 A.B.A. J. 801, 801-03, 844 (1942) (discussing need for practical application of law and increased public service from attorneys).

49. See STEVENS, *supra* note 13, at 160 (describing return of faculty members from New Deal service and growing acceptance of idea that law professors should be teaching public service).

50. See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2083 (1993) (discussing the preoccupation during the 1950s with case law and its application to New Deal statutes as a retreat to formalism).

51. See FRANK L. ELLSWORTH, *LAW ON THE MIDWAY* 67-68 (1977) (observing that early curriculum, influenced by Ernest Freund, University of Chicago Professor of Law and Political Science, included history, political economy and science, and sociology; discussing subsequent adoption of Harvard's competing case method, which angered Freund); see also Gordon, *supra* note 50, at 2084-85 (discussing Freund's plans for University of Chicago to supplement private law thrust of legal education with courses in public law and policy science, in order to train attorneys for work in regulatory system).

52. The Scottish Enlightenment during the eighteenth century sought human betterment through the pursuit of science and the reformation of philosophy, economics, and jurisprudence. Its leading participants included David Hume, Adam Smith, Adam Ferguson and John Millar. See IAN SIMPSON ROSS, *THE LIFE OF ADAM SMITH* xviii (1995) (discussing scope of Scot-

very truncated and partial.⁵³ As in the 1930s and 1940s, there's a big gulf between the sometimes intimidating, interdisciplinary character of the scholarship, which led Judge Richard Posner to speak of the decline of law as an autonomous discipline⁵⁴—a decline which he had done more than any other single person to bring about.

(Laughter.)

PROFESSOR GORDON: The everyday teaching of law, as evidenced by casebooks, remains overwhelmingly doctrinal and formalist.⁵⁵ The policy appears in the brief introductory overviews and then again periodically in the snippets and footnotes through the rest of the book. The vanguard of the policy forces has gained a beachhead mainly in the specialized upper-year courses concerning family law, water law, or health law, where issues of policy, context, and institutional design overwhelm those of doctrine.

Policy has invaded torts books for presumably the same reason. The tort system is in a crisis. The fall of the old doctrinal citadel has made issues of the economic basis of tort liability inescapable. But in many fields, as Schlegel says, where you'd expect to find the influence of the study of policy and context, it's surprisingly, and almost totally, missing.

You'd think that in a corporations class you might learn something about corporations in the society and political economy; about the character of their institutional relations with shareholders, institutional investors, creditors, customers, suppliers, labor forces, and legal communities; about the internal politics and organization of business firms that are crucial to understanding the range and limits of the influence of corporate counsel; and about the extraordinary recent transformations in capital markets, international product and labor markets, and methods of production that have created a new generation of legal headaches and operating environments for corporate management and their lawyers. But it's not there. In the adventurous books, that is, in the books with the lowest market share, there's usually a little economics.⁵⁶ This is sometimes efficiency-of-

tish Enlightenment).

53. See David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 92-93 (1990) ("American law schools are still caught astride a chasm that separates the Scylla of the academic university from the Charybdis of the practicing profession American law faculty have long been caught between the demands by the seeming incompatibility of the basic visions and functions of the university and those of educating aspiring lawyers.").

54. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 777-78 (1987).

55. See Gordon, *supra* note 50, at 2108 (complaining about overwhelmingly doctrinal flavor of today's legal textbooks).

56. See MICHAEL P. DOOLEY, *FUNDAMENTALS OF CORPORATION LAW* 1-14 (1995) (offering

common-law-economics in the early Posner-Chicago style, more often these days, some Williamsonian neo-institutional analysis,⁵⁷ sometimes a little finance theory is applied to takeover markets.

In labor law, it's the same story. A field with a superb institutional literature, to judge by the case books, checks its policy concerns at the door of the classroom. The neoclassical and neo-institutional labor economics on the role of unions, the comparative work on the relative weakness of unions in American economic and political life, and the new management and worker relations emerging from the transformed economy are just not there.

Maybe the most amazing field is criminal law and procedure. Criminal law, to judge by the case books—Schlegel mentioned this, too—is mainly about the doctrinal elements of crimes, constitutional motion practice, and somewhat peripherally, about theories of punishment. It's not about, among other things, crime, criminals, or the criminal process in which criminal lawyers put in their time. It's not about policing, prosecutorial discretion, plea bargaining, sentencing, prisons, or parole. A more extreme example of the attitude that if there aren't a lot of cases on it, it doesn't exist, would be hard to find.

There is some reason for hope. There actually seems to be more of a genuine movement in this direction in law teaching these days than there has been at any other point since what is still, in some ways, the high point, which occurred during the late eighteenth century. Things have really never approached or re-approached the peak represented by Adam Smith's classes at Edinburgh during the 1760s.⁵⁸ Nevertheless, I think there is some room for hope, if this is the direction that you would like to encourage, but this change is painfully incremental, gradual, and slow.

Jim [May] spoke of historical changes in context, local variations, and tendencies toward national uniformity and historical continuity. I hope the time is coming when changes in context and variations in locality will begin to overwhelm the forces of national uniformity and continuity, whose inertial drag has been considerable on our enterprise. Perhaps that time is coming, but it is not yet here.

PROFESSOR JOAN WILLIAMS: Let me say first that I am very

"An Overview of the Law and the Economics of the Firm," including economic theory, and discussing different forms of corporate structuring).

57. See OLIVER WILLIAMSON, INSTITUTIONS OF CAPITALISM (1985).

58. See ANDREW STEWART SKINNER, A SYSTEM OF SOCIAL SCIENCE: PAPERS RELATING TO ADAM SMITH 7-8 (1996) (discussing lectures of 1748-50 at Edinburgh and Adam Smith's subsequent adoption of similar style at Glasgow University during the 1750s and 1760s in opposition to standard teaching style of period emphasizing logic and metaphysics); see also ROSS, *supra* note 52, at 97-98 (1995) (observing Adam Smith's rhetorical teaching style).

honored to be on the panel today with two people I have always admired, both of whom were major figures in the critical legal studies movement.⁵⁹ In a well known 1984 *Stanford Law Review* volume on Critical Legal Studies, for example, Jack [Schlegel] and Bob [Gordon] were two of the major authors.⁶⁰ I want to pick up on some of the themes the panelists have mentioned so far and tie them together with the issue of privilege and what it means, both to people who have it and to those who are trying to gain access to it.

Picking up on the model that Jack and Bob talked about, they basically set up a good-guy and bad-guy model of legal education. Jack and Bob define the good and the bad guys slightly differently, although not very differently. The bad guy of both stories is what Bob called the magnetic north of legal education. In other words, we keep returning to this nineteenth century private law-dominated curriculum. This curriculum is defined both by its focus on private law and by its focus on doctrine.

As Bob pointed out, one of the ways of describing what happened during the nineteenth century with people like Langdell is as part of a much broader movement in the nineteenth century that started with political economy: a topic that combined, from our point of view, moral philosophy, politics, and economics, and considered them all one and the same. It started from that model and went to a very different model of social "science." This is documented in a wonderful history of American social science by Dorothy Ross.⁶¹ She documents the period in which Americans veered away from the model of political economy to the model of social science, in economics, in sociology—in all of the American social sciences. In the social science model, social thought is reconceptualized along a model of natural science and is tied to a specific political philosophy and a series of naturalizing metaphors. We often call that political philosophy "possessive individualism" or "economic liberalism." Ross documents the process by which economic liberalism was read into the structure of the universe.

One useful way to read Langdell is as a part of this larger strategy of reading possessive individualism into the structure of the universe.

59. See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 429 (1987) (uncovering cracks in epistemological foundation of critical legal studies); see also ROBERTO MANABEIRA, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983) (discussing critical legal studies movement as undermining central ideas of modern thought and arising from leftist modern legal thought and practice).

60. See John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

61. See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1990).

So that is where we start out, this Langdellian heritage.

The alternative, which both Jack and Bob have talked about a lot, particularly in Jack's recent and influential study of legal realism,⁶² is a law-as-policy-science approach. Jack followed the early Yale legal realists in focusing on the distinction between "law in the books" and law in practice. He urges people to study what lawyers actually do—the actual routine practices of practicing law.⁶³ Of course, WCL is one of the best schools in the country to do this because we have such wonderful and influential clinics. Bob has described the approach a little bit differently, in keeping with a different part of the Yale legal realist tradition, by emphasizing the need to train lawyers to see that accepted principles of judgment are based on "policy."⁶⁴

An integral part of legal realism was a very conscious re-invention of the role of the lawyer as "public counsel,"⁶⁵ which I'm familiar with because my father's career epitomized this new role. My father graduated from Yale Law School at the height of legal realism. He took the idea that you had to integrate law with policy so seriously that he became a city planner. As Bob pointed out, that's one of the anxieties that legal realism awoke; that people would take the idea of lawyer as policymaker so seriously that they would cease to be real lawyers. In a sense, my father was one of those, but he also wrote a multi-volume legal treatise!

As the author of a case book,⁶⁶ I reject almost equally both the Langdellian model that stresses that the goal of legal education is to train students to seek accepted premises of judgment through legal doctrine, and that version of legal realism that trains law students to seek accepted premises of judgment through policy. It seems to me that these models leave in place a dichotomy between law and policy that is totally unviable. This is partly because I teach a topic, property, that is not defined in terms of nineteenth century legal categories. Although property has always been part of the Langdellian canon, property as a concept has an intellectual history quite inde-

62. See SCHLEGEL, *supra* note 18, at 256 (discussing policy science or policy analysis approach practiced by "the heirs of [legal] Realism").

63. See *id.* at 82-83 (discussing Yale's early realists' proposals to establish Institute of Procedure to discover ways to reform conventional legal practice).

64. See generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 67 (1986) (reviewing Yale and Columbia's attempts to make legal education more policy-oriented and efficient by merging law with social sciences).

65. See Joan C. Williams, *At the Fusion of Horizons: Incommensurability and the Public Interest*, 20 VT. L. REV. 625, 628-29 (1996) (defining public counsel as one who applies his or her own values in public interest as a bulwark against and rejection of corporate business class lawyering).

66. C. BERGER & J. WILLIAMS, *PROPERTY: LAND, OWNERSHIP, AND USE* (1997).

pendent of the law.

If you are trying to train students how to talk as property lawyers, you have to train them in a rhetoric of property that has always existed apart from property doctrine. And yet there are also forces that pull you back towards the “magnetic north” Bob describes. These forces concern the link, rarely discussed, between law school and class formation.

One role of law school has been to train members of the elite to assume elite positions. Langdell invented his curriculum at Harvard to boss around other members of the elite.⁶⁷ At Yale Law School, the role of public counsel re-vamped the idea that we were going to train certain members of the elite, this time as public counsel, to boss around other members of the elite.

But training members of the elite to lead is only one social role law schools have played. Another, far more important one is that in this country, seeking a legal education has been a way that people who were not born into the elite seek to enter the elite. This imaginative role of legal education, this romantic, striving, and symbolic role, is why we have massive numbers of students to this day, talented ones who are in this room, seeking a legal education in a sharply constricting market. Many WCL students continue to seek a legal education because they seek what the lawyer’s role has promised for so long: the ability to do good and to do well simultaneously. That’s part of the attraction of law school. WCL students today also seek, in an era of de-industrialization, to ensure their continuation or ascension into the elite, to use a timely and ecclesiastical metaphor.

If you are involved in legal education, and specifically if you’re writing a case book, you need to think of the relationship of law to privilege. As Bob pointed out, the case books that go the furthest into “law and”—into law and economics, or law and history, or in law and whatever—have the least market share. That’s partly because the role of most law schools is to serve people who are trying to gain access to the elite, which produces a very conservative tenor. So that if you’re doing something weird, for example, like Ellen Spencer Mussey and Emma Gillett did, you try to make up for your weirdness by being extremely traditional, as they did in legal education and as most law school textbooks do to this day. That is a very strong impetus towards preserving this traditional nineteenth century canon and the traditional sequence of topics in a case book and in legal educa-

67. See STEVENS, *supra* note 13, at 63 (describing appeal of case method at Harvard and its ability to allow lawyers to enter elite class more readily).

tion. I would explain the magnetic north that Bob talks about partly in terms of legal education and its relationship to class formation.

Going back to the relationship between the study of law as the study of doctrine and policy science, I think we really have to go beyond both of those. We certainly no longer believe that you can deduce neutral conclusions from legal doctrines, but I don't believe that you deduce neutral policies from anything. How can you say in Washington, D.C., that a given rule reflects "public policy"? If you live in this town, you may have noticed that we don't agree on public policy. That's why I've said in various published works that the phrase "public policy" deadens the mind to legal contradiction.⁶⁸

The legal contradiction is that we do not agree on public policy, and yet within the rhetoric of the law, the phrase "public policy" is used as a solution. Oh, we're going to change this tort doctrine because of public policy, to which the obvious response is, which public policy?

I think you have to reject both the law as doctrine and the law as public policy models and go to a model that I think of as law as rhetoric. In the context of property that means to me that you have to teach property law as part of a political rhetoric in this country in which people talk about whether property rights should be stable and the extent to which they should be redistributed. There are some very strong native traditions of redistribution which you can teach students—and you can teach them to use these traditions in arguing property cases. Then you teach students how to translate this political rhetoric, the intersections between the general political rhetoric of property and the translations of that rhetoric, into legal doctrine.

If you teach law that way, you're not teaching anything as an answer. You're not teaching either doctrine or policy as an answer. You're teaching students to play—to participate in political life in a specific way—in a way we call being a lawyer. But that doesn't answer the question of what role students will play in political life. In a sense, we're going back to the earlier model of political economy. At that point, you are combining moral inquiry with politics and economics on the theory that you cannot separate these three.

PROFESSOR MAY: Let's see if there are comments or additions or responses by various people on the panel. Then hopefully we'll have

68. See Williams, *supra* note 65, at 630-34 (discussing differences between those who view law as objective and critical legal scholars who view law as ideological); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 97-99 (examining the study of law as ideology and its effects on scope of power of cities).

some time to open it up for questions and comments from the audience.

PROFESSOR SCHLEGEL: Well, it's interesting what Joan [Williams] had to say, because my response to Bob, who keeps telling me this extraordinarily fascinating stuff about the science of legislation, which I quite clearly love, is to get around the distinction between law and politics, which I think bedevils us completely. As long as we see policy as, in some sense, not law—and the achievement of the eighteenth century was to see policy as something that was law—we're not going to get very far. The point of my shift to practices is to try to avoid that, to avoid putting the social sciences and economics together with the law, to take the "and" out of the phrase "law and" and to get students to study what those practices are. My reason for doing so is one that Joan identified, and that is her discussion about the aspiration toward class formation. So much of the law is like understanding what fork to eat with and understanding what arguments are appropriate and inappropriate. What are the accepted and unaccepted bases of doing things?

Teaching at Buffalo, I find that a great number of my students, many of whom are actually interested in corporate practice in some sense, have no idea what corporate practice looks like or what corporate behavior is like. So, every day in Corporations, we start with the same question: "What is in today's *Wall Street Journal* that befuddles you?" I teach from the front or back page of the *Wall Street Journal* or from any page the students find interesting in every class. My point is to try to expose people to those things that distinguish the lawyers on the basis of what fork they use. Do you know what an oyster fork is?

It strikes me that in this way, it is the conservative tenor adopted by radicals that is the mistake that perpetuates what Karl Llewellyn used and called, wonderfully, dog-law.⁶⁹ Llewellyn referred to the way we train law students in class as the same way you train a dog. When a dog does something you don't want it to do, you hit it over the nose. Nowadays, when a law student makes an argument that is inappropriate, someone sort of helps them along with their stuff. The old fash-

69. See Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 37 n.69 (1983). Jeremy Bentham originally developed the concept of dog-law. See *id.* Bentham stated:

Do you know how they make [the common law]? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it and then you beat him. This is the way you make law for your dog, and this is the way judges make laws for you and me. They won't tell a man beforehand The French have had enough of this dog-law; they are turning it as fast as they can into statute law, that everybody may have a rule to go by

ioned way was to just knock them down and go on to the next speaker. Students for whom class formation is important need to have this done explicitly and to be told, "This is a grapefruit fork. This is an oyster fork. Do you see the difference in the little tines? One is straight and the others have little curved hooks on the end." By focusing on practice and explicitly on understanding the practice in its fullness as sociology, economics, and institutional behavior, you give students a leg up—the ability to understand.

One of my favorite scenes in the whole world is Jack Nicklaus getting his green jacket from the Masters and he can't quite figure out how to get it on. Nicklaus gets one arm into it, but the coat is low. He's trying to reach up and finally, the gentleman who is putting the coat on Nicklaus, this sort of backwoods character, who may never have had anyone hold a coat for him, brings the coat down and then up over Nicklaus's arm and it works fine. In worlds where you don't know exactly how to get the coat on but you'd like to wear it because it's really spiffy, such is the explicit task of the social learning that I've spent so much time on, and, indeed, love, as anyone knows who's read my stuff. I love some of this crazy old shit and that's why you do it. That's why you focus on practices in their social profusion: to try to avoid what Robert [Gordon] clearly sees—in my case, I don't hide it—as an underlying concern about policy that runs very deep.

PROFESSOR GORDON: I wish I disagreed more with my fellow panelists because that would make it more interesting. I like to be contentious, but I actually don't disagree with Joan Williams or Jack Schlegel very much. They're both saying that one of the problems with constructing the notion of doctrinal and policy education alternatives is that it reinforces the law and policy distinction. I agree with that. I don't think that in a sound conception of law there is any law or policy distinction—that all law is, in fact, policy. We have to find ways to communicate this in our law teaching that will not make students put down their pencils when they hear or think they're about to hear something which is not quite law or something else.

I agree with Jack that the way to avoid that "putting down the pencil moment," when people feel that they're venturing into a strange land, is to concentrate on practices, problems, and situations. If you're trying to solve a set of concrete problems in a concretely described situation, you'll want to use whatever tools are useful to the purpose. I think most students realize that. They realize, for example, that there's a point at which the doctrine just runs out of ideas for how to solve things because the doctrines all seem to conflict or are too vaguely specified. You have to turn to some other set of tools.

I agree with Joan that when you turn to that other set of tools, the economics, the political economy, the moral philosophy, the moral reasoning, and so forth, you don't get any more definite answers. Instead, you get richer, more interesting, and, I think, more meaningful answers. I think it's right that lawyers often avoid going into these neighboring worlds partly because it threatens their identity as lawyers and partly because when they go into those neighboring worlds, they leave the security of the rhetoric which they have learned to be comfortable with for the insecurity of new rhetoric in which they have not learned to be comfortable and in which there are other experts who are much more skilled than they are. But what are we supposed to be good at as lawyers if not at being magpies or if not at cannibalizing neighboring disciplines and picking up new ways of speaking and incorporating them into our practice? That is the generalist skill of the lawyer, and I think it always has been.

Just one observation about class formation. Joan, it seems to me, is absolutely right, but I do want to differ slightly with her about one thing. It's true—and WCL is a good example—that Dean Ellen Spencer Mussey inaugurated WCL with the most conservative curriculum possible because she was taking so many risks in another dimension: training women for the practice of law. An intellectually risky curriculum would have been an unnecessary and extravagant risk. I think that's absolutely right. You have this combination of a very conservative curriculum and this rather activist social reform project throughout the school's early history. There's an early graduate I noticed called Nanette Paul who was involved in progressive education, the Women's International Peace Society, and the Susan B. Anthony Foundation while writing practical hornbooks on legal subjects and an incredibly conservative paean to the common law called *The Heart of Blackstone*.⁷⁰

(Laughter.)

PROFESSOR GORDON: This combination of intellectual conservatism and social activism is very appealing. But I don't think the notion of the lawyer as a policy activist, the lawyer as civic activist, the lawyer as the statesman or stateswoman, or the lawyer as civic leader, if you like, is peculiar in any way to the children of elites. It's true that people who are upwardly mobile and aspirational often want to chose the most conservative path: the least intellectually and politically risky path to improve their class position. On the other hand, if you look at the history of twentieth century legal reform movements,

70. NANETTE BAKER PAUL, *THE HEART OF BLACKSTONE* (1915).

while some of them are led by children of elites, they're for the most part led by children of marginals—women, African American, and Jewish lawyers, for example—partly because they're excluded from the mainstream paths of opportunity and they find ways which inspire them to remake their society.

WCL is an interesting example of both projects at once. Mussey and Gillett were both, in a way, children or members of an elite, although a surprising elite. On the other hand, when Mussey and Gillett opened the Law School, there were no educational attendance requirements, except for passing an exam in English. If you were either a high school or a college graduate, you didn't have to take the exam in English. Otherwise, you only had to take the exam in English.

One of the things that is inspiring, but also somewhat heartbreaking about the WCL project in its earliest years, was that it was very realistic and modest about its aspirations. The early catalogs say, "The executive departments of the Government, especially the Patent, Pension, and General Land Offices, afford an opportunity for legal investigation which qualifies the student for special practice in cases before such departments."⁷¹

Mussey and Gillett knew that if the Law School graduates were going to be employed as lawyers, the single largest employer was the federal government. But the 1899-1900 catalog also says, and here's the heartbreaking note of realism, "A demand exists in law offices for stenographers and typewriters [typists] having a legal training, and higher wages are paid for such services."⁷²

Indeed, many of WCL's early graduates were limited in their reach by those jobs. But, of course, for those graduates, those jobs as stenographers and typists in private law offices were a step into the working world and an enormous step up in most cases in economic opportunity and class position.

This is sort of the paradox of law as a profession in America. It's an extremely conservative profession which has, at the same time, been a quite effective corridor and avenue of upward mobility for a lot of people.

71. WASHINGTON COLLEGE OF LAW, WASHINGTON COLLEGE OF LAW CATALOGUE 1899-1900, at 8 (1899).

72. *Id.*