

ACHIEVING OUR LAW:
TOWARD A MODERN LEGAL SCIENCE

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ABSTRACT

Today the thought that law could be understood as a science like any other taught and studied at a modern university is felt to be, if not ridiculous, then surely a mistake. In this dissertation I argue that that consensus is only partly right: in fact law *is* a science in one sense but not quite in another. By retracing the evolution of the idea from the early days of the Western legal tradition among the Scholastic Jurists to the birth of the modern American law curriculum at the end of the nineteenth century, this dissertation explains why our law can still be thought of as a science and why that belief matters for restoring our faith in a rational rule of law. Yet, even if our law *is* a science in a more fundamental sense, what it has never been is a fully *modern* one. This dissertation therefore aims to delineate a credible intellectual premise for a renewed legal science, by sketching a naturalistic picture of what lawyers think and argue about as lawyers—the constituents of the legal point of view. The theory I propose centers on the idea of the doctrinal model: an abstract normative structure drawn from the same cognitive theory advanced in the philosophy of science. What that theory brings to light are both the intellectual constituents of a truly modern science and also its cultural preconditions: the organizing concepts of discovery and therefore of progress, as well as disciplined public debate. Coming to see those features already latent in law should not only restore our confidence in the legal point of view. It also reveals the outlines of the distinctively modern project of discovering, elaborating, and defending those doctrinal models that will serve a more fully democratic life. By taking up that project anew we will come that much closer to achieving the promise of our nearly thousand-year-old Western legal tradition—to achieving our law.

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INTRODUCTION

“Ideals without technique are a mess. But technique without ideals is a menace.”¹

This is an uneasy time for our law—a time of crisis.² Some of this uneasiness has its roots in familiar philosophical soil: in the usual doubts about the legitimacy and soundness of the present legal order,³ for example, or in perplexities about the nature and desirability of the rule of law itself.⁴ Such theoretical worries are a perennial concern of Jurisprudence—indeed, one might be tempted to say they are its *only* concern. But these doubts are not the source of the present feeling of crisis, although, as we will see, they do have a role in relieving it. The cause of the present uneasiness—our current crisis—instead lies elsewhere.

And, indeed, in the last forty years or so these more familiar concerns about the nature of law have given way to a different set of doubts—concerns that are, in a sense, more inward-looking and self-regarding, and that have accordingly provoked a relatively new crisis.⁵ This is a crisis of *self*-doubt, a crisis in the way lawyers understand themselves and what they think law is all about. Does law have a subject-matter all its own and therefore a distinctive way of approaching and handling social problems—its own point of view? Or is law instead merely the handmaiden to the other social sciences—a mixture of practical reasoning and political science, perhaps with a smidgen of sociology (the more statistics, the

¹ Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).

² The talk of an intellectual crisis in our law has been a theme of legal theory for some time now. *See, e.g.*, HAROLD BERMAN, *LAW AND REVOLUTION I: THE FORMATION OF THE WESTERN LEGAL TRADITION* 1 (1983); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992). Talk of other crises for our law also abound. *See, e.g.*, Michael E. Tigar, *Crisis in the Profession: Don't Mourn, Organize!*, 37 OHIO N. L. REV. 539 (2011); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1996).

³ *See, e.g.*, Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B. U. L. REV. 671 (2014); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?* 94 TEX. L. REV. 1330 (2016).

⁴ *See generally* SCOTT SHAPIRO, *LEGALITY* 1-34 (2013).

⁵ *See* Anthony Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1, 1 (1999) (noting that “[t]he legal profession is passing through a period of anxiety and self-doubt, an identity crisis of unprecedented proportions”); *see generally* ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996).

better) and a dash of psychology (preferably neuroscience, ideally with fMRIs)?⁶ Is there, in short, any ‘there’ there to legal thinking? Or is law merely the perfection of a kind of sophistic technique and lawyers the technicians, trafficking in whatever second-hand ideas and peddling whatever second-rate syllogisms will pay today’s billable hour? As David Luban once put it, what legal thinking lacks is a paradigm,⁷ and, so far, none has appeared on the jurisprudential horizon.

Obviously these are to some degree questions of self-perception and to that extent self-confidence: law is nothing if not self-aware.⁸ But they are also questions of profound importance for the survival of our Western tradition of law—and hence the present feeling of crisis. The thesis of this dissertation is that this crisis is at bottom an intellectual one—a crisis of confidence in the legal point of view itself—and that the end of the crisis will come only by rethinking law in a way that has long been held unthinkable. That thought is that our law can be and should become a modern science. And the work of this dissertation is thus not only to make that thought clearer and more concrete, but to explain why it can, and should, become a new ideal for us today.

Accomplishing this, however, first requires something of a legal lobotomy. For even though the “[e]conomists and feminists, sociologists and doctrinalists, centralists and pluralists, positivists and purposivists” who make up our law may be “unable even to agree

⁶ As we will see in Chapter 2, even this concern is not altogether new: some of the American Legal Realists clearly foresaw, and indeed welcomed, the blurring of disciplinary lines, and some even sensed the crisis that would come from it.

⁷ DAVID LUBAN, *LEGAL MODERNISM* 12 (1994).

⁸ Consider, for example, how many times the American legal profession has declared itself in crisis over the last century: by one count, at least once a decade, due to everything from the arrival of new immigrants in the early years of the last century to the Red Scare several decades later to the present (overblown) threat posed by e-discovery and other online legal services. See JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS* 1 (2013). Few, if any, of these crises were ever truly existential, though the one considered in this dissertation, I believe, may well be.

on the boundaries” of legal thought and theory,⁹ they *do* agree on at least one point: whatever our law is, it is not and cannot be a science. Much of the work of the first chapter is therefore directed to excising this intuition: first by tracing it back to the *fons et origo* in our law—the legal science made infamous by Harvard Law’s first dean, Christopher Columbus Langdell—and then, by an abstracted dissection, exposing its one brilliant mistake. That mistake is what I call Langdell’s absolutism: his belief in a single body of legal doctrines that *are* our law.¹⁰ The result of that belief was not only a new legal technique and literature—the “inductive” method and the casebook—but a tidy new legal ideal: the ideal of a rationalist legal science.

However brilliant, that belief was nevertheless a mistake, and within a generation the corresponding ideal of a legal science appeared to be on its way to the oblivion of forgotten history. One last attempt at reviving that ideal came, of all places, here at Johns Hopkins, at its short-lived Institute of Law. Led by a trio of Legal Realists armed with the empirical techniques of the social sciences, the Institute would become the last visible symbol of Langdell’s ideal in the twentieth century—and yet another failure. But that failure, like Langdell’s, is instructive. As I explain in the second chapter, this brief institutional experiment marked the beginning and the end of a new ideal of a legal science: an *empiricist* science, reconstructed along the lines of a newly *naturalistic* methodology. But that methodology ultimately betrayed them: by pursuing their naturalizing technique they ended up offering a jurisprudential account of law that would have replaced our ordinary, prescriptive legal rules with empirical descriptions of how officials—preeminently judges—actually decided cases. For most lawyers and philosophers this was a simply incredible

⁹ LUBAN, *supra* note 7.

¹⁰ For reasons that will only become apparent by the end, one might also consider it his *fundamentalism*. See NANCY CARTWRIGHT, *THE DAPPLED WORLD: A STUDY OF THE BOUNDARIES OF SCIENCE* 23ff. (1999).

substitution of statistics for good sense: a jurisprudential non-starter. And thus, within the span of a few lively years, this last symbol of a science of law came to an abrupt, and rather ignominious, end.

The story of the first two chapters is therefore one of a common failure. Langdell and his followers had sought to tidy up the mess of our common law, but ended up turning his ideal of a legal science into a menacing—and unsustainable—absolutism. And while the Hopkins Realists had instead tried to let in all the messy realities of our law, they did so by following the path of a naturalism that, in the end, had doomed the ideal of legal science altogether. Thus both had allowed bad technique to thwart their ideal. And we are still the poorer for it.

But, for all their failings, these rationalists and empiricists did have their flashes of insight. And in the remainder of the dissertation, drawing on the intervening century of work in the philosophy of science, I explain how we can assemble those insights into the premises of a new ideal of a legal science, a science built up by a new body of techniques. The techniques belong to what I call a theory of doctrinal models, and the idea of legal science they support is accordingly a science of idealization and abstraction, rather than one of absolute laws or of empirical generalizations.¹¹ Together, I argue, these techniques and this idea can create the conditions of something genuinely new for our law: the cultural and institutional conditions of a fully *modern* science. But to do this would require us to make that idea into a new ideal for our law, by redrawing our legal culture around concepts that are, at least at the moment, rather alien to it. That task lies beyond the end of this dissertation. But just seeing that this idea and ideal are real possibilities for our law—that they are not nearly as thin and fatuous as has long been believed—is enough, I submit, to

¹¹ The processes of idealization and abstraction are the subject of Chapters 3 and 4. For a general discussion of this distinction, see NANCY CARTWRIGHT, *NATURE'S CAPACITIES AND THEIR MEASUREMENT* 183-230 (1989).

put an end to our law's many doubts about itself today. We *can* bring an end to our present crisis of confidence, but only by finally achieving our law.

CHAPTER 1
LAW WITHOUT ABSOLUTES

. . . the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.¹

Introduction

Today the very idea of a science of law—the thought that law could be made a science like any other taught and studied at a modern university—has the ring of an oxymoron, the punch line of a forgotten joke. Ever since Oliver Wendell Holmes challenged the first dean of the Harvard Law School a century or so ago for peddling a “legal theology” in his first casebook,² itself a first try at legal science in America,³ the idea has received near universal condemnation.⁴ Although critics are divided over exactly where and why a thinker like Langdell got things so badly wrong, there is little question today that he did.⁵ Misled about how lawyers and judges really think when thinking about law, the criticism goes, Langdell inevitably misunderstood what it is that lawyers think *about*. Lawyers no more resolve disputes with deductions from “a few fundamental doctrines”⁶ than car mechanics fix sputtering engines with calculations from the laws of motion or electro-magnetism. Failing to see what lawyers actually *do* when ‘doing’ law, the professor let

¹ ALFRED, LORD TENNYSON, *ALYMER FIELD* 14 (1898).

² Oliver Wendell Holmes, *Book Notices*, 14. *AM. L. REV.* 233, 234 (1880).

³ CHRISTOPHER COLUMBUS LANGDELL, *CASES ON CONTRACTS* i (1871).

⁴ A recent exception is Nancy Cook’s attempt at rescuing the “paradigm” of legal science through an analogy with twentieth-century philosophy of science. See Nancy Cook, *Law as Science: Revisiting Langdell’s Paradigm in the 21st Century*, 88 *N. D. L. REV.* 21 (2012). Her emphasis falls, only naturally given that aim, on drawing out the points of similarity between the two. Here, by contrast, I aim to make a direct case for a science of law, by fleshing out the wider sense of ‘science’ that inspired lawyers like Langdell to think of their work as scientific.

⁵ WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* 5 (1998) (describing the idea of a legal science as “fatuous”).

⁶ *Id.*

himself slip into the grip of a picture that was altogether too tidy and so, naturally, false. Just where law is to go from these purely negative observations has eluded the same consensus, with some thinking it should be reworked essentially from the outside, in the image of the “real” sciences of economics or sociology,⁷ while others would demote it to paid partisanship, the lucrative business of getting clients out of court and on the right side of the powers-that-be.⁸ No matter the resolution of those debates, however, the contemporary consensus is now quite clear: whatever law is, it is not a science.

This consensus I believe is mistaken, indeed importantly so. Not only does this blank rejection of legal science rest on an overly crude, indeed at times false, understanding of the tradition of legal science that began long before Langdell thought to make it a theme of his casebook and classroom. It also fails to reckon seriously, if at all, with the possibility that there *is* something intellectually distinctive to law: that there is more than a codeless myriad of past decisions to guide decisions today, and that through its vast wilderness one can cut paths other than those leading to the glory of a headline, or a good living. Just as importantly, though, this overhasty dismissal of legal science has thrown the law into a genuinely practical predicament—the near constant feeling of professional crisis that has come with the hollowing out of its intellectual identity, the loss of its fighting faith.⁹ It was

⁷ See RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (9th ed., 2014); Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC'Y 171 (1998). See also Anthony Townsend Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 337-339 (1988) (discussing the ways that Law and Economics and Critical Legal Studies have sought to study the law from outside the discipline).

⁸ See Kronman, *supra* note 7, at 338-339 (discussing the “conventionalist” response to Legal Realism); Brian Bix, *Law as an Autonomous Discipline*, THE OXFORD HANDBOOK OF LEGAL STUDIES 975 (Peter Crane & Mark Tushnet eds. 2003) (arguing that the law’s relative autonomy is due to the distinctive skills lawyers learn as participants in a hierarchically rule-governed and precedent-bound system).

⁹ See generally Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885 (1993) (remarking the “identity crisis” facing the “lawyer-teacher” arising from the uncertainty about law’s “integrity and autonomy as an institution”); Jack Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 964-70 (1996) (noting the sense of crisis in the law and its relation to the encroachment of disciplinary outsiders); HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 33-41 (1983) (discussing the crisis in which the Western legal tradition found itself at the close of the twentieth-century, linked to a decline in a viable legal science); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s*

no accident, after all, that Langdell first sketched his idea of a legal science in the preface to a casebook, or infamously opened his first class at Harvard, not with the then-customary lecture, but by asking one Mr. Fox for the facts of *Payne v. Cave*.¹⁰ Indeed, the pedagogical pillars on which the modern profession now stands—the three-year post-baccalaureate degree; the lecture-hall drama of the “Socratic” interrogation; the bread-and-butter genres of modern legal literature, the casebook and law review; even final exams—all were quarried from an idea that is now thought worse than quaint, even faintly ridiculous: the idea that law could be a science, and the library its laboratory.¹¹ Having forgotten if not forsaken its scientific past, law now finds itself at a loss to explain its place alongside the disciplines of a modern university—its status as a genuinely *learned* profession. Law, no longer a science, has not only lost its intellectual focus, but its very point of view.

In this chapter I want to explain why this rejection of legal science, giving rise today to so much professional and intellectual doubt, was altogether needless—a self-inflicted jurisprudential wound. There *is*, in fact, a sense in which we can see law as a science, but only once we see more clearly and accurately just why Langdell’s science was destined to fail: what about his legal science was so clearly wrong. Part I accordingly lays out both the basic idea of legal science and specific conception that Langdell was working out in the context of the American common law: the *rationalist* tradition of legal science. What was distinctive of that tradition was the *absolutist* way it had understood and framed the *intellectual* character of legal science: an absolutism as to the law’s content, method, and viewpoint. Part II then reviews and examines the twofold critique of that science begun by Holmes and later carried out in detail by the American Legal Realists, showing that, contrary to the claims of a

‘*Consideration and Form*’, 100 COLUM. L. REV. 94, 97-98 (2000) (indicating the declining faith of the “American legal consciousness” in its own rationality).

¹⁰ Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

¹¹ Christopher Columbus Langdell, *Address 1886*, 9 L Q REV 123, 123-25 (1887); WIECEK, *supra* note 5, at 93.

rationalist legal science, the law is indeterminate not just *in practice* but *in principle*. Hardly a decisive objection to a science of law as such, this principled indeterminacy instead sets the stage for a fresh reconsideration of the failure of rationalist legal science, one already pioneered by the early fellow-traveler of the Legal Realists, John Dewey. What Dewey sought was a *naturalized* understanding of the intellectual premises of the law and, through those efforts, a naturalized theory of legal science—a science of law without absolutes. By taking up the naturalism of Holmes, and absorbing the critical lessons of the later Realists, Dewey sought a legal science that would synthesize the law’s distinctive body of concepts and principles in a way that would be useful to the working lawyer yet capable of the growth that was largely lacking in the rationalist tradition of legal science. What he argued for, and what we need now more than ever, is a *pragmatic* science of law—the first article of a new fighting faith for our law.

I. Absolutizing the Law: The Rationalist Idea and Ideal of Legal Science

The idea and ideal of legal science that Justice Holmes had ridiculed was already quite old by the time it swept across the American legal scene in the dawn of the last century—a century that would see more than one attempt at burying it for good. Indeed, the roots of that legal science, lightly sketched in the first pages of the first modern casebook, reached well beyond the traditional materials of English theory and experience on which American lawyers like Langdell ordinarily drew, and into the very earliest years and oldest sources of Western legal thought. And like those ancestral notions of legal science, the ideal of a legal science that briefly flourished among American legal thinkers¹² was a

¹² See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 478 (3rd ed., 2005) (noting that towards the end of the nineteenth century the “dominant culture of legal scholarship was infected by Langdell’s ideas of

vision of absolutes—of law as a system of principles that was practically and intellectually autonomous from any other discipline or field of study. It was this vision that the Realists all rejected in one way or another, and which therefore deserves in this section a somewhat more synoptic depiction than it has usually received.

Before turning to that depiction, however, it is worth noting that the tradition of legal science I outline here is necessarily a simplification, an abstraction away from the actual historical systems and thinkers discussed. What has gone by the name of legal science has differed greatly from one legal thinker, system, and age to the next. Thus, an idealization like the one I pursue here will of course have to rub away important qualifications and complications. Only complicating matters is the fact that the thinkers who articulated the elements of a *theory* of legal science, Langdell among them, were lawyers and jurists, not philosophers.¹³ Perhaps understandably, then, they often displayed little inclination to spell out their analytical assumptions and prepossessions. In what follows I will therefore be aiming less for the faithful biography of the idea of a science of law and more for its philosophical reconstruction, along lines that will be somewhat artificial as a result. This will nevertheless help to lay out more clearly what a legal science has generally been thought to entail—what the idea of a legal science comes to both generically and under the more specific, traditional interpretation that links a relatively modern lawyer like Langdell to the medieval jurists and canonists who helped found our broader Western legal tradition. As we will see, what that traditional science has been thought to involve are three closely-connected

legal science, or converged on the same state”). There is of course not universal agreement that this highly formalistic and conceptualist mode of thinking ever achieved anything like the status of an orthodoxy in that period, although the evidence against it has been less than persuasive. See BRIAN TAMANAH, *BEYOND THE REALIST-FORMALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010) (disputing the prevalence of Langdell’s type of “formalism” in the same period); Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?* 16 *LEGAL THEORY* 111 (2010) (questioning the cogency of Tamanaha’s historical argument on this point).

¹³ See WIECEK, *supra* note 5, at 80 (noting that, “like American lawyers of any period,” legal thinkers in late nineteenth-century America were “notoriously indifferent to philosophical inquiry”).

assumptions about the *intellectual* character and premise of the law—what it consists of, and how we come to know, justify and use it—all of which were drawn in a spirit of absolutes.

A. The Assumptions of Traditional Legal Science

When Langdell declared at a meeting of the Harvard Law School Association that “law is a science,” and that “all the available materials of that science are contained in printed books,”¹⁴ his audience of lawyers likely sensed nothing especially revolutionary in the air. Nor did they likely catch the echoes of the Scholastic Jurists who had expressed much the same conviction several hundred years before. After all, what Langdell appeared to be saying in calling law a “science” was simply that it was more than mere handicraft. Law, regarded as a science, was also an authentically intellectual discipline, aimed at elaborating and systematizing a body of general propositions or “truths” of law, and which therefore needed the prop of an intellectual culture that valued impartial inquiry and institutions willing to support it.¹⁵ This was hardly startling stuff, at least not to a generation of lawyers raised on systematic treatises like Parson’s *Contracts* or Greenleaf’s *Evidence*, or to the fairly uncommon lawyer in those early days who had picked up his doctrinal basics at a law school like Harvard’s.¹⁶ In this wider sense, Langdell’s science was less a philosophical surmise than a sociological banality—plain fact.

Yet, at a closer look, these bland appearances gave way to a more radical thought.

For what Langdell had understood as the *intellectual* substance of this science—the truths that

¹⁴ Christopher Columbus Langdell, *Address 1886*, 9 LAW Q. REV. 123, 123-25 (1887).

¹⁵ These correspond to the premises that Harold Berman has identified as the founding assumptions of the scientific strain in the Western legal tradition, what he calls its methodological, value, and sociological premises. See Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 930-941 (1977); see also Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999) (discussing the background of early “moral” and later “naturalistic” legal sciences in nineteenth-century American law schools).

¹⁶ See FRIEDMAN, *supra* note 12, at 467-77 (reviewing the history of Harvard Law School’s curricular transformation under Langdell and the treatises popular with lawyers in the nineteenth century); see also WIECEK, *supra* note 5, at 38-41 (discussing the early examples of legal science in 19th century American law).

he believed he was uncovering as a legal scientist—and how he thought they related to the prosaic materials of legal life, had amounted to something genuinely new in America, and represented a considerable narrowing of the notion of legal science from its wider sense. It was in fact only the modern flowering of what I will call the tradition of *rationalist* legal science.¹⁷ The fact that Langdell’s was only a modern variant of a much older and more general theory of legal science (and a rationalist one at that) can be seen in the way that he elaborated the three assumptions on which it rested—assumptions relating to the law’s content, to its methodology, and to its viewpoint. These assumptions, held and explored long before Langdell came to apply them to American common law, naturally gave rise to differences between these theoretical variants. Some of the differences, as we will see, are quite substantial. But these were differences lying mostly on the surface, ultimately owing more to the vastly different social and intellectual milieus in which they were conceived—late nineteenth-century America as opposed to twelfth-century Europe—than to the theory that their common assumptions defined. Understanding how those assumptions were worked out in these differing contexts, and especially in the modern and medieval contexts where they achieved their widest influence, will help us to see just what their common theory of legal science really came to, and why, in Realist hands, it was sure to unravel.

1. The Content Assumption: Content Absolutism

The two attributes most clearly—and invidiously—associated today with the leading historical examples of legal science are ones that their champions only rarely addressed directly, and never in so many words. These are what have since become known as their

¹⁷ By calling this science “rationalist” I do not mean to imply any particular affinity between the view I am attributing to Langdell and the twelfth-century jurists and the various philosophies that have since gone by the same name. I am instead following the usage that the philosopher Ronald Giere has suggested for characterizing the logical positivists’ philosophy of science, an “enlightenment rationalism.” See RONALD GIERE, *SCIENCE WITHOUT LAWS* 57-65 (1999). Nor am I the first to use the term in characterizing Langdell’s legal science. See Morris Cohen, *Law and Scientific Method*, 6 AM. L. SCH. REV. 231, 234 (1927) (observing that Langdell “labored under a thoroughly rationalistic conception” of law).

conceptualism and formalism, and both lie at the heart of the rationalism typical of their common intellectual tradition. Just as important as each of these attributes, though, was an assumption implicit in both, and especially when taken together—the assumption that law comprises a set of universal or absolute legal principles of concepts, comprehensive in scope and complete and consistent in its answers to legal questions. It was a picture of law sketched from a vision of conceptual absolutes. Explaining how that absolutism has historically appeared and what more it entails will first require some discussion of the twin attributes associated with the legal science typifying it—its conceptualism and formalism.

In the case of modern legal science, both attributes made an early, if oblique appearance in one of the few places that Langdell ever spoke of a science of law at all:¹⁸ in the preface to his first casebook on Contracts. There, he introduced this effectively new genre of legal literature with typical matter-of-factness:

Law, considered as a science, consists of certain principles and doctrines. To have such a mastery of these as to be to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be trace in the main through a series of cases . . . Moreover the 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. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.¹⁹

Beyond the obvious longing for simplicity and conceptual tidiness is also a theoretical

¹⁸ Bruce Kimball has noted in his enlightening intellectual biography of Langdell that, in all of the ten-thousand-odd pages he wrote, Langdell explicitly drew an analogy between law and natural science only three times—the most widely remembered being the one reproduced above. Kimball therefore doubts both the centrality, even the sincerity, of that analogy in Langdell's understanding of law. Suffice it to say that I disagree with his assessment, and, bowing to received tradition, will pursue the analogy as a live one. See BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* 349-51 (2009).

¹⁹ LANGDELL, *supra* note 3.

impulse, found where the first and last sentences meet—the point at which his conceptualism emerges. This view holds that law not only consists of certain legal rules, principles, and concepts, together forming what lawyers broadly call “doctrine.” It also consists of these doctrinal “threads” in a certain orderly, systematically-interconnected way: they were thought to run throughout different patches of the common law, invisibly pulling together and binding the rules scattered across the case reporters into a single conceptual garment. These doctrinal threads were accordingly few in number—they collected together many rules, even some that might not have appeared to go together—and were wider in reach than ordinary, case-specific rules of law.²⁰ All the legal scientist need do was uncover these threads.

This thought alone, of course, was hardly enough to distinguish a unique legal theory, let alone a legal science. Nobody could seriously have denied, after all, that notions like ‘negligence’ or ‘causation’ spanned law in a way that lifted them in a sense out of and above a narrow line of cases. What was distinctive about Langdell’s thinking on this point—the *conceptualism* behind his thought—was his belief that the *entirety* of the common law was amenable to this kind of abstract simplifying, this systematic kind of legal synthesis. Formal legal materials only reflected this universally-valid, hierarchically-ordered system, with legal rule derivable from legal principle, and legal principle bridging one set of expansive legal concepts to another. Thus it came to resemble a formal axiomatic system, probably by design,²¹ but its underlying impulse was the orderly systematizing of the law on the books.

To take one notorious example, Langdell encouraged his students to see the

²⁰ The concepts relevant to this ordering are those, as Thomas Grey has pointed out, that lawyers would consider issue-determinative: concepts like ‘adverse possession’ or ‘collateral estoppel’ or ‘strict liability.’ Categorical distinctions dividing areas of law—between tort and criminal law, say, or contracts and property—need not be of this kind, though they may be. In those cases where they are not, one could say they are differences of organizing *captions* rather than of operative *concepts*. Grey, *supra* note 10, at 1, 9 n. 28.

²¹ M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

“bottom-level” rule²² governing the acceptance of an offer delivered through the mail not as a question of practicability, convenience, or justice, but as the conclusion of a demonstrative argument: a deductively-valid inference from a set of legal concepts and a legal principle underlying all of contract law. Insofar, that is, as a contract requires valid bargained-for consideration (a legal principle accepted on authority), which in the case of a bilateral contract must be a promise (due to the definitions of ‘bilateral contract’ and ‘consideration’), and since a promise made by letter cannot be conveyed to the promisee until she has read it, a contract by letter consequently cannot be considered made—the offer cannot be said to be accepted—until it has at least been received (the bottom-level rule of acceptance by mail). Thus, the formal legal materials—the principle and several basic concepts—had completely determined the choice of rule: strictly speaking, the only choice was whether to accept what the law entailed. So the alternative rule—that acceptance becomes effective as soon as the promisor drops the letter in the mail (and hence its later name, “the mailbox rule”)—could be confidently rejected out of hand, despite the weight of precedential authority backing it at the time (to say nothing about better sense),²³ simply for failing to square with the relevant legal principles and concepts. The formal legal materials had thus not only yielded a new rule for this novel case but had trumped another. Even the apparently hard case had an easy answer.

That lesson, of course, was general.²⁴ What was true of the mailbox rule could and should be true of all the common law, so Langdell believed, with bottom-rung rules

²² I adopt this term and way of framing this example from Thomas Grey’s insightful examination of the finer points of Langdell’s legal science. Grey, *supra* note 10, at 12.

²³ See Grey, *supra* note 10, at 20 (observing that the weight of English and American authority at the time appeared to side with the mailbox rule).

²⁴ As Duncan Kennedy has pointed out, the doctrine of consideration could answer questions across contract law, including whether courts should enforce promises of gifts (no, absent grounds for promissory estoppel) or promises of compensation for a benefit previously conferred (no) or promises guaranteeing somebody else’s debts (no). Kennedy, *supra* note 9, at 100.

systematically brought into line with higher-level legal principles that themselves drew on similarly expansive legal concepts. However dissimilar the dizzying diversity of cases and rules may have seemed, and however they clashed on the page, they all could nevertheless be seen pointing beyond themselves, to a conceptual system that would clarify and resolve them. The principle and concepts constitutive of that system could thus yield fresh rules in new cases, because they were in a sense already there, latent in the scheme they defined and only awaiting discovery and arrangement by the legal scientist, on the one hand, and use and elaboration by the scientifically trained lawyer on the other. Every case would be, quite literally in principle, an easy one. And a messy law of unsorted rules would thus harmonize into a tidy rule by absolutes.

Joined to and rigidifying Langdell's conceptualism, though not entailed by it,²⁵ was his further belief that every legal question that did or could arise had a single, exact, and absolutely certain answer. His faith on this point, typifying his formalism,²⁶ flowed from the thought that these higher-level conceptual materials could supply the premises of a demonstrative argument—argument that was deductively valid and perfectly exact in its subsumption of specific cases within its premises' general terms.²⁷ The “true lawyer,” as Langdell put it, could thus bring the law's few fundamental doctrines to bear on legal subjects with a “constant facility and certainty,” as he thought he had, for example, in the case of the mailbox rule. And although this would later be lampooned, not altogether unfairly, as a kind of ‘mechanical’ thinking (especially in the context of judicial adjudication), a little charity might instead lead one to say only that his formalism required legal reasoning

²⁵ Grey, *supra* note 10, at 8-9 (noting that formal conceptualism differs from an informal one on just this entailment).

²⁶ Brian Leiter has helpfully distinguished between two varieties of formalism: one vulgar, where reasoning from legal materials takes the literal form of the syllogism, and another more sophisticated version under which legal reasoning may stray from the syllogism while still remaining rationally determinate. Leiter, *supra* note 12, at 111.

²⁷ See Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing both of these aspects of formalism).

to be in all cases rationally determinate.²⁸

Every legal question, that is, was thought to have a unique answer that followed demonstrably from what under one's legal system counted as the relevant legal material, allowing of course for the conceptually wider sense in which Langdell thought of those materials. This meant that, in principle at least, every possible legal question was covered by the system both substantively and procedurally (the law was *complete* and *comprehensive*), and that there was never the risk—again, in principle—of reaching conflicting answers on any question (it was thus *consistent*).²⁹ Coupled to his conceptualism, Langdell's formalism had thus hardened his understanding of law into a system that was as substantively as it was logically absolute.

It is important to see, though, that simply saying Langdell took these higher-level conceptual materials to be conceptually and formally absolute did not mean that he must have believed they could not or did not evolve.³⁰ After all, in the same breath that he called on lawyers to peel away the many obscuring layers of case law in order reveal the “few fundamental doctrines” just underneath, he also pointed out that law is a “growth,” having evolved into its present state only by “slow degrees.”³¹ And in this way Langdell differed markedly from the early Scholastic Jurists who had expounded their own, similarly rationalistic legal science centuries before, relying on the then-recently rediscovered legal materials compiled centuries earlier under the Roman Emperor Justinian.³² For them, the Roman law revealed through Justinian's *Codex* was more than just another legal system against which to compare and make a fresh study of their own local feudal customs. Rather,

²⁸ See Leiter, *supra* note 12, at 111.

²⁹ Grey, *supra* note 10, at 7-8.

³⁰ See Grey, *supra* note 10, at 28 (discussing Langdell and his followers' belief in the evolution of the common law).

³¹ LANGDELL, *supra* note 3.

³² Berman, *supra* note 15, at 898.

it was “an ideal law, a body of legal ideas, taken as a unified system,” much like the common law would later be imagined by Langdell.³³ Yet, unlike Langdell, they had no sense of the evolutionary potential in the Roman materials from which they proceeded in their legal analytics. They instead treated the legal rules they found there (*regulae*) as what they called legal “maxims.” That term signified not what it does in English now—something closer to a rule of thumb or practical saying—but something theoretically far richer, and more absolute—what Aristotle had called a universal proposition, i.e., a proposition that was considered self-evidently true and which could form the major premise of a syllogism.³⁴ These were rules in the sense of being “independent principles of universal validity” expressing “universal truth and universal justice,” and were therefore not thought to be subject to revision, let alone growth.³⁵ Just like the legal principles and concepts Langdell had imagined settling between the lines of reported judicial opinions, the newly-recovered arsenal of Roman *regulae* were believed by the Scholastic Jurists to make possible a complete systematization of their canon and secular law. These Justinian maxims would thus serve as the conceptual lights by which they would cut their orderly analytical paths through a bewildering underbrush of legal materials they were only beginning to confront.

And the reason they believed they could do this was the same as Langdell’s: they had assumed that the legal principles and concepts unearthed in the Roman texts could play the role of universally valid principles of legal reasoning *for them*—universal, that is, across the vast territory of legal materials they had set out to explore and classify and put in fresh order. So whatever differences there were between the Scholastic’s and Langdell’s legal science—and there were many—they did not fall in the roles they had each envisioned for their

³³ *Id.* at 907.

³⁴ The Latin term was also Aristotelian in origin, with “maximum proposition” translating the original Greek for “universal” (and hence the short-hand “maxim”). *Id.* at 917.

³⁵ *Id.* at 918.

respective conceptual materials. Neither side doubted the universality of the principles and concepts they were synthesizing out of the welter of received legal norms. We might say that in both systems these conceptual materials were thus *relatively* absolute—central and indubitable, but only in relation to their respective legal systems.³⁶

Where, then, *did* the difference lie between these two theories of legal science such that Langdell could believe in the growth of his conceptual system while the Scholastics did not? The answer is likely found in the extraneous belief that the Scholastics had with regard to Roman law generally: they took that law to be more than just the law of a once living but then vanished legal system, but instead a “written embodiment of reason, *ratio scripta*”—not just absolute *for them* but for all rational thinkers.³⁷ They therefore took these received maxims as at once timeless and inerrantly true, much as they took the immutable truth of Scripture to foreclose the possibility of any later, incompatible revelation.³⁸ Langdell, by contrast, who had read his Darwin³⁹ and could look across the Atlantic to the unfolding of a rival common law, could not have seriously maintained that the legal principles and concepts he postulated for his legal science were the *only* ones possible, any more than a modern physicist could seriously deny the possibility of geometrical systems other than Euclidean, in light of our deepened understanding of phenomena on the scale of collapsing stars as well as falling apples. Law could not only have a structure but a history.⁴⁰ From the standpoint of a lawyer working within the system of common law as it had evolved up to his time, Langdell

³⁶ The belief in a kind of relative absolute or necessity may have its affinities with Hegel, yet it lives on today in decidedly un-Hegelian jurisprudential circles. See Brian Bix, *Raz on Necessity*, 22 LAW & PHIL. 537 (2003) (discussing Joseph Raz’s appeals to necessity in his positivist analysis of the concept of law).

³⁷ BERMAN, *supra* note 9, at 204.

³⁸ *Id.* at 918 (comparing the Scholastic Jurists’ treatment of Roman texts with scripture). This is not to say, however, that the jurists and canonists of the eleventh and twelfth centuries were not alive to the evolutionary potential of legal materials. See BERMAN, *supra* note 9, at 205 (noting that canon law showed “a quality of organic development” and “conscious growth over generations and centuries”).

³⁹ See KIMBALL, *supra* note 18, at 26-27.

⁴⁰ So Justice Holmes would later, anonymously, accuse Langdell of crypto-Hegelian sympathies. See *Book Notices*, *supra* note 2.

was only expressing the obvious in saying that the legal principles and concepts he had ‘discovered’ there were universally—and in this sense absolutely—valid *for them*, much as latter-day physicists could assume the validity of the axioms and postulates of Riemannian geometry in working out the theory of general relativity. They were both thought to be on the order of universal generalizations, empirically observed and rigorously confirmed in their respective domains of fact: legal for Langdell, material for physicists.⁴¹ Each may have emerged to meet their specific intellectual—and in the case of law, broadly social—needs, but each also had its own rational structure and a content, an inner logic, absolute in its own domain because universally true of it.

Langdell had thus added to this tradition of legal science an importantly modern qualification: the recognition—almost too obvious to mention today—that there might not only be another, equally authoritative legal system, but one that also had a very different natural history, and, as a result, its own peculiar structure and content—its own inner logic. As to the content of his *own* legal system, however, Langdell joined the Scholastic Jurists in postulating a single system of legal principles and concepts spanning and determining the content of all of its authoritative materials, thus making possible demonstrative argument about and from them. And this formed the core of the first assumption he had thus shared with the jurists and canonists several hundred years before him: an absolutism as to the law’s content.

2. The Methodological Assumption: Categorical Rationality

The second major assumption made by the tradition of rationalist legal science reaching from the twelfth-century study of Justinian’s code into Langdell’s analysis of common law was methodological. Here, the central concern was not *what* a theory of legal

⁴¹ See Grey, *supra* note 10, at 18.

science was about—viz., the conceptual absolutes just discussed—but *how* those conceptual materials were thought to be arrived at. And on this point, the modern and medieval legal sciences differed remarkably little, at least in general outline. The method they both envisioned was a distinctly *rational* one: a logically disciplined technique for the analysis and synthesis of legal texts that has sometimes, misleadingly, been referred to as induction, but which is better thought of as a process of *abduction*.⁴² It was a method conceived, moreover, in a similar spirit of absolutes. Drawn in the broad terms of categorical principles of rationality, the method would supposedly allow any legal scientist to extract from existing legal materials a body of correct or ‘true’⁴³ legal principles and concepts—the absolutes discussed in the last section—from which they could then go on to solve new legal difficulties arising under novel circumstances, all along familiarly formalist and conceptualist lines. Their conceptual absolutism would thus be blessed by an infallible method.

For the Scholastic Jurists who had pioneered this method by sorting through their ragbag of legal authorities—including everything from local custom to Roman law to Scripture—the constant burden was to find a way of reconciling rules and principles that were clearly contradictory. And so, somewhat naturally, the technique they proposed took the form of a dialectic of opposites, a drama of abstractions shaped much like the disputes that took place before the courts of justice at the time, with cases presented for the respective sides that concluded either in their reconciliation or with the victory of one or the

⁴² See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 27 (1949) (noting that legal reasoning “is not truly inductive,” since “[w]ith case law the concepts can be created out of particular instances”). The term ‘abduction’ is due to C.S. Peirce, and refers to the process by which explanatory hypotheses are drawn from empirical observation. It has been illuminatingly examined in the context of legal reasoning by Scott Brewer. See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 945-48 (1996).

⁴³ I enclose the word in inverted commas to ward off the too-easy misinterpretation of this account of legal concepts and principles as presupposing a kind of Platonism. See Berman, *supra* note 15, at 919-21 (discussing the nominalist backdrop to the Scholastic Jurists’ understanding of legal science).

other.⁴⁴ Thus a typical inquiry would begin with a question (*quaestio*) relating to a contradiction on some point of law derivable from authoritative sources, from there leading to the assertion of a main proposition (*propositio*) along with its opposite (*oppositio*), both of which were similarly elicited from authorities. A contest of claims would then follow, with reasons and arguments drawn up on both sides from still other authoritative texts, and, after consideration of each, resolution (*solutio* or *conclusio*) was arrived at, accepting one or the other, or their qualified reconciliation.⁴⁵

In an example that Berman provides from the canonist Gratian,⁴⁶ both the New and Old Testaments were taken to forbid killing, yet each revealed cases where the use of deadly force had been approved. The question (*quaestio*) naturally became: when, if ever, was the use of force legally appropriate? Among its many precepts, Roman law had laid down the rule (*propositio*) that force could be used to repel force (*vim vi repellere licet*).⁴⁷ Meanwhile, one could equally point to the example and sayings of Jesus for the clearly contrary proposition that one should instead turn the other cheek (*oppositio*). The task for the scholar then became one of mediating these obviously contradictory positions, backed as they both were by equally weighty authority. They did this by a process of synthesis which we would now call abductive:⁴⁸ the canonist would draw out of the litany of examples and cases from various authorities a rule best explaining and reconciling them, a rule that could then be used to answer the question presented in the immediate, target case.⁴⁹ In the present example, the canonists like Gratian ultimately drew from the contrary maxims found in Roman law and

⁴⁴ BERMAN, *supra* note 9, at 147-48.

⁴⁵ *Id.* at 148.

⁴⁶ This example was repeated elsewhere by other twelfth- and thirteenth-century canonists. *Id.*

⁴⁷ *Id.*

⁴⁸ See *supra* note 42.

⁴⁹ Berman has somewhat perplexingly likened this to the rule of inference, familiar from predicate logic, of existential generalization, but as explained above the reasoning involved is in fact abductive. See BERMAN, *supra* note 9, at 140; see also *supra* note 42.

the New Testament a reconciliation taking the form of a series of principles, or other ‘maxims,’ determined when force would be justified or excused (to defend oneself or one’s property, for example, or to see that the law is carried out). These were then repurposed in later cases to answer questions arising out of other seemingly unrelated civil and criminal contexts, even being pressed into farther-ranging disputes in political theory and theology (such as in the debates over ‘just war’).⁵⁰

Naturally, this is a simplified presentation of an already simple example. Of importance here, however, is simply the fact that this method was thought to embody a uniquely and categorically *rational* way of arriving at a set of legal principles and concepts that were themselves believed to underlie and determine the application of lower-level rules across widely varying contexts. In this way, a scattering of rules across dissimilar contexts and from different authorities could give rise to and justify a set of universally valid principles and concepts of law. Law would have both a unique subject-matter and a unifying method. Indeed, as Berman points out, it was precisely these twin beliefs that distinguished the way that the Scholastic Jurists and canonists had used the Roman legal materials (among others) from the use the Romans had themselves made of them. Although the Romans had the same legal concepts and ‘maxims’ at their disposal, they did not treat either “as ideas which pervaded the rules and determined their applicability,”⁵¹ and so they had no reason to think they required any sophisticated technique to reconcile the varying application of rules, or even different rules, in what looked to be substantially similar contexts.⁵² It was thus the canonists’ belief that behind these various and conflicting rules stood a unifying conceptual

⁵⁰ Their use of legal *solutiones* in these latter contexts was a natural consequence of their taking the Roman *regulae* as forming a body of law alongside the rules and doctrines that today’s hard positivists would consider strictly ethical or theological, i.e., non-legal, sources. See BERMAN, *supra* note 9, at 148.

⁵¹ *Id.* at 150.

⁵² *Id.* at 916 (noting that the “classical and postclassical Roman jurists thought of a legal rule as a generalization of the common elements of decisions in a restricted, specified class of cases”).

system—their faith in what I have called content absolutism—that had led them, unlike the Romans (who did not share it), to contrive a correspondingly rational method to elaborate and justify that system. Their theory of legal absolutes was bounded by an account of legal rationality.

The modern method of legal science that flowered centuries later in American law schools would follow much the same pattern. For Langdell, who infamously led his curricular revolution at Harvard in the hopes of realizing this methodological ideal—bequeathing to us both the casebook and the cold call⁵³—the challenge presented by the common law was only slightly less formidable than that faced by the twelfth-century canonists. If law consists of certain fundamental principles and concepts (the same absolutes discerned by the canonists in their own law), how does the legal scientist go about rooting those out from the plethora of cases standing for so many, often-conflicting rules and principles? Just as the canonists several centuries before him, Langdell sought his answer by way of an essentially abductive method.⁵⁴ Much like those early jurists, that is, Langdell believed that by comparing the holdings of various common law appellate decisions (typically American, though occasionally British), one could arrive at a set of relatively few principles and concepts that, as we saw before, were fundamental to the common law (such notions as ‘consideration’ or ‘bilateral contract’). These could then be used, as in the case of the mailbox-rule, to draw out conceptually the ‘correct’ bottom-level rule in whatever situation at issue.⁵⁵ In a perhaps surprising example of this method, Louis Brandeis, then a lawyer but later a Justice, would famously argue for the recognition of a right to privacy that was then unknown to the common law, but which he contended could be detected behind a

⁵³ KIMBALL, *supra* note 18, at 6; WIECEK, *supra* note 5, at 93.

⁵⁴ Thomas Grey, though repeatedly likening this method to induction, also seems to imply that it would in fact be more accurately considered abductive. *See* Grey, *supra* note 10, at 18-19, 31. *See also* Brewer, *supra* note 42.

⁵⁵ *See* Grey, *supra* note 10, at 19.

range of seemingly far-flung cases from across the law of torts and property and contracts.⁵⁶ Although he rested as much of his argument on policy grounds as he did on case law, his argumentative technique was otherwise impeccably Langdellian.⁵⁷ He purported to have teased out of “existing law” a novel legal concept, capable of explaining those apparently unrelated decisions but also siring new doctrinal lines, as it would more than half a century later.⁵⁸

Conspicuously missing from examples like these, though, was even the intimation of the logically disciplined procedure that had been so prominently advertised in the casebook boilerplate and preached from law school podiums—a method worthy of the name. Indeed, that Brandeis could so easily mimic Langdell’s moves in pursuit of purposes that were rather doubtfully scientific in Langdell’s sense points to just how vain the talk of method could become on disbelieving lips. And, as we will see, this was a weakness that the Legal Realists would later exploit disastrously. For now, though, the important point is simply that Langdell, like the Scholastic Jurists before him, nevertheless believed that an account of this method *could* be given—that there was a distinctive line of rationality running through the hand-waving talk that was capable of being traced out precisely and then rigorously translated elsewhere. And once it had been, it could decide and justify the selection of the principles and concepts that Langdell and his followers saw as the lifeblood of the common law.

Of course, this was an assumption taken not only on faith but in a similar spirit of absolutes. Nowhere was this absolutism more glaring than in the way Langdell regarded and

⁵⁶ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See Grey, *supra* note 10, at 31.

⁵⁷ His inquiry was accordingly whether “the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.” See Warren & Brandeis, *supra* note 56, at 197.

⁵⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

treated the law that fell outside the common law he took to be his method's sole subject: namely, the growing body of statutory law and constitutional decisions that then was threatening to overtake, and since has overtaken,⁵⁹ common law decision-making as the preeminent source of American law. Finding them to be either too vague and unprincipled (like the constitutional doctrine of police powers) or too foreign to the existing stock of common law concepts to lend themselves to reasoned integration under his method,⁶⁰ Langdell simply disregarded them as unfit for rational study. In the case of statutory law, he and his followers typically advocated, in formalist spirit, for strict literalism in interpretive method, and largely left it at that.⁶¹ And in the case of constitutional law, Langdell was of the opinion that it should not be taught in American law schools at all: his curriculum at Harvard for some years did not include it even as an elective, and he had nearly withdrawn the institutional support he pledged to the fledgling law faculty at the University of Chicago over their decision to offer it as a part of theirs.⁶²

All of this was absolutism at its purest, its most doctrinaire. And it all had flowed naturally from Langdell's belief that the only areas of law allowing for rational study and synthesis—the law whose conceptual underpinnings were susceptible of categorical justification—were those belonging to judge-made private law. It was thus the modern triumph of the same methodological assumption shared by the jurists who given life to the idea of a legal science some eight hundred years before—an assumption typifying the rationalism of both.

⁵⁹ See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (noting the preeminence of legislation over judicial lawmaking in contemporary American law).

⁶⁰ See Grey, *supra* note 10, at 34-35.

⁶¹ *Id.*

⁶² *Id.* at 34.

3. The Viewpoint Assumption: Strict Internalism

The final assumption common to the tradition of legal science inherited from the Scholastic Jurists and swept into modernity by Langdell dealt with the *type* of theory of law they took their science to be. At the core of this assumption was a point of view about law itself—the way they looked at and approached the materials constitutive of their law in trying to analyze and synthesize it. As such, it has already been hinted at and evinced in the discussion of the two other assumptions they made about law; indeed, in a sense it had pervaded because it shaped the expression of both, in the same uncompromising spirit of absolutes.

In each of the historical examples of legal science surveyed up to now, medieval and modern, we saw that the scholar who took up its work had presumed to derive from a collection of legal texts a body of highly general, abstract law—a system of conceptual absolutes drawn up with the absolute confidence of a rational method. The collection of texts he⁶³ chose was of course far from accidental. They were all taken as authorities, and worked out along lines that were considered authoritatively acceptable. In the case of the Scholastic Jurists this meant that the legal scientist would not only gloss Scripture but gloss it according to accepted interpretive strictures: dogma was as much a part of their intellectual equipment as the syllogism. For Langdell, case law had to be read in light of and somehow made consistent with prior cases that were “on point” (under the principle of *stare decisis*), distinguishing between what was essential to their conclusion as to law—the proposition they stood for, or their holding—and what in them was considered inessential, mere *obiter dictum*.⁶⁴ These were the argumentative techniques and interpretive canons of lawyers who

⁶³ And at the time, the legal scientist was always—regrettably—a “he.”

⁶⁴ See Harold Berman, *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 447 (1996)

worked *within* the respective systems, in other words, those of participants who had *accepted* these materials and methods and thus felt bound to respect them in their thinking and theorizing.⁶⁵ Together they therefore reflect a certain attitude or point of view that we all can and do take toward at least some norms, of which the legal is only one kind—a point of view which has since come to be known as *internal*.⁶⁶ An *external* point of view, by contrast, takes none of these techniques or canons or even materials as authoritatively given. They are as much open to rejection or acceptance, revision or reinterpretation, as any other intellectual commitment, equally up for grabs. The external view is that taken by the detached and disinterested outsider; the internal that of the invested, convention-bound participant. And as is clear from the description, the point of view presumed by both the medieval and modern legal sciences was resolutely internal.

As much as this internal point of view had colored and shaped the way the Scholastic Jurists and Langdell had respectively worked out the other two assumptions of their legal science, those assumptions also fed back into and reshaped the point of view they took toward their working materials. Once they had come to see in their authoritative legal materials the dim reflection of a far larger and more absolute system of legal concepts and principles, one whose truth they could assure categorically and apply with unquestioning confidence and certainty, they no longer had any reason to believe they needed to look *outside* that system to understand law at all. All one would ever need to know in order to

⁶⁵ Some writers have taken the distinction between the internal and external points of view to align with the distinction between practical and theoretical reasoning. See Richard L. Schwartz, *Internal and External Method in the Study of Law*, 11 LAW & PHIL. 179, 179-180 (1992) (contrasting the internal point of view, as “a species of practical reason,” with the external point of view’s allegedly “cognitive and theoretical” stance). Here, however, I assume the internal point of view capacious enough to include both an academic and practical dimension. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 827 (1989) (noting that Holmes allowed both a practical and more theoretical stance within the internal point of view).

⁶⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 56-57 (2d ed. 1994); see generally Michael Steven Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381 (2011) (discussing the prediction theory along with rival accounts of law offered by the American Legal Realists).

understand and use the law was right there in the legal materials themselves—in the *regulae* of Justinian or the decisions of the Supreme Judicial Court. An absolutism as to the law’s content and methodology had thus given their tradition of legal science over to an attitude that was more than just resolute, but itself absolutist. Theirs was a *strictly* internal point of view, one that could on principle refuse the advances of disciplinary outsiders as just that—outside law and so simply irrelevant to it.

Here again there were differences between the medieval and modern variants of legal science, none starker than in the sense that they could and did regard law as autonomous.⁶⁷ In one sense, as we just saw, both could equally lay claim to a kind of *intellectual* autonomy, in the sense of the independence of legal thinking from other disciplinary modes of inquiry and thought. Yet in another sense of autonomy—the independence of law from broader societal pressures and practical needs—the two schools parted ways, owing to the same difference they had in background intellectual assumptions that were seen in the way they worked out their absolutism as to the law’s content. On the one hand, the Scholastic Jurists could legitimately, or understandably anyway, believe that their legal science was capable of being worked out independent of larger and more diffuse societal pressures, whether political or economic or sociological, not only because they took their maxims as tantamount to natural law, but because they had little reason, looking around at what they knew of history, to think much if anything had materially changed in the millennium separating them from the Romans (whose law they were busy systematizing). Law had a reason and a literature all its own, and could thus comfortably seclude itself from other societal forces when settling its own account. It could realize a *full* autonomy—autonomy in both senses. Not so for

⁶⁷ The two senses of law’s autonomy I discuss here are the same that Judge Posner has suggested, and rejected, in several places. See, e.g., RICHARD POSNER, *OVERCOMING LAW* 17 (1995); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Richard Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?* U. TORONTO L.J. 333 (1988) [hereinafter *Conventionalism*].

Langdell and his legal science, steeped as he and it both were in the historical and historicizing consciousness of the common law. For him, as we saw in his assumption as to the law's content, law had a reason but also a history, and so it naturally lent itself to an understanding that was at least partly sensitive and responsive to shifting circumstance, even if this was still only visible through the refracting medium of case law. Law in his eyes could not quite achieve an absolute autonomy in the end, but nearly so. Yet this “nearly” was enough to justify its claim to an absolute *intellectual* autonomy, rooted as that was in the strictly internal attitude that Langdell, like his scholastic predecessors, had taken toward the law. This was the only sense of autonomy, and the last absolute, needed to complete the rationalism of their common tradition of legal science.

B. Rationalism and the Traditional Science of Law

That the tradition of legal science sketched above was in fact only that—a single tradition, flowing from a far broader idea and ideal—has been remarked surprisingly little by intellectual historians of law, let alone by legal philosophers. Instead the very idea of legal science has tended to be assimilated to this traditional interpretation, often wholesale, and only then to be written off as the relatively minor, philosophically unsophisticated episode in the intellectual history of law that it largely was⁶⁸—as naïve in its confusions as it was unoriginal in its insights. Yet this is a mistake, and a philosophically important one at that. Not only is the idea of a legal science clearly distinguishable from this traditional understanding of its premises, but wresting the idea out of its traditional context can help us see in it some critical lessons for the study of all manner of legal phenomena, legal thinking above all. We can reject what was spurious, implausible, and frankly silly in traditional legal science without turning our backs on the insights of legal science altogether. But to do this

⁶⁸ As noted earlier, Leiter has thus called this view, by no means eccentrically, a “Vulgar Formalism.” See *supra* note 26.

we will need to have clearly before us what legal science entails more generally—the sense of legal science at which Langdell’s contemporaries had not batted an eye—and how the tradition begun in the twelfth century and brought to its modern maturity in America ended up distorting it.

In one sense, as noted at the outset, Langdell was hardly sounding a cry to revolution in declaring law a science, and the library its laboratory. After all, in a wider sense of the word, the one likely familiar to the lawyers he was addressing that day, law truly was scientific. For it was (1) a relatively distinct body of abstract knowledge that (2) was studied in an intellectual culture valuing objective inquiry and research and (3) had the backing of a loose network of institutions (academic faculties principally) willing and able to keep its researchers working and its doors open to the students who would later join its ranks as fellow researchers. These are what Berman has identified as the three fundamental premises of a legal science—what we could call the intellectual, the cultural, and the institutional premises. And it was out of those premises that a coherent theory of legal science emerged among the twelfth century jurists and canonists,⁶⁹ and reached maturity in America with Langdell. But legal science in this wider, pre-theoretical sense sweeps more broadly than a theory about just what law or legal thinking involves. It instead denotes a far richer and more complex social phenomenon, of which the growth of the modern university and its diversifying techniques and norms in scholarship and research, the changing relationship between faculties and the profession and between law and other disciplines, are all integral elements. It is this more generic idea of legal science, consisting of these three premises, that is the more fundamental, and which I will therefore refer to simply as legal science. And in this wider, more fundamental sense, the idea of legal science is clearly applicable to both the

⁶⁹ For Berman, they also forged the first working “prototype” of science in its modern sense. See BERMAN, *supra* note 9, at 151.

modern and medieval exemplars surveyed in this section.

Just as clearly, though, the point runs deeper than mere terminological fastidiousness. For once we cleanly separate out this more fundamental idea of legal science from the historical tradition with which it is often conflated, we can begin to see why that tradition was in fact only that: a particular, traditional way of interpreting that more fundamental idea. And, moreover, what had made that tradition of legal science truly distinctive was the particular picture it supposed of the *intellectual* premise of the law, a picture filled in with the bold strokes of absolutism as to the law's content, methodology, and viewpoint. That tradition, as we saw, assumes the law to consist in a single, universally-valid and in this sense an absolute system of legal principles and concepts (content absolutism) that would be known and categorically justified by equally universally-valid, absolute principles of legal reasoning (methodological absolutism), and autonomously worked out from a strictly internal point of view (viewpoint absolutism). Together these three absolutist assumptions frame what I have called the *rationalism* of that tradition. And that rationalism made up the core of that tradition's sense of what the law *is* and, just as importantly, what it *should* be. Precisely because they saw the law as implicitly embodying this systematic conceptual whole, these lawyers also believed, as scholars and not just practitioners of the law, they should try to give as full an expression of it as they could. It was as much an *idea* as an *ideal* of a science of law, no less an empirical description as the articulation of a working program—the program of a *rationalist* legal science.

Just to see things this way, though, opens up the prospect of a broader reexamination of that traditional account of legal science, letting in a fresh view of exactly where and how it went wrong. Assuming as most rightly do today that Langdell and the Scholastic Jurists were wrong about the viability of their legal science, it hardly follows that

the nub of that error was their belief that law could be a science in *any* sense. Indeed, their mistake could well have fallen in the way they drew up the *intellectual* premise of that legal science: in the *absolutist* way they had framed the three assumptions outlining the intellectual character of the law. It is entirely possible, that is, that their blunder lay not in their belief in a science of law *as such* but in the rationalism of *theirs*. As I argue in the next section, we can indeed take Legal Realism as having shown exactly that: it was their absolutism as to the intellectual character of law—their rationalism—that they were led astray, and their science led aground. Once we abandon that absolutist way of understanding the intellectual premise of legal science, however, and come to grips with the reasons why it was bound to fail, we will also see why the idea and ideal of legal science in *another* sense need not have been abandoned.

II. Naturalizing Law: The Prospects of a Pragmatic Legal Science

Nearly a decade after Langdell first outlined the assumptions of his science of law in the preface to his first casebook, a short, unsigned review of its second edition appeared in the *American Law Review*.⁷⁰ Its author was a then-relatively obscure Boston attorney and a future colleague of Langdell's—Oliver Wendell Holmes. And like the remarks of Langdell's that it was nominally out to discuss, it swelled with its own revolutionary ambition. “The life of the law has not been logic,” read its one unforgettable line, “it has been experience.”⁷¹ And as is clear from that line alone, its ambition was in many ways sharply opposed to Langdell's, even if, in others, it was also deeply sympathetic.⁷² Those points of sympathy and disagreement combine to tell the now familiar story of the jurisprudential movement that

⁷⁰ See *Book Notices*, *supra* note 2.

⁷¹ *Id.*

⁷² See Grey, *supra* note 65, at 822 (discussing Holmes' attraction to the formalism and conceptualism distinctive of Langdell's legal science).

took them as its fighting faith—the movement now known as American Legal Realism.⁷³

But they also tell a less familiar story: a story not only about how and why the legal science that the Legal Realists rose up against ultimately declined and fell, but also why it need not have. It is the arc of this lesser known tale that I trace in this section, beginning with the critical lessons that the Realists taught about the science of law and leading from there to a brief account of how one of their fellow-travelers—John Dewey—sought to turn those lessons into the tools for its reconstruction.

A. The Critical Thesis: Some Realism about Legal Reasoning

Even if, as the saying goes, we are all realists now, we can also now say that there never was a single view that went by the name.⁷⁴ More a mood and a movement than a self-conscious philosophy, Legal Realism has long stood on less than sure, indeed often contested, theoretical grounds. Yet in the last twenty-five years or so a fairly clear consensus has nevertheless emerged around several key claims, all of which do seem to distinguish and typify the Realist point of view tolerably well. Those claims can all be found more or less distinctly in Holmes' early, anonymous critique of Langdell's first casebook, the fount of his legal science.⁷⁵

As noted, there were points of both strong affinity and even stronger difference between Holmes' thinking and the legal science that Langdell advertised at the beginning of his tenure as a legal scholar proper. His review thus divided down the middle: part criticism, part proposal. "Mr. Langdell's ideal in the law," the critique began, "the end of all his

⁷³ Although throughout I will refer to this movement as "Legal Realism" and the various figures within it as the "Realists," there was in fact another Scandinavian school that went by the same name in roughly the same years, though of dissimilar views. They are not the subject of the discussion here.

⁷⁴ See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE 15, 15-17 (2007).

⁷⁵ See Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

striving, is the *elegantia juris*, or *logical* integrity of the system as a system.”⁷⁶ Yet this preoccupation “with the formal connection of things” not only led away from the forces that “have actually shaped the substance of the law,” “the felt necessity” that is “the seed of every new growth within its sphere.” Worse, it tempted the false impression that the law was in substance “a form of continuity” resembling “a logical sequence,” as if the form and the sequence were anything but “the evening dress which the new-comer puts on to make itself presentable.”⁷⁷ Drawing this line of criticism to a positive point, the review went on:

The important phenomenon is the man underneath it, not the coat . . . No one will ever have a truly philosophical mastery over law who does not habitually consider the forces which have made it what it is. More than that, he must remember that as it embodies the story of a nation’s development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.⁷⁸

In the end, then, the great “legal theologian”⁷⁹ had not only misunderstood how law had come to be, but even what it was—a creature not of logic but of experience.

1. Practical Indeterminacy

We will return to the proposal shortly. But the criticism on display in these few lines not only cut deeply into the credibility of Langdell’s legal science; it had also set terms of a twofold critique that later came to define the loose movement of lawyers and legal scholars now known as the American Legal Realists. That critique takes its point of departure from one of the claims that we saw was basic to Langdell’s thinking about the law: that it was a complete, comprehensive, and consistent system of legal principles and concepts that was, as

⁷⁶ *Book Notices*, *supra* note 2.

⁷⁷ *Book Notices*, *supra* note 2.

⁷⁸ *Id.*

⁷⁹ This was no idle slur either. As a typical contemporary of Langdell’s wrote of his religious thinking: “I may describe my forward step by saying that hitherto I had been using the Bible in light of its statements, but that now I found myself using it in light of its principles.” WILLIAM N. CLARKE, *SIXTY YEARS WITH THE BIBLE* 97-98 (1909).

such, rationally determinate.⁸⁰ For Langdell, as we saw in the mailbox example, this meant that there was a unique, demonstrably correct answer to every legal question based solely on the relevant legal materials—one which spanned the higher-level doctrinal concepts and principles perhaps unseen in the individual case, but discernible from the entire line of relevant cases. And on this point one might say that Holmes simply called Langdell’s empirical bluff. As a point of fact as opposed to the exigency of a theory, why would anybody ever believe the law to be nearly this complete and consistent, this determinate? How could any lawyer, for that matter, believe that the *form* of a well-crafted judicial opinion, dressed as it is in a gown of demonstrative inferences, would actually reflect the *substance* of the thinking behind it? And if the legal reasoning on the page could and did diverge this systematically from the legal thinking that actually went into reaching some legal conclusion, how could Langdell then say so confidently that the result in those cases had been *determined* by the legal reasons set forth there? Worse, what if the operative considerations were not even *legal* reasons at all, but the very reasons of justice and equity and convenience Langdell had brushed aside as too vague and unprincipled, too unscientific?

Questions like these help to frame the now standard problem of legal indeterminacy, in one of its forms anyway,⁸¹ and they formed the core of the skeptical challenge pressed by

⁸⁰ The qualification matters here: despite the carelessness of some of Holmes’ language in his review, very few Realists had or need have denied that the law was rationally determinate in at least *some* cases, rather than in the relatively few that end up on appeal at prominent state and federal courts. Yet their differences with Langdell were no less real for being so modest: after all, to disagree with Langdell all one had to believe was that the law was indeterminate *somewhere*. That Langdell could not concede even this little to Realism was a consequence of his absolutism—his rationalism.

⁸¹ Another sense of indeterminacy often mentioned in connection with Legal Realism results from the open-texture, or potential vagueness, inherent in every term with empirical significance—a *linguistic* indeterminacy (as in the standard example of a stroller pushed through a park with a sign warning, “No Vehicles in the Park”). Even though Hart appears to have taken this to be a major front in the Realist war against the determinacy of legal rules, this indeterminacy did not loom large in Realist thinking. See Leiter, *supra* note 12, at 111 (observing that “most legal reasoning in common-law jurisdictions is given over to explaining why the *applicable rule of law* is, in fact, the applicable rule of law”); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 211-12 (1986) (same); see also Frederick Schauer, *Authority and Indeterminacy*, 20 NOMOS 28, 30 (1987) (noting that distinction between open texture and actual vagueness).

the Realists against Langdell's legal science. For these questions point up two potential gaps in what Langdell saw as the law's seamless conceptual fabric. The first falls between the so-called "paper rule" and the real rule governing a legal question.⁸² On this score, one need only think of the forgiving way that police and the courts enforce posted speed limits: the sign on the highway may say 55 miles per hour, but in point of fact police rarely ticket, and courts seldom uphold citations against, drivers caught going 60 miles per hour.⁸³ The actual "law" of the enforced speed limit—anywhere from five to nine miles per hour over the speed limit—thus strays from the law of the posted sign. Another gap falls between the *legal* reasons formally offered as the grounds for the conclusion reached and the unstated *non-legal* reasons that had actually produced it.⁸⁴ Here the Realists could point to the bevy of appellate decisions where judges openly drew not on formal legal materials to reach their conclusions, but on what were, by nearly all accounts, clearly non-legal reasons, and especially the factual circumstances under which the case arose (or "situation types," as Karl Llewellyn named them).⁸⁵ In either case, it would obviously be impossible to say that the law on the books had in fact *determined* a result: it would at most only have appeared to. And were this phenomenon a genuine one, it would likewise be impossible for Langdell to claim that law was rationally determinate in *all* cases. As these gaps appeared to open and grow, so did the doubts as to just how universally determinate—and universal—the law really was.

And yet, forceful as doubts like these were and are, they still had only set the terms of a problem for a rationalist like Langdell, and an empirical problem at that—a *practical*

⁸² See Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2014) (discussing this distinction).

⁸³ *Id.* at 767-68.

⁸⁴ See Leiter, *supra* note 74, at 24.

⁸⁵ A notorious example of this is *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (refusing to apply a federal statute prohibiting foreign labor against the hiring of a minister because, as a "Christian nation," the Court did not "believe that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation").

indeterminacy in the law. As only a descriptive claim about the way law worked in practice, its force as an objection stood or fell by what it purported to reveal about legal thinking, what the facts really were. Just how real and pervasive a phenomenon was this apparent indeterminacy, and what was its cause? Given how the Realists tended to answer on these empirical points, it is hard to see, at first blush anyway, just how much of an objection they really could make to Langdell's science.

First of all, they generally did not claim this indeterminacy spread much if at all beyond cases decided by appellate courts; they were thus highly unrepresentative of legal questions at large, with some being virtually by definition incredibly close, very hard cases. As only a select few of an already skewed sample of cases, what if these alleged instances of indeterminacy were then traceable to the sloppiness or dishonesty of the relatively few judges who decided them, or to new areas of law where there were few if any prior cases to begin with? In those cases, the gaps between formal legal materials and legal outcomes may have been real but inconsequential, being the result of the normative failings of relatively few officials or an understandable underdevelopment of the law, not an essential shortcoming in the legal materials themselves. Where the indeterminacies were due to the former, they would no more have argued against the determinacy of the law *in fact* than a few bad calls by a handful of corrupt or incompetent referees would argue against the determinacy of the rules of football—or to take an analogy closer in spirit to Langdell's science, no more than the fudged calculations of a few careless or unscrupulous engineers would call into question the truth of Newton's laws of motion. And where indeterminacies resulted from underdevelopment, the objection more begs the question than proves it: only if one restricted the relevant legal materials to the words on the page of the case reporters, as Langdell clearly would not, would the criticism go through. The whole conceit of a

conceptual system, after all, is to supply principled answers where formal legal materials turn up empty. However real (or apparent) these discrepancies were between the formal legal materials and the actual legal conclusions drawn, they were nevertheless far from amounting to an objection *in principle* to thinking of the law as fully rationally determinate. At most they could be seen as empirical outliers, mere anomalies that Langdell could explain by explaining them away, at least in general terms.

Of course, if the discrepancies grew too numerous and widespread, one might begin to think differently about the force of this evidence. If, in other words, this indeterminacy ran rampant throughout a legal system, leaving no reliable correspondences between formal legal materials and the results in particular cases (as some of the more extravagant Realists were wont to say),⁸⁶ one might well be led to think—as an inference to a better explanation—that the rationalist assumptions behind Langdell’s science were seriously off the mark. In that case, one could fairly wonder whether the formal legal materials (and, *a fortiori*, any conceptual systematization of them) were really the key to understanding the intellectual character of the law at all. A judge’s decision might just as well be prefigured in her breakfast as from her bookshelves.

Few of the Realists ever went this far, however. Indeed, the consensus now has it that the core Realist claims to indeterminacy by and large focused instead on the fringe of cases that made it to adjudication on the merits at state and federal appellate courts. Indeterminacy may have been alive and well in the law, but it ran on a fairly short empirical leash—well short of seriously calling into question, on its own, the premises of Langdell’s legal science. What the Legal Realists therefore needed, and what they later gave, was some explanation as to why this indeterminacy was not only practically significant but also a

⁸⁶ See, e.g., FRED RODELL, *WOE UNTO YOU, LAWYERS!* (2d ed. 1957).

principled problem. They needed a kind of indeterminacy that a rationalist like Langdell would not be able to simply brush aside as an anomaly, as practically real yet explicable nonetheless.

2. Principled Indeterminacy

The Realists ultimately found the indeterminacy they were looking for just where one might have expected it: in the way Langdell framed the method he believed would determine and justify the selection of the legal principles and concepts making up the backbone of the common law. Drawing on the same body of evidence on which Langdell had built his own system (typically state appellate decisions), the Realists showed that there was not one but always several conflicting rules available in any case, rules that, crucially for the Realists, and devastatingly for Langdell, could draw support from equally justifiable but incompatible conceptualizations of the doctrines and facts at hand. Indeterminacy necessarily fringes the law, the Realists claimed, because there, along that small but salient margin of cases, the law inevitably runs out.⁸⁷ A typical example from the heyday of Legal Realism, from one of the judges often said to have embodied it,⁸⁸ will help flesh out this point.

In June 1914, the firm of Jacob & Youngs put the final touches on a country house they built for a man by the name of Kent, costing somewhere north of \$77,000. For reasons lost to history, as a part of their contract, Kent had specified that: “All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as ‘standard pipe’ of Reading manufacture.”⁸⁹ At some point the following March, Kent discovered that a considerable

⁸⁷ Leiter, *supra* note 12, at 112.

⁸⁸ See RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 31-32 (1990) (observing “that little that has survived of legal realism cannot be found, more articulately as well as more temperately expressed, in Cardozo’s jurisprudential writings”); Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1752 (2000) (noting that Cardozo understood the “substantial degree” to which judges are not “constrained by doctrine”).

⁸⁹ *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 240 (1921).

amount of the pipe installed in the house was not of Reading but some other manufacture.⁹⁰ He informed his architect, who in turn instructed the firm to redo the piping according to the terms of the contract, a do-over which, by that point, would have required them to tear down large swaths of the house, obviously at considerable cost. The firm refused, instead demanding final payment. Kent also refused, citing the unsuitable pipes. In the suit subsequently brought by the firm seeking the outstanding balance, the New York trial court directed a verdict for Kent, but only after excluding evidence offered by the firm that showed the pipe used was in all respects, except its brand, identical with the Reading pipe contracted for.

The case eventually found its way to the Court of Appeals of New York, and into the hands of Judge (later Justice) Benjamin Cardozo. The question on which it turned was deceptively simple: in the absence of a provision clearly addressing the matter, what was required of the firm in order to be entitled to payment?⁹¹ The general rule in American law is that, in the absence of an express provision by the parties to the contrary, courts will imply a condition requiring the adequate performance of the seller before any payment from the buyer legally comes due.⁹² But what would make for an adequate performance in this case? Here two rules presented themselves, vying equally for plausibility. On the one hand, in cases of the “simple and uniform” such as in “a sale of common chattels,” the rule has been for ‘perfect tender,’ giving the buyer the right to reject without liability any performance that fails to live up to the precise specifications found in the contract. Here, of course, this rule would have entitled the defendant Kent to reject the house as delivered, and refuse final

⁹⁰ The dissent noted that the total amount of pipe of Reading manufacture appeared to be only two-fifths of that installed. *Jacob & Youngs*, 230 N.Y. at 246.

⁹¹ Here I am following the very insightful analysis of this case offered by Todd Rakoff. See Todd D. Rakoff, *Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation Sense’*, GOOD FAITH AND FAULT IN CONTRACT LAW 191, 203-213 (1997).

⁹² *Id.* at 203.

payment, all because of the plaintiff firm's evident failure to mind its brand-names when shopping for pipe.⁹³ On the other hand, in those cases dealing in the "multifarious and intricate," such as in contracts for literal performances and other one-off, special arrangements (say, for the construction of a "mansion or a 'skyscraper'"),⁹⁴ the common law rule had long been for 'substantial performance', which allowed the seller minor deviations from the details set down in the contract without risking its right to payment (subtracting whatever damages resulted from the non-conformity). Under this rule, it was Kent who then would be out of luck. With the evidence excluded at trial tending to show that the difference in value and quality of the pipe was either "nominal or nothing,"⁹⁵ what breach there was of the agreement was minor at worst (not material, in legal terms). As a practical matter, it was thus beyond dispute that the firm had substantially lived up to its agreement on this point. Kent would have to pay up.

There were thus two opposing rules open to the court, leading to inconsistent results. Which should govern? If it is difficult to imagine just what Langdell would have said here that is because the choice facing the court seems so obviously unavoidable. This is not to say that arguments, even apparently demonstrative ones, could not be given. He might well have looked askance at the entire line of cases upholding a rule for substantial performance, for example, sensing how vague and undisciplined their inquiries into the substantiality of performance would necessarily become (was two-fifths conformity really

⁹³ Moreover, this would have justified the trial court's refusal to admit the evidence as to the pipe's value: all that mattered was whether the firm had lived up to the letter of its bargain, which, here, it clearly had not. There is thus a clear connection between this formalism and the thinking that came by most accounts to dominate American law in the late nineteenth century. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992); see also Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH IN L. & SOCIOLOGY 3, 4-5 (Steven Spitzer ed. 1980) (discussing the rise of classical legal thought); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 9-32 (1995) (reviewing classical legal thought as a "formalism").

⁹⁴ *Jacob & Youngs*, 230 N.Y. at 242 (internal quotation marks omitted).

⁹⁵ *Id.* at 244.

substantial, and how could one say?), and how unsystematically they would vary across cases as a result. Adopting a standard this conceptually slack would in any case be to let judicial sympathy oust formal precision: it would let the distaste for the perhaps silly punctiliousness of one defendant overrule the need of preserving scientific rigor across the law. And as we saw, Langdell's science was nothing if not driven by concern for just this sort of formal precision and conceptual tidiness, nowhere more glaring than in his dismissal of constitutional law.⁹⁶

Even if this were a plausible (or plausibly rationalist) resolution of the case, it is frankly impossible to see how Langdell's method could justify it. As Cardozo put the point, almost as if thinking of Langdell: "Those who think of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred."⁹⁷ The familiar metaphor Cardozo uses here, of dividing lines cutting across conceptual space, may lead one to think all he meant to point out were the usual vagaries of general classifications, and why choice necessarily followed—a line of thinking also frequently associated with the Realists.⁹⁸ But not only would that have failed to answer an argument like the one hazarded above (except question-beggingly), it would also have missed an importantly different, and no less distinctively Realist, line of analysis one could instead see him advancing there. As Cardozo suggests, the reason why these two rules had appeared among the cases to begin with was that, among those same cases, there were two distinct ways of *conceptualizing* the underlying doctrine requiring performance before payment. The bottom-level rule specifying the implied condition divided because the higher-level doctrine

⁹⁶ See *supra* note 62.

⁹⁷ *Jacob & Youngs*, 230 N.Y. at 242-43.

⁹⁸ See *supra* note 81.

itself fractured along two different understandings.

One can see this fracture emerge from the way that the doctrine was portrayed from one line of cases to the next, with what Cardozo called the “simple and uniform” typically set to one side, and the “multifarious and intricate” swept to the other. In the former cases, as in the sale of manufactured goods, it made a good deal of sense to think of ‘performance’ as involving execution of exact specifications. Items like these were often easily made and sold in large quantities, so that even if they were not always as simple as crates of apples or boxes of staples, they were at least reasonably generic, and so generally replaceable without extravagant effort or loss. Under circumstances like these (a ‘situation-type’ in Llewellyn’s sense), where a performance was more naturally thought of as a literal reproduction of some item, a rule for perfect tender only made sense (in what Llewellyn would call ‘situation-sense’). Not so, however, in the latter cases, where what was contracted for was stereotypically much less like a mass-manufactured toy or a bag of onions. In these cases, the performances agreed to were instead more one-off, more complex and individualized—like painting a portrait or playing a gig or putting up a skyscraper. In these circumstances, and in contrast to those in the case of sales of goods, ‘performance’ was more naturally thought to entail a standard of approximate rather than exact reproduction: it would be silly after all to feel cheated when the crooner at the mic sounds little like the bodiless voice in the earbuds. In situations of this type, a rule requiring substantial performance, rather than literal conformity, had only made sense.

Not only, then, were both of these rival rules equally and amply justified by the case law, but so too were the rival doctrinal conceptualizations that made sense of them. And the latter was the truly decisive point. Each rule could lay claim to an equally justifiable

conceptualization—what we might call a *model*⁹⁹—of the same pivotal doctrine, a model that would then systematize, as its doctrinal consequences, the relevant area of law into directly applicable, bottom-level rules. Here, where that doctrine called on the court to imply a condition for adequate performance, Cardozo then faced not only the choice of which bottom-level rule to apply (perfect tender versus substantial performance) but also, and more importantly, the choice of how to think of the higher-level concept (“performance”) that would decide the fitness of that rule. Deciding which rule to apply meant that Cardozo would have to choose which of these models better fit the facts of the case. Did this look more like a sale of a crate of oranges (the sale-of-goods model) or more like a promise to paint somebody’s portrait (the unique-performance model)? To Cardozo and a majority of the court the practicalities decisively favored the latter: Kent would have to pay. But as Cardozo heavily underlined, there was simply no *formally conceptual* way out of the decision they as judges had to make:¹⁰⁰ no amount of analyzing and synthesizing case law would relieve them of their burden of choice since *both* models had (and still do have) a place in our law. The lines of decision had indeed blurred—precisely where, and because, the conceptual shadows had crossed.¹⁰¹

Here was a kind of legal indeterminacy that no rationalist legal science would be able to explain away, to dismiss as an explicable outlier, an indeterminacy that therefore meant

⁹⁹ I adopt the term from Ronald Giere, who has argued that models in essentially the same sense capture the “cognitive structure” of all scientific theories. See GIERE, *supra* note 16, at 97-117 (1999); Ronald Giere, *An Agent-Based Conception of Models and Scientific Representation*, 172 SYNTHESE 269 (2010).

¹⁰⁰ A less formalist conceptualist, perhaps like Ronald Dworkin, might argue that Cardozo was wrong if he thought that *no* conceptualist argument could decide between one model or another. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); see also Grey, *supra* note 10, at 9, n.27 (noting that Dworkin exemplifies an informal conceptualism). The Thomistic doctrine of *determinatio* might also have been a gesture in this direction. See THOMAS AQUINAS, *SUMMA THEOLOGIAE*, Ia-IIæ q.95 a.2.

¹⁰¹ George Lakoff has discussed in some depth the various ways that rival models produce these effects. See generally George Lakoff, *Cognitive Models and Prototype Theory*, CONCEPTS 391 (Eric Margolis and Stephen Laurence eds. 1999).

the end of their science, as they had understood it.¹⁰² It was one thing for the Realists to point to the hard cases of law, like those that often come before appellate courts, where the paper rules seemed not to determine the results reached by the courts, and leave it at that. This practical indeterminacy was perhaps a troubling, even embarrassing, fact for a rationalist like Langdell to explain, but not a difficulty in principle. Yet it was quite another thing for the Realists to then go on to show that the formal legal materials did not determine a result in those cases because they *could not*; that in those situations the law *inevitably* runs out. This was the principled objection the Realists were looking for—a *principled indeterminacy*.¹⁰³ And what a judge like Cardozo and an avowed Realist like Llewellyn had helped to show was its source: the rival conceptual models built into the very framework of ordinary legal thinking, throughout the common law and even statutory and constitutional contexts.¹⁰⁴

For rationalist legal science, this was as close as it could get to outright refutation. This principled indeterminacy pointed up the futility in Langdell's thinking that the law would, in point of fact, formally and uniquely determine an answer to every legal question. It had also exposed this stronger indeterminacy by exploding the assumptions that made that belief credible in the first place—the rationalist assumptions that the law was even intelligible as a conceptually absolute system that could be known by a categorically rational method. Descriptively, this was simply not how legal concepts worked. On the contrary, as

¹⁰² What I have called a principled indeterminacy is one way of spelling out a point heavily underlined by the pioneers of Critical Legal Studies. *See generally* Altman, *supra* note 81.

¹⁰³ This way of presenting this critical side of Realism—as a conflict over rival doctrinal models—is hardly new, though it does add an analytical, explanatory layer over the now fairly standard account. *See, e.g.*, G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984) (noting that the “Realists demonstrated that such [legal] principles were always contradictory, that for every principle there existed a potential counter principle”).

¹⁰⁴ Karl Llewellyn famously made the same point in the statutory context. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

exemplified by Cardozo's analysis in *Jacob & Youngs*, from one situation-type to the next one could in fact justify multiple, conflicting rules because one could no less justifiably systematize the implied condition of performance—the concept of 'performance'—under the sale-of-goods model as under the unique-performance model. The law could support not a single conceptual systematization as the rationalist legal scientists had presumed, but many. These competing models drew their substance, moreover, directly from the logic of the situations from which they emerged, situations that differed systematically and so conflicted in fact. To believe, as the rationalists did, that one could nevertheless appeal from these conflicting situations to the tribunal of a universal conceptual system, which would then render final judgment either by reconciling them both to some absolutely 'correct' type or by selecting one as 'true'—was to simply close one's eyes and dream away the facts of our conceptual life, the way we really live with and use and make concepts.¹⁰⁵ Just as elsewhere in our conceptual lives, there was not one but always potentially many ways to model the general doctrines of our law: as many models as the novel situation inspires in the attentive lawyer. To insist otherwise, as Holmes had pointedly said of Langdell, would be to make a theological necessity out of the accidents of history.¹⁰⁶ This was a *conceptual* Realism,¹⁰⁷ in short, and it took on Langdell's science where it was most vulnerable—in the absolutism of its assumptions as to the law's content and methodology. The truth of this indeterminacy told the falsity of that absolutism, his rationalism.

Of course Langdell could always have made the reply imagined before, that he *could*

¹⁰⁵ In the philosophical literature, essentially the same point is made in terms of a definitional theory of concepts, which has undergone extensive criticism since W.V.O. Quine attacked it through his famous critique of the analytic-synthetic distinction. See generally Eric Margolis and Stephen Laurence, *Concepts and Cognitive Science*, CONCEPTS 1, 8-27 (Eric Margolis and Stephen Laurence eds. 1999).

¹⁰⁶ *Book Notices*, *supra* note 2.

¹⁰⁷ I take it that this would also capture the gist of Legal Realism as Leiter understands it. See Leiter, *supra* note 12, at 112. The relation between Leiter's Legal Realism and the one I sketch above is close, and I have drawn considerably on his illuminating account of that movement here.

systematize the doctrine here by simply assimilating every case to the perfect tender rule (and, implicitly, the sale-of-goods model that made sense of it). That assimilation he might then justify by pointing to the formal values it would serve—presumably, the enhanced administrability and *ex ante* certainty that comes with formal simplicity. But note that the argument would then have shifted ground. There would no longer even be the pretense of a formal, rational compulsion guiding this simplifying absolutism, no *uniquely* categorical justification of a *single* system of legal concepts and principles. Indeed, as Holmes saw all too clearly in the first stirrings of Langdell’s science, what we instead behold is a mere “striving” after a “*logical integrity*” that is not *there* in the law in any actual sense, and certainly not in the sense Langdell had advertised in his famous preface. If there was ever a formally and conceptually absolute system behind the American common law, it was one that Langdell and his fellow scientists would have needed to put there, for reasons that might be sensible, surely idiosyncratic, and even, in its own ways, heroic,¹⁰⁸ but none of them rationally compulsory. Langdell could have salvaged his science only by eviscerating it. And this made for the lasting critical lesson that Legal Realism left for the idea of a science of law. Whatever else that science was, it could not be the absolutist system that Langdell and the Scholastic Jurists before him had assumed it to be. A *rationalist* legal science simply could not be made to work.

B. Another Realism, Another Legal Science

What I have surveyed so far has been the history of an idea whose time many believe has come and gone. In the heyday of Legal Realism it would surely have been thought worse than wishful thinking, even a little quaint, to keep toiling on in the belief that there was something left in the traditional idea of legal science, let alone something worth

¹⁰⁸See *infra* note 146.

resurrecting.¹⁰⁹ In the decades since Legal Realism passed from being a loose but lively movement of jurisprudential heretics into a virtual platitude among lawyers and legal scholars, there have been occasional stirrings in the direction of reviving a legal science, especially in the flanking schools of Critical Legal Studies (to the left) and Law and Economics (on the right).¹¹⁰ But by nearly all accounts, a legal science, in Langdell's sense or in any other, would seem to have passed from the scene for good.

In many ways, not least philosophically, we are still living with the uncertainty and intellectual fragmentation that only naturally followed its dissolution as a viable organizing idea and ideal for the law.¹¹¹ It was no accident, after all, that Langdell's science arose in an age hungering for a model of law that could answer the challenges of a rapidly industrializing, suddenly urban society, any more than it was mere coincidence that the first legal science emerged in a period when the Western Church was struggling to assert the independence of its clergy from the authority of the secular figures who had long dominated it.¹¹² Whatever else the scientists themselves may have said, their legal sciences were always at least in some measure justified by the practical fruits they bore for the culture and institutions they would help create and sustain. A science of law always was as much the solution to a social need as it was the answer to a philosophical question. And much the same need persists today.¹¹³

¹⁰⁹ In fact, some of the Realists did hope to build a *new* science of law, but none believed that it would bear much resemblance to the legal science conceived by Langdell and urged on by his followers. *See, e.g.,* Herman Oliphant and Abram Hewitt, *Introduction*, FROM THE PHYSICAL TO THE SOCIAL SCIENCES ix (1929) (noting that “there is now no such thing as a science of law unless one is willing grossly to abuse the word ‘science’”).

¹¹⁰ *See* Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 337-339 (1988) (discussing the “scientific” reaction to the challenge raised by Realism against adjudicative determinacy).

¹¹¹ *See* WIECEK, *supra* note 5, at 16 (noting that, since the collapse of the “comprehensive structure of thought” that Langdell helped shape, “much of the [Supreme] Court’s work today remains vulnerable to challenges to its legitimacy”); Cook, *supra* note 4 (discussing the “void” left by the collapse of what I have called rationalist legal science).

¹¹² *See* BERMAN, *supra* note 9, at 520-521.

¹¹³ *See* WIECEK, *supra* note 5 (noting that American law has still not moved beyond the collapse of classical legal thought).

If this point sounds strangely Realist, echoing more Cardozo than canonist, it is because it is, and at one time was. In the same years as Realists like Llewellyn and Jerome Frank were still toying with jurisprudential formulas that more sophisticated Realists today can only look on with a mixture of exasperation and regret,¹¹⁴ another of the leading philosophical figures associated with Realism—John Dewey—was beginning to work out an approach to the law, only naturally from a philosophical angle, that would make it at once fully subservient to the social needs Holmes saw as its moving force *and* a coherent, integrated, and relatively autonomous body of abstract knowledge. What Dewey was working toward, in sympathy if not quite in tandem with the Realists, was his own legal science.¹¹⁵ In the pages left here I lay out what I take that science to involve, and where I think it differs from the rationalist tradition of legal science Dewey opposed and why it founders on none of the rationalist’s mistakes. I also hope to make clearer, even if only schematically, what work remains to be done in order to make that science viable today.

1. From Absolutizing to Naturalizing Legal Science

If the lawyers who gave us the idea and tradition of Western legal science were clearly no philosophers, the philosopher who sought to revive that idea early in the last century was just as clearly no lawyer. In fact, although the law and legal subjects occur repeatedly and prominently in his writings, Dewey himself never set down anything resembling a legal philosophy proper, or even a full work on law. What he did have, and

¹¹⁴ See Leiter, *supra* note 74, at 15 (noting the regrettable “Frankification” of American Legal Realism by later commentators, and the resulting confusion of their philosophically respectable, core theses); KARL N. LLEWELLYN, *THE BRAMBLEBUSH* 5 (2008) (claiming that “[w]hat these officials do about disputes is, to my mind, the law itself”).

¹¹⁵ Dewey had made some contacts among legal scholars while a professor at Columbia University, where in the 1920s he gave a course in the law school entitled “Logical and Ethical Problems of the Law” that was reportedly attended by a number of law professors. See Edwin W. Patterson, *Dewey’s Theories of Legal Reasoning and Valuation*, JOHN DEWEY: PHILOSOPHER OF SCIENCE AND FREEDOM 118, 119-120 (Sidney Hook ed.) (1950).

what he gave abbreviated expression to in several places, was a point of view on the law, a way of approaching jurisprudential questions that rested on fundamentally the same basis as the Realists' views. For him, that basis would go by the name of naturalism. And one can begin to see its emerging outlines in the words of the lawyer he most admired, about the rationalist science both would decisively reject.

In the passage that we saw earlier from Holmes' critique of Langdell's science, there were two leading thoughts on display.¹¹⁶ There was first of all, and perhaps most famously, the negative thought that would harden into the two indeterminacy theses, practical and principled, that later galvanized the Realists and solidified them into a reasonably coherent jurisprudential movement. But there was also a more positive thought evident there, dimly expressed though it was, that Holmes sought to relieve against the benighted backdrop of Langdell's legal theology—a constructive proposal mingling with a diagnosis. As he hinted in contrast to Langdell's taking at face value the outwardly logical appearance of legal thought, what mattered instead was the “man underneath,” the show of formality, the “history and nature of human needs” bubbling up all around the edges and through the cracks of its dialectical and demonstrative argumentation. What Langdell had overlooked in his haste to make a science out of law was the way he was approaching that science, how law should be thought of and studied as a social phenomenon. “As a branch of anthropology, law is an object of science,” as Holmes went on to say, but this meant that “the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.”¹¹⁷

There were thus two senses of science that Holmes was invoking in his critique of

¹¹⁶ See *supra* note 78.

¹¹⁷ *Book Notices*, *supra* note 2.

Langdell. The first was the sense in which law itself could be thought of as a science—as in the working formula I have followed Berman in suggesting here, that would see law as an organized body of abstract knowledge (the intellectual premise) supported by a culture valuing objective research (the cultural premise) and institutions making that research possible (the institutional premise). There is little evidence that Holmes had any objection to regarding law as a science in *this* sense at all, in any of its three premises. As he says near the end of his review of Langdell’s casebook, and as he repeated elsewhere, there was indeed great value in having faculties devoted to working out the law’s postulates as a body of abstract knowledge, which could then be imparted to students as one, however “arbitrary,” way of understanding how the law “hangs together.”¹¹⁸ There was something essential, Holmes conceded, and essentially right, in taking the law as at least in part a conceptually coherent system, as something more than just “a rag-bag of details.” Like many lawyers of his day, including Langdell of course, Holmes seems to have had little trouble identifying law as scientific in this more fundamental sense.

In another sense, however, Holmes was clearly signaling his departure from the way Langdell had understood that science. Their difference came down to how they would *approach* an understanding of that science: in effect, how they thought a *philosophy* of that science of law should work. As we saw in his analysis of that science’s intellectual premise, Langdell supposed that understanding the law as a science meant that one would be engaged in an effectively conceptual and logical enterprise: a *logical analysis* of the postulates of the law that would be dominated by the analytic and *a priori* (the conceptual absolutes), whose principal intellectual work was to articulate a method of *justifying* the specific absolutes postulated there (a theory of categorical legal rationality). This was what Holmes found

¹¹⁸ *Id.*

“unscientific” in Langdell’s theory, what had given Langdell over to a pseudo-Hegelianism. Where Holmes thought the law would instead “fin[d] its philosophy [was] not in self-consistency,” not in any a priori *logical* analysis at all, but in history and anthropology.¹¹⁹ One should study the science of law as one would any human phenomenon, Holmes was saying—empirically, scientifically, or as we would say today, naturalistically.¹²⁰ The law, considered as a science in its more fundamental sense, was no less amenable to scientific observation and analysis as any other natural phenomenon. Law is fundamentally human, after all. And as the “great anthropological document” that it always was,¹²¹ the law demanded a philosophical lens that would not distort away all the conceptual imperfections and logical deformities that grew from its messy natural history. The science of law needed to be naturalized.

Some decades later, when thinking through the implications of his logical theory for legal thought, Dewey had come to much the same diagnosis, and arrived at essentially the same approach. As to the latter, he was among the first American philosophers to call himself a naturalist, and had done so in the same years as he was beginning to work out his general approach to law.¹²² Thus, in perhaps his most famous piece on the law proper, he began where Holmes had left off nearly forty years earlier: in an analysis of “human conduct.”¹²³ And a number of years later, in his only piece laying out his own “philosophy of law,” he remarked that his “standpoint” had led him to look on law as “through and

¹¹⁹ *Book Notices*, *supra* note 2.

¹²⁰ Ronald Giere has recently given a sense of naturalism—what he calls a *methodological naturalism*—that Dewey would likely have found congenial. See GIERE, *supra* note 17, at 69-83, 151-173.

¹²¹ Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

¹²² His most famous exposition of his naturalism occurs in *Experience and Nature*, published only a year after his most famous article on law “Logical Method and Law” appeared in *The Philosophical Review*. See JOHN DEWEY, *EXPERIENCE AND NATURE*, 1 JOHN DEWEY: THE LATER WORKS, 1925-1953 (1925).

¹²³ John Dewey, *Logical Method and Law*, 33 PHIL. REV. 560 (1924).

through a social phenomenon: social in origin, in purpose or end, and in application.”¹²⁴

Understanding law thus required an analysis of “human *activities*,¹²⁵ natural facts that are clearly susceptible to study and examination in an anthropological and psychological vein—from the point of view of the natural and social sciences. His views on law were as thoroughly naturalistic as was his philosophy generally.¹²⁶

Yet the way that Dewey had begun to work out that naturalistic approach to law—incompletely, by his own admission—took a somewhat different direction from Holmes’, as Dewey also saw.¹²⁷ That turn in his thinking away from Holmes had come chiefly from a preoccupation with logical theory and the philosophy of language and psychology that Holmes, as a lawyer, did not share.¹²⁸ But it had also come from the sharpened diagnosis of the failures of Langdell’s science that had accompanied the Legal Realism rising in those years. Holmes himself had taken as one of the lessons of Langdell’s failures that the law could be thought of as a science (and understood scientifically), but only by effectively dissolving “in cynical acid” the point of view that had given rise to that science in the first place: Langdell’s strictly internal point of view within and toward his science of law. Holmes instead abandoned altogether that internal point of view toward law—under which one takes certain materials in one’s thinking as authoritative—and replaced it with a purely *external* point of view (and, hence, the predictive theory of law he infamously advocated some years

¹²⁴ John Dewey, *My Philosophy of Law*, 14 JOHN DEWEY: THE LATER WORKS, 1925-1953 115, 117 (2008).

¹²⁵ *Id.*

¹²⁶ Leiter has similarly thought of this as the hallmark of a naturalized jurisprudence. *See* Leiter, *supra* note 74, at 40 (noting that “Jurisprudence . . . is ‘naturalized’ because it falls into place . . . as a chapter of psychology (or anthropology or sociology)”).

¹²⁷ *See* John Dewey, *Justice Holmes and the Liberal Mind*, 3 JOHN DEWEY: THE LATER WORKS, 1925-1952 177, 182 (2008) (contrastively noting the “realistic strain” in Holmes’ thinking that led him to his externalist, prediction theory of law).

¹²⁸ JOHN DEWEY, 12 LOGIC: THE THEORY OF INQUIRY, JOHN DEWEY: THE LATER WORKS, 1925-1952 537 (2008) (referring to logic as his “first and last love”); *see also* JOHN DEWEY, *STUDIES IN LOGICAL THEORY* (1903).

later).¹²⁹ Holmes, as naturalist, would thus have salvaged a science of law by excising from it the internal viewpoint entirely: by letting the purely legal point of view fall away.

Dewey, however, was never tempted by this externalist assumption about the law's viewpoint, and rightly not.¹³⁰ His concern was instead to find a way of making sense of the obviously internal point of view lawyers take in their reasoning with legal materials, yet without succumbing to the “delusive exactness” that he and Holmes had scorned in Langdell's science.¹³¹ He had sought a way of preserving a broadly scientific concern for evolving a “logical systemization with a view to the utmost of generality and consistency”¹³² without lapsing into the rationalist belief that this meant “fixing a concept by assigning a single definite meaning, which is then developed by formal logic.”¹³³ He would have kept alive the hopes of a legal science that would preserve, to some degree, the same conceptual systematizing and formal development of the law that Langdell had explored, all from a similarly internal point of view. But he would also have done so in a way that respected “[t]he judgment, the choice, which lies behind the logical form,” the twofold indeterminacy that Realists like Llewellyn and Cardozo had shown lurking along the margins of the law. Dewey, too, wanted to naturalize the science of law, then, but his naturalism had led him to a different picture of what the *intellectual* content of that science was—away from the rationalism of traditional legal science and towards another destination entirely. His science was to be as conceptually and formally rich as Langdell's, yet vulnerable to none of criticisms that had made the latter's conceptualism or formalism empirically untenable. It was to have the intellectual heft of a relatively autonomous discipline, while being no less useful for the

¹²⁹ See Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991 (1997).

¹³⁰ See Brian Leiter, *Postscript to Part II: Science and Methodology in Legal Theory*, NATURALIZING JURISPRUDENCE 188-91 (discussing the naturalist appropriation of Hart's argument for the internal point of view).

¹³¹ Dewey, *supra* note 127, at 180.

¹³² Dewey, *supra* note 123, at 562.

¹³³ Dewey, *supra* note 127, at 180.

working attorney. And he wanted to do all this without assuming any of the absolutes that had doomed Langdell's science to a fanciful piety, an impossible dream. What he sought, but never gave, was naturalistic proof of the possibility of a *pragmatic* legal science.

2. Toward a Pragmatic Legal Science

Just what this naturalized legal science would have come to in Dewey's hand and how he would have defended it are, like any counterfactual of history, impossible to know with any certainty. More to the point, and taking Dewey at his own word, they are largely beside the point.¹³⁴ What Dewey left us was something immeasurably more valuable than any detailed roster of theses or intricately elaborated philosophical system. He left us a point of view; a line of thinking clear enough in its direction to amount to a viable working program. What that working program comes to, as is clear by now, is a new kind of a science of law: a *pragmatic* legal science. And that program takes as its basic framework of assumptions the same legal science that the Realists and their sympathizers, like Dewey himself, had hoped to fully and finally dislodge from the center of the intellectual tradition of our law nearly a century ago: the rationalist tradition of legal science. Below I therefore lay out how I believe those revised assumptions—as to the law's content, methodology, and viewpoint—should be understood from Dewey's point of view, and why their restoration in our law is so vital today.

a. The Content Assumption: Conceptual Experimentalism

As a naturalist in his philosophy of legal science, Dewey believed one could and should approach a study of the law in a way that comported with the best empirical account not only of how lawyers think when thinking about law, as the Realists also believed,¹³⁵ but

¹³⁴ See John Dewey, *Nature in Experience*, 14 JOHN DEWEY: THE LATER WORKS, 1925-1952 140, 140-41 (2008) (alluding to his "definite point of view" informing his philosophy).

¹³⁵ See Leiter, *supra* note 74, at 39-46 (discussing the Realists' naturalized approach to a theory of adjudication).

of what they are thinking *about*. What he believed Realists like Cardozo and Holmes had shown through the argument for principled indeterminacy was that lawyers were thinking not along the lines of any absolute system of legal principles and concepts, but of multiple, conflicting doctrinal *models*—different idealized conceptualizations of the same formal legal materials. For Dewey, this insight had not only formed the core of his logical theory, through a pragmatist theory of concepts,¹³⁶ but it had also laid the basis of a larger normative project that he called conceptual *reconstruction*.¹³⁷ Its upshot for legal science was nevertheless more general: whatever the ultimate account one can and should give of these doctrinal models, they were far from absolutes. These models are always merely hypothetical, held only contingently—and in this sense, *experimental*. Moreover, like in other contexts in our conceptual lives, rival models can and do subsist side by side. Even if one ultimately has to say which model to apply in one case, or which to make more or less central to a given concept as a part of systematizing an area of law, there is always a choice to be made in situations like these, as Cardozo had owned up to in *Jacob & Youngs*.¹³⁸ As these conceptual models thus come to replace conceptual absolutes, a conceptual absolutism gives way to what we might call a *conceptual experimentalism*.

b. The Methodological Assumption: Instrumental Rationality

The way that lawyers and judges make their decisions—the way they decide not only which model to apply but what models there are—also differs radically from the way that a rationalist like Langdell thought of it. Just as Dewey rejected as mere falsehood the belief in a single complete, comprehensive, and consistent set of legal principles and concepts that

¹³⁶ See Dewey, LOGIC, *supra* note 128; see also Jady Hsin, *Laws, Demands, and Dispositions: John Dewey and his 'Concept Pragmatism'*, 50 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 286 (2014) (arguing for a roughly model-based account underlying Dewey's theory of concepts).

¹³⁷ See James Campbell, *Dewey's Method of Social Reconstruction*, 20 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 363, 380-385 (1984).

¹³⁸ 230 N.Y. at 243.

defined the law's content, he also jettisoned the accompanying belief in a method that would categorically justify any such a system. He, along with Holmes, instead insisted that what justified the selection of a particular model in some case, or the development of a new model for a range of later cases, were the consequences that flowed from its adoption or creation. Models would thus be justified *instrumentally*, not categorically, tested by their value in solving social problems and answering social needs, not merely by the extent to which they cohered with an arbitrarily privileged set of legal postulates. In this legal science, an *instrumental rationality* replaces the categorical rationality of the rationalist tradition, and an unworkably absolutist methodology surrenders to a practicable scheme of empirical investigation and test by consequences—a methodological experimentalism.

c. The Viewpoint Assumption: A Pluralist Internalism

Once we leave behind these two prior absolutist assumptions, we can see that the naturalist commitment to preserving the internal point of view toward law also has to undergo yet another, and final, transformation from the rationalist tradition. As we saw earlier, the absolutist way that that tradition understood the prior assumptions fed back into and transformed the internal point of view that it took for granted: not only was the law's point of view internal but it was also absolutely autonomous. This was the case because the body of knowledge that the rationalist assumed as the law's content, and the method by which the rationalist legal science could come to know it, required only a knowledge of the formal legal materials themselves: disciplinary outsiders could no more presume to teach a lawyer law than a lawyer could presume to teach a chemist chemistry.

Having witnessed the collapse of the rationalist's absolutism as to the law's content and methodology, however, we must also come to recognize how much less absolute that autonomy must be. Not only can other disciplines —across the social and even natural

sciences, from economics and sociology to epidemiology and environmental sciences—help lawyers understand the consequences that their choice of models will likely have in answering social needs; they can also aid in framing and developing the postulates of new models: disciplines like philosophy and political science especially, and the humanities more broadly, all can and do contribute to framing the conceptual raw materials that go into the many, various, and changing models composing our law. Yet this is far from conceding away *all* of law’s autonomy, as if welcoming in the insights of another discipline were to deny that lawyers had any of their own.¹³⁹ On the contrary, as Dewey made sure to point out,¹⁴⁰ it is up to lawyers, and lawyers alone, to build the final models that go into our law, and to draw out their consequences for the workaday minutiae of the practicing attorney and the presiding judge. It is lawyers, after all, who in our society build the bridges from formal legal schemes to principled models to practicable rules of law. The premises of our law may not be entrusted exclusively to lawyers’ concern, but their legal implications should be and largely are.

In their moments of theoretical repose lawyers thus are, or at least could be, more and less than they have been thought—more than the social janitors that Judge Posner sees, but also less than the priests of Langdell’s legal seminary, divining a mythical law beyond the cases.¹⁴¹ One could instead call them our social architects though that, too, risks some exaggeration, particularly now that so many of the law’s blueprints are the work of legislators, not all of whom are lawyers or, when they are, particularly learned ones at that. More fitting then may be the title of social coder, authors of the apps for a social world endlessly in the midst of technical and fashionable upgrades—the evolving source code of a

¹³⁹ See *supra* note 8.

¹⁴⁰ See John Dewey, *The Historic Background of Corporate Personality*, 35 YALE L.J. 655 (1925) (arguing that what makes a corporate body a “person” under the law is “whatever the law makes it mean”).

¹⁴¹ Posner, *Conventionalism*, *supra* note 67, at 338; see also *supra* note 79, and accompanying text.

Legal Science 2.0.¹⁴² Whatever the image, the lesson is clear enough. Even if the broad outlines of the legal vision for our society may not be entirely or even mainly of lawyers’ imagining, its blueprints, the lines of code, are. This is enough for law to enjoy a *relative* intellectual autonomy,¹⁴³ unified by its own point of view—by its *pluralist internalism*.

III. Conclusion

The century since Langdell’s legal science began its steady descent into obsolescence tells the tale of our disenchantment with law. Today, perhaps more than ever before in our history, Americans have come to distrust not just the policies and personages of a Congress or an administration, but the very rule of our law.¹⁴⁴ Politicians may still pay their lip-service and we may still dutifully nod along, but for many Americans the rule of law has never felt more elusive, less real, than it does today. Although this complex phenomenon naturally has many causes, one powerful force of disintegration has come from within law itself: from the “fragmenting jurisprudence” of the last half century,¹⁴⁵ which has corroded away the belief, first among lawyers and consequently among others, in a distinctively legal aim or intellectual method—in the legal point of view.¹⁴⁶ Many lawyers, disillusioned with the centuries-old belief that law could be made rational, have now given up on making it even seem reasonable. And as law has come instead to be seen as the expression of colliding interests

¹⁴² See Posner, *Conventionalism*, supra note 67, at 338. This work, moreover, is already a staple of legal scholarship. See, e.g., Todd Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006) (discussing the move away from the classical, bargaining model of boilerplate in contracts to other sociologically-grounded models); Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84 (2007) (recounting the contract, tort, and statutory erosions of the at-will employment model over the last century and suggesting the need for a new “hybrid” model better fitting these trends).

¹⁴³ Considering law as a body of doctrinal models would also explain law’s resilience in the face of the many disciplinary perspectives (the so-called “law and’s”). See Balkin, supra note 9 (discussing the same).

¹⁴⁴ See, e.g., Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL’Y 583, 584 (2016) (discussing the “general populist unease that now infects much of our public discourse” and its relation to a decline in faith in the possibility of the rule of law).

¹⁴⁵ Berman, supra note 15, at 943 n. 84.

¹⁴⁶ For an insightful analysis of the concept of a ‘point of view’ in this sense, see Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1566-81 (1998).

or raw political will or just the dictate of the deep-pocketed, our fellow citizens have begun to give up on law, too.

Just under a century ago, as the world looked on in horror at the vast carnage of its first modern war, Dewey could also feel the same forces of disintegration, of disbelief in the power of ideas to rule social life, acidly coursing through public opinion.¹⁴⁷ And like the generation of legal scholars before him who came of age in the shadow of a savage civil war, he too saw the need to restore the public's faith in "intelligence and ideas . . . as the supreme force in the settlement of social issues"—its faith in law as a rational system of justice.¹⁴⁸ Like his legal idol Holmes, however, he had no illusions about what that system—what Langdell had so triumphantly called a science of law—could realistically do, or what it had to be.

As already explained, it simply could not be the absolute system of rules and principles that lawyers like Langdell or jurists like the twelfth-century canonists dreamed it was. So long as "life is still going on, it is still an experiment,"¹⁴⁹ the rationalist faith in a system of law frozen in time, absolutized into a bloodless and impractical conceptual perfection, was an obstacle, not a help, to resolving social conflict—a formula of repose, not a postulate for living. To their great credit, the Realists helped us to see why that was. And yet, after the rationalist idols finally came crashing down, they also offered precious little help in picking up the pieces.

As also already argued, even as the mainstream of the legal tradition began to fray after the Realists themselves had come and gone, another tradition—the far older counter-tradition of legal science—quietly lived on. While other Realists were lunging down their

¹⁴⁷ Dewey, *supra* note 127, at 183.

¹⁴⁸ *Id.* at 182.

¹⁴⁹ *Id.* at 183.

jurisprudential dead-ends, philosophers like John Dewey and even some of the foremost Legal Realists like Walter Wheeler Cook were busy rebuilding that tradition in the image of a very different conception of legal science—the pragmatic conception discussed in these pages. It is fair to say that that tradition, overwhelmed as it was by the misfortune of circumstance and shifting intellectual fashion, never got the hearing it deserved. But there is far more to that tradition of legal science, conceived in that experimentalist spirit, than our more cynical jurisprudents would care to admit. At the very least, that conception of legal science can escape the fate of its rationalist ancestors: we need not turn our back on the insights of the Realists to believe in the possibility of a legal science, at least of the pragmatic kind. Law can be a science in this sense, and in many ways it already is. In our present age of disenchantment, its full revival as a working postulate of our law—as an article of a new fighting faith—is not just long overdue, but sorely needed. In the following pages I hope to explain how we might go about restoring that postulate and reviving that faith, beginning with a brief examination of the last attempt at making law a truly modern science, by the faculty of the short-lived Institute of Law here at Johns Hopkins.

CHAPTER 2
HOPKINS REALISM AND ITS LESSONS FOR LEGAL SCIENCE

“Perhaps naturalizing jurisprudence should, in short, *change the subject*, in much the way that the naturalistic revolution in post-positivist philosophy of science has led . . . to the subsumption of scientific practice under more general human activities.”¹

Introduction

Late in 1928, four lawyers from several of America’s leading law schools gathered at America’s first research university to open a new chapter in the study of law in America. It would end, several years later, as an embarrassing flop.² They had been tasked with founding at Johns Hopkins a new Institute of Law—a substitute for the long-planned School of Jurisprudence that had never gotten off the ground there.³ And like the university where it was to be housed, the Institute would bill itself as an academic first, yet another double-barreled experiment. Principally it was to be a try at an “entirely new” model of legal research and, more incidentally, of legal education⁴—applying to the law the same research model of graduate study pioneered by Hopkins over half a century earlier.⁵ There would be no law students, at least not in the traditional vocational sense, nor would the Institute serve the cold-called, black-letter staples that had become standard fare at Langdell’s Harvard and its many later imitators. The Institute’s mission would instead be research—research at the same frontiers in the study of human behavior being scouted elsewhere at the university in those years, “objective and experimental in method, practical in approach, and cooperative

¹ Brian Leiter, *Postscript Part II: Science and Methodology in Legal Theory*, in NATURALIZING JURISPRUDENCE 183, 199 (2007).

² John Henry Schlegel, who has written the definitive historical account of the Institute, has come to the same conclusion. See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 255 (1995) (describing the Hopkins Institute as a “washout”). Some of the Institute’s contemporaries were even less charitable. *Id.* at 200 (quoting Karl Llewellyn as saying that he doubted “whether in all of the quest for social science there has ever been such hastily considered, ill-planned, and mal-prepared large-scale research”).

³ *Id.* at 150.

⁴ Walter Wheeler Cook, *Scientific Method and Law*, 13 A.B.A. J. 303, 309 (1927).

⁵ SCHLEGEL, *supra* note 2, at 151.

with the other social sciences in plan and execution.”⁶ They had set out to revolutionize law, in short, by making it empirical.

Only naturally this experiment would call on a fair measure of their institutional ingenuity—crafting a curriculum, drawing up new lines of research, lightening a few donors’ pockets. But it would also require, as its founding faculty saw,⁷ a little philosophical spadework. It was therefore no accident that among the Institute’s seminal quartet were three of the foremost American Legal Realists: Walter Wheeler Cook, visiting from Yale Law School, and Herman Oliphant and Hessel Yntema from Columbia.⁸ All three had felt the pull of Hopkins’ institutional iconoclasm, its rebellious rejection of the cold-called doctrinal study of law that had swept westward across the law schools. But what ultimately drew these three from their comfortable perches in New Haven and Morningside Heights to a few empty Baltimore offices, in a university wholly without a tradition in law, was something more—the *idea* that the Institute stood for, or at least would once it was up and running. As they went on to explain in a series of largely forgotten articles,⁹ it would not be enough for them just to try tinkering with or, even, tearing down the institutional fixtures installed by Langdell and his followers a generation earlier, not so long as lawyers still built upon the catechistic foundations of their casebook ‘science’. What they therefore needed was a more radical break with that tradition, occasioned and blessed, they believed, by a newly scientific analysis of the structure and function of legal thinking itself—an empirically accurate account of how lawyers think and what they think about when thinking like lawyers. Law

⁶ Even though several of the founders of the Institute, including Walter Wheeler Cook, had clearly envisioned a complete reform of legal education, *see* Cook, *supra* note 4, at 308-9, in fact the brevity of the Institute’s life meant that no such educational program ever materialized.

⁷ *See* SCHLEGEL, *supra* note 2, at 160-63.

⁸ I am following convention in identifying these three as among the more prominent American Legal Realists. *See* Michael Steven Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381, 382 n.5 (2011) (noting that Cook, Oliphant, and Yntema are commonly counted among the Realists).

⁹ *See, e.g.*, Cook, *supra* note 4.

could become empirical only, as we now might say, by going naturalist in its jurisprudence. And the Institute was to be living proof that it could do, and so become, both.

And yet for all its ambitions, the Hopkins experiment crumbled almost as hastily as it was put together. Just over a year after the Institute opened came Black Thursday, and after limping along for several years without an endowment and with dwindling university support, it shut its doors for good in 1934, with the last of its four faculty members scattering back to the law schools they had hoped to leave behind.¹⁰ In the end the grand experiment lasted five years. And despite the stacks of reports and stirring testimonials that trailed in its brief wake, the Hopkins experiment in law has long since receded into obscurity, a forgotten because seemingly forgettable episode of jurisprudential history.

In this chapter I propose to offer a philosophical reappraisal of this largely overlooked chapter in American legal thought—the short-lived Hopkins school of Legal Realism and their ill-fated legal science. My reasons for doing so are not purely historical, though I argue that that history has been somewhat misunderstood. Instead, I believe, and as I explain below, there is an important lesson that we can and still should learn from the Institute’s discouraging failure: a lesson in how we might go about reviving the intellectual heart of the idea of a legal science that gave life to our Western tradition of law, now all but forgotten in contemporary American law. In the first section I accordingly begin the jurisprudential story of the Institute where it left off, by challenging the conventional explanation of why the Institute failed through a reframing of what it represented—a try at a new *empiricist* legal science. In the following sections I then take up the historical and philosophical questions of why that legal science, and the Institute that embodied it, ultimately collapsed, and what lesson we should take from that failure. My answer, laying the

¹⁰ See SCHLEGEL, *supra* note 2, at 198-99.

basis for the work of the next chapter, is that, although the Hopkins Realists got right their basic methodology—their naturalism—where they went wrong was in applying the explanatory strategy. They hoped to explain scientifically the way lawyers think and what lawyers think about when thinking like lawyers—the legal point of view—yet ended up denying the most basic elements of legal common sense. They needed to naturalize the legal point of view yet ended up naturalizing it away. And in the next chapter I take up their positive lesson—the way they could have gone about their naturalizing without defying legal common sense—by exploring the strategy they implicitly declined in pursuing their legal science: an evolutionary naturalism.

I. A Baltimore Realism

It has never been easy pinning anything like a definite doctrine onto American Legal Realism, no doubt because it was less a creature of the seminar room than the public square—a thing full of mood but rather short on message.¹¹ But even a mood like theirs—iconoclastic, bumptious, mainly negative—could inspire a few points of agreement, and at least a few common themes.¹² Here our focus, however, and fortunately, will not fall on Legal Realism itself but on the small band of Realists who found themselves, for five meandering years, on faculty at the Institute of Law at Johns Hopkins: Walter Wheeler Cook, Herman Oliphant, and Hessel Yntema. And as I explain in this section, these Realists did seem to share a fairly firm and definite jurisprudential aspiration—a common if somewhat garbled message, articulate enough in any case to merit their consideration as a budding school all their own: the Hopkins Realists as I will call them. Just what that

¹¹ See Brian Leiter, *Rethinking Legal Realism*, Naturalizing Jurisprudence (2007) 15, 15-21 (acknowledging that Realism has more commonly been seen as a loose coterie of thinkers than a coherent philosophical school).

¹² See generally *id.* (discussing the “core claim” of Legal Realism).

aspiration was, why it ended ultimately in philosophical as well as institutional failure and what lessons that failure bears for us and the legal science suggested in the last chapter, is the story of this one. And to tell that philosophical story it will be easiest to begin where it ended: in the demise of their grand experiment, the Hopkins Institute of Law.

A. Explaining the Institute's Demise

Among the earliest difficulties encountered by the founding faculty at the Institute was the one that ultimately led them, and it, to split apart: each other. As John Henry Schlegel has told in his masterful history of the Institute, much of its story could be framed around a constant search, “for topic or topics of research and . . . for permanent funding by four individuals so unlike each other that it is hard to conceive of them agreeing on a single approach to anything.”¹³ From the beginning it was clear that the Institute was as unlikely to converge on a common philosophical line as the Legal Realism was going settle into a single formula. Largely, and understandably, this was because the four founding faculty—Cook, Oliphant, Yntema, and Leon Marshall—seemed to care less about unity than productivity. Early on, apparently, all four had decided, despite their spare numbers and even sparer resources, that each would head up his own “practically independent” unit, devoted to his own line of research.¹⁴ What that meant in reality, however, was that their respective research programs, on the surface, appeared to have nothing in common. Yntema and Marshall, for instance, would spend much of their time assembling statistical reports on cases winding through the Ohio and Maryland court systems,¹⁵ while Oliphant, running down his eclectic to-do list, went about collecting stacks of survey data to support reforms

¹³ SCHLEGEL, *supra* note 2, at 10.

¹⁴ *Id.* at 147.

¹⁵ *Id.* at 173-74.

of jury procedures in New York City.¹⁶ Cook, meanwhile, continued making his name in the decidedly unempirical business of conflict of laws theory, opining only occasionally on broader issues, like law's adoption of scientific method.¹⁷ "Practically," these petite "units" thus appeared to be related less by independence than simple indifference, to one another and whatever it was they, together, stood for as an Institute. And as Schlegel notes, figuring out how they ever would fit into a single intellectual program—how they slotted under a common idea—would become no small concern to them all, at least once the fundraising spigot began to run dry.

There was one point on which the original quartet did all concur, however: their distaste for the legal culture within which they had come of age. "Our present position and present dissatisfaction," as Edwin Baetjer, a Baltimore attorney and one of the sponsors of the Institute, would explain on its behalf, "are due to the rapidity and importance of the changes in our economic and social structure; we are living in a world that has quickly become utterly different from the world as it existed before."¹⁸ Law was growing out of date, and increasingly out of touch. Of course, Baetjer allowed, legal doctrine had always to some degree adjusted to the needs of the times, and so was "more correctly defined as the embodiment of experience—as a growth."¹⁹ As we saw in the last chapter, even Langdell, that great common law absolutist, had understood that much. Yet, Baetjer insisted, the way law had historically taken on those adjustments—the way it had grown, especially in the direction cleared by Langdell and his epigones—just no longer served, not in a society as suddenly urban and sweepingly industrial as early twentieth-century America had become.

¹⁶ *Id.* at 161-62.

¹⁷ *Id.* at 10.

¹⁸ Edwin G. Baetjer, *Policy and Program of the Johns Hopkins Institute of Law*, 16. AM. BAR ASSOC. J. 312, 313 (1930).

¹⁹ *Id.*

“These rapid social and economic changes” had not only threatened whole legal regimes with obsolescence—witness the sometimes bloody clashes over the labor injunction and the early struggles for industrial democracy. Those changes had also “outstripped the slower processes of the law and made [their] older processes inadequate.”²⁰ They had outstripped, that is, the way lawyers learned and used and, accordingly, had adapted legal doctrine to meet the exigencies of their times, the still largely Langdellian “science” and its lecture-hall laboratory.

But the dismay, even disgust, that the Institute’s faculty felt for the Langdellian revolution that had swept across the law schools and seeped into the general legal consciousness did not appear to translate into anything more substantial than—a felt, directionless dissatisfaction, at least as Schlegel sees it. The Institute’s cast of research programs not only seemed to have been reading from entirely different scripts, they also seemed not even to be *about* the same thing, not even the one basic idea they all had nominally agreed on when joining the Institute’s ranks: that, whatever else their work amounted to, it was essentially *scientific*. Among the three theoretically-inclined of the founding four—the Realist trio of Cook, Oliphant, and Yntema—Schlegel’s verdict is that there was, in fact, “no agreement even on what a scientific approach to law meant.”²¹ They instead made do, and for a while got by, on boilerplate, their vaguely pragmatist “slogans”²² like “social control, law as a human device or tool, the need for readaptation of law to life.” This was hardly weighty stuff, as even they appreciated.²³ And indeed within a few years, as the twenties plunged bleakly into the thirties, others too began to notice. Evocative as the

²⁰ *Id.* at 314.

²¹ *Id.* at 205.

²² *Id.*

²³ See SCHLEGEL, *supra* note 2, at 205.

Institute's slogans were, its critics charged, they were simply too vague to support a working program—or to justify the fairly exorbitant expense of maintaining a faculty like the Institute's at university as small as Hopkins.²⁴ The end, in Schlegel's view, was all but sealed at that point. With “no theoretical or even less grandiose idea that might have grounded the Institute's research,” and only the “mishmash of what each individual, each practically independent research unit . . . wanted to do,” the Institute, without a direction and with dwindling support, simply petered out.²⁵

What, then, killed the Institute? The tempting but ultimately too-easy explanation would be: money, or the lack of it caused by the Depression. There is some truth in that, of course, as Schlegel admits, but the real cause he believes lies deeper. On his subtler telling, that cause was instead what the “practical independence” of each of the Institute's units reflected: their more basic theoretical disunity. There was just no theoretical framework, no idea, to give the Institute's work *legal* significance: no jurisprudential cord bundling together Oliphant's hodgepodge of surveys and studies and Yntema and Marshall's stacks of statistical analyses or Cook's doctrinal efforts in the law reviews. The program, as one unimpressed foundation official put it, just did not “hang together.”²⁶ With their slogans proving to be merely that, a litany of bland boilerplate, the quartet found themselves on the defensive, struggling to say what it was the Institute really represented, and what about its work was really so different from the usual law-review fare. They were struggling to identify the Institute's point. And who in those lean years was going to throw money at a pointless

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 149.

cause? The Depression may have had its hand in the Institute's downfall, but only by revealing that there was never an idea behind it worth supporting in the first place.²⁷

B. A "Grandiose" Idea

It may well be true then, as Schlegel plausibly hypothesizes, that the Institute did not succumb so much from the financial starvation brought on by economic malaise years as from the hostility of a faculty and a university administration that had lost faith in its mission. But this obviously *need* not mean that there was no common approach among its faculty—that there was "no theoretical" idea behind the Institute itself. There may have been some such idea, just one that, for some reason, failed to sell.

And, in fact, there was one: the almost too-obvious idea that law could be made a science. Indeed, the faculty's interest in developing this idea was scarcely a secret. The three Realists had all taken some pains during their time at the Institute to defend not just the place of empirical research in legal study, but the idea of a legal science itself. What is more, they also seemed to think this idea a more significant and salient aspect of their work than even the reams of studies they had churned out in their brief time at the Institute. In a promotional report published not long after the bottom fell out of the Hopkins endowment and word of impending cuts had gotten around, the faculty pointed not to that trove of empirical work to justify their continued funding; it was still "too early," they conceded, "to estimate how far the Institute [had] realized its purposes" in that regard.²⁸ The Institute's "most important contribution thus far," they instead underlined, was in having "indicate[d] the validity of the scientific ideas which led to its establishment."²⁹ Their backs to the wall,

²⁷ See *id.* at 206.

²⁸ *Id.* at 191.

²⁹ *Id.* at 191-92.

and the loss of their institutional experiment—and for that matter, their livelihoods—looming over the next fiscal ridge, the Hopkins Realists had decided to take their stand on what certainly looks to have been a theoretical, even “grandiose” idea: that of legal science itself.

Just what were these “scientific ideas,” though, adding up to a science of law? Admittedly, as Schlegel points out, none of Cook, Oliphant, or Yntema ever offered anything like a careful exposition of the idea, which certainly could give the impression that it was both anything and nothing at all—just another of their many slogans.³⁰ The analytic contours of whatever idea they did have in mind must therefore lie a bit below the surface of their scattered theoretical writings, which is perhaps why Schlegel found so little in them that could have served as a unifying theme of their work, and why in the end the Institute bungled its pitch.

However obscure the contours of that idea may have been in the Institute’s short day, now they are not nearly so difficult to discern. As we saw in the last chapter, in his magisterial studies of medieval and modern legal science Harold Berman has explained that tradition, and both of those historical exemplars, by way of a common set of premises—one intellectual, another cultural, and the last, institutional.³¹ Together they molded the core of what traditionally has been understood as a science, and in the fire of their resulting ideal they served to anneal the legal scholarship of those very different eras into a durable program, the tradition of a distinctively *legal* science. As discussed in the last chapter, a legal science in this sense is thus (1) a relatively distinct body of abstract legal knowledge that (2) is studied within an intellectual culture valuing objective or impersonal inquiry and research

³⁰ *Id.* at 206.

³¹ See HAROLD BERMAN, LAW AND REVOLUTION I: THE FORMATION OF THE WESTERN LEGAL TRADITION 152-55 (1983) (what I call the intellectual premise Berman identifies as the methodological).

and which (3) has the support of organized, institutional resources. And as a brief survey of these Realists' writings will make clear, they too appear to have had something like this fundamental idea of a legal science in mind, on occasion vividly though more often only dimly, as they set about to assemble the Institute.

1. The Institutional and Cultural Premises

Perhaps the most obvious way that the Hopkins Realists were seeking to build a science of law in Berman's sense was by enlisting in the ranks of the Institute at all. Although the Columbia contingent of the eventual Hopkins faculty—all but Cook, that is—had joined under less than philosophical auspices,³² as early as 1923 Oliphant was expressing his hope, as he later put it, that “at least one school [would] become a community of scholars, devoting itself to the non-professional study of law, in order that the function of law be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life.”³³ Professional disappointment may have nudged Oliphant to look beyond the security of a Columbia for the next move, but it was this idea and ideal—a novel approach of law nestled into a novel institutional model—that drew him to Hopkins.³⁴ This was a motive common, moreover, among the other faculty, so much so that, when tasked with promoting the Institute, Baetjer, as we saw, could make essentially the same plea on the faculty's behalf. All believed in the need for a differently-focused center for legal research, and all saw that coming together in the little faculty that Cook was assembling in Baltimore. The Institute was thus the visible index of their

³² In 1928 the selection of a new dean at Columbia's law school had deeply divided its faculty, leading some to resign or, as in Oliphant's case (who had been passed over for the deanship), to look for opportunities elsewhere. See SCHLEGEL, *supra* note 2, at 147-48.

³³ SCHLEGEL, *supra* note 2, at 149 n. 20.

³⁴ SCHLEGEL, *supra* note 2, at 149.

institutional aspiration, and of their embrace of the corresponding institutional premise of a legal science.

All three similarly saw the intellectual culture they were hoping to foster at and through the Institute as a highlight of that institutional experiment. That culture would emphatically value what Oliphant defended as the “impersonal” and objective quality of their research, the “detached scrutiny” of “actual conduct” of officials, distinct from the spirit of partisan advocacy typical of lawyering and, even, of the Langdellian tradition of common law scholarship.³⁵ Yntema, for instance, would answer some of the more forceful critics of the Institute’s obsession with “objective research” by simply owning up to it.³⁶ “Plac[ing] more faith in facts than fables,” Yntema rejoined, the Institute’s faculty instead saw their concern for objective inquiry into what law is—allegedly oblivious to the normative concern about what it ought to be—as a “distinct advance.”³⁷ That “degree of objectivity,” Cook added, was in fact “required for the study of legal problems,” at least if that study followed the “entirely new and different approach” that the Institute was spearheading.³⁸ The Hopkins Realists were thus openly committing themselves, in their own work as well as promotionally, to an intellectual culture steeped in broadly scientific notions of objectivity and rigor, albeit with a modern, empirical twist. And as seen in the last chapter, that was enough to put their otherwise self-consciously revolutionary proposal in direct line, culturally, with an understanding of legal science as old the Western legal tradition itself.

2. The Intellectual Premise: Law as Empirical Generalization

³⁵ See, e.g., Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 138 (1932); Herman Oliphant, *Stare Decisis Continued* [hereafter *Stare Decisis*], 14 AM. BAR ASSOC. J. 159, 160 (1928).

³⁶ Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 Col. L. Rev. 925, 935 (1931).

³⁷ *Id.*

³⁸ Cook, *supra* note 4, at 308.

On the final premise of a legal science—its intellectual one—the Hopkins Realists ventured quite a bit beyond that tradition, however, not infrequently at the expense of precision, and at a still higher cost to legal common sense. The question that this premise implicitly answered was, in any case, beguilingly simple. What were lawyers thinking and talking and arguing *about* when doing law? Surely, even trivially one might think, that answer must be: rules, the stuff of statutory codes and case reporters and constitutions.³⁹ That, however, was exactly what the Hopkins Realists would deny. And in denying that they accordingly took on the jurisprudential task that Langdell never quite broached with his absolutist legal science: the task of explicating their understanding of law, through a dissection of the concept itself.⁴⁰ It was the logic of that answer—and there was, in fact, a logic to it—that brought together all the empirical and other projects essayed by the Hopkins Realists, imparting the sort of intellectual coherence Schlegel in his otherwise incisive history appears to have overlooked. And as we will see in the next sections, it was also that answer that would unravel the legal science whose intellectual premise it had perfected.

What, then, did these Realists believe legal rules were? To the extent that any of them clearly said so, they all espoused a theory closely related to what we now would call a *prediction theory* of law.⁴¹ It could more accurately be considered a *descriptivist* or, as I will call

³⁹ This is what Brian Leiter has called the “Simple View” as to what law is. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 289 (2001).

⁴⁰ The difference here is between what *counts* as law in the first place—what the concept or law or legality amounts to—and what the particular law of a particular jurisdiction is. The natural lawyer will insist, for example, that what law is turns on whether it meets the test of more general moral principles, so that a morally unsound law could be no law at all (*lex iniustia non lex est*). On the other hand, the positivist believes that the test of legality comes down to questions of social fact in which moral considerations play no *necessary* part. (A positivist who believes that morality *may* play that part—depending on what the social facts are of a particular legal system—is sometimes called a *soft positivist*, while one who insists that morality can play no part whatever is instead a *hard positivist*.)

⁴¹ See Michael Leslie Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381, 409 (2011).

it, an *empiricist* theory of law. Law was thus said to consist in “certain generalizations” of what the officials of some jurisdiction, and especially its judges, have decided in some line of cases.⁴² If, as in one of Oliphant’s examples, a father were to convince his daughter to call off her engagement, and the jilted groom were later to fail to win a judgment against the father for doing so, we could then give the resulting rule or law of the case, Oliphant says, in the form of a series of generalizations, of gradually widening scope:

1. Fathers are privileged to induce daughters to break promises to marry.
2. Parents are so privileged.
3. Parents are so privileged as to both daughters and sons.
4. All persons are so privileged as to promises to marry.
5. Parents are so privileged as to all promises made by their children.
6. All persons are so privileged as to all promises made by anyone.⁴³

Despite the distracting mention of legal ‘privileges’, and the perhaps mysterious ontology that such talk flirted with,⁴⁴ Oliphant thought the analysis of statements like these decidedly unmysterious, banal even. They were *descriptions*, of “what courts have done in response to the stimuli of the facts of the concrete cases before them.”⁴⁵ In cases where a father has convinced his daughter to call off her marriage he has not, says the first rule, been found liable for damages. More generically, where a parent has done the same he or she has likewise faced no liability, and so on. The *real* “rules and principles of law” under this analysis are *only* these descriptive remarks—remarks not about ‘privileges’ or ‘rights’ or ‘liabilities’ or any other dream-like thing,⁴⁶ but about what living officials had done in actual cases. These rule-statements formed what the Hopkins Realists referred to as the law’s “empirical generalizations,”⁴⁷ descriptions of the patterns settling in-between the lines of

⁴² Cook, *supra* note 4, at 308.

⁴³ Herman Oliphant, *A Return to Stare Decisis*, 14 AM. BAR ASSOC. J. 71, 72-3 (1928).

⁴⁴ For the most trenchant of the Realist critiques along these lines, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

⁴⁵ Oliphant, *Stare Decisis*, at 159.

⁴⁶ See *supra* note 44.

⁴⁷ Walter Wheeler Cook, *Legal Logic*, 31 COLUM. L. REV. 108, 113 (1931).

judicial decision-making, associating stereotypical sets of facts with typical results. Habit and the pressures of conformity being what they are, lawyers could then rely on these statements to predict those and other officials' "probable behavior in the future"—what a judge likely would do tomorrow on some set of facts given what that or some other judge down the hall had done in similar circumstances last year or, even, last century.⁴⁸

This novel theoretical accent—falling on how judges ruled regardless of how they reasoned—was voiced throughout the Hopkins Realists' writings, and for good reason. It made clear that what attorneys needed was research, the largely unharvested fruits of modern statistical and experimental technique. Law not only *could* but *had* to become empirical, in other words, and the two halves of their picture of law, negative and positive, purported to show why. First of all, it was clear that law was *not* to be found among the words that legislatures enacted or the holdings that judges pronounced, or the use officials made of either in deciding cases—the “law in discourse.”⁴⁹ The only truly operative considerations were factual antecedents and legal result: a father leaning on his daughter to call off her wedding and his freedom from liability, whatever the reasons why, if any at all. All this was heresy enough for lawyers brought up on Langdellian casebook-science. But that thought would serve only to open the way to a still more outlandish heterodoxy. Since, on this view, law is really only what officials *do* in resolving disputes, with legal rules serving as the pithy generalizations of previously undescribed patterns in official decision-making (the “law in action”), the lawyer then *had* to resort to an essentially empirical method to do her job: she would necessarily come to regard the body of reported decisions as a body of *evidence* from which to elicit empirical generalizations, legal rules in this basically empiricist sense.⁵⁰ The

⁴⁸ Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 475 (1924).

⁴⁹ Mortimer J. Adler, *Legal Illusion*, 31 COLUM. L. REV. 82, 103 (1931).

⁵⁰ See Cook, *supra* note 48, at 475.

soundness of those rules, moreover, would naturally depend on the strength of that evidence—it would depend, that is, on how many cases one had observed, over how long, and in what jurisdictions and what courts and with what panels of which judges, and so on. The methodological posture was thus always the same and basically inductive: from a number of true singular statements (“A is not liable for inducing his daughter to break off her engagement to B”) the lawyer would sum them up into a universal generalization (“No father is liable for inducing his daughter to break off her engagement”), to be confirmed inductively from what other officials were observed to have done under like circumstances in later cases.

Nominally, then, case law research would retain its usual place of importance within the Hopkins Realists’ picture of law, but with this unfamiliar gloss and, importantly, with new limitations. On this and practically any other view,⁵¹ case law could guide only where prior official behavior was, as lawyers say, “on point:” or in empiricist translation, where the generalizations drawn from past cases—the situational antecedent of the generalized conditional—covered the case at hand. In these easy cases, the prediction of a result could be made to a tolerable degree of certainty, subject to all the usual caveats about past performance and future results. Where, on the other hand, the case law failed to cover the case—where the law in this non-standard sense ran out—the Hopkins Realists believed the lawyer, and the official especially, would need to go even more resolutely empiricist. For on what other grounds, Cook asked, could a lawyer intelligently make a case in these circumstances, or the official reach a judgment, without addressing “(1) what social consequences or results are to be aimed at; and (2) how a decision one way or other [would]

⁵¹ An arguable exception would be Ronald Dworkin’s. See RONALD DWORIN, *LAW’S EMPIRE* (1986).

affect the attainment of [those] results?”⁵² In order to speak meaningfully to either of these points, with the experiences of any one official or counsel necessarily being limited, both would therefore need “to call upon the other social sciences,” the wider and more rigorous studies of economics or psychology or sociology.⁵³ Hard cases, too, had empirical answers. And where lawyers lacked clear rules—tolerably certain generalizations about the probable drift in official decision-making—they therefore needed more and better research. And this, of course, was just what the Hopkins Realists believed their Institute was made for.

Whatever else may be said of their analysis of ‘law’, it clearly depicted *the* law as a distinctive body of abstract knowledge: the body of empirical generalizations that the Hopkins Realists considered the living tissue of our and any legal system. These were what they believed successful lawyers had to master to ply their trade and what legal scholars were called on to clarify and help shape with their empirical research—what they were hoping to do at a university like Johns Hopkins, with its near-obsessive focus on research and graduate-level training. This was also all that the Hopkins Realists needed to round out the final premise of their common idea, inspiring their Institute and its piles of empirical studies: their “grandiose” idea that the law could become a science.

Schlegel may well be right that the demise of the Johns Hopkins Institute of Law was due less to historical misfortune than to the failure of an intellectual ambition, a botched working program. Even so, it is hard to see why that failure had anything to do with the *absence* of an underlying “theoretical idea.” In fact there was one: the idea that law could become a systematically empirical study of rules of law (albeit in the Hopkins Realists’ non-

⁵² Cook, *supra* note 4, at 308.

⁵³ *Id.*

standard sense of rules), a study that would be advanced by the traditional tools of case law research bolstered by other social scientific research, and carried on in a spirit of objectivity and impartiality. What the Hopkins Realists had thought they were accomplishing with their Institute, along with their early try at statistical and other empirical research into legal institutions, was to “indicate the validity” of these “scientific ideas”— to prove the possibility of legal science by more or less literally building one. The Institute was to be living proof of an *empiricist* science of law.

But if the Hopkins Realists did have this as their unifying idea, why then did their contemporaries seem to think their program just did not “hang together,” that the intellectual thrust to their empirical work was essentially directionless? Why did the Institute fail so soon? As I explain in the next section, I believe the answer lies exactly where the Hopkins Realists were at their most controversial and, indeed, least convincing: in their picture of what law was ultimately about, the intellectual premise of their legal science.

II. The Failure of Empiricist Legal Science

A. A Study of Contrasts

One way of appreciating the novelty of the Hopkins Realists’ approach to what I have called the intellectual premise of their legal science—their assumptions as to how ‘law’ should be understood and so what *the* law of their day was—is by way of contrast. In an early and now largely overshadowed exchange anticipating the later “Realist Controversy,”⁵⁴

⁵⁴ SCHLEGEL, *supra* note 2, at 184.

the philosopher Mortimer Adler delivered one of the few contemporary defenses of an alternative understanding of legal science, what he himself would call a *rationalist* legal science.⁵⁵ Although ostensibly reviewing Jerome Frank’s *Law and the Modern Mind*, Adler had clearly set his critical sights on a broader coalition of Realists and their philosophical allies, including those then at Hopkins.⁵⁶ Unleashing a broadside of objections targeting the jurisprudential core of these Realists’ view, Adler gave voice to what, for want of a better word, we could call the legal common sense of their day: the common sense of the “law in discourse.” That core of common sense, as we will see in the following section, was exactly what the Hopkins Realists set out to defy—at the cost not only of their jurisprudential credibility but of their institutional home and the legal science it was intended to secure.

In their broadly empirical study of law, as we saw, the Hopkins Realists believed they could unearth the real “rules” underlying the American legal system by discerning within official decisions—nearly always case law—true generalizations depicting what their authoring officials—usually judges—actually did. This was the law, as Adler put it, of “official action.”⁵⁷ But there was another kind of law, answering to a different and more familiar sense of ‘law’, that Adler believed more traditionally-minded legal academics took themselves to be analyzing and criticizing. This is the now standard, because more intuitive, understanding of law as a body of legal *norms*: rules in the *prescriptive* sense, addressed to both officials in resolving disputes and ordinary citizens in structuring their affairs.⁵⁸ These are rules *for* conduct rather than, as in the empiricist picture, remarks *about* it. Law in this sense

⁵⁵ Adler, *supra* note 49, at 92 n. 5.

⁵⁶ *Id.* at 91.

⁵⁷ *Id.*

⁵⁸ *Id.* at 105 n. 23.

could also form “an academic subject-matter, a body of propositions having certain formal relations capable of analysis,”⁵⁹ and could therefore be approached much like any other formal system, by some empirically-sanitized mixture of interpretive work and logical and conceptual analysis—*rationalistically*, as Adler put it.⁶⁰ And like the empiricist picture the Hopkins Realists were proposing, this rationalist alternative laid the groundwork of an altogether different kind of science: it supplied an alternative *intellectual* premise for a science of law.

In addition to their differing conceptions of what legality meant and thus what the law is at any given moment, there were two further commitments made by the rationalist legal science that the Hopkins Realists’ empiricist legal science did not share. First, as Adler repeatedly stressed in his criticisms of Frank, legal rules yielded to formal analysis because they framed an already rational system—that is, an assumed body of legal postulates (rules and principles) and their *necessary* implications. As such, these rules could and usually do figure in legal reasoning *deductively*, as the major premises of arguments licensing logically necessary conclusions. Under the American law of employment contracts, for example, it is generally assumed that an employee hired for an indefinite period of time may be fired at any point, for whatever reason or, indeed, none at all.⁶¹ This rule of at-will employment would thus straightforwardly back an employer who wanted to dismiss an at-will employee for

⁵⁹ *Id.* at 103.

⁶⁰ *Id.* at 105 n. 23.

⁶¹ Naturally, like any black-letter doctrine, this “rule” is not nearly that simple: the de facto employment law regime has long recognized that one cannot quite take this canonical formulation at face value, as literally true—a point that would obviously have mattered to the empiricist. Not only are certain reasons for dismissal categorically excluded for the great majority of employers under Title VII of the Civil Rights Act of 1964 and similar state provisions, but further erosions since the 1970s and especially the 1980s, sounding in both contract and tort law, have curtailed the right of employers to dismiss employees under contracts of indefinite duration in ways obviously incompatible with this familiar Wood formulation. I return to this example and this point in the next chapter. See Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUSTRIAL LAW JOURNAL 84, 84-8 (2007) (discussing the erosions of the at-will employment doctrine).

wearing the wrong tie,⁶² or for alerting authorities to her employer's misconduct,⁶³ or simply because the employer no longer wanted her on the payroll. Because rules of law embody these formal structures, we may confidently reason from the stated rule (as a major premise) and the facts of a particular case (the minor premise) to a logically *necessary* result (the conclusion). In these cases, in other words, the law *rationaly determines* an outcome: the rules and factual premises lead to a conclusion that is deductively valid and, so, rationally certain.⁶⁴ To give this position a label, we might say that the rationalist legal science had supposed a *deductivism* as to legal reasoning:⁶⁵ that in a certain range of cases—the *easy* cases—legal results flow from the conjunction of legal rule and factual premises with rational certainty, as a matter of deduction.

Of course to see that a set of statements logically entails some conclusion hardly commands either's acceptance. A valid argument by modus ponens, after all, may give as much reason to nod at its conclusion as to shake one's head at its premises. In the context of legal thinking there is naturally less freedom to reject the received premises—least of all, obviously, the major premises pre-arranged in the paper rules, depending on where one sits. According to a rationalist legal science, this is not merely because, the penal system being what it is, refusing them is often less than a live option.⁶⁶ By far the larger reason why these rules sway us, as H.L.A. Hart would later underscore, is that we choose to let them. They *bind* us, or so we feel. The employer feels it her right to dismiss a worker at a trifling

⁶² David Schaper, *Chicago Dealership Fires Salesman Over Packers Tie*, National Public Radio (Jan. 26, 2011), <http://www.npr.org/2011/01/26/133233053/Chicago-Dealership-Fires-Salesman-Over-Packers-Tie>.

⁶³ *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991).

⁶⁴ See generally Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9 (2000) (discussing the role of deductive argument in legal reasoning).

⁶⁵ I borrow this term, by negation, from Scott Brewer's very insightful discussion of the role of deductive reasoning. See *id.*

⁶⁶ See generally FREDERICK SCHAUER, *THE FORCE OF LAW* (2015) (arguing that a non-necessary but nevertheless central feature of law is the threat of force backing it).

provocation, just as an employee feels it her right to walk off the job whenever she likes, because both *take* themselves to be free to do so under law—“it’s a free country,” as it’s said. The legal fact of at-will employment is a point of conscience as much as it is just another brute compulsion to put up with. We therefore regard legal arrangements like these, not as matter-of-fact *descriptions* of how officials or anybody else acts (though that clearly matters to some degree), but as rules by which to order our affairs: as *reasons* in accordance with which to act and grounds for *criticism* should we not. This regard for legal rules is what Hart has called the *internal* point of view. And it is the second distinguishing feature of the way the rationalist legal science understood law: as it is now said, there is a *normativity* inherent to law, one finding its expression in the internal point of view. We could say that the rationalist legal science had thus assumed a kind of *viewpoint internalism*: that central to its understanding of law was its resolutely internal point of view, in which legal norms are taken as standards for correction, as authoritative reason for action.

Taking these features together—the rationalist’s understanding of what law is and what the law must be at any given time, along with its two corollaries of deductivism and viewpoint internalism—one can also see coalescing within that legal science a powerful sense as to what we could call the law’s *autonomy*. Law on this view had its own intellectual subject-matter—the body of legal postulates and the theorems derivable from them—but also its own way of developing and understanding it. In Adler’s eyes, this was largely to be case law research, souped up perhaps by some more formal techniques of logical analysis—formalizing arguments for clarity, checking that formalization against the stated reasoning of an opinion, deriving from those postulates new consequences for different fact patterns, and so on. The rationalist could defend law as science because she had supplied a clear sense of what the *legal point of view* came to: the unique set of normative principles and concepts and

techniques by which the thoughtful lawyer could classify and arrange and study legal phenomena. The rationalist could say not only what it meant to think like a lawyer, but why lawyers, when doing law, were also thinking along lines uniquely their own.

B. Failing on their Own Terms

Quite unsurprisingly, the defenders of what Adler called an empiricist legal science, the Hopkins Realists foremost among them, met all of this with something of a shrug. As already seen, the two sides had principally divided over the jurisprudential question as to what law is and, consequently, what *the* law of their day was. For the rationalists law was a body of prescriptive norms, while, for empiricists like the Hopkins Realists, law was instead a body of descriptive statements, empirical generalizations drawn from decisional law about the ways officials had actually resolved cases. Adler, clearly siding with rationalism, found this disagreement befuddling enough. Only aggravating this division of jurisprudential opinion, however, was the reason the Hopkins Realists gave for believing in their side of it: what today we would call their naturalism. Together these views—empiricism as to law, and naturalism as to philosophical method—would not only put them on the wrong side of legal common sense in the end, but also on the wrong side of contemporary philosophical opinion. And even if they might have succeeded in beating back one or the other of these foes separately, against both they simply stood no chance.

1. The Legal Criticism

The legal attack leveled against empiricists like the Hopkins Realists—and not just by lawyers—took aim squarely at each of the two corollaries of their prediction theory, and ran along the rails of a *reductio*. As to the first corollary, about the role of deduction in legal reasoning, the philosopher Morris Cohen pointed out that the empiricist legal scientists, if

right, would have effectively banished from the law *all* deductive reasoning, a consequence Cohen believed no lawyer could stomach. Indeed, the way the empiricists had framed the use of logical reasoning in developing their science seemed to Cohen to tangle two large mistakes into a confused knot. The first was the empiricists' "regrettable confusion"⁶⁷ as to how logical necessity figured in legal argument, and the second their apparent "prejudice against deduction," having its source in something of an overreaction to the discredited belief that *every* case had a rationally determinate answer—that every case was an easy one.⁶⁸

And as one might expect, the source of this error lay in the empiricists' assimilation of the legal rule to the descriptive statement. Were the empiricists right that legal rules are simply inductive generalizations from case law, clearly those rules could underwrite none of the necessity exhibited by deductive argument: no legal conclusion could ever be a logically necessary conclusion of an accepted rule. From the merely *empirical* observation that all swans have been white it obviously does not follow that any future swan *must* be white. Or in Oliphant's example, that a number of judges may have decided over the course of several cases that the fathers, after inducing their daughters to break off their marriages, would face no liability, it would not logically follow that any future father who did so would *necessarily* face no liability either. Accidental generalizations of this kind do not support the necessity of authentically universal ones. At most one could say that a future swan would *probably* be white, or that some later meddling father would *probably* not face liability. Thus, as the empiricists liked to say, a "logic of probabilities" had come to supplant in the law an allegedly discredited "logic of certainty."⁶⁹ Every inference from legal rule to conclusion, no matter what a judge said or how she decided a case, was merely probable, and no conclusion

⁶⁷ Morris Cohen, *Philosophy and Legal Science*, 32 COLUM. L. REV. 1103, 1115 (1932).

⁶⁸ Morris Cohen, *Law and Scientific Method*, 6 AM. L. SCH. REV. 231, 235 (1928).

⁶⁹ Adler, *supra* note 49, at 101; *see also* JEROME FRANK, LAW AND THE MODERN MIND 7 n.8 (2009).

ever certain. The Hopkins Realists, as empirical legal scientists, had thus gone thoroughly *anti-deductivist* in their account of legal reasoning.

But how could the empiricists get around the obvious difficulty—which Adler and Cohen scratched their heads at having to point out to lawyers like Cook and Yntema—that so many legal arguments *do* look deductive?⁷⁰ And how would empiricists explain away the apparent fact that, at least in easy cases, the “law in discourse,” the rules on the books, did appear to decide outcomes with the sort of pedestrian necessity that a theory of law as empirical generalization, with all its vague talk of a logic of probability, was forced to deny in principle? They could of course have disposed of the point with the egregiously question-begging retort: because the real legal rules are not what appear on the books. In fact, though, the Hopkins Realists, even the empiricists, preferred an even more bewildering answer. As Cook noted in his reply to Adler’s review of *Law and the Modern Mind*, even if:

one accepts the major premise that “the finder of a lost article has a better right to it than anyone else except the rightful owner or someone claiming under him,” and also the minor premise that “A (who is claiming as against B, who is not the owner and does not claim under him) is the finder of lost property, to wit, the article in question,” he is certain, if he sticks to his logic, to find that A has as against B a better right. But, as every lawyer knows, all the members of a court may agree on the “rule” expressed in the major premise but disagree as to its “application” to the case in hand; some may assert that A is not a “finder,” or that the property is not “lost” but only “misaid.” It is therefore difficult to know just what Mr. Adler means by saying . . . that if a “rule of law” is “adopted” by judges it “*determines their official action* and its consequences.” This it most certainly does not do until they have for some reason or other decided on the minor premise they are going to adopt.⁷¹

⁷⁰ H.L.A. Hart would later voice much the same observation when rebuffing the criticism often leveled against positivists that they implausibly assumed *all* cases could be settled by “deductive reasoning.” In fact, Hart notes, it would be “an entire misconception of what analytical jurisprudence is” to suggest that a positivist like Austin (and presumably himself) “believed that the law was a closed logical system in which judges deduced their decision from premises,” since in “penumbral” cases of “vagueness or open character [potential vagueness],” judges had no choice but to legislate. One can fairly assume, by negative implication, that Hart therefore thought it obvious that in cases falling within the core of legal terms there was no such need to legislate: there judges *could* and *did* deduce legal conclusions from premises of fact and law. H.L.A. Hart, *The Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-9 (1958). I owe this point to Scott Brewer.

⁷¹ Cook, *supra* note 47, at 114.

Few other passages reveal quite how far the Hopkins Realists were willing to go to miss their critics' point.⁷² True enough, a judge presented with this finders' rule could decide that A did not "find" the article in question or that the article was only "misplaced" and not "lost" within the meaning of the rule, and that, indeed, would render its logic inert for the facts set before her. In this perfectly banal sense, the rule *alone* determines nothing, says nothing, about the case. Of course Cook could have gone farther than that: rules themselves never *determine* or *say* anything, except in an obviously metaphorical sense, masking the more literally accurate sense in which living beings like ourselves, using rules, reach decisions. And, one might think obviously, it was only in this literal sense that Adler or Cohen or anybody else had ever argued for deduction's role in legal argument—something that charity would seem to dictate that Cook well knew. *Should* a judge believe A to be a finder of genuinely lost property, Cook essentially allows, she *would* have logically necessary grounds to conclude, under the rule, that A has better right to it than B.⁷³ It is little wonder why Cohen, facing arguments like these, could feel that he was looking down the barrel of a confusion.⁷⁴

⁷² A more sophisticated reply would deny that reasoning from legal rules—in the sense of rules on the book—is ever *indefeasible*. He might well have argued, that is, that legal rules take the form of merely accidental generalizations, from which one can reason only *defeasibly*, i.e. from "All As are Bs" in the sense of "all As have so far been observed to be Bs" one can only conclude that, if x is an A, it *probably* is a B. Indefeasible reasoning, by contrast, is warranted by truly universal propositions, and proceeds along the lines of the familiar syllogism: "All As are Bs, x is an A, so x is a B." Cook, however, never hints at this objection in his reply to Adler, and, in light of his prediction theory, may have balked at the thought that legal reasoning from rules on the book ever mattered. *See generally* Brewer, *supra* note 64 (discussing the difference between defeasible and indefeasible reasoning in the context of Legal Realism).

⁷³ Strangely enough, Adler had made this very point in the piece that Cook was supposedly addressing. *See* Adler, *supra* note 49, at 100 (noting that "formal logic does not dictate which . . . premises to accept").

⁷⁴ It is hard to say what inspired this clumsy sleight of hand. In another article Cook very clearly saw that deduction had some place in our thinking, and so presumably also in *legal* thinking: "In our reaction from the excesses of the older view we must not suppose that we can entirely discard the deductive process. Far from it. It plays a necessary and indeed indispensable part in *all* our thinking." Cook, *supra* note 4, at 307 (emphasis added). As I explain above, it nevertheless matters quite a bit that he argued as he did here.

The difficulty confronting an empiricist legal science was graver, however, than could be met by this apparent evasion. If it was true, as Cook was barely admitting, that legal arguments *could* and apparently *did* have deductive arguments behind them—if his anti-deductivism was mistaken in fact, whatever its merits in conceit—why ever would one believe the account of law that inspired it, the empiricist theory of law as empirical generalizations? Here the Hopkins Realists waxed pragmatic, even a touch cynical. “[T]he practicing lawyer,” Cook explained, “as much as, let us say, an engineer or doctor, is engaged in trying to forecast future events.”

What we wish to know is not how electrons, atoms, or bricks will behave in a given situation, but what a number or more or less elderly men who compose some court of last resort will do when confronted with the facts of his client’s case. He knows how they or their predecessors have acted in the past in many more or less similar situations. He knows that if without reflection the given situation appears to them as not differing substantially from those previously dealt with, they will, as lawyers say, follow precedent.⁷⁵

Probably the only way of making sense of passages like these is to put them in the terms of the workaday attorney’s only other *lingua franca*: the billable hour. Judicial decisions could be understood in this reductively empirical way, Cook implied, because what lawyers *really* need to know is whether, on the facts presented by the client, there would be any prospect for recovery or any threat of liability—any chance now of charging a bigger bill by pursuing a profitable case or turning away a loser, or of being retained again for the quality of her advice. So it was simply beside the point whether the law on the books presented rules from which judges could and perhaps even did reason deductively—though, as we saw, Cook seems to have doubted even that. What mattered was how lawyers themselves saw and used law, and, for them, that was nothing more than what officials, and typically judges, were likely to do on any given set of facts—what kept the billables flowing.

⁷⁵ *Id.* at 308.

Yet, somewhat ironically, regarding law this way made another casualty of legal common sense: dismissing the viewpoint internalism as the Hopkins Realists did meant that law, as they understood it, was basically indifferent to the way lawyers themselves *felt* the law worked. On their view, law reflected nothing more than an empirical judgment as to what officials would probably do under some stereotypical pattern of circumstances, no matter the rationales those officials gave. The Hopkins Realists had thus come to look upon legal phenomena—statutes and holdings, orders and institutions—from a purely *external* viewpoint. In contrast to the internal viewpoint assumed by the legal common sense, powerfully coopted by rationalists like Adler and Langdell before him, they took statements of law as little more than the predictive cousin of what Hart called “orders backed by threats:”⁷⁶ minding the rules meant doing whatever was likeliest to lead away from undesirable official consequences. Law imposed no obligations; it gave neither a standard of correction nor a ground for criticism. As Yntema put it, it was quite literally a “judgment,” an indirect “declaration” of what would likely come to pass if one failed to do as the state said.⁷⁷ To say that an employer was liable for dismissing an employee without cause was simply to report that judges in the past had ordered employers who had dismissed employees under certain circumstances to pay up, no matter what doctrine the judges cited or how they themselves reasoned to that conclusion.

Here, too, the Hopkins Realists drew incredulity. “[H]ow in the name of empirical science,” Cohen marveled, could anybody realistically deny that there were legal commands,

⁷⁶ In his diagnosis of where he believed Austin’s positivism had gone awry, Hart famously likened that early positivist account of law, thought of as the commands of the sovereign, to the gunman’s order backed by a threat, e.g., “your money or your life.” Here we might see the empiricists as offering an analogous account, by way of a sibling prediction: “if you do not hand over your money the gunman will take your life.” On this question of viewpoint, the difficulties Hart raises against the command version would seem to afflict the predictive account in just the same respects.

⁷⁷ Yntema, *supra* note 36, at 953 n. 73.

actually normative prescriptions, telling officials, not what they did, but what they were *allowed* or *required to do*.⁷⁸ A sheriff enforcing the judgment of the court surely does not regard the judgement to be enforced as itself a prediction of what he, as a sheriff, ordinarily will do. Perhaps more importantly, as Cohen saw, anticipating to some degree an objection later raised by Hart, the provision of a state or municipal code delineating what jurisdiction a sheriff has to enforce orders, or a court has to decide certain cases, would seem to be rather less like a description-cum-prediction than a prescription—less a remark about what anybody *has* done and so likely *will* do than one about what they were instead *empowered to* do. Indeed, much as Hart would later argue in relation to the *order* backed by a threat, because it is hard to see what exactly the description would even indirectly threaten in this case, it is even more difficult to see how the view of rules as empirical generalizations could account for the type of rule apparently at issue in jurisdictional statutes, those delineating the powers of an office rather than compelling a result.⁷⁹ The question that Cohen was incredulously asking, though raised in the name of “empirical science,” was really one of self-understanding: how exactly were the Hopkins Realists going to square this account of

⁷⁸ Cohen, *supra* note 67, at 1122.

⁷⁹ The more sophisticated version of this argument, suggested by Hart, turns on the distinction between two types of rules evident in any modern legal system: (1) constitutive rules, like jurisdictional statutes or the at-will employment rule, that confer legal powers on actors and entities, and (2) primary or duty-imposing rules, like those found in criminal statutes, directly bearing on conduct. Hart argued that the two types of rules could not be collapsed into a single type, as the traditional Austinian positivist would have had to assume (the law being the command of the sovereign), because while the duty-imposing type of rule could be intelligibly distinguished from any associated sanction, the power-conferring could not. So, for example, the legal rule proscribing murder and punishing its transgression with death could still be understood without its sanction: the sovereign could intelligibly forbid an otherwise indefensible killing without putting those killers to death, or even punishing them at all. Not so, however, for a power-conferring rule like a jurisdictional statute, since the only apparent sanction for, say, a federal court’s not respecting the amount-in-controversy requirement for a suit in diversity would be the *nullity* of its eventual decision in the case. But that nullity, its sanction, is essential to delineating the limits of the jurisdiction laid down by the rule. Articulating the boundaries as to what matters the court has the power to reach—where its decisions are valid and where not—is the very point of the amount-in-controversy rule. And the empiricist view of law as empirical generalization carries just the same difficulty, by collapsing all rules, not into the duty-imposing sort that Hart considers, but into the empiricist’s descriptive variety: mere statements about what officials do. *See* H.L.A. HART, *THE CONCEPT OF LAW* 27ff. (1961).

legality with the lived reality of legal life, where lawyers do seem to draw on formal legal materials, paper-rules, to arrange their lives and resolve their disputes? Just how tortured were the empiricist legal scientists willing to let their depictions of legal phenomena become in order to vindicate their allegedly empirical account of law? Or to put the point in more contemporary terms: was ‘law’ no longer a *hermeneutic* concept, one “whose extension is fixed by its role in how humans make themselves and their practices intelligible to themselves?”⁸⁰ Is our understanding of ‘law’ really best surrendered to the proverbial bad man?

Whatever answers the empiricists may have had to these points individually, even if only answers in principle, the damage was already done. Not least because both of these corollaries, as implications of their jurisprudential difference with rationalists like Adler, together added up to a startling repudiation not just of legal common sense, but of the legal point of view itself. If, as the empiricists claimed, law was just a body of empirical generalizations about what officials did in fact, whose conclusions were merely probable because essentially unconnected to anything on the page of statute books or case reporters, and which moreover compelled lawyers to see law essentially as calculating observers rather than as mindful insiders, there was really nothing intellectually unique *to* law itself, no special “enterprise” that could not be handed off to political scientists, say, or sociologists.⁸¹ Even if law had something of its own subject-matter—predictions about official conduct instead of, say, stocks—still there was no mastery of an *intellectual* subject-matter all its own. Techniques in analyzing and distinguishing case law, the drawing out of ever subtler implications of

⁸⁰ Leiter, *supra* note 1, at 186 (internal quotation marks omitted).

⁸¹ Here I am following Scott Brewer’s insightful discussion of what he calls the “enterprise” conception of a point of view, under which “particular methods of analysis are chosen and used to serve specified cognitive goals.” Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1570 (1998). I would only add—though it is perhaps implicit in Brewer’s account—that points of view, regarded as enterprises, presuppose their own *intellectual subject-matter* as well.

complex formalisms—all of it was beside the point of *real* law. To think legally was just to think like any other social scientist, rigorously, quantitatively—empirically.

As the sense of what made up law’s intellectual subject-matter thus slipped away, so too did the sense that there was anything truly special about its study—that there was a stable point of view which lawyers were working out along distinguishably legal lines.⁸² Naturally this was a conclusion that could only sit poorly with traditional legal academics. As Cook had said some years before joining the Institute of the political scientist Ernest Freund’s work on the police powers, if one let legal science wander from the pages of the law review and into those of the political and social science journals, law itself threatened to vanish into its disciplinary other.⁸³ Minding the boundaries of the disciplines mattered, not just to the prospects of legal science or the Institute, but to the very “professional identity of the law professor.”⁸⁴ To naturalize away the legal point of view was to argue the lawyer out of their *learned* profession.⁸⁵

2. The Methodological Criticism

Even if the Hopkins Realists could weather this lawyerly critique unscathed, they faced yet another volley of criticism from rationalists like Adler, this time along the methodological front. Here the critique fell not on *what* the Hopkins Realists claimed made up the intellectual premise of their empiricist science, but on *how* they thought they had reached those conclusions. “Legal realism,” Adler had observed in opening his critique of Frank’s book, simply denoted “pragmatic and empirical thinking about the law,” so that “its confusions [were] due to an uncritical acceptance of the dogmas of raw empiricism and

⁸² Put another way: there was no longer a sense of law’s being its own *enterprise*, in Brewer’s sense of that term.

⁸³ SCHLEGEL, *supra* note 2, at 37.

⁸⁴ *Id.*

⁸⁵ See Cook, *supra* note 4, at 309.

pragmatism.”⁸⁶ The confusions we have already seen, but what to make of Adler’s accusation that the Realists had given themselves over to the “dogmas” of an empiricism and pragmatism? Quite simply, that the Realists, and especially those championing an empiricist legal science, had “employed a one-sided description of science,” “blindly convinced” that that science could be “strictly empirical and in close contact with reality,” much like the social sciences rising in their day. In arguing for their science of law, Realists like Cook, Oliphant, and Yntema, had instead been swindled by “questionable empirical findings,” “misled by the latest claims of this or that group of psychologists, sociologists, and anthropologists” in coming up with their understanding of law generally and legal science specifically.⁸⁷ The Hopkins Realists, in short, had befouled their legal philosophy with a rotten philosophical method: they had tried to make legal philosophy consistent, methodologically and in substance, with natural science. Adler was accusing them, quite fairly, of trying to *naturalize* jurisprudence.

One of the results of their methodological naturalism, as Adler saw it, was that the Hopkins Realists ended up eliding some quite crucial distinctions, none more so than that between the *psychology* of legal thinking and its *logic*. And here Adler, like other critics of the Realists, pointed a finger directly at the philosopher they thought responsible for all this naturalistic confusion: John Dewey. “[T]he work of Dewey . . . [has] no bearing on formal logic,” Adler declared, “except in so far as it utterly confuses the problems of logic and psychology.”⁸⁸ Principal among these confusions was Dewey’s failure to see that “formal logic is not an instrument of discovery but of demonstration,” concerned not with *uncovering* the way we in fact use legal rules (in the sense of legal norms, paper-rules) but the way we

⁸⁶ Adler, *supra* note 49, at 91.

⁸⁷ *Id.*

⁸⁸ *Id.* at 100.

justify that use.⁸⁹ To the extent that the Hopkins Realists had been adapting the “armchair psychological sketches of the way human beings are supposed to think” into an account of what would justify the way lawyers draw inferences in doing law, they had been merely translating this supposed mistake in logical theory into legal philosophy. Empirical legal science was just another of naturalism’s howlers, this time gone legal.

The merits of these criticisms aside,⁹⁰ unfortunately for the Hopkins Realists, Adler was far from alone in believing them. Worse yet, one of those believers, also one of Dewey’s more implacable critics, just so happened to serve as one of the leaders of the Hopkins faculty of arts and sciences: the philosopher Arthur O. Lovejoy.⁹¹ And as Schlegel points out, of all the pressures on the Institute none was quite so powerful as the other faculty’s, which with every passing year, and each shrinking budget, grew steadily more hostile to the Institute’s existence. It seems quite plausible, then, that Lovejoy’s displeasure with the Deweyan thrust of the Institute’s intellectual direction had played no small part in aligning the faculty against the fledgling Institute and the empiricist legal science it stood for.⁹²

In the end, then, it was arguably not the Depression that did in the Institute, nor the absence of a theoretical idea that could have given it the credibility of an articulate direction, a program for the “practically independent” units run by each of the Institute’s faculty. On the contrary, they had just such an idea—the “grandiose idea” that law could be made a science. What more probably had buried the Institute, then, preserving it as the largely

⁸⁹ *Id.*

⁹⁰ We will return to this criticism in the next chapter.

⁹¹ See SCHLEGEL, *supra* note 2, at 191.

⁹² *Id.* at 208.

unremembered relic that it is today, is what its contemporaries believed it stood for: a specifically *empiricist* legal science, an idea and ideal rooted in an empiricist theory of law that those contemporaries thought a mistake.⁹³ A mistake about the nature of law and our attitude toward it, a mistake about the nature of legal thinking and how one should go about studying it. A mistake about everything that lawyers had assumed about what it meant to think like a lawyer, from the legal point of view.

Yet any one of these mistakes, by itself, would probably not have been all that decisive. If all the Hopkins Realists had promoted was a legal science understood as the study of a body of empirical generalizations, or if all they had urged was that law as science could be made consistent with the best social sciences of their day, they would probably not have aroused the enmity, even disdain, that they did. Adler and Cohen both were willing to admit, after all, that an empirical legal science was possible in principle, that there was nothing objectionable in it just as such. What did not sit well with any of these critics was rather the confluence of the Hopkins Realists' two controversial lines of thought: that law in effect *had* to become an empirical science because the science of their day told them that that was the way lawyers *really* thought. The problem, in other words, was not that the Hopkins Realists had tried to naturalize jurisprudence, or had sought to lay the foundations of a separate, empirical legal science in which the legal point of view, surrendering to social-scientific objectivity, would simply shrink away. The problem was that they were trying to do both at once—trying to naturalize *away* the legal point of view. And that, as they soon

⁹³ Obviously I have not said enough here to completely vindicate this historical hypothesis—to nudge it beyond the plausible to the probable. But that plausibility is all I need to make the point of this chapter: that there was a sense in the air that the Hopkins Realists were up to something big, or bigger, anyway, than anything Schlegel has picked up on in his otherwise masterful history of the Institute and of Legal Realism's flirtations with “scientific” ideas.

discovered, had simply strained the credulity of their contemporaries, lawyers no less than jurists, to the breaking point.

C. Lessons in Failure

The story of Cook, Oliphant, and Yntema's brief institutional experiment at Johns Hopkins, as I have tried to tell it here, is the story of an aspiration gone wrong. They had aspired to bring scientific methods to the study of law—to make law empirical. But behind that aspiration lay the deeper idea—the still more powerful aspiration—that law should be made empirical so that law could become a genuinely modern science. In the sense in which I have used that term, following Berman, the Hopkins Realists were thus trying to make plausible the idea that law was its own body of abstract knowledge, suitable for study within an intellectual culture valuing objective or impersonal inquiry and in an institutional context like any other research faculty at a university. And judging from the concessions they were able to extract from critics as otherwise severe as were Adler and Cohen, they might well have succeeded.

But, of course, they didn't. Not only would their own institutional experiment stall and soon peter out, but so too would all talk of reviving a legal science in *any* sense. Obviously it would be unfair to pin the blame for *that* failure on the Hopkins Realists and their vanquished idea of an empiricist legal science. Accidents of political and intellectual circumstance—the coming of another world war and the rise of a new administrative state, the birth of the process school at Harvard and the post-war analytical jurisprudence founded by Hart across the Atlantic—all took their toll, as did the extravagances of the rather less scientifically-minded Realists who followed in the wake of the Institute's closure.

Yet there was no doubt a deeper dissatisfaction arising from this brief Baltimore adventure in jurisprudence that could help explain why both the Institute and its idea and ideal of making law a science disappeared as they did. After the Realists at Hopkins and across the legal academy came and went, nobody was quite sure what would fill the lacuna hollowed out by the demise of both the classical rationalism of a Langdell or Adler and the empiricism of Realists like the trio who led the Institute. There was simply no longer a sense of what a credible *intellectual* premise of such a science would look like. And, as we saw in the last chapter, that is still true today. Lawyers have long since given up their faith in the law as an essentially closed, rational system of postulates and theorems, just as they have long since given up the belief, if any but a few eccentrics ever held it, that law could be surrendered to an empirical study of how judges rule no matter how they reason. And to draw up a legal science without even some faint impression of that premise—to imagine a science without the outlines of its own intellectual subject-matter—would be to picture nothing at all.

The failure of the Institute’s empiricist science of law was in any case to be the last gasp of legal science in the last century, and what little talk there has been of a revival has so far gone nowhere. As a colleague reportedly wrote to Schlegel about the prospect of writing a history of twentieth-century science’s reception into law: “that’s not history; that’s futurology.”⁹⁴ And that future, as noted in the last chapter, has still yet to arrive. But does that mean the idea of a legal science, with this uncertain and at moments even inglorious past, has rightly been cast aside, exposed for the mistake it always was? I think not. The reason why not lies, ultimately, with an insight that the Hopkins Realists themselves had. Not only, as we saw, did they hope to remake law into its own kind of empirical science,

⁹⁴ *Id.* at ix.

they also thought they could do so by building it out of a modern *scientific* understanding of what lawyers were thinking about when thinking like lawyers. They sought to give, inchoately for sure, what we might now consider a *naturalistic* account of the intellectual premises of a legal science: of how lawyers think when doing law, and of what they think about and from what perspective. They had hoped to build a science of law, in a word, out of a *naturalized* legal point of view. It so happens that once they had gotten through with their naturalizing there was no legal point of view left to speak of. They swore off the necessity of legal reasoning and the normativity of its internal point of view, and ended up denying what lawyers, self-descriptively, common-sensically, take themselves to be doing as lawyers. The Hopkins Realists had not so much naturalized the legal point of view in the end as naturalized it away.

The question left unanswered about their project is the same raised, in rather different terms, by the failure of Langdell's legal science a generation ago: was there something to the Hopkins Realists' methodological insight, their early naturalism, that could help salvage the intellectual premise of a legal science? Is there a way to naturalize the legal point of view without naturalizing it away? To say either way will require us first to put a finger on just where they went wrong in framing their legal science: the crude and often confused way that they understood their naturalism.

III. The Path Untaken: Naturalizing the Easy Case

All throughout their time at the Institute the Hopkins Realists were plagued by a basic uncertainty: just what did they mean when they said, as they so often did, that they were bringing science to law? At least for Cook, who had the firmest view on the subject, "science was simply a method," meaning, apparently, that "[a]nything could be done

scientifically” once one had “adapted the available tools to the materials and objectives at hand and set to work at whatever project one wanted.”⁹⁵ Yet even if, as I have argued here, the project of the Institute was tolerably clear—they had set out to vindicate naturalistically their idea of a legal science, and in particular its intellectual premise—it never became clear just what tools the Hopkins Realists thought they would be handling in accomplishing that task, and how they expected to adapt them to the work it called for. It never became clear, in other words, how they thought they would be *naturalizing* the legal point of view in the first place. And as Adler showed, their uncertainty on this point had exposed them to the withering accusation, one left effectively unanswered, that they were simply throwing the latest psychological fad at the law in the hopes that it would stick.⁹⁶

But this accusation was never entirely fair. All three Hopkins Realists seemed to appreciate that bringing science to law—framing a naturalistic picture of law’s intellectual premise—involved a fairly specific appropriation of scientific thinking into the context of legal doctrine and argument. Indeed, as already explained, today they could fairly be considered the early proponents of what Brian Leiter has called *methodological naturalism*: they all thought they were framing their account of legal science in a way that was “continuous with the sciences . . . in virtue of [its] dependence upon the actual results of scientific method in different domains.”⁹⁷ Nowhere was this clearer than in Cook’s brief article on scientific method and law, which directly answered the question of how to bring “truly

⁹⁵ *Id.* at 227.

⁹⁶ See Adler, *supra* note 49.

⁹⁷ Leiter, *supra* note 11, at 35. As Leiter also rightly cautions, one should be careful not conflate this methodological naturalism with a *substantive* one, which holds, ontologically, that “the only things that exist are *natural* or *physical* things.” and, semantically, “that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry.” *Id.* at 35 n.96. Methodological naturalism obviously can, indeed often does, go hand in hand with a substantive naturalism, yet, as Leiter notes, their relation in this direction is that of not entailment: “it is an open question whether the best philosophical account of morality or mentality or law must be in substantively naturalistic terms.” *Id.*

scientific methods to the study of legal phenomena” by tracing “the developments in mathematics and biology” from Aristotle through Poincare’s non-Euclidean geometry and Darwin’s evolutionary theory.⁹⁸ Adler’s accusation had not entirely missed the mark after all: Cook clearly believed that he was importing theoretical and empirical findings from the social and natural sciences into his account of law and legal thinking. And in this very simple sense Cook’s program was already recognizably naturalistic.

A. Replacement Naturalism, or How Not to Go Naturalist

But there was a subtler sense in which Cook’s thinking had taken a naturalistic turn, richer than a mere raid on fashionable scientific theory. Indeed, I believe that we can see in Cook’s article an early anticipation of a particular naturalistic strategy, also traced by Leiter, called a *replacement naturalism*, for which “the goal of theorizing is description or explanation” of some target range of phenomena—here, obviously, legal ones. In Leiter’s telling, replacement naturalism arose out of Quine’s famous attack on epistemological foundationalism, more specifically the mid-twentieth-century foundationalism associated with the logical positivists.⁹⁹ The positivists had supposed that scientific theories, understood as formal axiomatic systems,¹⁰⁰ could ultimately be *grounded* in the deliverances of sense-data, a purportedly indubitable body of sensory evidence. The relationship between theory and evidence, in their view, was thus a *logical* or *justificatory* one: the positivist could categorically justify any properly scientific theory by relating it logically to this reservoir of immediate sensory data. Of course to believe this one would need to give an account of what this logical, essentially normative, relation between theory and evidence looked like:

⁹⁸ Cook, *supra* note 44, at 303, 305.

⁹⁹ Leiter, *supra* note 11, at 35-7.

¹⁰⁰ See RONALD GIERE, SCIENCE WITHOUT LAWS 97 (1999).

and hence their pursuit in those years of an *inductive* logic, a project that continues to this day.¹⁰¹ Quine argued, however, that this project was doomed in conceit: as there would always be more than one hypothesis or theory consistent with any given body of evidence, there was no sense in which that evidence uniquely grounded any one theory—the evidence inevitably undetermined the choice of theory.¹⁰²

The result, as Quine saw it, was that epistemology simply needed to get out of this foundationalist game: it needed to give up on trying to give a non-circular *justification* for our beliefs and try instead to *explain* how we got them. Thus “[e]pistemology, or something like it, simply falls into place as a chapter of psychology and hence of natural science. It studies a natural phenomenon.” In the absence of a foundational story, the only choice left for epistemology, Quine was suggesting, was to tell a descriptive and explanatory one: to “tur[n] over its central question—the relationship between theory and evidence—to the relevant empirical sciences.”¹⁰³ And this, for Leiter, is the hallmark of a *replacement naturalism*: where there is no possibility of specifying a justificatory relation between some pair of relata—between, for example, theory and evidence, or reasons and belief—a naturalist of this persuasion would simply turn the question over to “the descriptive/explanatory account given by the relevant science of that domain.”¹⁰⁴ In these cases the descriptive and explanatory account thus sweeps in as a replacement for the logical and justificatory one.

And, indeed, one might believe that this was the lesson that Cook thought the law should draw from nineteenth century geometry and evolutionary biology. The discovery that our sensory experience did not uniquely justify any one geometry, for instance, or that

¹⁰¹ *Id.* at 33.

¹⁰² Leiter, *supra* note 11, at 36.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 37.

empirical evidence about biological life did not justify a single, static classificatory scheme suggested to Cook the “limitations of the process of deductive and inductive logic.”¹⁰⁵ The belief “that new truth about the world can be deduced from general laws arrived at by induction” was simply “naïve,” precisely because there was no such a categorical justification to be found for the laws articulating rival scientific theories.¹⁰⁶ No scientific theory could rise and another fall simply by virtue of its unique ‘fit’ with the evidence; there was simply no logical ground for that choice, any more than there was a logical ground to choose one geometry over the other. Rather, one had to tell an effectively instrumental and contextual story, one based on the interests and purposes of individual theorists. The history of science itself had convinced Cook of the same methodological lesson that Quine would later draw on formal grounds, though with far more subtlety: that naturalism can and should step into the explanatory breach torn by foundationalism’s collapse.

Even if we could therefore regard Cook’s theory of law—or at least, the methodological premise of his empiricist legal science—as something of an anticipation of Leiter’s replacement naturalism, it is nevertheless clear that Cook could not have exploited that methodological insight in quite the same way Leiter has. And this is because, as Leiter sees it, Quine’s argument for naturalizing epistemology offers a natural analogy to law only in a select range of cases, where the relevant legal materials fail to determine, or uniquely justify, a legal result—in hard cases.¹⁰⁷ For it is only in those cases that Leiter finds any warrant for the move to naturalize along the same lines Quine suggested for epistemology more generally, by providing an *explanation* of those facts about adjudication drawing on the

¹⁰⁵ Cook, *supra* note 4, at 306.

¹⁰⁶ *Id.* at 307.

¹⁰⁷ Leiter, *supra* note 11, at 39ff.

most fruitful natural scientific account now available, such as the Attitudinal Model.¹⁰⁸ But as Leiter sees, naturalizing hard cases in this way effectively presupposes a particular *jurisprudential* theory, following from the very definition of a hard case.¹⁰⁹ The foundationalist account fails in those cases, that is, precisely because the paper-rules enacted as statute or authoritatively laid down in precedent do not justify any one result.¹¹⁰ The truth of the naturalistic replacement for the foundational account, such as the Attitudinal Model, thus presupposes the truth of a kind of legal positivism—indeed as Leiter sees it, an *exclusive* or *hard* positivism.¹¹¹ In order for the naturalistic explanation of the hard case to be “true and explanatory,” in other words, law *must* consist in *social* rules recognizable independently of *any* moral judgment. The naturalistic explanation that Leiter sees as replacing the foundationalist account in hard cases thus draws for its explanatory power on the conceptual truth embodied by legal positivism. Yet, as we saw, the Hopkins Realists flatly rejected just that alleged conceptual truth, that positivist jurisprudence. Unlike the social rule supposed by latter-day positivists like Hart, the empirical generalizations they thought of as law not only lacked justificatory force (their normativity), but they also could not figure in legal argument in the way a positivist supposes they can and do—as rules from which one can reason demonstratively, barring instances of vagueness of course (their necessity). A prediction theory of law like the one Cook and the other Hopkins Realists had advocated would accordingly have precluded them from even framing the analogy at the heart of Leiter’s naturalized jurisprudence. And so even if Cook believed in a replacement

¹⁰⁸ That model looks not to formal legal materials, paper-rules, to explain why cases come out as they do but the political persuasion of the judges rendering those decisions. Leiter, *supra* note 1, at 188.

¹⁰⁹ *Id.* at 188.

¹¹⁰ *Id.* at 189.

¹¹¹ *Id.* at 189.

naturalism in Leiter's sense, any use he had made of it would necessarily have differed on this fairly fundamental point.

What use, then, if any, did the Hopkins Realists make of this naturalistic strategy? An apparently indiscriminate one. As we saw, the only other relata whose justificatory relation Cook ever directly called into question—beyond, that is, those of theory and evidence—are precisely those that Leiter, in his naturalized jurisprudence, takes for granted: the relata of the paper-rule and legal conclusion. Indeed, as we witnessed in the discussion of legal necessity, Cook went out of his way to rebuff even the mild suggestion that deduction played *some* role in legal reasoning; it did not, he seemed to say, because in a supposed point of fact our legal premises never really *determine* official action. To put the same point in these methodological terms, we could therefore say that Cook was arguing—less articulately or incisively for sure than a latter-day naturalist like Leiter—that even in apparently *easy* cases there is no justificatory relation to be found between legal rule (understood as the social rule delineated in the statute or precedent) and the conclusion that officials reach—there is no sense in which a legal result logically follows from the major premise of a paper-rule of law. The foundationalist program did not just founder on the law's hard cases, Cook could be read as saying, but in *all cases*, even the easiest. And just as Leiter drew a jurisprudential lesson from the naturalistic model of hard cases that came to replace the foundationalist model he had applied in the easy ones, Cook could likewise be seen as having teased his own conceptual truth from the naturalistic model he applied, rather more indiscriminately, across the theory of adjudication, in cases both easy *and* hard. If one assumed with the Hopkins Realists that judges simply responded to the “stimulus” of the fact-pattern with a typical result, it would seem only natural that one would gravitate toward a theory of law like theirs, of law as empirical generalization. That conceptual theory, after

all, would easily make the underlying naturalized theory of adjudication “true and explanatory.” if rules of law are nothing more than statements of what officials do, those rules, as seen already, do not, because they cannot, demonstratively justify legal results. We can therefore read Cook as having aggressively pursued the strategy of replacement naturalism: widening its reach from the hard case Leiter makes his focus to even the easiest of cases. And as we have seen, that naturalism would eventually lead him, and the legal science it was meant to support, to failure.

B. One Failure, Two Lessons

There are two ways of looking at this failure, however, and accordingly two lessons to be drawn from it. The first way concentrates on the particular explanatory strategy the Hopkins Realists appear to have adopted, the tactic prefixing its naturalism. On this view, the Hopkins Realists had simply tripped over the implausibility of their basic analogy: their ill-considered try at *replacing* the foundationalist account of the easy case with a naturalistic one. It was not their naturalism that was the cause of their fatal misstep, but rather a false focus. Had they simply seen more clearly what made hard cases truly hard, and easy cases so trivially easy, they would have left the use of the replacement strategy at the hard case, and simply given the usual justificatory account of the easy one. Of course, if they had, they would have ended up anticipating more than just the very idea of a replacement naturalism but also the by-far more sophisticated use that Leiter has made of that argument in his naturalism. They may have not just anticipated a naturalized jurisprudence, but achieved it. As it happened, though, they saw neither of these things, and so ended up making the mistake that would seal the fate of their institutional experiment, the Johns Hopkins Institute of Law.

There is another way of looking at the failure of the Hopkins Realists' legal science, however. And that is as the execution of an inapt naturalistic *strategy*. Here the mistake is not that the Hopkins Realists had selected the wrong target for their naturalistic explanation—the easy cases where the rules on the book did seem to demonstratively determine official action. It was instead that they had pursued the wrong naturalistic *framework* in explaining those cases: their early, if inarticulate, replacement naturalism. Indeed, there is at least some hint in the writings of all three Hopkins Realists, and especially in Cook's, that they may have had some such alternative framework in mind, not least because, as already noticed, they so prominently invoked the ideas of the philosopher now associated with it: John Dewey.¹¹²

That framework is what the philosopher Ronald Giere has called an *evolutionary* naturalism.¹¹³ In the context of the philosophy of science, what the evolutionary naturalist proposes is that “[b]y looking back at evolutionary history, scientists themselves can better understand their own cognitive situation and investigate the development of their own cognitive capacities.”¹¹⁴ A naturalist of this stripe seeks to adopt the strategy of giving an *evolutionary* explanation of some target practice: in Giere's case, the practices of scientists themselves. What more specifically this means for the philosophy of science, Giere explains, is a shift in focus, by providing an “evolutionary account of scientific progress” in a way that can adequately account for “the mechanisms underlying the analogous processes of variation, selection, and transmission,” the processes figuring in any fruitful evolutionary

¹¹² One of the clearest expositions of naturalism in the sense Dewey likely understood it has been given by Ronald Giere, who explicitly associates Dewey with this position. See GIERE, *supra* note 100, at 12 (identifying Dewey's as an evolutionary naturalist “to some extent”).

¹¹³ RONALD GIERE, EXPLAINING SCIENCE 12-13 (1988).

¹¹⁴ *Id.* at 13.

explanation.¹¹⁵ As Giere sees it, this latter criterion of a successful evolutionary account of science involves “two sorts of mechanisms.”

First are the biological and psychological mechanisms underlying the cognitive capacities of individual scientists. Second are the social mechanisms operative in the social and institutional environment in which scientists work and interact. For a theory of cognitive capacities of individuals we should look to the cognitive scientists. And for a theory of the social environment we should look to the social sciences, particularly the sociology of science.¹¹⁶

In the case of the former mechanism, which is the focus of Giere’s own work, by far the largest question is how one goes about giving a promising cognitive psychological account of “how scientists construct, use, and learn *theories*.”¹¹⁷ And in Giere’s view, a plausible, indeed “standard view in cognitive psychology suggests associating theories with *families of models*.”¹¹⁸ An account running along these lines thus forms what Giere calls a *cognitive approach* to explaining scientific practice: an account of scientific practice built out of the theory of cognitive models.

To abstract a little from the context of the philosophy of science, we could say that the evolutionary naturalist seeks to understand the development of some target practice by providing a *cognitive* account of the intellectual capacities involved in that practice, as well as a broadly *sociological* account of the factors influencing it. Evolutionary naturalism is thus fully

¹¹⁵ As Giere elaborates, variation, selection, and transmission are the “fundamental processes in organic evolution.”

There is naturally existing *variation* in the traits possessed by individual members of a population. The fitness of individuals to leave offspring varies with variation in traits. The result is *selection* favoring those whose traits make them fitter. The relative prevalence of the favorable trait increase in the population because that trait is disproportionately *transmitted* to the next generation. GIERE, *supra* note 100, at 48-49.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 50. The two other broadly cognitive features of scientific practice that Giere seeks to explain are scientific judgment and experimentation. *See id.* at 51-52.

¹¹⁸ *Id.*

continuous with the natural and social sciences whose findings it borrows in framing its explanatory account. And it is accordingly a methodological naturalism in Leiter's sense.

But how could this evolutionary naturalism be made relevant to law? Here I think we can once again take our cue from Leiter's replacement strategy, by framing a new analogy along these distinctively evolutionary lines. Just as Giere has argued that we can explain natural scientific practice through a broadly evolutionary strategy, and in particular through a cognitive approach to natural scientific theories, we can apply a similarly evolutionary strategy to *legal* practice, and in particular through a cognitive approach to explaining the way lawyers construct, use, and learn *legal theories*, here in the sense of the "theory of a case," or *legal doctrine*. And to do this we can likewise draw a further lesson from the Hopkins Realists' failure. What if, instead of thinking of their methodological naturalism in the vein of a replacement strategy, they had instead thought of it along the lines of an *evolutionary strategy*? What if they had sought instead to naturalize the legal point of view by giving a fully evolutionary account of the way lawyers think and what they think about when learning and doing law, beginning with a *cognitive* account of the case where that thinking canonically occurs—the *easy case*?

Of course these questions are necessarily posed in the counterfactual. For even if one could read into Cook's allusions to Darwin's biology and Dewey's logical experimentalism an inchoate belief in an evolutionary naturalism, it seems quite clear that Cook had not articulated anything like a definite approach along those lines—certainly not in his writings, and likely not to himself—when he set out from his perch at the Institute to defend a science of law. Indeed, to have done so would have required not just an uncanny philosophical clairvoyance, anticipating a naturalism that could only have come to maturity after Leiter's pioneering work in the last twenty years. It would also have required him to

have foreseen the developments of the nearly sixty years of cognitive science that has gone into making this approach a viable one in the philosophy of science. And as a still very early—and, frankly, crude—behaviorist, it seems rather unlikely that Cook would have appreciated or, even, have understood those developments in any case.

Whatever the Hopkins Realists may have thought about an evolutionary naturalism and its cognitive approach to explaining the easy case, it remains an open question whether that strategy and that approach could have done for their legal science what their own account plainly did not. It remains to be seen, that is, whether and how a cognitive approach to explaining the way lawyers learn and use legal doctrine could give grounds for believing again in the intellectual premise of that science.

IV. The Future of a Failure

When the Hopkins Realists set out to justify their idea of a legal science, they did so thinking they could give an empirically respectable account of not only how lawyers think when doing law but what it is they are thinking about. They believed that they could ground the intellectual premise of that science in a naturalized picture of the legal point of view itself. As it turned out, however, their view of law as a body of empirical generalizations—their prediction theory of law—ended up distorting away the very aspects of law and legal thinking that have seemed, descriptively, most central to it: that lawyers and judges, officials and citizens, can and do reason demonstratively from the paper-rules of judicial opinions and statute books, and by and large freely oblige those conclusions, as required and not just compelled. The Hopkins Realists had courted their empirical science, in short, by defying legal common sense. And in doing so they ended up not so much naturalizing the legal

point of view as naturalizing it away. To the lawyers whose professional world the Hopkins trio were hoping to rejuvenate with their empirical revolution—their empiricist legal science—this depredation against legal common sense was ultimately too revolutionary to be credible. And so that science, and the institutional experiment at Johns Hopkins that was to be its living proof, instead came to an embarrassingly abrupt end.

One might be tempted to conclude from this seemingly forgettable jurisprudential episode that the tradition of legal science that the Hopkins Realists were hoping to salvage and usher into an experimental modernity had finally been exposed for the sham that it always was, an idea needing only a proper burial in the graveyard of philosophical failures. But that would be to miss its point, and the opportunity it presents. For what the Institute gestures toward is an understanding of exactly what we were lacking at the end of the last chapter: a plausible sense of *how* to go about restoring the intellectual premise that was vital to both Langdell's rationalist science and the Hopkins Realists' empiricist counterpart. Their twin mistakes—of absolutism and empiricism—together forge the complementary halves of a single program: of the framework of a pragmatic legal science, and the proper way to go about reviving its intellectual heart, the subject-matter that makes law a truly learned profession.

But the only way to see that program through is to see just where the Hopkins Realists, like Langdell, went wrong and where right. And as I have explained in this chapter, where they went right was in making their explanatory focus those cases where legal thinking seemed most obvious and least controversial—the easy cases. Their mistake, however, lay in the way they had set out to explain those cases: their indiscriminate use of what we could fairly call their replacement naturalism. Believing in the ubiquity of law's indeterminacy, they ended up denying the very possibility of a foundationalist account of the easy case. And they

therefore thought, relentless empiricists that they were, that what they then needed was an empirically-sound account of what *really* goes on in those cases, purging away all the merely theatrical rationality of the advocate's brief and the judicial opinion. They had gone on with their naturalizing oblivious to legal common sense, and, quite unsurprisingly, they ended up converting very few lawyers to their cause.

Yet there was another way that the Hopkins Realists might have explained the way lawyers construct, use, and learn the law, just as naturalistically and far more plausibly. But doing so would have required them to exploit a naturalistic strategy quite different from the one they implicitly chose: an evolutionary naturalism, drawing on a cognitive approach to explaining the way lawyers use and learn and alter legal doctrine. And in the next chapter I take up the task of elaborating just such an account.

CHAPTER 3 MODELING A MODERN LEGAL SCIENCE

“One is bound to say that there is now no such thing as a science of law unless one is willing grossly to abuse the word ‘science’. And among the principal reasons why there is no science of law is the fact that an approach to its study, of the age and parentage of medieval scholasticism, has kept students of the law going about in circles, largely futile so far as developing a genuine science of law is concerned.”¹

By 1929, the year in which Herman Oliphant wrote these words, the dream that law could become a science was already dying. But why? Partly, as we have seen, because the idea was already quite old. Indeed, it was old as the Western legal tradition it had helped bring into being several centuries earlier and has helped to sustain ever since. Not only was the idea practically ancient by the beginning of the last century, it was also becoming a conceptual misfit, a relic from a time when astrology was still counted *scientia*² and when otherwise eminent “scientists” were still expounding quite learnedly on the habits of witches and werewolves.³ Thus it was all too easy for a lawyer like Oliphant, living through an era of startling natural discovery and technical wonders—the age of Einstein and Edison—to feel the juxtaposition of law with science an awkward, even ridiculous, anachronism, a gross abuse of the word. That feeling lingers with us today.⁴

But by accusing the study of law in his day of being stuck in “medieval scholasticism” Oliphant was stating more than just the familiar slur. He was also stating a fact. That fact is that there *was* a thread of continuity running from the Scholastic university of the twelfth century through the American law school of the early twentieth. That thread,

¹ Herman Oliphant and Abram Hewitt, *Introduction* to JACQUES RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES: INTRODUCTION TO A STUDY OF ECONOMIC AND ETHICAL THEORY, at ix, ix (1929).

² DAVID WOOTTON, THE INVENTION OF SCIENCE 23 (2015).

³ *Id.* at 533.

⁴ WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 5 (1998) (noting that the “[t]he very notion of law being a ‘science’” has become “fatuous”).

although Oliphant appears not to have appreciated it, was a common *scientific* aspiration, the dream of making and keeping law a science. As we have seen, though, the sense of ‘science’ drawn on by Langdell and the Scholastics was at once wider and more ecumenical than the one Oliphant felt had yet to be realized. And in this older sense of ‘science’, the legal science of the Scholastic Jurists had differed remarkably little, at least in outline, from the legal science that gave Langdell’s Harvard its allegedly modern turn. Both had centered on a body of doctrinal absolutes curated by a professional class of scholars who held in common some basic assumptions about what made for proper analytical technique and sound argument. In this sense, the Western tradition of law—our law—has always been, and still is, scientific.

What it has never been, however, is a fully *modern* science. And this was the gravamen of Oliphant’s complaint. He, along with the other Hopkins Realists, believed that they had hit upon the cure for that failing, a way of bridging the scientific aspiration basic to our law with the modern, narrower conception of ‘science’ that had come to displace the wider sense of the word, in the air since the rediscovery of Justinian’s *Corpus Juris Civilis*. As we saw in the last chapter, that cure was to bring modern-scientific *methodology* into the study of legal phenomena. The scientific lawyer, as Richard Posner would say a generation later, is therefore in the business of “mak[ing] precise, objective, and systematic observations of how the legal system operates in fact and [of] discover[ing] and explain[ing] the recurrent patterns in the observations—the ‘laws’ of the system.”⁵ The Hopkins Realists had believed this too, but they had taken the last thought much more—much *too*—literally: for them, the patterns of decision they sifted out of their statistical observations just *were* the law, no matter what any judge or lawyer ever said or perhaps even believed. The result was that they ended up denying other beliefs basic to our understanding of law—the belief that a law is *law* because

⁵ Richard Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437 (1972).

it articulates a standard for us to obey, and that it typically does so through a rational compulsion, the laying down of a legal necessity. By trying to pull together a modern legal science these Realists ended up altogether pulling apart our sense of legality. And so this last try at a genuinely modern science of law came to nothing in its day, and is hardly even a memory in our own.

The story of the last two chapters is therefore one of a series of brilliant mistakes. Much of my telling so far has focused on their errors: Langdell's rationalism, the Hopkins Realists' empiricism. And, indeed, the depth of their errors all too easily swallows up the brilliance of their insights. In this chapter I therefore want to take a step back from these two stories, and by gathering together the lessons we can learn from them, both positive and negative, I want then to explain how they point to an answer to Oliphant's complaint. I want to suggest how, from Langdell's vision, and from the Hopkins Realists' naturalism, we can go about building not just a science of law for our times, but indeed a fully modern one.

I. Explaining Law

“The central task of [a historical] epistemology is not to explain *why* we have been successful in our pursuit of scientific knowledge . . . Rather it is to track the evolutionary process by which success has been built upon success; that way we can come to understand *that* science works, and *how* it works.”⁶

It was hardly an accident that Langdell opened the first casebook—the first textbook of a modern legal science—by pointing to the past. For, as Langdell saw it, that past was a prologue of sorts to the science he hoped to make law's future. It was also something of a mess. Thus in the preface to his casebook, Langdell bemoaned the “misapprehension” caused by “the many different guises in which the same doctrine is constantly making its

⁶ WOOTTON, *supra* note 2, at 543.

appearance, and the great extent to which legal treatises are a repetition of each other.”⁷ The “legal treatises” Langdell had in mind were everywhere in nineteenth-century American law. Between 1842 and 1899 Simon Greenleaf’s treatise on evidence alone would go through eleven editions,⁸ and Joseph Story’s many commentaries—on the Constitution most eminently, but also on the law of bailments and of agency among other doctrinal areas—would end up earning him more each year in royalties than he made as a Justice of the Supreme Court.⁹ These treatises, at least in Story’s and Greenleaf’s cases, also grew out of a familiar intellectual ambition—the one Langdell learned while himself a student at the law school they had built at Harvard.¹⁰ That ambition was broadly scientific, the desire to remake law along the lines of a natural science.¹¹ And through their treatises, documenting and classifying the many types of rules and pleadings the lawyer could find among the cases, Greenleaf and Story were attempting to give expression to that ambition.¹² The treatise was both symbol and tool of their distinctively American legal science.

A generation later, Langdell would bless the ambition but belittle the attempt. The problem with a treatise like Greenleaf’s *Evidence*, as Langdell saw it, was not a dearth of doctrinal detail: that there was plenty of, indeed to an excess. There were instead two related problems. First was the absence of focus: where in the diverging lines of doctrine that crisscrossed the case law would the lawyer find the general principles and concepts capable of classifying the whole common law—the sort of universal conceptual order that mature sciences, ostensibly like law, were striving to uncover? That misgiving led to a further worry:

⁷ CHRISTOPHER COLUMBUS LANGDELL, *CASES ON CONTRACTS* i (1871).

⁸ Howard Schweber, *The “Science” of Legal Science: The Model of Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421, 447 (1999).

⁹ Steve Sheppard, *Teaching Books and Methods in the Lecture Hall*, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 7, 17 (1999).

¹⁰ Schweber, *supra* note 8, at 438.

¹¹ *See generally id.*

¹² *See id.* at 437-41.

even where a conceptual structure was relatively fixed, how could the lawyer be sure of its soundness? To both questions, as we saw, Langdell gave a single answer: there *was* a universal law behind the mass of doctrine, and lawyers could come to know it by becoming more like a nineteenth-century naturalist—if they took the library for their laboratory, and learned the loosely empirical but universal casebook method he was cold-calling from his lectern at Harvard. Langdell had thus set out to remake the American tradition of legal science by joining a doctrinal with a methodological absolutism.

The rest is by now a familiar story—the story of a brilliant mistake. The mistakes we have already canvassed in Chapter 1, and we will return to them again shortly. For now, however, I want to focus on the brilliance of Langdell’s attempt. For though the idea of a legal science was not original with Langdell, not even among American lawyers, his way of working it out was. What he saw most presciently was that the American tradition of legal science needed to be *modernized*: it needed to be brought into line with the other more exact natural sciences that were then only beginning to flourish in American universities. That, for him, meant that legal science needed to be patterned off of the heavily classificatory sciences of his day, like the geology and botany he learned from Agassiz. But it also meant that law, like so many other nineteenth-century institutions, would need to absorb the discovery made by Darwin: the discovery of evolutionary change. Law would need to come to grips not just with the diversity of the law’s structures but with their growth.

Langdell’s science ultimately failed at both, as we saw. But his aspiration—to modernize the American tradition of legal science—lived on. In the minds of the trio of Realists at Johns Hopkins’ Institute of Law, that aspiration became a rallying cry for a newly *empirical* legal science, in a double-sense. Law not only needed to adopt empirical methodologies in studying legal phenomena, they argued, it also needed to apply those

methodologies to the study of the way lawyers actually did law. That was the thrust of their naturalism—the scientific basis on which they hoped to build their empiricist legal science. It so happened that when they got done with their naturalizing there was little left in the legal point of view that would have been recognizable to lawyers as law; they had naturalized the legal point of view by naturalizing it away. But as I suggested at the close of the last chapter, they at least hinted at a naturalism less reductive than the one they ultimately chose, and that naturalism offers a way of fulfilling the aspiration they shared with Langdell: of making law a genuinely modern science. That naturalism is at once cognitive and evolutionary. And as I will explain in this section, it takes its point of departure from the thought that we were left with at the close of the first chapter: that ours is a law of many models.

A. Towards a Cognitive Theory of Legal Doctrine

Like the approach to legal doctrine that I will be suggesting here, the cognitive approach to scientific theory arose from the ruins of a broadly empiricist program. In the case of the philosophy of science, that program was the theory of Logical Empiricism, which analogized the theories found in the exact sciences (and those of physics most especially) to formal axiomatic systems—a system of statements linked by formal rules of inference. Theories were thus taken to be essentially linguistic entities. At their pinnacles were the axioms of the theory, which were thought, at least in principle, to be either true or false. Another set of equally universal statements took the form of empirical generalizations, viz., general statements about the world that were inductively confirmed from observation, and were also held to be either true or false.¹³ These latter generalizations were thought to be the

¹³ RONALD GIERE, *SCIENCE WITHOUT LAWS* 91 (1999).

formal counterparts of “laws of nature,” like Newton’s universal law of gravitation or Schrödinger’s equations, and thus were believed to describe the regularities experimentally observed among natural phenomena. Largely these laws were known to us mathematically, as equations, but they could and sometimes were stated in natural language. Either way, however, there were taken to be true of the world they described. Laws, on this view, make “direct claims about the world.”¹⁴

Some forty years ago, however, several leading philosophers of science—Nancy Cartwright and Ronald Giere especially¹⁵—began to question this account of scientific laws and the theories they framed. Driven by observations of the way physicists actually understand physical theory,¹⁶ and the way we use concepts more generally,¹⁷ Cartwright and Giere separately pursued a theory of scientific theories that treated them instead as families of *models*. Like linguistic entities, as Giere explains, models are at once “abstract structures” but also perfectly familiar things: they can be “described linguistically,” though they need not be “limited to linguistic entities”—a set of plastic balls linked by metal rods is, in Giere’s sense, just as much a model of chemical structure as any formal presentation of atomic theory.¹⁸ Typically, though, scientific models are formulated in language, even if only in the abstruse tongue of modern mathematics. No matter how they are presented, however,

¹⁴ Ronald Giere, *An Agent-Based Conception of Models and Scientific Representation*, 172 *SYNTHESE* 269, 270 (2010).

¹⁵ See generally NANCY CARTWRIGHT, *HOW THE LAWS OF PHYSICS LIE* (1983); RONALD GIERE, *EXPLAINING SCIENCE* (1988).

¹⁶ See generally CARTWRIGHT, *supra* note 15.

¹⁷ Giere makes clear that he takes the “cognitive structure” of scientific theories from the work of cognitive psychologists and linguists like Eleanor Rosch and George Lakoff in the theory of concepts. See GIERE, *supra* note 13, at 97-117; see generally George Lakoff, *Cognitive Models and Prototype Theory*, in *CONCEPTS* 391 (Eric Margolis and Stephen Laurence, eds., 1999) (discussing the idealized cognitive model account of concepts on which Giere relies).

¹⁸ GIERE, *supra* note 13, at 50.

models in this sense exhibit two related features: they are hierarchical and principle-centered.¹⁹ Each of these will need to be spelled out with some care.

At the heart of any modern scientific theory are its laws, and in keeping with that thought, Giere places what he calls scientific *principles* at the center of his account of scientific models. They are not, however, laws in the sense that the Logical Empiricists would have understood them. For what the laws of physical or biological theory do not do, in this account, is *describe* much of anything. Indeed, as Cartwright has brilliantly argued, if we thought otherwise we would be left with the unhappy conclusion that the laws of physics are, in fact, generally false: that quite often they lie.²⁰ Laws, or principles, instead function to characterize models.²¹ In classical mechanics, for example, Newton's laws of motion characterize a range of specific force functions: the second of these laws ($F=ma$) articulates the pattern for a series of more specific equations involving more specific situations, like the force function characterizing a two-body system ($F=mGM/r^2$).

The *model* that a principle like this characterizes can be thought of as an idealized picture filling out that principle. Models transform the abstractness of a scientific principle, a law, into the concreteness of actual conditions.²² Thus the two-body system pictured along with Newton's law of gravitation, or the simple pendulum exemplifying the force function of a harmonic oscillator ($F=-kx$), make those force functions concrete, by adding to them more or less real physical conditions. The 'more or less', though, is critical. Models are not *literal* pictures of any real system. Planets wobble, pendulums glide against the miniscule but real resistances of air and the friction on its string. They are instead like a kind of thought

¹⁹ See generally Giere, *supra* note 14.

²⁰ See generally CARTWRIGHT, *supra* note 15.

²¹ Giere, *supra* note 14, at 271.

²² Nancy Cartwright, *Fables and Models*, 65 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 57 (1991).

experiment, like Galileo's perfectly smooth balls rolling down frictionless planks. We idealize real conditions to figure out the right characterization of the relations and capacities of objects.²³ Thus laws are true, but only of the "highly abstract models" they characterize.²⁴ And what they tell us, at whatever their level of abstraction, is what characters we should notice and the relations we should therefore expect from them: we learn to pick out masses and measure the distance between them, and from that see how to characterize a new relation—the *force*—between them. At the heart of all this is a core set of principles—Newton's laws of motion—framing what Giere calls a "theoretical perspective," a point of view toward aspects of the world indicated by those principles.²⁵

As the example of Newton's second law suggests, models are also *hierarchical*. Adding specific constraints and conditions to a "core theory" like Newtonian mechanics yields the more particular, though still idealized, models resembling observed physical systems.²⁶ Thus, providing the idealized two-body picture along with the force function for gravitation ($F = mGM/r^2$) allows us to gin up a thought experiment for the interactions between the real physical interactions between Jupiter and its moon Europa.²⁷ As a result, these more specific force functions, fitted out with their more specific models, appear at a lower level in the theory than the general model defined by Newton's three laws: a 'law' like that for gravitation is only an instance of the equation codified by Newton's second law of motion ($F = ma$), and thus the model of a two-body system is subsidiary to the core theory articulated by the general classical-mechanical model defined by Newton's three laws.²⁸

²³ *Id.*

²⁴ GIERE, SCIENTIFIC PERSPECTIVISM 70 (2006).

²⁵ *Id.* at 14.

²⁶ As Giere makes clear, the notion of derivation here is not one of deduction but of "idealization and approximation." Giere, *supra* note 14, at 270 n. 2. In the next chapter we will explore this process in greater detail.

²⁷ *Id.* at 270.

²⁸ *Id.*

Newton’s laws therefore broadly define a perspective we can take toward the natural world—the point of view of classical mechanics. That general point of view then makes possible the narrower perspective taken toward more particular natural phenomena, such as in the example of two-body systems.

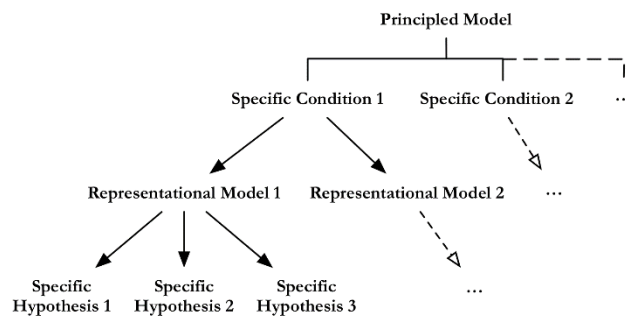


Figure 1: Natural Scientific Models

Put this generally, models may seem like interesting but fairly useless theoretical devices: too abstract and idealized—indeed, generally false—to do any real scientific work. But to say that these models do not exactly fit real systems—that they are literally true only of the pristine conditions pictured in our thought experiments—is not to say the models are useless. For once we decide that a model does fit a real system more or less well it is far from barren. Once we see that Newton’s law of gravitation tolerably fits the observed motions of heavenly bodies, including our moon, it becomes clear, or at least explicable, why tides would go in and out every twelve hours, or why the Earth would be round.²⁹ Learning

²⁹ See RICHARD FEYNMAN, THE FEYNMAN LECTURE ON PHYSICS, VOL. 1 7-4, 7-5 (2013).

from a model how to pick out the characters and relations indicated by its lower-level principle allows us to make *hypotheses* about whatever real physical systems the model happens to fit. Given a small mass, m , at distance r from the Earth, itself of mass M_E , we can say—hypothesize—that it should move with an acceleration of GM_E/r^2 (since $F/m=GM_E/r^2$ and $F=ma$). The important point is that models are generally far from *universal*—looking at the physical world from the classical-mechanical perspective distorts at both ends of scale, the very small and the very large. But that does not mean that, in contexts where they are nearly *true*, they do not tell us anything interesting about the way things are or how they should work.³⁰

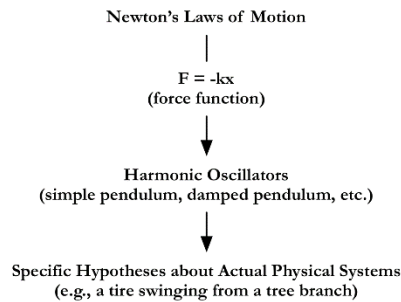


Figure 2: Harmonic Oscillator Model

We can also regard this account of scientific laws and theories as formulating what Giere calls an *agent-based* account of scientific theories. Agents *intend* to use these *models* to *represent* some part of the world for some particular *purpose*.³¹ Just as the Newtonian mechanics fills in one picture of the physical world from one standpoint (the classical

³⁰ I am leaving aside important complications about how models come to fit out lower-level principles, and how those principles are arrived at. I discuss those complications at length in the next chapter.

³¹ Id. at 269. See also CARTWRIGHT, *supra* note 15, at 10.

mechanical), Schrödinger's equations draw us another (the quantum mechanical). Neither, again, is true or false *simpliciter*; neither is a universal truth in the sense that the Logical Empiricists understood their universal generalizations. But both are true *ceteris paribus*: as just noted, they fit real physical systems more or less well, and are therefore more or less useful to the representational purposes physicists have in mind in using them—explaining the behavior of swinging tires and discharged bullets as opposed to that of quarks. On this view there is both a *perspectivalism* inherent to scientific thinking as well as a *pragmatism*. Models come and go based on the purposes they serve, not on the supposed metaphysical achievement of having accurately mirrored the way things are—their capital-T truth. Whichever model serves the representational purpose of the research community at some time simply is the “right” theory—until, as interests and focuses change, it no longer does, and so no longer is.

There is more to this account, though, than the analytical anatomy of individual scientific theories. It also provide a naturalized picture of science itself. To the extent that any principled model may be said to characterize what Giere calls a perspective—or a point of view, in my lightly stylized sense—we can see the whole family of these models, from across all the various natural sciences, as coalescing into a unique perspective, a point of view all its own. We can see them linked into a common *enterprise*, united by “particular methods of analysis” for reaching their shared “cognitive goal” of representing the diverse and ever-deepening relations observable in the natural world.³² Joined under this cognitive aim (generically, of representing) as well as by a handful of techniques, these models meld into something larger and more cohesive than the mere sum of so many abstractions. They form instead a distinct way of understanding and approaching the world—what we could

³² Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1570 (1998).

call the *natural-scientific* point of view.³³ Thus this cognitive approach to scientific theory not only explains what scientists are doing when constructing their many models of the world. It also implies a *scientific* account of the natural-scientific point of view itself—a *naturalized* picture of science.

B. Modeling Doctrine

This is, of course, a theory about the exact sciences—a theory about scientific laws and the theories they define. How, then, does it bear on law? More or less directly, I want to suggest, by way of what in the first chapter I called the *doctrinal model*. As already noted, models in this sense are thoroughly familiar to lawyers and legal scholars.³⁴ But, as I shall argue in this section, they are also structurally quite close to the models that Cartwright and Giere see at work within the natural sciences—close enough, I believe, to count as sibling notions, making the scientific model theory a proper basis on which to rest a theory of legal thinking. To get a feel for just how these doctrinal models have worked in practice—what

³³ By qualifying this point of view as “natural-scientific” I do not mean to exclude models from the various social sciences. Just the opposite, in fact: the more exact the social science, the more its models come to approximate the natural scientific point of view. In the case of economics, for instance, we might see its models as just the attempt to apply natural-scientific modeling techniques to the study of human practices and institutions.

³⁴ For a practically random sampling, *see, e.g.*, Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012) (challenging the medical model of donor-conceived families and the traditional model of domesticated individuals as applied to the community of donor-conceived families and arguing instead for a more holistic model); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000) (discussing the American with Disabilities Act as a civil rights model of disability accommodation that sees discrimination and consequent inequality as the principal difficulty facing people with disabilities); Todd Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006) (discussing the move away from the classical, bargaining model of boilerplate in contracts to other sociologically-grounded models); Vicki Schulz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing for a shift from a sexual desire-dominance model of sexual harassment in the workplace to a competence-centered model); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999) (reviewing the traditional and newer models of family privacy).

they are and how they help explain why easy cases are easy and hard cases, hard—it will be helpful to focus on an example, drawn again from employment law.

No rule is as foundational to American employment law as at-will employment.³⁵

That rule holds that an employee hired under a contract of indefinite duration is presumed to be at-will, that is, terminable by either party at any time and for any reason or none at all.

This was not always the rule, however, either in America or in the English courts from which so much early American law was derived. Indeed, an early formulation of a quite different rule occurs in Blackstone's *Commentaries*:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that servant shall leave, and the master maintain him, throughout all the revolutions of the respective seasons, as well as when there is work to be done as when there is not.³⁶

As Blackstone indicated, early English precedent had established a rather different doctrine as to employment contracts: where an agreement was silent as to its duration (and hence indefinite), the courts would presume the employment to last for an entire year. Why this difference? Part of the answer lies in what Blackstone offered as justification for the rule: the “principle of natural equity” that he believed it supported.³⁷ Thus he explained that:

injustice would result if, for example, masters could have the benefit of servants' labor during planting and harvest seasons but discharge them to avoid supporting them during the unproductive winter, or if servants who were supported during the hard season could leave their masters' service when their labor was most needed.³⁸

³⁵ See generally Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. EMP. LAW 65 (2000).

³⁶ WILLIAM BLACKSTONE, 1 COMMENTARIES 413.

³⁷ See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976).

³⁸ Feinman notes there were other factors supporting the rule of yearly hire, including the various requirements of the Statutes of Labourers and the Poor Laws. *Id.*

One might think from this example that Blackstone had drawn the principle from a familiarity with the customs of agrarian employment, and perhaps was trying to stipulate, in the name of natural equity, what the intent of the parties likely would have been and thus what they would likely have put in the agreement had it been reduced to writing. It certainly *sounds* that way, at least to a modern lawyer. In fact, Blackstone was not relying on a background understanding of employment agreements at all, not in our modern sense anyway.³⁹ And this was because the way he understood employment relations differed radically from the way we understand them now. For as John V. Orth has explained, the theory of employment in Blackstone’s time was instead dominated by “the law of property, not by the agreement of the parties.”⁴⁰ The principle of natural equity that Blackstone cited came to him not from an intuition but a theory—a theory of *possession*.

An even clearer example was the marital relation. Under the common law, the only way a man and woman could become man and wife was through agreement: there was a contract to marry, requiring the now familiar “meeting of the minds” and general capacity to contract.⁴¹ But, as Orth says, the contract only escorted the couple to the threshold of marriage; once they married, becoming husband and wife under law, the contractual aspects gave way to a pre-made legal *status*. That status was essentially one of possession, a property relation; indeed, it is no accident, as Orth points out, that traditional marriage rites contained a formula recalling the language of a deed—*habendum et tenendum*, to have and to hold.⁴² And, indeed, like the common-law categories governing property, such as the fee simple or fee tail estate, there was no contracting around the status imposed by the common law. Once the

³⁹ John V. Orth, *Contract and the Common Law*, THE STATE AND FREEDOM OF CONTRACT 44, 53 (1998).

⁴⁰ *Id.* at 52.

⁴¹ *Id.*

⁴² *Id.*

couple swore the vows, the law handed them a pre-made and inseverable bundle of rights and obligations. Under the doctrine of necessities, for instance, the wife could demand from her husband an adequate measure of support, and have that right enforced by the courts, no matter what the two had agreed between each other.⁴³ But she gained that right at a grievous cost: under the doctrine of coverture, the woman's legal identity also merged into the legal individuality of her husband, depriving her of whatever rights she had enjoyed before the marriage to own or convey property in her own name.⁴⁴ Choosing to marry came under contract, but the actual status of marriage was conceived along the lines of possession—of property.

The same was true of employment relations. Thus, in the same small chapter in which Blackstone addresses the rule of yearly hiring he also speaks of “the property that every man has in the service of his domestics, acquired by the contract of hiring, and purchased by giving them wages.”⁴⁵ Even if the agreement hiring a servant, like the agreement to marry, sounded in the law of contract, the actual relationship of employer and employee (still denominated the law of master and servant) arose under a theory of possession: a theory ordered along the same lines of a property status as the possession of land under the fee simple. The principle of “natural equity” that Blackstone refers to when explaining the rule of the yearly hire is thus an instance of that general property relation, dictating that “a servant, once hired, belonged in a sense to the master,” much as the wife, in a very real sense, belonged to her husband.⁴⁶

⁴³ See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 345 (Neb. 1953) (discussing the doctrine of necessities).

⁴⁴ Orth, *supra* note 39, at 52.

⁴⁵ BLACKSTONE, 1 COMMENTARIES 428.

⁴⁶ Orth, *supra* note 39, at 53.

What I want to suggest is that the employment relationship in Blackstone’s time, like the marital one, was one *model* of a general theory of possession—the “core” theory of property—in much the same sense that a two-body system and the simple pendulum are models of Newton’s second law of motion. There is a general theory of possession which, in the context of the agricultural life of Blackstone’s England, yielded his principle of natural equity: that it would be unjust for the master to lose ownership of his servant’s labor, or the servant his claim to his wages, should either be allowed to walk away from the relationship midseason. And the yearly hire rule follows from this model as a point of prudence: it serves the specific *purpose* of the English courts to settle disputes arising from these relationships—relationships of possession—by handing both master and servant another stick for their bundles.⁴⁷

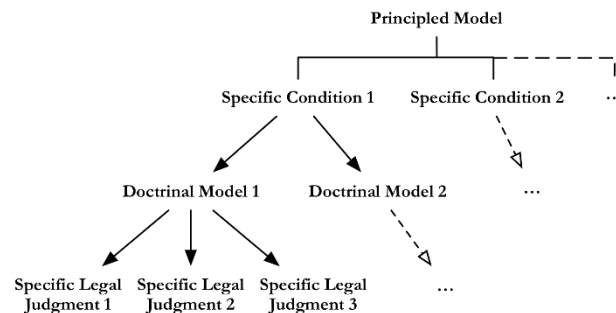


Figure 3: Doctrinal Models

A similar story can be told, moreover, of the American at-will regime. Once the theory of contract gained ascendancy over property-thinking in the nineteenth century,

⁴⁷ The sense in which the rule follows from the principle, and the principle from the “core” theory, is considered at length in the next chapter.

especially in America, the employment relationship only naturally began to shed the trappings of a property-based status and instead became the subject of private negotiation. Thus, Orth explains, the hiring “agreement was becoming an employment contract, executory for the duration of the service, creating and defining the rights and duties of persons soon to be called employer and employee.”⁴⁸ The result was that, by the end of the nineteenth century, the employment relation had become thoroughly contractualized: the controlling theory was no longer one of *possession* but of *intention*. Also buoying this novel conceptualization of the labor relation was the rising political economy rooted in Lincoln’s free-labor ideology, boosting “individual opportunity through property acquisition and contract.”⁴⁹ As that political economy diffused through the culture it also came to be fused with *laissez-faire* principles of private ordering and the freedom of contract. Thus, in the context of the employment relationship, it was thought that both the worker and the owner of capital—employee and employer—should be left to order their affairs however they saw fit, decided strictly according to their respective intentions. With the terms of their agreement—including duration—now brought under the core contract theory,⁵⁰ this meant that both employer and employee should have the right to walk away from the relationship at any time, unless they had signaled their intent to be bound for longer. It was from that principle that the familiar at-will rule soon emerged:⁵¹ “Men must be left without interference . . . to discharge or retain employees at will for good cause or for no cause, or

⁴⁸ *Id.* at 59.

⁴⁹ Joseph Fiskin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B. U. L. REV. 671, 686 (2014)

⁵⁰ Orth, *supra* note 39, at 60.

⁵¹ See Summers, *supra* note 35, at 66-68.

even for bad cause without thereby being guilty of an unlawful act per se.”⁵² That rule remains with us, despite some important qualifications,⁵³ today.

Stepping back from the doctrine, I think it now at least apparent how the cognitive approach to scientific theory can capture the way lawyers think and talk about legal doctrine. Doctrinal models, like scientific models, are principle-centered and hierarchical. At the summit are the abstract principles characterizing a core legal theory, such as the theories of possession and intention, property and contract. Once fitted out with specific conditions—the life of an English wage laborer, the role of middle-managers in late-nineteenth-century firms—those core theories then supply the premises of lower-level doctrinal models centered by their own, more particular principles—Blackstone’s principle of natural equity, or the freedom-of-contract principles typical of so-called classical legal thought. Those principles then come to be reflected in prudential rules, such as the early English rule of the yearly hire or the current American rule of at-will employment. This symmetry in cognitive structure also goes hand in hand with a more pragmatic symmetry. Just as scientists deploy natural scientific models to explain target phenomena, officials use these models to resolve specific problems, for particular normative purposes. A legal theory governed by intention—the theory of contracts—therefore constitutes its own perspective on social life, just as the legal theory centered around intention did so in Blackstone’s day.

Naturally, though, there are differences between these types of models, perhaps none as obvious as their different directions of fit. In the case of the natural scientific theory, both the principled model and families of lower-level models falling under it are thought to

⁵² *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884).

⁵³ See Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 *INDUS. L.J.* 84 (2007).

“fit” the way the world is in some respect: the relation of “fitness” runs *from* the world *to* the model. This, of course, is the result of those models’ defining aim. Their point, as we saw, is to *represent* some feature of the world (the behavior of a two-body system, for example), so the question of any such model’s fitness necessarily turns on whether it really “captures” the relevant features. For the doctrinal model, on the other hand, the relation runs exactly in reverse, *from* the model *to* the world. And this, too, is a result of its specific aim. The principled model and doctrinal rule do not purport to tell us *the way the world is* in some respect, but *what we may or must do* in it. Doctrinal models prescribe, not represent. They therefore fit more or less well *our* sense of the way things *ought* to be.

And this distinction has consequences. Doctrinal models, for instance, can formalize only so far. Of course we can depict the logical structure of any legal doctrine as we would any set of related sentences in English, clarifying the logic of its rules and their implications by way of first-order sentential or predicate logic.⁵⁴ Indeed, such work is arguably essential to disciplining and refining legal argument.⁵⁵ But this is a far cry from the mathematization of physical explanations that is the hallmark of the exact sciences⁵⁶—the analysis of rectilinear motion by way of differential equations, for example. This is also clearly a consequence of the divergent aims of doctrinal, as opposed to natural-scientific, models. Models in the exact sciences purport to identify and describe; those in law aim to prescribe. And for ordinary purposes we prescribe through normative language—language that is not obviously or easily amenable to functional analysis or mathematical reduction.

⁵⁴ See Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9 (2000) (discussing the role of logical analysis in legal reasoning).

⁵⁵ See, e.g., Scott Brewer, *Satisfaction and Posner’s Morin Opinion: Aliquando bonus dormitat posnerus?*, 120 HARV. L. REV. 1123 (2007).

⁵⁶ See WOOTTON, *supra* note 2, at 163-211.

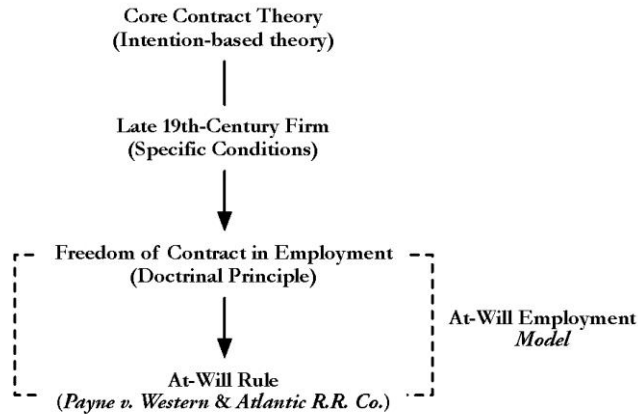


Figure 4: Contract-based Model of Employment

There are clearly differences, then, between these types of models, the natural-scientific and the doctrinal, indeed some quite significant. And yet at all the most critical points I believe that we can see their structures aligning quite closely. Principles center and characterize very general theories in our law, which then yield in specific situations more particular doctrinal models and rules. The explanatory lines will run in opposite directions—from word to world rather than the reverse—yet still in parallel.

II. The Legal Point of View Naturalized

There is a natural objection that might occur at this point, well worth considering. It is one thing, this objection goes, to concede an *analogy* between the cognitive approach to scientific theory and doctrinal thinking in law—between the way scientists and lawyers respectively learn and construct and use their theories. Analogy, though, is not identity, and drawing lines of similarity from one subject to another does not prove them to be siblings, that they have something essentially in common. But that of course is what I have set out to claim. This theory of doctrinal models, I want to say, is *true of* legal thinking; this *is* the way

that lawyers think when they are thinking like lawyers. How, then, do the lines of similarity I have traced so far lead to an argument for *that* claim?

As I see it, the best—indeed the only—argument that I can give on behalf of my stronger claim is simply that this account gets right what others have gotten wrong. And that brings us back to the stories I told in the first two chapters: to the errors behind the otherwise brilliant mistakes made by Langdell and by the Hopkins Realists. For Langdell, that mistake was his absolutism; for the Hopkins Realists, their intemperate naturalism. I want to concentrate on those latter lessons first, what we should learn from the story of the ill-fated Institute of Law at Johns Hopkins, before turning to Langdell's lessons. But what I will claim from both is that through their cautionary examples we can come to see why our reasoning in the exact sciences is not merely *like* the thinking lawyers do about law. The lessons of those examples should convince us that doctrinal models *are* what lawyers think and argue about when thinking and arguing as lawyers—that they are the intellectual constituents of our law.

A. Explaining Legal Normativity and Necessity

The Institute of Law, as we saw, was more than just another of Hopkins' institutional experiments. It was also a symbol of what the law could become if it came to be more empirical—the symbol of a modern science of law. Or so the three Legal Realists on its faculty had hoped anyway. But the swift demise of Institute made clear that what it had instead come to symbolize was a mistake: the mistaken belief that because the law was just what officials did on certain facts, the work of savvy lawyers lay in revealing those regularities in decision-making. This led them to reject on principle three features that, descriptively, seemed to the Institute's critics to be central to our understanding of law: (1)

that the rules laid down by earlier authoritative acts are what we mean by ‘law’ (the “simple” view of law), (2) that we regard those rules as providing a standard for correction and criticism, and (3) that those rules also determine official action, by dint of what they entail. The faculty’s denial of these features in the name of their empirical legal science, I suggested in the last chapter, played a major part in the Institute’s failure. That failure should therefore serve as a warning: no viable legal science can be built on a theory of law incapable of accounting for those features. It so happens, however, that all three features figure prominently, indeed necessarily, in the theory of doctrinal models.

First, far from disregarding the role of the rules on the books, this account instead places them back at the center of legal thinking. Paper rules are the scaffolding of all doctrinal models.⁵⁷ The at-will rule and the freedom-of-contract principle, along with the core theory of contract, were all eventually accepted and laid down by the courts; they were what advocates argued for and against and what judges and Justices struggled over. The way that these doctrinal models work, moreover, is by *prescription*: their very point is to indicate what is to be or may be done, to provide direction and guidance to lawyers and judges in the form of *obligatory* rules of decision. For the theory of doctrinal models to succeed in explaining the behavior not just of officials but of anybody using legal materials *as law*, it will have to make an essential appeal to the normativity of legal rules—to the internal point of view.

⁵⁷ We could therefore say, taking our cue again from Leiter, that there is a concept of law implicit in the doctrinal model account, “a view of law required” by that account in order to make it “true and explanatory.” Brian Leiter, *Postscript Part II: Science and Methodology in Legal Theory* [hereafter *Postscript*], in *NATURALIZING JURISPRUDENCE* 183, 188 (2007). That view, as we have already seen, would assume law to consist of rules satisfying the criteria of a certain social practice (the “law in discourse,” as Adler put it, the rules officially laid down by authoritative bodies like legislatures and courts). Those rules would therefore not *necessarily* be connected to any particular moral judgement; the rules are what they are no matter our moral assessment. And these are of course the defining features of a legal positivism. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278, 286 (2001) (characterizing legal positivism as consisting of the social and separability theses).

For the same reason that doctrinal models can make sense of legal normativity, they can also explain the role of necessity in legal thinking. The reason why this is so is closely related to an observation Cartwright makes about models in scientific thinking. Take again Galileo's thought experiment, about the perfectly smooth ball rolling down a frictionless plane. His conclusion, as Cartwright relates it, was that "[t]he pull of the earth induces an acceleration of 32 ft/sec/sec in balls rolling down totally frictionless totally stable planes."⁵⁸ In itself that is only a mildly interesting result, doubly muted by being not only about an unhelpfully abstract set of conditions (when are planks ever totally frictionless, or a bowling ball ever that round?), but also by being an unhelpfully narrow lesson. What we want to know about, after all, is not a property of bowling balls rolling down perfectly frictionless declivities, but a property of fired cannon balls and sailing rockets. We therefore have to climb the ladder of abstraction, to use Menno Rol's apt phrase,⁵⁹ not just from the messy facts of actual balls on rough planes, but also to more general lessons. And the reason why is that we are hoping to reach conclusions that, by being more general, can tell us about the way *many* things *will* work. In the exact sciences this takes the shape of very general formalisms supporting *deductive* inferences, like Newton's second law of motion or his law of gravitation. And as Cartwright notes, "[d]eduction is a key ingredient to [the] rigor" of these models, what imparts exactness to the exact sciences.⁶⁰ "We are assured that the consequences drawn from the models are genuine because they follow deductively from the starting descriptions; these consequences must occur whenever these descriptions are satisfied."⁶¹

⁵⁸ Nancy Cartwright, *Models: Parables v Fables*, BEYOND MIMESIS AND CONVENTION 19, 20 (2010).

⁵⁹ *Id.*

⁶⁰ *Id.* at 22.

⁶¹ *Id.*

The important point for our purposes is that the *aim* of these models—natural-scientific ones, as I have called them—imposes a constraint on their internal *logic*, the way they work. Our desire to see things more generally—to *represent* more than just mythically smooth bowling balls but also real rockets—not only forces us up the ladder of abstractions, but also disciplines our choice of abstractions. We want formalisms that tell us what *will* happen, so that, appropriately hedging as needed with *ceteris paribus* clauses,⁶² we can say something about more generally about the world, to represent it more universally. The model’s aim decides its logic.

The same point carries over, I want to suggest, to doctrinal models. In the early years of the at-will rule’s development in America it would have been easy to find cases supporting what we might call the *phenomenological rule*⁶³ of at-will employment: say, where a firm, after turnover of its board, decided to let go several middle-managers hired under an agreement silent as to the duration of the relationship, no liability was found.⁶⁴ This is just the sort of “rule” that we saw the Hopkins Realists trying, implausibly, to elevate into actual rules of law. The implausibility in that attempt was not only that this phenomenological rule does not *prescribe* anything—and hence violates the normativity constraint on what we mean by a law. A rule of this kind also does not support any necessary inferences: it does not tell us what *must* be allowed or disallowed under the circumstances indicated by the “rule”. The doctrinal model aims to solve both of these problems, I want to suggest, by focusing on the

⁶² See CARTWRIGHT, *supra* note 15, at 44-53.

⁶³ I call the rule “phenomenological” in a similar sense in which Cartwright speaks of “phenomenological laws”: they are no less real or accurate depictions of what facts or considerations have moved courts to rule as they have, but they are not the full-blooded prescriptive rules that constitute what we consider law. In this sense they are more like the lower-level causal laws Cartwright describes as the empirical counterpart to the “theoretical laws” that make up our scientific theories, and hence the choice of the term. See CARTWRIGHT, *supra* note 15, at 100-127. A fuller discussion of this very interesting and important distinction I must leave for another occasion.

⁶⁴ See Feinman, *supra* note 37, at 127-29 (discussing such cases).

deeper problem with a phenomenological rule like this: its unhelpful narrowness.⁶⁵ Now that we know what some judges are willing to do in the case of large firms and their middle-managers, in other words, what about railroads and their engineers, or poultry farms and their chicken-sexers? Doctrinal models work, when they work at all,⁶⁶ by thus ascending the ladder of abstractions—not only from *phenomenological* to *prescriptive* rules of law, but also from rules of lesser to greater generality. A merely phenomenological description of what some judges likely are to say about firms firing their middle-managers under some conditions thus becomes a prescriptive rule laying down general permissions: that in the absence of a contractual term saying otherwise *employers may* dismiss *employees* at *any* time and for *any* reason. Our prescriptive ambition leads us up, rung after rung, the better to say what should be done not just in one sliver of special cases but across a swath of quite varied circumstances.

And like natural-scientific models, the model's aim also decides its logic. Precisely because lawyers and judges want to know with *certainty* what may or may not be done, wherever possible models prescribe results through rules imposing *determinate* conditions—that exhibit what I have called legal necessity. Knowing that an employee's contract says nothing about the duration of her employment thus gives us a conclusive reason to believe she may quit whenever she pleases. This result follows *necessarily* from the at-will model; the rule has all the hardness of the logical 'must'. And so the law's normativity and its necessity intertwine.

⁶⁵ As we saw in the last chapter, Oliphant appears to have recognized this, with his example of the jilted groom, but drew the wrong lesson.

⁶⁶ This account assumes, of course, that lawyers and judges will take seriously the conclusions indicated by a model. That, however, is not an intellectual but a cultural point, despite the occasional suggestions to the contrary. See, e.g., DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* 158 (2008) (discussing the “work” of “transform[ing] an initial apprehension of what the system of norm requires, given the facts, so that a new apprehension of the system, as it applies to the case, will correspond to the extra juristic preferences of the interpretive worker”).

It may well be that deductive reasoning appears less often in the judgments of courts than some would like, certainly less than somebody like Langdell might have supposed.⁶⁷ And there is also the nagging question of how we should make sense of the appeals to necessity that we do end up making in those arguments.⁶⁸ But these questions and qualms, interesting and important as they are, are also beside the point. For all a doctrinal-models theory claims is that it makes room for the fact of legal necessity, to whatever extent our law actually allows it. That is what the Hopkins Realist declined on principle to make any room for, and why their Institute was destined to fail as it did.

Arguably, though, reasoning like in the case of the at-will regime—straightforward, generally uncontested, demonstrative—does crisscross the law. This is perhaps why, as Leiter has noted,⁶⁹ even a good many Realists were careful to restrain their realism within the narrowest fringe of appellate cases (cases worthy of the elusive writ of *certiorari*, say, or of going *en banc*),⁷⁰ where demonstrative reasoning from legal rules to legal result is, practically by definition, impossible. But whatever ultimately the facts may be about the phenomenon of legal necessity, it is clear that the doctrinal-models account faces no special difficulty accommodating it. If anything, a models theory would incur the converse difficulty, of

⁶⁷ See generally Arend Soeteman, *Legal Logic? Or Can We Do Without?*, 11 ARTIFICIAL INTELLIGENCE & LAW 197 (2003).

⁶⁸ See generally Brian Bix, *Raz on Necessity*, 22 L. & PHIL. 537 (2003).

⁶⁹ See Leiter, *Postscript*, at 20.

⁷⁰ The United States Supreme Court, except in unusual cases arising in its original jurisdiction, selects the cases that it hears, by granting what is called a writ of *certiorari*—on average only eighty out of several thousand petitions it receives every year. There is no such discretion in the vast majority of the cases that come before the twelve separate Courts of Appeals, and the cases they hear are typically decided by a panel of three judges selected randomly from all those serving on the circuit. Rarely, however, a case decided by a panel may be reheard by the whole court—sitting *en banc*, as it is said—if a majority of active judges on the circuit vote to hear it. Only cases of far-reaching importance—those presenting novel or difficult questions of law, on which other courts or panels have divided—will be resolved by an *en banc* court or by the Supreme Court. It is indeed the rare case that will be deemed worthy of either hearing when a result would clearly follow from a prior binding decision.

appearing to suggest a farther range to those rules' application than they will really bear.⁷¹

Necessity, then, like normativity, is not only a highlight in the theory of doctrinal models but is, indeed, basic to its explanatory power.

B. Explaining the Law's Growth

The lessons that we have considered so far all come to us from Realist missteps, leading to the failure of the Hopkins Institute of Law. That failure taught us something important about the way lawyers think and argue and thus what a legal science must accept if it is to be even notionally salvaged. It may be tempting to take these lessons to justify treating law as consisting of a *fixed* set of such rules and principles—of some set of doctrinal models—that make up the “true” body of our law, either at any time or for now. That, however, would be no less a mistake—indeed, it was the mistake behind Langdell's ill-fated science of law, the error of his absolutism. As we saw in Chapter 1, however, Langdell nevertheless smuggled that mistake into his science under the cloak of an important discovery: the discovery painstakingly documented in the *The Origin of the Species* that the natural world did not just have a structure but a history, that its condition was permanently one of growth. Langdell, unlike the Scholastic Jurists, therefore set out to make growth a

⁷¹ This is not to say that a models-based account *requires* conclusions to follow by deductive reasoning in every case or indeed even in many cases. On the contrary, the fact that doctrinal models, like scientific laws, are not universally apt would indicate that, and also explain why, arguments from them can often be defeasible. Even though, for example, the at-will regime would ordinarily apply with full force to a case where a female employee was fired after a boss tried to pressure her into a date, we only naturally—and rightly—balk at applying that doctrine unreservedly in those circumstances. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130 (1974). All a models-theory rejects is that these defeating conditions *necessarily* affect the logic of the model, the way it works in the abstract conditions of the stereotypical case. Just as hedging the Newtonian model of a two-body system with *ceteris paribus* clauses does not alter the model's nomic structure (by making the law of gravitation probabilistic, for instance), the presence of defeasibility conditions—sexual harassment as in *Monge*—does not *necessarily* force a revision to the logic of the doctrine. But, of course, it might. See *Monge*, 114 N.H. at 133.

hallmark of his science—the first try at a modern science of law in America. But he struggled to explain in what sense there could be anything like real growth amid his world of doctrinal absolutes. His conceptualism would thus betray his naturalism. In the end, Langdell had put his finger on an important fact about our law—that there was both stability *and* growth—but simply had no way of explaining it. Doctrinal models can.

And the reason that they can is that, as Giere has argued, a cognitive theory like the models-based account discussed here is not just a naturalistic theory but an evolutionary one. To see this, however, we will first need to understand what makes a theory evolutionary at all. And that, Giere explains, comes down to three fundamental processes:

There is naturally existing *variation* in the traits possessed by individual members of a population. The fitness of individuals to leave offspring varies with variation in traits. The result is *selection* favoring those whose traits make them fitter. The relative prevalence of the favorable trait increase in the population because that trait is disproportionately *transmitted* to the next generation.⁷²

Darwin, as it turned out, struggled much as Langdell did. He had of course identified the fact of organic evolution, as Langdell later did of legal evolution, but what he never gave was a satisfying account of the *mechanisms* behind those changes. By the close of the nineteenth century, although it was broadly agreed that evolution had occurred and was still occurring, few were willing to believe Darwin had an answer to what was responsible for the vast variation in natural traits and their transmission.⁷³ It would instead take another revolution, ushered in by Mendelian genetics, to bring evolutionary *theory* back into repute, by pinpointing a plausible source of the phenotypic selection that Darwin had observed as well as the vehicle of their transmission across generations.⁷⁴ And the lesson, of course, is

⁷² GIERE, *supra* note 13, at 48-49.

⁷³ *Id.* at 49.

⁷⁴ *Id.*

general: any evolutionary theory, like Giere's theory of science, must specify "the mechanisms underlying the analogous process of variation, selection, and transmission" that work to transform one "stage" of development into another.⁷⁵

And this is where a models theory comes in. Following Thomas Kuhn's theory of scientific revolutions, Giere has proposed that theory-change in science is driven by shifts in *exemplars*: a canonical problem or case whose solution becomes what Kuhn famously called a *paradigm*.⁷⁶ We can think of exemplars as natural-scientific models in the sense already discussed, but they are unique in two respects. Exemplars serve as solutions to what a community of researchers takes to be a major problem, like the inverse square law that Newton derived as an explanation of Mars's elliptical orbit around the sun (the so-called "Kepler's problem").⁷⁷ Because of they solve problems of such importance, and hence their cognitive centrality, exemplars also implicitly lay down standards for "what counts as a significant problem and what counts as a solution."⁷⁸ They serve to anchor our sense of what qualifies *as* a proper scientific explanation in the first place. At their most general they therefore frame the basic approaches in a scientific field, what Giere calls their principled models or core theories, like the classical-mechanical model, inspired by the solutions found in Newton's *Principia*.

But the laws of nature (or principles) at the heart of these models, as we have seen, are true only of the abstract models they characterize: they are true but not universal. This is

⁷⁵ *Id.*

⁷⁶ Giere offers this as a self-consciously iconoclastic interpretation of Kuhn's *Structure of Scientific Revolutions*, reading that early work in light of a later essay in which Kuhn appears to distinguish paradigms in a more global sense (i.e., as a conceptual scheme) from this more particular sort, dubbed an exemplar. See GIERE, *supra* note 15, at 34-37.

⁷⁷ See Nancy Cartwright, *Where Do Laws of Nature Come From?*, 51 *DIALECTICA* 65, 67 (1997). As Cartwright notes, technically there are two directions to this problem: Newton's solution of the "direct Kepler's problem," deriving the inverse square law from the elliptical geometry describing Mars's orbit, as well as his inverse solution, showing why a law of that kind would give rise to that orbital motion. See *id.* at 67 n. 3, 4.

⁷⁸ *Id.* at 37.

not just because laws hold only *ceteris paribus*, as a two-body model will account for the orbits of the planets so long as one is not too concerned about their wobbling. Rather, sometimes the laws cannot be made to fit new phenomena at all, as when the laws of classical mechanics confronted the orbits of electrons around atomic nuclei. In these newly problematic cases what is called for is not the fitting out of an old principle with new more complex models, just as Newton's laws were fitted out with a three-body model for wobbling planets. Instead, what these cases will be felt to require is a *new exemplar*, made possible by the discovery of new principles and thus new models—a new paradigm. And thus the growth of scientific theory, as Giere explains, is explicable through its cognitive structure: as old exemplary models confront novel, insuperable difficulties, they occasionally give rise to new models and thus new research programs. What one generation of researchers hands down to the next generation, through its textbooks and exams and research programs, is just its set of exemplary models: the classical-mechanical model, for instance, consisting of its many lower-level models (harmonic oscillators, two-body systems, and so on). Natural science thus evolves as new exemplars arrive and old ones are displaced, at least from the center of focus but sometimes altogether. And all of these changes, whether in the form of reformations or total revolutions, come ultimately from the representational aim of the day's researchers: their sense of what makes for a problem, a truly hard case.

What a models theory can thus explain in natural science—the evolution of scientific theory—I believe a doctrinal models theory can likewise explain in law. What varies and is selected, and then gets handed down from one generation to the next, are models. This is as true of physicists' models of quarks as it is of lawyers' models of employment relations. The possessory model of employment found in Blackstone's *Commentaries* became not only an

exemplary solution for a common problem, but it soon spread—first to English and later to early nineteenth-century American courts. Generations of lawyers thus learned from Blackstone and the courts that followed him how to think about employment relations, and thus what to do in the many cases where no term of duration had ever been agreed to. Times changed, however, and with them came the startlingly new circumstances of late-nineteenth century industrial life: the rise of the assembly line and the decline of skilled labor, the coming of the corporation and the labor union, the emancipation and grudging enfranchisement of slaves and the rallying of restive suffragettes. The possessory model of employment relations, like the same model of marital relations, thus came to feel more a hindrance than a help—a problem more than a solution. That feeling in turn gave rise to a new core legal theory for a newly industrial age: the contract model, privileging parties’ intentions over their statuses. And that model would reign, notorious and triumphant, until the paradigm once again began to shift in the years leading to the New Deal.

This is of course only an impressionistic rendering of a very complex history. But the arc of that story is all I need to illustrate how doctrinal models can explain what Langdell’s science could not. In any given period, an exemplary model—the core theory of property in the still-medieval law of Blackstone’s day, or the core theory of contracts in fin de siècle America—can and usually does serve to integrate large swaths of the law, achieving a kind of consensus.⁷⁹ That is what Langdell was effectively working out in the name of his absolutist science, the integration of commercial law under a core theory of intention. But what Langdell did not see was that this is just one of many such theories, a model no less powerful or comprehensive than the possessory model described by Blackstone in his *Commentaries*. Still, that comprehensiveness was always short of total. And once the political

⁷⁹ That consensus now goes by the name of classical legal thought. *See generally* WIECEK, *supra* note 4.

economy of the factory foreman had fully and finally dislodged that of the feudal lord, the possessory theory soon surrendered its place in our law.

A theory of doctrinal models can therefore explain what Langdell's conceptual absolutism clearly could not: the fact that the law has more than just a structure but a history, that the law evolves. It does so by pinpointing the mechanism of all this doctrinal upheaval—the constant readjustment of our law's many models. What varies are simply the elements of those models—the principles articulating core theories and lower-level doctrinal models, as well as the legal thought experiments we use to fit out those principles, such as the “well-known, acontextual ‘A’ and ‘B’” who “stalk the Restatement of Contracts.”⁸⁰ Those are then selected by lawyers trying to solve specific problems—problems set less by law itself than by a felt unfitness of our present models, a normative concern tied up with our sense of who we are, politically and economically, as a people and as a country.⁸¹ If those models do solve those problems (or are at least widely thought to), they are subsequently passed down from one generation of lawyers to the next through largely the same cultural and institutional apparatus devised by the jurists who founded our tradition of law nearly a millennium ago—by the indoctrination of the law school and the treatise and now, thanks to Langdell, the casebook.⁸²

The story of the law's evolution is thus a history of exemplary solutions to hard problems—the rise and fall of our law's core models, our legal paradigms. Joined with its explanation of law's necessity and normativity, the theory of doctrinal models I have

⁸⁰ Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1239 (2006).

⁸¹ I broach this point at greater depth in the next chapter. For a general sense of what I mean by this background of normative assumptions, see K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1330, 1354-59 (2016).

⁸² This is of course just the same training that natural scientists receive in their own disciplines: “Science replicates itself by indoctrination, since scientific communities work most efficiently when they are agreed about what they are trying to do.” WOOTTON, *supra* note 2, at 543.

advanced here should be thought more than just an enlightening analogy, and more essential than just a few lines of similarity drawn from the philosophy of science to the philosophy of law. Together these explanations should instead convince us that doctrinal models are what law, intellectually, is all about.

III. Awaiting Legal Modernity

And this brings us back, finally, to the thought from which we began: the thought that law could be made a science. That thought fell into disrepute early in the last century, and remains there today, largely for one reason: we have simply lost sight of what it is that lawyers think and argue about that is uniquely legal. Or as I put it in the last chapter, we have lost sight of what endows law with a point of view all its own, and thus makes law a relatively autonomous intellectual enterprise. Thus “[t]he very notion of law being a ‘science’ challenges us moderns,” having become more “fatuous” than really conceivable.⁸³

Accepting that challenge, what I have argued in this chapter is that there *is* a core to legal thinking that is uniquely legal, and which accordingly defines a perspective that belongs distinctively to law. Composing that core are what I have called doctrinal models, and like the natural-scientific models they resemble, once tethered together they coalesce into a whole perspective on social life, and a special enterprise within it. Together they forge the legal point of view.

That point of view is what I, following Harold Berman, have called the *intellectual premise* of our law,⁸⁴ and, as we have seen, it was that premise that Langdell and the Hopkins Realists each misunderstood, in their radically different ways. The absence of a plausible

⁸³ See WIECEK, *supra* note 4, at 5.

⁸⁴ See HAROLD BERMAN, *LAW AND REVOLUTION I: THE FORMATION OF THE WESTERN LEGAL TRADITION* 152-55 (1983) (what I call the intellectual premise Berman identifies as the methodological).

candidate for that premise is what doomed those two attempts at a modern legal science, and the restoration of that premise through the theory of doctrinal models is therefore the final piece needed to clinch the claim I set out to defend in this dissertation: that law *can* be thought a science, indeed the pragmatic kind that Langdell would surely have abhorred. Law is, intellectually, the science of doctrinal models.

But as Berman has also showed, ‘science’ in its original sense was far broader than the one we use and would understand today, encompassing in addition to this intellectual premise two other premises: one cultural, the other institutional. Broadly-speaking, those premises represent much the same culture and institutions today as they did in the days when canonists were scribbling down their *solutiones* of legal questions, Justinian’s Code at one elbow and the New Testament at the other. In this sense Oliphant was right when he accused the legal study of his day—not quite a century ago—of being of the “age and parentage of medieval scholasticism.”⁸⁵ Indeed, we could make the same accusation today. Culturally and in many ways institutionally our law still is very much stuck in a past that much of the intellectual world—and most especially our *other* sciences, the ones we would unblushingly call such—has long since moved beyond. And nothing I have said so far cuts very deeply into *this* problem. Even if tomorrow lawyers everywhere were to embrace the account I have offered here, and began to talk of our law as a body of doctrinal models, we would still not have gotten at the nub of Oliphant’s complaint. We still could call law a ‘science’ only by grossly abusing the word.

The reason for this is that our legal *culture* still lacks the triplet of organizing concepts that were arguably indispensable to the invention of our distinctively *modern*

⁸⁵ Oliphant, *supra* note 1.

sciences, none more important than the concept of discovery.⁸⁶ What we got from the invention of the very idea of discovery—beginning with Columbus’s voyage to the New World and leading through Tycho Brahe’s spying a new star and Newton’s publication of the *Opticks*—was not just new knowledge, but a new way of understanding and appreciating that knowledge. The spread of the idea of discovery throughout the Western world was thus “the spread of a new culture, a culture oriented toward progress.”⁸⁷ That culture also brought with it a new form of public discourse—the public quarrels that provided the ground-rules for priority disputes and the testing of hypotheses by experimental replication, among others.⁸⁸ Modernity thus set in when these three “meta-scientific” beliefs spread beyond the close quarters of what then were still called philosophers—when knowledge became more broadly “public, progressive, and discovery oriented.”⁸⁹

The final contribution that I believe a theory of doctrinal models can make is to suggest how our legal culture can come to embody each of these three organizing concepts: how our science of law in Berman’s sense can become a science in our fully modern one. If, as I hope, lawyers were to stop thinking of our law as just a ragbag of rules to ply for today’s billable hour, or as so much rhetorical cover for the junior-varsity politics of the bench, and were instead to start thinking of our law as fitted out with the large principled models that I believe are so much of what we learn and try to use as lawyers, three consequences would follow.

First, we could come to appreciate the very large extent to which our law is, in fact, the creature of many little and some very large *discoveries*. It took ingenuity for Brandeis to

⁸⁶ See WOOTTON, *supra* note 2, at 105, 96.

⁸⁷ *Id.* at 104.

⁸⁸ *Id.* at 91-96.

⁸⁹ *Id.* at 96.

divine a concept of privacy from our common law, just as it took quite a lot of imagination for lawyers and judges in the lead-up to *Lochner* era to think through the doctrinal implications of their *laissez-faire* political economy. The Scholastic Jurists, as we saw, would have likened this to *recovering* doctrines that were already there in the *Codex* and the Gospels, requiring only synthesis and restatement, precisely because those doctrines had already been contemplated by those materials' authors. And on the broader point, Langdell, despite his evolutionary airs, largely agreed. In saying this he was merely joining the Scholastics in a common tradition of inquiry that long antedated the Scientific Revolution, bowing to the beliefs of a time when, in the scholar's Latin, there was no word for discovery at all.⁹⁰ But models make clear that the story of our law is not one of recovery, where everything is already there and nothing new. Rather, it is a story of exploration and discovery. Against a moving backdrop of normative assumptions and evolving social relations, jurists and judges, legal scholars and advocates explore *new* legal principles whose theories are then marshalled in imposing legal order on those relations—like the theory of intention drawn from the fin-de-siècle freedom-of-contract orthodoxy. And those theories, as we saw, have to be fitted out with increasingly diverse principles developed from cases—as in the employment and marital relations we saw earlier—that are as novel as the models they shape. Those models and principles may have deep roots, like the bloodlines of any species, but what proceeds from them is genuinely new. Their discovery—the discovery of new ways of imagining and thus reordering our increasingly complex social life—is the engine of all legal evolution. And the recognition of that fact can and should be the first step to spreading the “meta-scientific” concept of discovery throughout our law.⁹¹

⁹⁰ See *id.* at 57-65.

⁹¹ See *id.* at 103 (describing discovery as the “meta-scientific idea” behind the Scientific Revolution).

By introducing that concept into law a theory of doctrinal models can also infuse the law with something larger than intellectual admiration. It can—and should—also inspire a sense of progress, in two senses. In the broader sense, law progresses by imposing the reasonableness of principled decision-making in what would otherwise be only one-off, quite possibly arbitrary acts of power. This is the progress of the *rule* of law itself, and to the extent that we can trace in the arc of the law’s evolution the growth of ever more refined models, we can see how our law can in a principled way adapt to novel difficulties. But this sense of progress, being this broad, is also quite shallow: after all, the Nazis too had their law—their own body of principles and models⁹²—whose “progress” in overturning the Weimar Republic no thinking person could have regarded with anything but horror.

But there is a narrower sense of progress, one framed from within a shared tradition of normative concern, in which we can say that law progresses. It is in this sense of progress that we can join Rorty in saying that “the Reconstruction Amendments and . . . the New Deal’s use of the interstate commerce clause” were not just new constitutional moments, but milestones along the law’s long road of progress.⁹³ We who do say that—as not all of us must or would—are of course drawing on our own sense of the fitness of those legal revolutions: a normative sense, underlying our use of doctrinal models altogether. What that sense of fitness is and how it works is a large question, part of which I hope to answer in the next chapter. But the point for now is simply that doctrinal models can and should inspire that sense law not only changes but advances. Of course we are the authors of those advances—the masters of our law’s evolution. And so learning not only *that* our law evolves but also *how* it does so also makes possible an entirely different sense of purpose

⁹² That a doctrinal models account can admit this point once again underlines the legal positivism it implicitly accepts.

⁹³ Richard Rorty, *Thomas Kuhn, Rocks and the Laws of Physics*, PHILOSOPHY AND SOCIAL HOPE 175, 186 (1999).

for our law, a sense of mission. That is the mission of *self-conscious* evolution, what Dewey called the project of *reconstruction*.⁹⁴ How that project should unfold in law, especially along the cultural and institutional dimensions I have largely left aside in this dissertation, is a story for another day. But the vital point is clear enough. Just as the invention of discovery in the natural sciences imparted to those disciplines their defining sense of progress,⁹⁵ so too should the recognition of doctrinal discovery impart to law a sense that law can and should continue to progress.

And, finally, this theory of what the law consists in intellectually can help us see how much of that progress depends on us. But as the early years of the Scientific Revolution taught us, what proceeds from a culture of discovery and progress are the ground-rules of debate.⁹⁶ In order to think through the implications of our models carefully and precisely, and to make a case for them effectively and—one would hope—fairly, lawyers will therefore require a new armory of techniques for analyzing and assessing those models and our arguments for them. What we need is a stronger sense of method, reinforcing the relatively autonomous point of view that defines our law. And what that calls for are essentially new techniques in training lawyers, much like Langdell made casebook analysis and the student note the techniques of his own allegedly modern science. Important steps have already been made in that direction.⁹⁷ But what they point to is key: the disciplining of knowledge through public discussion and debate.

⁹⁴ See JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY, THE MIDDLE WORKS OF JOHN DEWEY, VOL. 12, 1899-1924 (1988); see also James Campbell, *Dewey's Method of Social Reconstruction*, 20 TRANSACTIONS C.S. PIERCE SOC'Y 363 (1984) (describing the projects of social and conceptual reconstruction Dewey outlined in his mature philosophy).

⁹⁵ WOOTTON, *supra* note 2, at 511-13.

⁹⁶ *Id.* at 91-96.

⁹⁷ See Scott Brewer, EVIDENCE __ (2017) (on file with author).

Law *is* a science in one sense, but is not quite one in another. The reformation we now need in law is not purely intellectual, though that is a very large part of the reform indeed. Truly significant and lasting reform, however, will come only with a revolution in our law's culture and, consequently, its institutions—a revolution of the same scope and thrust that gave us science in the sense we now recognize. In these pages I have advanced only the first intellectual article of the many others that will be needed to foment that revolution—reforms that, if seen through, would finally plant our law in a culture of discovery and therefore of progress, disciplined by robust public debate. Dewey would have called this culture democratic.⁹⁸ And what I have therefore shown in this chapter is that a truly democratic culture in law can proceed only from the recognition of a fact that for too long has been misunderstood: that law does have a point of view all its own, and that any hope of achieving a truly modern science of law will depend on it.

⁹⁸ See, e.g., JOHN DEWEY, FREEDOM AND CULTURE, 13 THE LATER WORKS OF JOHN DEWEY: 1925-1953 63, 136-172 (1988).

CHAPTER 4
FREE-SPEECH FABLES

Introduction

On a crisp March evening in 1949, a slight-framed college student mounted a soapbox laid on a street corner, and in a “loud, high pitched voice,” urged the “Negro people” to “rise up in arms and fight for equal rights.”¹ Over the next twenty minutes, his voice reverberating through a speaker hooked to the car idling beside him, Irving Feiner breathed fire against the political powers-that-were—from the American Legion to the city’s mayor to, at one point, the President himself (a “bum,” he supposedly snarled).² As one might expect, Feiner was also beginning to “sti[r] up a little excitement.”³ “[A]ngry mutterings” swept through the racially “mixed audience” assembling before him, some seventy-five or eighty all told. There was pushing and shoving, some restless “milling around.”⁴ A few among the listeners began to worry aloud that the two police officers then on the scene—hastily summoned by a telephoned complaint—would be unable to control the growing “excitement.”⁵ Then came the threat of violence.⁶ As the numbers swelled and the ugly words kept on coursing electrically among them, the officers made their way to Feiner, still haranguing from his box, and asked him to step down—so they could calm the proceedings, they explained, and head off a brawl. Feiner, though, kept talking. Several more tense minutes passed. Now vastly outnumbered and fearing a full-on riot, the officers

¹ Feiner v. New York, 340 U.S. 315, 317 (1951).

² He would later dispute that account, insisting that if he had insulted President Truman he would have chosen a slur quite a bit saltier than ‘bum’. Douglas Martin, *Irving Feiner, 84, Central Figure in Constitutional Free-Speech Case, is Dead*, THE NEW YORK TIMES (Feb. 2, 2009), <http://www.nytimes.com/2009/02/03/nyregion/03feiner.html>.

³ Feiner, 340 U.S. at 317.

⁴ *Id.* at 330 (Douglas, J., dissenting).

⁵ *Id.* at 317.

⁶ According to the officers’ testimony, a man approached them—some twenty minutes into Feiner’s address—saying that, “If you don’t get that son of a bitch off, I will go over and get him off myself.” *Id.* at 330 (Douglas, J., dissenting). It was only then, the officers said, that they moved against Feiner.

approached Feiner once more, this time explaining that he was being placed under arrest for disobeying their commands.⁷ Again they ordered him down, and, probably sensing the inevitable, he at last relented. But before relinquishing his makeshift platform, Feiner let out one last, unsettling thought for the mob that had just succeeded in silencing him, a thought that has echoed ominously down the last half century of First Amendment theory: “the law has arrived, and I suppose they will take over now.”⁸

The facts of Feiner’s now infamous case illustrate in classic form what Harry Kalven, Jr., once called the “genuine puzzle”⁹ of provocative speech—widely known today as the problem of the heckler’s veto.¹⁰ A private speaker or speakers engage in what all concede to be some form of expressive conduct, in a space traditionally open to the public, only to be shut down by police over what they claim to be a threat of disorder, of near-violence, from an audience of hostile listeners and onlookers. This problem classically presented by Feiner’s case, and alive and well in our day,¹¹ is quite easy to see: simply by growing menacing enough, listeners hostile to the message of a provocative speaker can effectively conscript the police to muscle her out of a public place—the very scene where one might think ideas should be able to spread most freely. The law steps in only to end up silencing the already unpopular, abetting the very evil thought to lie at the heart of the First

⁷ Justice Black notes in his dissent that in fact Feiner was originally told that he was being arrested for “unlawful assembly;” only later was the charge officially made out as “disorderly conduct.” *Feiner*, 340 U.S. at 325 (Black, J., dissenting).

⁸ *Id.*

⁹ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1965).

¹⁰ Although the substance of the “heckler’s veto” *doctrine* has been attributed to Justice Black’s dissent in *Feiner*, as explained below, the label for that doctrine, and the problem that gave rise to it, is due to Kalven. See KALVEN, *supra* note 9, at 140-45.

¹¹ See, e.g., Andrew Napolitano, *Donald Trump and the Heckler’s Veto*, REASON (Mar. 17, 2016), <http://reason.com/archives/2016/03/17/donald-trump-the-hecklers-veto>.

Amendment’s counter-majoritarian concern.¹² And there is now considerable consensus among the courts and commenters alike that, short of a clear and imminent danger of violence or its actual outbreak,¹³ the enforcement of an otherwise content-neutral ordinance that effects such a heckler’s veto cannot withstand constitutional scrutiny. Indeed, the Supreme Court has made abundantly clear, in contexts well beyond this more classic case, that the accomplishment of a heckler’s veto—more generally understood as the silencing of an idea simply because of the displeasure or disagreement it may provoke in its audience—falls well beyond the constitutional pale. As a matter of First Amendment principles, such a veto is simply “out of the question.”¹⁴

Yet for all its clarity in rejecting the permissibility of a heckler’s veto the Court has yet to say just what the First Amendment would then require of police, as a matter of black-letter law, so as to keep them from effecting one. What, in other words, should be the substance of a heckler’s veto *doctrine*?¹⁵ It is this question—what so puzzled Kalven about the heckler’s veto—that sets the terms of what we might call the larger heckler’s veto *problem*, requiring an answer to not one but two closely linked questions. First, what justifies our now firmly entrenched sense that a heckler’s veto is indeed constitutionally unacceptable? And, secondly, what then does the First Amendment demand of police who must struggle to

¹² For an example of how one might try to focus First Amendment jurisprudence around precisely this concern—the protection of dissent—see STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

¹³ See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

¹⁴ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Kennedy, J., dissenting) (describing taxpayer dissenters to government speech as “a First Amendment heckler’s veto” that would be “out of the question”).

¹⁵ In drawing the distinction this way—as between the *fact* of a heckler’s veto, which the Court has deemed constitutionally impermissible, and the heckler’s veto *doctrine*, on which it has yet to squarely speak—I am seeking to tease apart the issue in a way that many lower courts have not, tending as they have either to collapse the doctrine into a rejection of the heckler’s veto or into what I will call a particular *model* for approaching the heckler’s veto *problem*, i.e., one focused on a clash of speakers where the impermissibility of the heckler’s veto is thought to lie in its violation of a principle of neutrality. See, e.g., *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286 (9th Cir. 2015) (identifying the heckler’s veto doctrine with the principle of content neutrality). For reasons that will become clear, it is important that the constitutional problem that we take the heckler’s veto to represent be kept distinct from the particular model we rely on in approaching and resolving it.

balance the need to keep peace in the public's fora and the rights of a provocative speaker in the face of a hostile audience? When the law arrives on a scene threatening a chaos of hecklers and heckled, how and on what principle must it act?

Offering up solutions to a puzzle like this is the stock-in-trade of traditional legal scholarship: legal reasoning at its most prosaic and workmanlike, as we saw in the last chapter. Lawyers examine the up-and-running models found in the law, draw out the conclusions latent in one such model and compare those conclusions against those of others, test those implications against further cases and assess them with an eye to preserving the normative thrust of the legal tradition their models help, implicitly, to define. All of this puzzle-solving continues today more or less by force of habit: which is to say, without any conscious sense of the project that those legal scholars and other commentators are engaged in or a clear sense of method to the apparently endless madness of doctrinal logic-chopping. This is true, moreover, even when those puzzles—like the one Kalven saw in the facts surrounding *Feiner's* arrest—fail to yield to ordinary means of solution: when tinkering with the old models simply does not tally. And puzzles in constitutional law, which touch our sense of who we are as a people most deeply, are likeliest to be of this more difficult kind: they are the most likely to lead not to enlightening discussion or analysis, but to the bitter and frankly confusing warfare waged in the pages of law reviews and, eventually, the reported cases. This was one reason why, as we saw in the first chapter, Langdell was so sure that constitutional law was only a marginal, indeed anomalous fad of some courts and legal scholars of his time, and why he refused to admit it into the inner sanctum of his absolutist science. A sturdy legal science could not possibly be built out those conceptually fragile things like due process or equal protection of the laws. There simply was no synthesizing such free-standing, amorphous phrases into a conceptually unified whole, a

tradition that grew only to become what it always was. Solving puzzles like these was, for better or worse, to be left to the play of politics—which, in our day, has meant the play of judicial politics above all.

But about this, too, Langdell was wrong—misled, as he was about many other things, by his now-familiar absolutism. An absolutist legal science like his may have struggled to make any sense of a science of constitutional doctrine, but not a pragmatic one—or so I claimed at the close of the last chapter. But in order to see how that could be true, we will need to see first how to make the naturalistic account of legal reasoning I offered there support what I have called the reconstructive project at the heart of a pragmatic science of law. Or as I put it in the last chapter, the evolutionary processes behind both legal puzzle-solving and paradigm-shifting must first come to a kind of methodological self-consciousness, converting the premises of the purely descriptive evolutionary theory of law I advanced there into the postulates of a working program—a living science of law. Sketching what that method might look like, and how it might work in the detail of an actual case, is the project of this chapter.

To do this I have made my focus here the relatively self-contained and fairly straightforward example of the heckler's veto problem. A principal aim of this chapter is therefore to suggest one solution to this problem while rejecting another, all by way of a refocusing of the problem itself—by way, that is, of an analysis along the lines drawn in the last chapter. As I explain in Part I, through an examination of Justice Black's influential dissent in *Feiner v. New York*, the lower courts and many commentators have now generally assumed that in approaching the heckler's veto problem the focus of our doctrinal attention should fall on the clash of the speakers themselves: a focus that has given rise to what I call the *speaker-focused model* of the heckler's veto problem. That model, now widely embraced by

the lower courts, accordingly consists of two basic propositions, answering to the two questions posed by the heckler's veto problem: that the impermissibility of the heckler's veto lies in the government's violation of a principle dictating neutrality among speakers and messages (the principle of neutrality), and that that violation all but requires for its doctrinal solution a constitutional rule requiring police to protect the speaker first, to some reasonable degree (the standard doctrine). Intuitively powerful as that model is, however, it has never been fully embraced by the Court, nor, I argue, need it be. I therefore move, in Part II, to show how we might go about challenging the cogency of that model, by testing its application in a controversial case recently decided by the United States Court of Appeals for the Sixth Circuit, *Bible Believers v. Wayne County*, which presents an interesting twist on the classic heckler's veto—swapping the usual roles of heckled and hecklers, a minority's speaker and the majority's mob. This twist, I argue, by pointing up several unseemly anomalies with the speaker-focused model, accordingly gives us reason to question the speaker-focused approach more generally. In Part III I then develop a distinct solution to the heckler's veto problem, through an examination of a seminal heckler's veto case from the Civil Rights era: *Edwards v. South Carolina*. I argue not only that that case points to an importantly different principle underlying the rejection of the heckler's veto—what I call the principle of anti-standardization—but that, by doing so, it also suggests a way of refocusing of the heckler's veto problem entirely: away from a clash of speakers to an attack on the public forum itself. In light of the anti-standardization principle that I argue that *Edwards* may be thought to stand for, I conclude that the heckler's veto problem is accordingly better understood within what I call a *forum-focused* model, joining the principle of anti-standardization to a new doctrinal rule requiring policing officials to ensure the openness of the forum itself—to defend the public's forum. And all of this, I explain in Part IV, will help us see how to

reconcile our unruly First Amendment doctrine with its many theories, by helping us to reconcile ourselves to the way theory and doctrine relate under the models-based approach I outlined in the last chapter.

I. From Dissent to Doctrine: A Brief History of the Heckler’s Veto Problem

A. *A Problem and a Solution: Feiner v. New York*

Like so many other doctrines now gathered at the heart of our First Amendment jurisprudence, the origin of the heckler’s veto doctrine lies doubly in dissent. To continue the story begun at the outset, Feiner was eventually convicted of violating New York’s breach of the peace statute, a conviction which he ultimately appealed to the United States Supreme Court, arguing that the application of the ordinance against him had worked a deprivation of his First Amendment right to free expression. The Court disagreed. Siding with the trial court’s judgment that “a clear danger of disorder was threatened” by Feiner’s continued harangue, the Court found little trouble in upholding the conviction, reasoning that the nature of Feiner’s speech had pushed him over the line separating controversial but no less covered speech and an act of incitement receiving no constitutional shelter.¹⁶

It was thus left to Justice Black, writing in strong dissent, to lay out a case for what has since come to be known as the heckler’s veto doctrine—what I will call the standard doctrine. He did so by underlining the practically important question behind this and all subsequent heckler cases: even assuming that an otherwise lawful¹⁷ speaker has so aroused her audience as to bring about the “critical situation” where violence appears imminent, whose constitutional rights take priority? After all, one could say that both Feiner and the

¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁷ Lawful because engaged in a form of expression covered by the First Amendment, unlike, say, in cases of incitement or fighting words. *See United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (noting the various classes of speech excluded from First Amendment protection altogether).

crowd of angry murmurers were in some sense exercising the same expressive rights under the First Amendment, and so both could legitimately lay claim, particularly on a public street, to a right to express their distaste. It just so happens that *Feiner*, as speaker, was the one that all parties conceded had brought about the threat of violence—a threat posed, of course, by the agitations of the obviously more numerous crowd. As a merely prudential point, one might suppose the answer here is clear: the police should move against the controversial speaker, not because they want to suppress her speech (any more than they would want to suppress the expressed outrage of the restive crowd), but because they would have a better chance of actually quelling the looming disturbance by moving against one (or a handful) of people rather than a crowd of several dozens, if not more.¹⁸ And as we have already seen, just such considerations are the *fons et origo* of the heckler’s veto puzzle that *Kalven* identified long ago—that the displeasure of an angry listener could, in effect, serve to justify the silencing of an unpopular speaker. Prudence, if nothing else, could thus be seen to counsel some trimming of our constitutional scruples, and in the years leading up to *Feiner*, a number of Justices appeared willing to heed it.¹⁹

But Justice Black saw things differently. Not only in his view did *Feiner* enjoy a certain immunity as speaker from the potentially severe reaction his speech was causing, but he was also entitled to a considerable measure of protection *to* speak. This protection would accordingly take the form of a set of instructions to policing officials: rather than move against a speaker *first*, as the officers had against *Feiner*, Justice Black believed they had an

¹⁸ Indeed this has been taken to be a natural consequence of applying the “clear and present danger” test to circumstances involving a hostile audience: once the speakers’ words or expressive activities generally threaten imminent violence or other disorder, under this test the speaker no longer enjoys the usual immunity from interference afforded by the First Amendment. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949) (overturning speaker’s conviction for breach of the peace since his speech posed no clear and imminent danger to public order); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

¹⁹ *See, e.g., Terminiello*, 337 U.S. at 37 (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact”).

affirmative duty, arising out of the First Amendment, “to make all reasonable efforts to protect” the speaker, first.²⁰ In addition to thus identifying what Kalven would later recognize as the core of the heckler’s veto problem—of a speaker forcibly silenced because of the hostility of her listeners—Justice Black had also effectively outlined one very clear solution to it: simply require the police to protect the speaker first. Under this reading of Justice Black’s dissent one could accordingly say that the heckler’s veto doctrine he was contemplating there—what I will call the standard heckler’s veto doctrine, or the standard doctrine—was to be robustly speaker-centric: the policing officials had a “duty to protect [a speaker’s] right to talk, even to the extent of arresting [anybody] who threaten[s] to interfere.”²¹ If literal push came to shove, it was thus the *speaker* who was to be protected first and foremost against those who threatened to silence her simply out of disagreement with her message. Justice Black could thus also be seen as endorsing, in effect, a constitutionally mandated subsidy to the unpopular speaker, at least in a public forum like the street corner where Feiner mounted his soapbox—a subsidy in the form of a certain measure of police protection. Left unanswered, of course, was the level of protection required or what “reasonable efforts” demanded—put otherwise, *how much* of a subsidy was due the speaker. But the shape of his solution to the heckler’s veto problem—his understanding, that is, of the substance of the heckler’s veto *doctrine*—was nevertheless clear: the doctrinal focus fell on the unpopular speaker, with the duty of the police being first and foremost to offer her protection to speak, no matter how hostile the audience.

B. The Speaker-Focused Model

²⁰ *Feiner*, 340 U.S. at 326 (Black, J., dissenting).

²¹ *Id.* at 327.

Just as important as what Justice Black took to be the better view of the heckler's veto, though, were the grounds he gave for its rejection: grounds that have furnished the basis for the now prevailing approach to the heckler's veto problem. In his judgment, the Court had dealt a blow not just to would-be critics of public officials but also—and more importantly there, given the obviously racially-charged context—to “unpopular” or, more tellingly, “minority speakers.”²² The practical effect of endorsing the heckler's veto, as he believed the Court had done in this case, was to give virtually unfettered discretion to police to “silenc[e] in any city” those who would dare to express such unpopular opinions²³—dare oppose a majority that was not inclined to listen. And this was what Justice Black singled out as the most troubling upshot of the Chief Justice's conclusion in *Feiner*. By reading out of the First Amendment the protection of a speaker like *Feiner* against a crowd as clearly hostile as was the one he confronted on that Syracuse corner, the Court had implicitly sanctioned the stifling of a *minority* opinion in the name of soothing irascible members of a majority view: a clear violation, he believed, of one of that amendment's “great principles.”²⁴

There was thus a twofold concern for dissent visible in Justice Black's own dissent. He was clearly worried, first off, about the First Amendment's guarantee of protection for the *minority* speaker: *Feiner*, after all, was railing against the powers-that-were over their betrayal, to his mind, of the building movement for civil rights. So naturally large swaths of his reasoning seemed directed at justifying his preferred protect-the-speaker rule (the standard doctrine) on just such grounds: namely, that it would shield specifically minority speech from, in effect, governmental censorship. But he also couched this worry in the distinct terms, seemingly interchangeably, of protections for the critics of governmental

²² *Id.* at 329.

²³ *Id.*

²⁴ *Id.*

authority, a point buttressed by his two sharp allusions to authoritarianism and totalitarianism.²⁵ Although his concern for minority expression and governmental critics could thus blur somewhat, the important point, and the lasting legacy of his dissent, was not so much the particular way he had framed these concerns behind the heckler's veto as was what he believed to be its general focus: as a clash of *speakers*, in which the government intervenes to serve the ostensibly neutral purpose of preserving order, only to end up working a restriction on the expressive rights of one side. What made the heckler's veto so clearly impermissible to Justice Black's mind was exactly the effect it had on those speakers, licensing the government to silence one speaker based, ultimately, on what she said. To put the same normative concern in the language of "great principles," Justice Black objected to the heckler's veto, thus understood, simply because it would allow the government effectively to privilege the speech of one speaker over another, overstepping the line drawn around all speakers by the First Amendment's guarantee of neutrality. The principled concerns moving Justice Black's dissent can accordingly be seen to mirror the doctrinal solution he was crafting there: they were both firmly focused on the interaction of the speakers themselves.

Laying these two planks alongside each other—the principle of neutrality and the standard protect-the-speaker doctrine—it becomes clear that Justice Black was indicating a particular approach that, when assembled more formally, can be seen to frame a particular model of the heckler's veto problem: what I will call the *speaker-focused model*. In that model, as we have seen, the constitutional problem with a situation like *Feiner's* is that the police, by enforcing an apparently neutral ordinance aimed at keeping the peace, effectively sides against one speaker (the minority or political dissenter) in favor of others (the disagreeable

²⁵ *Id.*

crowd), violating a principle of neutrality thought central to the First Amendment. The natural solution then—indeed, apparently the only solution consistent with the principle—is thus to raise a constitutional rule requiring the police to protect the speaker to whatever degree, this being what I have called the standard doctrine. But just as important as these planks is the ground on which they rest: an understanding of the heckler’s veto problem as involving, centrally, a clash of *speakers*. To what degree this model and the understanding it presupposes are adequate, either with respect to the disposition of actual cases or as a reading of precedent, is the subject of Part II.

C. From *Feiner* to Current Doctrine: The Rise of the Speaker-Focused Model

As powerful and intuitive as this model is, still Justice Black found himself dissenting in *Feiner*, even if only because the majority refused to see the facts in the same light as had the dissenting Justices. There is little question, however, that this speaker-focused model of the heckler veto problem has proved not only durable, but quite influential. Indeed, later cases have made clear that Justice Black largely had it right as to the protection deserved by speakers whose mode and content of expression were otherwise covered by the First Amendment,²⁶ and certainly when that expression occurs in what has come to be called a traditional public forum—canonically, public streets, sidewalks, and parks.²⁷ Taking *Feiner*’s

²⁶ The distinction contemplated here is between the *coverage* versus the *protection* afforded by the First Amendment. Not all forms of speech are thought to raise First Amendment claims, the classic example being the insider trading information provided by tipper to tippee or speech occurring in contractual agreements or, somewhat more controversially, fighting words or incitement. We say that the First Amendment’s doctrines and principles simply do not *cover* those types of speech. On the other hand, speech that is covered may receive differing levels of *protection*: for instance, restrictions on political speech generally receive the highest level of scrutiny, while restrictions on commercial speech draw an apparently lesser form. For a fuller exposition of this distinction, see Fredrick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

²⁷ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (distinguishing between the levels of scrutiny required in different fora). The type of forum—whether a traditional, a limited, or a designated public forum—can substantially alter the standard of review the courts will apply in assessing government restrictions of speech within it, leading to markedly different results. Compare *Edwards v. South Carolina*, 327

actual holding at its word, the Court has swept aside its broader implications for the heckler’s veto problem, reading it instead as simply another in a line of cases dealing in incitement, falling outside the scope of the First Amendment entirely.²⁸ And, indeed, later courts have expanded both the understanding of the heckler’s veto problem and the doctrinal solution laid out in Justice Black’s dissent—working within, and building on, the speaker-focused model he adumbrated there.

Although the Court has spoken definitively as to the entirety of the speaker-focused model, and never embraced it outright, it has nevertheless made clear that Justice Black was certainly right in finding the heckler’s veto a constitutional non-starter. Moreover, the Court has also now firmly ratified the principle of neutrality implicit in Justice Black’s understanding of the speaker-focused model. In *Forsyth County v. Nationalist Movement*, for example, the Court expressly invoked the distinction between content-based and content-neutral regulations—regulations, that is, aimed at regulating *what* is said as opposed to *how* (or *where* and *when*) it is said,²⁹ the genus of which viewpoint discrimination is a species³⁰—in a context similar to the heckler’s veto, holding that “[l]isteners’ reaction is not a content-neutral basis for regulation” and thus draws the Court’s strictest scrutiny.³¹ And although

U.S. 229 (1963) (overturning convictions of protestors charged with disorderly conduct for demonstrating on state house grounds) with *Adderly v. Florida*, 385 U.S. 39 (1966) (upholding conviction of protestors for trespassing during similar demonstration at local jailhouse).

²⁸ See, e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971) (suggesting that *Feiner* involved “the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction”); *Edwards*, 327 U.S. at 229-230 (1963) (distinguishing *Feiner* as involving direct incitement).

²⁹ Generally, content-based restrictions must survive strict scrutiny, whereas content-neutral regulations face a more lenient, if still heightened form of scrutiny. See *City of Chicago v. Mosley*, 408 U.S. 92 (1972). See also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-190 (1983). The exceptions to this general rule are those “well defined and narrowly limited classes” of so-called low-value speech that the Court has ruled beyond the scope of the First Amendment entirely. *Stevens*, 559 U.S. at 468-69 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

³⁰ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing viewpoint discrimination as an “egregious” form of content-based restriction).

³¹ 505 U.S. 123, 135 (1992). See also *McCullen v. Coakley*, 134 S.Ct. 2518, 2531-32 (2014) (noting that a restriction on speech would “not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners’ reactions to speech” (internal quotation marks omitted)).

the Court has never squarely addressed the substance of the standard doctrine,³² the evolution of tiers-of-scrutiny analysis since *Feiner* strongly suggests that there would be few, if any, occasions in which policing officials could permissibly move against a speaker without at least trying, in some measure, to control the crowd first.³³ For if any such move against a provocative speaker is indeed justified by the reaction it has provoked in her listeners, as seems practically certain given the single-minded focus on the speakers themselves, it is hard to see how anything short of providing the speaker an ample measure of protections would survive such sharp scrutiny.

And, indeed, the lower courts³⁴ and commentators³⁵ have consistently drawn just that conclusion, tracing the same line of reasoning bridging the speaker-focused understanding of the heckler's veto problem, and the neutrality principle that it appeals to, to the doctrinal rule that policing officials have a duty to protect the speaker to some reasonable degree, however hostile her audience. If one therefore agrees with Justice Black in framing the heckler's veto problem in his speaker-focused way, it would seem that one would be hard-pressed to find

³² *Bible Believers v. Wayne County*, 805 F.3d 228, 271 (6th Cir. 2015) (Gibbons, J., dissenting) (describing the "heckler's veto" as a "debater's point rather than . . . a doctrinal tool"). The nearest the Court appears to have come to embracing the speaker-focused model was in *Brown v. Louisiana*, 383 U.S. 131 (1966), where the Court, in a footnote, observed that the "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of constitutionally protected demonstrate itself, that their critics might react with disorder or violence." *Id.* at 134, n.1. Notably, however, the *Brown* Court did not suggest that it would go so far as to embrace the standard doctrine, viz., that the police have an affirmative duty to protect the speaker first, saying only that speakers would not be subject to charge (e.g., for breach of the peace) even if they happened to provoke hostility from their listeners.

³³ See, e.g., *Bible Believers*, 805 F.3d at 271 (Gibbons, J., dissenting) (noting that given the application of strict scrutiny endorsed by the majority the "the police may never limit speech in order to protect the speaker, even if doing so is the only way to protect the speaker from serious injury or even death at the hands of an angry mob").

³⁴ See, e.g., *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286 (9th Cir. 2015) (describing the heckler's veto as a violation of the principle of content neutrality, drawing strict scrutiny); *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541 (4th Cir. 2010) (noting that "[c]ourts have recognized a heckler's veto as an impermissible form of content-based speech regulation for over sixty years"); *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) ("[D]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993))).

³⁵ See, e.g., Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOF. L. REV. 1305 (2007) (discussing the relation between the principle of viewpoint neutrality and the standard doctrine).

grounds excusing one embracing the entirety of the speaker-focused model, including, crucially, the standard doctrine. The planks of the model, along with their focus on the speakers, hold or fall together.

II. Challenging the Speaker-Focused Model: *Bible Believers v. Wayne County*

In the fifty years since *Feiner* came down, the speaker-focused model of the heckler's veto—comprising both the standard doctrine (protect-the-speaker rule) and its grounding principle (content or viewpoint neutrality)—has drawn considerable support from the lower courts and commentators alike. But, as I explain in this section, a recent case arising out of the United States Court of Appeals for the Sixth Circuit presents an interesting twist on the classic heckler's veto, swapping the usual roles of heckled and hecklers, a minority's speaker and the majority's mob. By pointing up several intractable anomalies with the speaker-focused model, I believe this twist gives us reason to question the speaker-focused approach more generally.

A. *Reversing Roles*: *Bible Believers v. Wayne County*

The case arose out of a disturbance at the 2012 Arab International Festival, a public gathering designed to encourage cultural exchange among the citizens of Dearborn, Michigan, and the many visitors it drew from across the United States and from elsewhere around the world. The city is itself also home to the second-largest Arab-American population in the country after New York City, and has naturally counted a large number of Muslims among its population, although the city remains majority non-Arab and non-

Muslim.³⁶ The yearly summer festival, which is open free of charge to the public and held along several blocks of Dearborn's streets, plays host not just to the usual staples of a city fair—music, food, carnival rides—but also a sizable number of religious groups wishing to use the occasion to spread their various messages, normally by reserving one of the many informational booths available to vendors. Among the groups that had a history of attending the predominantly Muslim festival were evangelical Christians, who, unlike most other groups, tended to roam freely throughout the festival grounds to proselytize as they wished.

On June 15, 2012, one such group—the Bible Believers—appeared at the festival as they had the year before,³⁷ bearing messages which were, to say the least, provocative. (A typical few proclaimed: “Islam Is A Religion of Blood and Murder,” “Jesus Is the Way, the Truth, and the Life. All Others Are Thieves and Robbers,” “Turn or Burn.”³⁸) Alongside the signage one of the Bible Believers had also hoisted on a pike the severed head of a pig—a symbol, members later explained, that would “ke[ep] [the Muslims] at bay” seeing as, “unfortunately, they are kind of petrified of that animal.”³⁹ As they moved into the festival grounds, the Bible Believers began to preach their message through a megaphone, variously telling the crowds they encountered that they were following “a false prophet” who was a “pedophile,” that they “believe in a prophet who is a pervert,” who “want[ed] to molest a child,” so that “God will reject you” and “put your religion into hellfire until you die.”⁴⁰ By then a number of Muslim teenagers had gathered around the Bible Believers, and were understandably displeased. Some urged restraint; the angrier among the teens, losing

³⁶ Niraj Warikoo, *Arab Americans Become Majority on Dearborn Council*, USA TODAY (Nov. 6, 2013 9:41 PM), <http://www.usatoday.com/story/news/nation/2013/11/06/arab-americans-become-majority-on-dearborn-mich-council/3460591/>.

³⁷ *Bible Believers*, 805 F.3d at 236.

³⁸ *Id.* at 238.

³⁹ *Id.*

⁴⁰ *Id.* at 238-39.

patience, began hurling plastic bottles and other small debris. Nearby, officers were seen observing the scene but waited several minutes before intervening, and only then to warn the youths to stop chucking bottles. Around the same time other officers also approached the Bible Believers, ordering them to put away the megaphone, since, the officers claimed, its use violated city ordinance. The Bible Believers obliged, but continued preaching. Meanwhile, a growing crowd of teenagers had surrounded them, loudly jeering and slinging obscenities. Bottles and debris soon began to fly again, as did, minutes later, several milk crates. An officer once more approached the Bible Believers, who by then had stopped preaching, telling them that they were “causing [a] disturbance” that posed “a direct threat to the safety of everyone” at the festival, because the Bible Believers were “tell[ing] [the crowd] stuff that enrages them.”⁴¹ An exchange ensued between the Bible Believers’ leader and an officer, resulting in a final warning: either the Bible Believers leave or they would “probably” be cited for disorderly conduct.⁴² The Bible Believers finally relented, unleashing a few parting recriminations before filing out of the festival, escorted by over a dozen officers.

The Bible Believers subsequently brought suit against the county where the festival was held, arguing principally that the officials had violated their free speech and free exercise rights under the First Amendment by forcing them to leave the festival grounds. After the district court granted summary judgment to the county, which a divided panel of the Sixth Circuit affirmed, the case was reheard *en banc*, and on October 28, 2015, the court not only reversed the grant of summary judgment against the county but awarded summary judgement to the Bible Believers. The majority, not unreasonably given the prevailing speaker-centric model, reasoned that this was a straightforward case of a heckler’s veto: by all accounts, which included clear footage of the incident, the officers had moved against the

⁴¹ *Id.* at 240.

⁴² *Id.*

speaker first, had done little to quell the crowd, and had otherwise done nothing to ensure the Bible Believers' right to preach. Worse, the officers were heard saying at the time that they were ejecting the Bible Believers—from a public gathering on a public street no less—because of the hostility that their message was provoking: mirroring the justification that the officials in *Feiner* had invoked. For the eight judges who joined Judge Clay's majority opinion in full, the conclusion therefore followed inescapably: having effected the teenaged hecklers' veto, the county had violated the Bible Believers' rights to free expression.⁴³

More revealing than the majority's exposition of the speaker-centric model, however, was the sharply-worded dissent it drew. Joined by four other judges, Judge Rogers opened with the troubling observation that the court had “provide[d] a roadmap that effectively advises how to force the police to help disrupt a minority's speech and assembly rights.”⁴⁴

Laying out that “roadmap,” he went on:

Yes, you can get the police to help you attack and disrupt something like a minority cultural identity fair, even if the police are not inclined to do so. Tell the police your plans ahead of time, and bring photographers. Get a determined group of disrupters and go in with the most offensive and incendiary chants, slogans, insults, and symbols—the more offensive the better. The object is to stir up some physical response. Then, when things get rough (your goal), insist that the police protect you, and (ironically) your First Amendment rights, by serving as a protective guard. The peace officers cannot at that point tell you to leave, even to avoid injury to you, because if the peace officers do that, they will have to pay you damages. Faced with the choice of allowing you to be an injured martyr (keep your cameras ready) or serving as a protective guard as the disruption escalates, the peace officers will doubtless choose the latter and become your phalanx. It's a win-win situation for you, and a lose-lose situation for the minority group putting on the fair.⁴⁵

As far as Judge Rogers was concerned, this was a result as perverse as it was unnecessary: indeed, “[o]nly a formalistic application of First Amendment doctrines . . . could lead to a

⁴³ The free exercise claim was disposed of on the same grounds as the free speech claim, as was a parallel equal protection claim. *Bible Believers*, 805 F.3d at 256.

⁴⁴ *Id.* at 274 (Rogers, J., dissenting).

⁴⁵ *Id.*

result so inconsistent with the core of the First Amendment.”⁴⁶ Moreover, he observed in closing, there was something “unfortunately ironic” about the Bible Believers “succeed[ing] in their tactics in this case based on towering . . . cases involving minority civil rights protest.”⁴⁷ For, as he saw it, “[i]n the greater Detroit community, it is the minority’s cultural expression that loses from today’s decision,” given that the Bible Believers had come “from a different part of a larger community to disrupt the First Amendment activity of Arab-Americans—a sometimes feared, misunderstood, or despised minority within that larger community.”⁴⁸ Looked at “realistically,” then, it was the Bible Believers, not the Arab teenagers at a predominately Muslim festival, who were the real hecklers.⁴⁹

B. Bible Believers as Test Case: *Anomalies in the Speaker-Focused Model*

Although Judge Rogers was clearly troubled that a doctrine born in the struggle for civil rights was being invoked against the losing minority of Dearborn’s Arab citizens, the conclusion he himself drew was that the heckler’s veto doctrine had been inappositely applied, given that violence had actually broken out.⁵⁰ Yet he was surely right in sensing both that the facts of this case were atypical, indeed revealingly so, but also that there was something anomalous in the results required by the speaker-centric model on which the majority was clearly drawing. Here, after all, unlike in any major heckler’s veto case past, representatives of what were a dominant religious persuasion deliberately sought to confront, and probably to provoke, the members of a religious minority in the midst of exercising their own expressive rights. A prototypical clash of speakers, one might think.

⁴⁶ *Id.*

⁴⁷ *Id.* at 278 (Rogers, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

And, prevailing as they did, those representatives now would have the potent weapon of liability to wield against officials who might otherwise be indisposed to help them parade their openly provocative—easily hateful—messages at a minority’s only annual festival. All of which is to say that the unique inversion of the usual roles in *Bible Believers* provides a particularly choice case for testing the strengths, and weaknesses, of the speaker-centric model itself. And as Judge Rogers’ dissent suggests, that model does not fare well.

1. Speaker or Heckler?

An initial difficulty for the speaker-focused model under these circumstances draws from the label of ‘heckler’ itself. As Judge Rogers points out, it is hardly obvious in this case who the hecklers really were: were they the Arab teenagers frustrated by the calculatedly obnoxious presence of especially zealous bigots at a festival celebrating their heritage, or was it the bigots themselves? More to the point, and as the speaker-focused model underlines, since in any heckler’s veto case there is always a *clash of speakers*, and since it would be practically inconceivable, even if literally possible, for a crowd to mutely grow surly as a lone dissenter railed on; each side will surely get angrier with the other, *both* sides could legitimately lay claim to being the heckled no less than the heckler. Just examine the facts of this case: the Bible Believers arrive, pig head in tow, crying out their religious slurs; a crowd soon gathers, with some shouting slurs in reply; the Bible Believers, now feeling drowned out, begin to shout more loudly, the edge of their epithets sharpening with every insult they bear; and on it goes. Once the police arrive, which side, exactly, do they pick out as the constitutionally-deserving speaker and which the undeserving would-be silencer? The tempting answer is just to throw up one’s hands: *obviously* the party that seems to have come with the provocative message, and which side seems to be the disagreeable audience. But of course the festival itself, and arguably the festival-goers too, have come with their own

messages (with expressions of their heritage, lessons in cultural exchange, etc.); indeed, they were there first, and were the only reason the Bible Believers showed up at all. And so the difficulty remains.

The reality, one suspects, is that the police will do what nearly anybody in their position would have to do: identify the point of view of the speakers first, deciding from there which party seems like the “speaker” and which side the “heckler.” But that, it seems clear, is to pierce the very veil of neutrality that the standard doctrine was meant to draw over the proceedings. Worse, it all but invites rigging, conscious or otherwise: did the police favor the Arab festival-goers here because they were, like many residents of Wayne County, of Arab extraction, or because they disliked fundamentalist Christians? Would the result flip if the roles were reserved, with a contingent of radical imams arriving to chant slurs at the visitors of a Christmas festival? Applying the speaker-focused model in a case like this appears to be self-defeating whichever way one looks at it: either by asking police to disregard the very principle its doctrine was meant to vindicate or by inviting manipulations that would add up to its evisceration. And in either case a model leading to such a bizarre result seems, at the very least, problematic.

2. A Subsidy for Discrimination?

Even if there were a practicable way of neutrally deciding which party was the “speaker” and which the “heckler,” the standard doctrine poses a still more vexing difficulty, one that Judge Rogers took some pains to outline in his dissent. Why is the application of the standard doctrine here not all but forcing the government to undermine the very theory of viewpoint discrimination it was meant to uphold? As Judge Rogers lays out this difficulty, in the shape of his “roadmap,” the standard doctrine—thought of, quite reasonably, as a subsidy to provocative speakers in a public forum—ensures that any group can enlist the

help of police, on pain of substantial liability, in exercising their own expressive rights, to the point of limiting, or even impairing, the rights of others. Indeed, the point is hardly hypothetical: since the Bible Believers' fateful encounter in 2012, the Arab Festival, a fixture of the Dearborn community for nearly two decades, has been cancelled out of concern that the Bible Believers or a similar group would return, this time reinforced by police escort.⁵¹ If, as the Court has emphatically said, the “whole theory of viewpoint neutrality is that minority views are to be treated with the same respect as are majority views,”⁵² it is difficult to see how that theory can consistently support a doctrinal rule all but ensuring that the members of a majority can at any point enlist the support of the government, in the form of a subsidized police escort, to disrupt the expression of a whole festival of minority speakers. A doctrine capable of diminishing what Judge Rogers rightly saw as an already vulnerable voice in American life hardly honors a principle calling for the respect of all voices—pointing up another serious strain in the speaker-focused model.

3. Less Speech, Not More

Of course one could point out in reply to the last argument that there is in fact no disjuncture between the standard doctrine and theory of viewpoint neutrality on this point, since it is equally true that a group of minority speakers could infiltrate the expressive assembly of a more dominant group (as in the earlier example, a group of radical imams at a Christmas festival), backed by the same police escort. Disrespectful though the exercise of that subsidy may be, it is at least not wielded discriminatorily, and all the theory of viewpoint neutrality calls for is, in effect, the *same* measure of respect to be meted out to minority and majority alike, however impoverished.

⁵¹ *Canceling the Arab International Festival was an admission of defeat*, THE ARAB AMERICAN NEWS (Apr. 2, 2015 10:28 PM), http://www.arabamericannews.com/news/news/id_10291/Canceling-the-Arab-International-Festival-was-an-admission-of-defeat.html

⁵² *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

True as this is, it nevertheless underlines a final difficulty for the speaker-focused model, one made especially evident in the fallout in *Bible Believers*. For the fact is that, even though it is of course true that a rule like the standard doctrine would apply equally to all comers, its effects would arguably fall disproportionately on marginalized groups, groups that are almost necessarily more vulnerable to the sort of disruptions sanctioned by the standard doctrine. And indeed that is precisely what happened to the group that had organized for nearly two decades Dearborn's Arab Festival: the threat of continuing protests forced its closure, apparently indefinitely. And yet this result, which would seem far from anomalous, rather directly threatens another animating ideal of our First Amendment jurisprudence: that what is called for is always "more speech, not enforced silence"⁵³—as much a core value of the First Amendment as neutrality. To the extent that the standard doctrine leads in a case like *Bible Believers* to a result as clearly contrary to a principle as firmly established as this suggests that there is, indeed, something at the least problematic, if not thoroughly backwards in the speaker-focused model on which it relies.

C. The Breakdown of One Model and the Search for Another

The speaker-focused model of the heckler's veto thus has its burdens, some of which I have argued strain credulity in a case like *Bible Believers*. Although none of the anomalies noticed in the last section argues decisively against the *coherence*, and hence the rehabilitation, of a speaker-focused model of the heckler's veto, taken together they do nevertheless point to the considerable tensions inherent to its formulation, both internally and with other principles thought basic to First Amendment jurisprudence. The speaker-focused model opens up as many difficulties, in other words, as it helps us put to rest in a case like this, suggesting either the difficulty of the case or, as I suspect, something amiss in the model

⁵³ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

itself. Either way, in the face of difficulties like these, we may well take a case like *Bible Believers* not as a reason to patch up an ailing model, but an invitation to reconsider the approach it represents to the problem altogether: an invitation, that is, to reconsider the basic assumptions not just of the received heckler's veto doctrine but the very way the heckler's veto problem has standardly been framed, focused as it has been on the clash of speakers. And in the following sections I aim to do just that, beginning with a reexamination of another seminal heckler's veto case, *Edwards v. South Carolina*.

III. Defending the Public's Forum: Toward a Forum-Focused Heckler's Veto Doctrine

In order to reconsider the shape of the prevailing approach to the heckler's veto problem—the speaker-focused model—it will be helpful to return to another seminal line of cases presenting the problem in its classic form: the Civil Rights cases, beginning with *Edwards v. South Carolina*. In this section I argue not only that this line of cases points to an importantly different principle underlying the rejection of the heckler's veto—what I call the principle of anti-standardization—but that, by doing so, they also suggest a way of refocusing the heckler's veto problem entirely: away from a clash of *speakers* to an attack on the *public forum* itself. In light of the anti-standardization principle that I argue the Civil Rights cases should be thought to stand for, I conclude that the heckler's veto problem is accordingly better understood within what I will call a forum-focused model, joining the principle of anti-standardization to a new doctrinal rule requiring policing officials to ensure the openness of the forum itself.

A. *Edwards v. South Carolina and the Origins of Anti-Standardization*

The facts underlying the rule of *Edwards v. South Carolina*, like those in *Feiner*, present the heckler's veto in its now classic form. There, like in all other heckler's veto cases before,

but unlike in *Bible Believers*, the speakers were representatives of a clear minority: African-American youths protesting the *de jure* discrimination of a fully segregated South Carolina. And like in *Feiner*, their protest was by all accounts peaceful, with well-dressed young men and women making their way from Zion Baptist Church, in Columbia, to the state house grounds where they walked single-file or two-abreast, with some bearing placards with bold though in no way profane messages (“I am proud to be a Negro,” “Down with segregation”).⁵⁴ They did not obstruct traffic, pedestrian or vehicular, and, despite the crowd of some 200 to 300 onlookers that had gathered to observe their demonstration, nor was there any hint of impending disorder or violence.⁵⁵ Nevertheless, as in *Feiner*, the police, sensing trouble, eventually approached the protestors to warn them that, after fifteen minutes more, they would need to disperse or face arrest. And like *Feiner*, the protestors refused to back down, instead singing and clapping along to such incendiary tunes as “The Star Spangled Banner” and other religious hymns while they continued to march.⁵⁶ Fifteen minutes later, they were indeed arrested, and later convicted in state court, for breach of the peace.

The Supreme Court had little trouble reversing the protestors’ convictions. Yet at the heart of Justice Stewart’s opinion for the Court, joined by all his colleagues save for the southerner Justice Clark, there lay an importantly different synthesis of First Amendment principles. The decisive proposition, according to Justice Stewart, was that the First Amendment could not tolerate government officials “mak[ing] criminal the peaceful expression of unpopular views.”⁵⁷ Just so far he could simply have been rehearsing the now

⁵⁴ *Edwards*, 372 U.S. at 231.

⁵⁵ *Id.* at 231-32.

⁵⁶ *Id.* at 233.

⁵⁷ Under the now standard doctrine of incorporation, Justice Stewart attributed this proposition to the Fourteenth Amendment, as a bar specifically against state officials, but the point applies generally to government officials at whatever level.

familiar rule against government officials disfavoring speakers simply based on *what* they say—the familiar principle, that is, of content or viewpoint neutrality. Yet, leaning on a long quotation from another important case concerning the heckler’s veto, Justice Stewart suggested there was a separate, larger worry moving the Court. As Justice Douglas had written for the court in *Terminiello v. Chicago*, an important “function of free speech under our system of government is to invite dispute,” so that speech may be thought to “best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁵⁸ The protections that Justice Douglas believed a provocative speaker would constitutionally enjoy do rest then, to some degree, on the concern that effecting a heckler’s veto would rob the speaker of her opportunity to express “provocative or challenging” ideas: that the veto would, to this extent, not cohere with a principle of neutrality.⁵⁹

Yet, according to Justice Douglas, the *central* reason why silencing the provocative speaker would be constitutionally problematic was not, as Justice Black had suggested in *Feiner*, because it involved a privileging of one set of clashing speakers over the other. The concern moving Justice Douglas in *Terminiello* seemed instead to turn on a different, equally intolerable counterfactual: had the Court allowed the police to move against a provocative speaker in the forum, it would thereby have permitted “the standardization of ideas either by legislatures, courts, or dominant political or community groups.”⁶⁰ The phrasing here bears some attention. For in formulating the concern in this peculiarly passive way, Justice Douglas invites a certain refocusing of the problem itself, away from what the government would be doing in effecting the heckler’s veto (the *act* of privileging of one speaker over

⁵⁸ *Edwards*, 372 U.S. at 237 (quoting *Terminiello*, 337 U.S. at 4-5).

⁵⁹ *Id.*

⁶⁰ *Id.* (emphasis added).

another) and toward the result flowing from an accomplished veto—the *fact* of the *standardization* of ideas, by government or any other dominant political or social groups.

We can see this most clearly by concentrating on a certain natural limit built into this concern. For it is clear enough that, even if the policing officials were allowed to move against a speaker who had proved too provocative, thus effecting a heckler's veto against her, this would not by itself standardize *her* ideas, or even ideas more broadly: silencing a speaker is not the same as refuting her, after all, and, besides, there are other ways to spread a belief than by standing on soapboxes or marching on the state capitol. But this means that the normative considerations that Justice Douglas was gesturing at on behalf of the *Terminiello* Court would not seem to have any particular concern for the heckled speaker and her message at all: the wrong of the veto no longer seems to turn on the effects, specifically, on any particular set of speakers, but on what effects it bears on public expression itself, the sum total of ideas expressed. The focus of the worry behind the heckler's veto can thus be seen subtly to shift, in other words, away from the effects on who is speaking and what is being said to the effects on the forum itself. On this refocused view, the wrong of the heckler's veto is not that the government effectively sides against an unpopular voice by helping its enemies to stifle it—a paradigmatic violation of the principle of neutrality, unmentioned in *Edwards* or *Terminiello*—but that, by siding with whichever side has enough muscle to threaten a brawl, the government would be shutting out of the one place where ideas should flow most freely those ideas that most need public airing. Thus understood, the impermissibility of the heckler's veto concerns not the government's privileging of one voice over another, but its ceding a space traditionally open to all comers to only the most dominant voices—its failure to defend the public's forum.

B. Anti-Standardization and the Heckler's Veto Problem: Focusing on the Forum

The principle that we could therefore take Justice Douglas to have enunciated in *Terminiello*, the same that Justice Stewart saw fit to repeat in *Edwards*, is what I will call the principle of *anti-standardization*: that the government may not permit dominant groups to standardize the ideas expressed within the fora it has opened to the public.⁶¹ And as just noticed, perhaps the most important fact about this principle for the purposes of solving the heckler's veto problem is not what it allows or disallows, but what it finds as its focus—the forum itself. The impermissibility that the anti-standardization principle thus recognizes in the heckler's veto also helps us to reshape our more general approach to solving the heckler's veto problem: it gives us, in other words, a new way of focusing our eventual model.

But what, more precisely, does it mean to say that a principle like anti-standardization invites a refocusing in the way we approach something as doctrinally concrete as the heckler's veto? What, in other words, is the relation between the anti-standardization principle on the one hand, and what I have been calling its shift in focus, on the other, away from the speaker and towards the forum? It is clear that, whatever the exact nature of this relation, it is certainly not logical: a principle like anti-standardization does not *entail* what I have called a focus, or the other way around, in the way that one premise or collection of premises syllogistically entails a conclusion. The relation is instead more approximate and intuitive than rigidly deductive, but for all that, no less determinate. A more natural analogy would be the case of grammatical voice: the choice between an active or passive wording of the same thought (“John loves Alice” versus “Alice is loved by John”)

⁶¹ What counts as a forum open to the public for the purposes of this approach can be thought of as the same fora deemed to be public within the meaning of the public forum doctrine, contestable though the nature and boundaries of that notion and doctrine may be. See Robert Post, *Between Governance and Management: the History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1986).

differs not in the logical implications the phrasing draws out but in where it naturally directs and places our attention, how it shifts our focus. In much the same way I suggested in the last section that the choice of principle—between anti-standardization and neutrality—serves to refocus our concern, away from the speaker and toward the forum. We will return to consider this point in more detail in Part IV.

For now, though, another way of indicating the particular relation I envision here is by way of contrast, with a rival principle and its consequent focus. As Jed Rubenfeld has argued, one might think that the principle lying behind and informing our commitment to the freedom of speech is what he calls the anti-orthodoxy principle,⁶² a principle he believes to have been most famously stated by Justice Robert Jackson:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁶³

Now, the normative gist of this principle as Rubenfeld understands it—that officials must not prescribe some opinion by proscribing others—is the intuition that people generally have the “right to their opinion,” so that any punishment for having or expressing those opinions must therefore be presumptively suspect.⁶⁴ Although this principle may seem unhelpfully broad in explaining the sharply narrower reach of First Amendment principles, as Rubenfeld acknowledges,⁶⁵ the important point for our purposes is what that principle leads Rubenfeld to focus on: the individual speaker and her opinions. Thus one of the central conceptual preoccupations for Rubenfeld’s account, only naturally given this focus, lies in clarifying the outer limits of the domain of speech and speakers to which it applies—

⁶² Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 818 (2001).

⁶³ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁶⁴ Rubenfeld, *supra* note 62.

⁶⁵ *Id.*

whether or not, say, the government can make orthodox certain truths (as in his pleonastic example of “true facts”).⁶⁶ But this is all only to point out that his principle naturally leads to a certain concentration of doctrinal attention, on the effects that governmental acts may have on the expression of an individual speaker’s opinions. The normative considerations behind anti-orthodoxy (a right to an opinion) thus give rise to a certain normative focus (the effects on the individual speaker and message). And applying this principle to the problem of the heckler’s veto, it would thus seem only natural, given its focus, to find the veto’s impermissibility to lie centrally in the effect it undeniably has on the silenced speaker: the violation of her right to the expression of her opinion.

In sharp contrast to this picture is the one drawn by a principle like anti-standardization: rather than centering its normative concern on an intuitive right to an individual opinion, this principle instead turns to consider the effects for public expression more generally—as we have seen, the standardization of ideas within public spaces by overbearing social forces. And as I suggested in the last section, where this principle leads us to center our normative attention is not on any one speaker or her message but, instead, on the forum itself. Intuitively, then, we might say that the normative gist of anti-standardization is the right to the *room* for expressing oneself, a right to expressive space.

C. Defending the Public’s Forum: A New Heckler’s Veto Doctrine

Assuming, then, the distinctness of a forum-focused approach to the heckler’s veto problem, what is its doctrinal solution? How, in other words, would a focus on the forum help us resolve what had so puzzled Kalven, that of providing instructions, in the formulation of a clear constitutional rule, to police faced with the threat of disorder on one

⁶⁶ *Id.*

side and, on the other, a speaker willing to brave violence just to have her provocative say? The solution that I believe coheres best with this forum-focused approach,⁶⁷ and fits with other constitutional principles thought to govern speech both in public fora and more generally, is a simple doctrinal rule: that the police must move to preserve the openness of the forum to as many speakers of as many viewpoints as possible. They are required, in a word, to defend the forum first.

What this doctrinal rule would require, more practically, is *space*: specifically, enforced buffers between the clashing sides for as long as they can be maintained. In keeping with the strictness of the scrutiny applied to restrictions in a public forum,⁶⁸ the police must make every effort not to silence any speaker—which, aside from impermissibly effecting a heckler’s veto, would risk the very standardization of views there that the forum-focused model centrally rejects. Instead, their principal obligation would be to keep the sides *separate* within the forum, even if this means forcing parties to separate and remain so, and moving only to shut down those whose conduct passes from expressive to actual violence. Only at the outbreak of considerable violence—violence that the police could no longer reasonably suppress—could they constitutionally move against any speaker, by temporarily closing the forum to all persons in it until order can be restored. Moreover, insofar as what justifies the operation of this rule is not any interest in suppressing the hostile reaction to a speaker but

⁶⁷ Although I believe that a similar synergy emerges between doctrinal rule and its principled focus as between the principle and focus, I do not mean to suggest that the defend-the-forum rule I advance here is the sole doctrinal solution compatible with anti-standardization or its focus on the forum. I address this point in more detail in Part IV.

⁶⁸ Arguably, as a regulation only of the manner in the way the forum itself operates, this rule would only need to satisfy a lesser form of scrutiny. Indeed, the consensus among lower courts is that restrictions much more oppressive than what I contemplate here would qualify as time, place, and manner regulations, needing only to meet intermediate scrutiny. See, e.g., *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004) (holding that a “holding pen” established in advance of the 2004 Democratic National Convention was a neutral regulation needing only to have met intermediate scrutiny); see generally Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. (2006) (discussing critically the generally intermediate standard of review applied by lower courts to free-speech zone restrictions in public fora). For the sake of the analysis here, however, I have assumed it must meet strict scrutiny, which I believe it would, for the reasons I outline above.

in preserving the openness of the forum, there would be no question of whether this restriction would face a separate challenge as a kind of content- or viewpoint-discriminatory regulation. As the anti-standardization principle makes clear, the justification for the regulation runs not to the speakers but to the forum itself.

Aside from its consistency with the basic principle behind many of the most important heckler's veto cases,⁶⁹ this forum-focused doctrine has several other important virtues. First, a defend-the-forum rule deliberately mirrors the standard doctrine in its clarity and simplicity: it provides relatively plain instructions to policing officials (create a buffer, only move against speakers if violence gets out of hand and then only to disperse all the crowds until order is restored), instructions which are by and large followed even now by major police forces.⁷⁰ Moreover there is an ease in administrability and, arguably, a neutrality to this rule absent from the standard doctrine, as witnessed already in the several anomalies afflicting that doctrine's application to *Bible Believers*. There is no need for the police to decide which side represents the heckler and which side the bona fide speaker in order to apply the defend-the-forum rule, and so no need for them, quite counterintuitively, to pierce the veil of neutrality in order to defend the speech within the forum. And, finally, the forum-focused doctrine gets right what the standard doctrine seemed to get wrong in *Bible Believers*: unlike the standard doctrine, the forum-focused doctrine there would not have called for a virtually unlimited subsidy to protect disruptive speakers (assuming, of course, the accuracy of that label at all) at the cost of silencing an already vulnerable, clearly little

⁶⁹ It is worth noting that, although under a forum-focused approach the principle of anti-standardization occupies a central justificatory position, it nevertheless does not occupy it to the exclusion of other principles. So the doctrinal conclusion of that model—the defend-the-forum rule—need not be taken to exclude other restrictions on the types of sanctions imposable on speakers in a public forum: it is, for example, entirely consistent with the rule suggested by the Court in *Brown v. Louisiana*, that a provocative speaker eliciting a hostile reaction cannot be charged for the resulting breach of the peace. *Brown*, *supra* note 32, at 134 n.1.

⁷⁰ See, e.g., District of Columbia Metropolitan Police Department, *Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations* at 10-13.

heard voice in American life. Although the forum-focused doctrine may have sanctioned the ultimate result in *Bible Believers*—for, as the majority there noted, the police essentially did *nothing* to keep the parties separate, that is, to defend the forum itself—the doctrine would have led to a markedly different rule for future encounters—a rule that would have let Arab-Americans enjoy their expressive rights unafraid of a roving band of bigots bolstered by police wielding batons.

IV. The Fables of Free Speech

But take a step back from the doctrine, and another thought, not quite an objection but more than a worry, emerges. We have already seen that what I have called the forum-focused model and its accompanying defend-the-forum rule conflicts with the standard, speaker-focused model and its defend-the-speaker rule—a doctrine that can be called standard only because it is, in fact, an easy approach to a stubbornly pervasive problem, particularly with the call to protest now on so many lips. To accept the use of one model we had to reject the application of another. But isn't this—the thought goes—just to throw another irreconcilable doctrine onto the pile of already “flagrantly proliferating and contradictory rules” that define our First Amendment jurisprudence?⁷¹ More, isn't the anti-standardization principle that I have claimed may be found within our tradition of free-speech theorizing only adding another theoretical curiosity to our already “profoundly chaotic collection of methods and theories?”⁷² How does one square this budding theory, this novel model, with all those others that have messily vied for supremacy across the last century of free-speech jurisprudence? Just how, in short, does all of this messy talk of

⁷¹ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000).

⁷² *Id.*

misfocused models and new doctrinal rules relate to the “simple and absolute words of the First Amendment float[ing] atop [this] tumultuous doctrinal sea”⁷³

Robert Post has already proposed a handy shorthand for this problem—that of “reconciling theory and doctrine in First Amendment jurisprudence.”⁷⁴ And in the pages remaining I want to explain why I think this problem is, quite simply, a mistake—one of the pseudo-problems that Langdell would have thought worthy of worrying about in the name of his legal science. This is not to say that Post has not identified a real point of concern; quite the contrary, he puts his finger on exactly where so much constitutional theorizing has gotten and still gets pointlessly tangled up, lost in perplexities that do not so much need to be resolved as gotten over. But like many constitutional commentators, Post seems to see this problem as one *of our law*—the problem of smoothing out the confusing wrinkles that spread across the case law “when the requirements of theory make little sense in the actual circumstances of concrete cases, or when doctrine is required to articulate the implications of inconsistent theories.”⁷⁵ But this is a problem having less to do with our untidy law than the way we are still tempted to think of that untidiness—our apparently unkickable habit of thinking that law must or should strive after a kind of conceptual unity. That unity is as unattainable as was Langdell’s legal science. And so the true problem of theory must lie elsewhere than in a vain struggle after the unattainable, or in drawing as near to it as we can. Quite the opposite, in fact. The real difficulty is learning to kick the old Langdellian habit of thinking we should do either, by coming to grips with the way theory and doctrine work together to rid us of government action that many of us will agree is constitutionally intolerable. The problem is reconciling *ourselves* to the way our law really works.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2356.

A. Theory and Doctrine in First Amendment Jurisprudence

How, then, *does* our law work? The easiest way to answer this is by first seeing where, in Post’s eyes, things get so problematically messy. The heckler’s veto is a straightforward example. On the one hand we have the standard, speaker-focused doctrine, consisting of the familiar principle of neutrality and the defend-the-speaker rule we saw the Sixth Circuit uphold in *Bible Believers*. But above and beyond this standard doctrinal model for the problem, there are also a number of ways of *theorizing* that model. One such way was famously urged by Justice Holmes, dissenting in *Abrams v. United States*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition in the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁷⁶

As Post explains, Holmes had thus “explicitly oriented his theory of the First Amendment toward the value of truth, which he linked to the concept of ‘experiment.’”⁷⁷ As a result, his theory—now commonly known as the “marketplace of ideas” theory—is “addressed to the abstract requirements of freedom of thought,”⁷⁸ and as such is indexed to speech tending to lead to discovery of *truth*. Thus, under this theory, the First Amendment would naturally be thought to embody a kind of “‘truth-seeking’ function,” “extend[ing] the shelter of constitutional protection to speech so that we can better understand the world in which we

⁷⁶ 250 U.S. 616, 630 (1919).

⁷⁷ Post, *supra* note 71, at 2360.

⁷⁸ *Id.*

live.”⁷⁹ By focusing on *true* ideas and the speech that communicates them, Holmes had offered a powerful way of unifying much of what we still think lies at the heart of the First Amendment’s concerns.

It is also easy to see why, if one supposes this theory to be the test of our constitutional freedom of speech, the standard model for the heckler’s veto doctrine would make a good deal of sense. One of the cardinal principles of a free marketplace, at least in the *laissez-faire* sense familiar to Holmes, is *neutrality*. And thus it follows that a central principle of free-speech jurisprudence under this theory would be what I have called the principle of neutrality, forbidding the government from selectively restricting some ideas or speakers over others based on what they say. But to allow hecklers their veto—to allow officials to abet the suppression of unpopular speakers, who are, of course, only unpopular because of the unpopularity of the ideas they are expressing—would effectively invite governmental intrusion into the functioning of the free market of ideas. The law would arrive on the scene to silence ideas whose very truth may be the reason for the trouble they stir up—a clear affront not just to neutrality but to our corresponding sense of a *free* marketplace. Thus we can say that the heckler’s veto doctrine is just another way of “implement[ing] the objectives attributed by [the marketplace] theory to the Constitution” while also “offer[ing] principled grounds of justification for particular decisions,” as in *Bible Believers*.⁸⁰

But this is hardly the only theory on offer in the literature or occasionally endorsed by the courts. A different family of theories focuses instead on the practices basic to self-government—now known as democratic self-government theories.⁸¹ As the Supreme Court

⁷⁹ *Id.* at 2363.

⁸⁰ *Id.* at 2355-56.

⁸¹ *See id.* at 2366-69.

has put the leading idea, the “[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”⁸² Thus, the specific constitutional guarantee of free speech, because of its centrality for “the maintenance of democratic institutions,” must be read to embrace any practice implicating “the liberty to discuss publicly and truthfully all matters of public concern.”⁸³ Only naturally the accent of these theories falls heavily on the two words Post also emphasizes: the *practices* that inform *public* discussion. Understood this way, the core concern of the First Amendment is thus to shield from governmental interference all those expressive practices specifically “pertinent to self-determination,” to the shaping of public discourse.⁸⁴

What makes a practice “pertinent” to self-government is the point at which this family of theories splinters. Some theories, like Alexander Meiklejohn’s, focus on the “communitive processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way:”⁸⁵ the processes that lead to “the voting of wise decisions.”⁸⁶ Other theories, like Post’s participatory approach, instead emphasize “the communicative processes relevant to the formation of democratic public opinion.”⁸⁷ In other contexts, as Post has argued, these two theories often differ. But as to the heckler’s veto, they arrive at the same conclusion. The problem of the veto, these theories would say, is that it traduces the principle of free discussion, either by blocking the ordinary avenues of democratic discussion (the speaker shouted down at the town meeting), or by violating the right of the minority speaker to participate in the formation of what one

⁸² *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

⁸³ *Id.* at 96, 101.

⁸⁴ Post, *supra* note 71, at 2367.

⁸⁵ *Id.*

⁸⁶ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1965).

⁸⁷ Post, *supra* note 71, at 2368.

day might become a new democratic consensus (Feiner's case). Whichever way one understands it, under a democratic self-government theory the solution to the puzzle of the heckler's veto would involve the call to defend the freedom of discussion by focusing on the right of the unpopular speaker to have her say—which is, of course, just the standard model of the problem, leading to the standard defend-the-speaker rule.

There have of course been other theories put forward by other scholars, some just as powerful and persuasive as these.⁸⁸ But as so far as I can tell, none would lead naturally or obviously to the doctrinal model I have proposed in this chapter. None, that is, would point to the effective closure of the public's forum as the focal concern of the heckler's veto problem. Nor, consequently, have any proposed the anti-standardization principle and defend-the-forum rule as the solution for what nearly all of us would take to be the constitutionally intolerable possibility of a heckler's veto.

But—to return to our original concern—what does all of this mean for First Amendment theory and its relation to doctrine? If one believes, as I do, that the standard model and the many theories explaining it cannot satisfyingly solve the problem of the heckler's veto, does that discovery show that those theories are in some sense *false*? And do we therefore need a *new* theory to explain the model I have argued for here, centered by the anti-standardization principle, perhaps another grand theory of free speech that can then be added to our familiar list of other First Amendment theories, and then put into the kind of formal arrangement that Post envisions?⁸⁹ Not at all, on both fronts. What I want to propose is that *all* of these theories are not just true and useful in their own ways, as Post

⁸⁸ See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999) (advocating a theory of the First Amendment focused on dissent).

⁸⁹ The formal arrangement Post has in mind is a lexical ordering, such that in cases where theories and doctrinal implications come into conflict, as they do in the case of the heckler's veto, one theory is to be given preference over another ("where theories A, B, C come into conflict, prefer A to B, and B to C"). See Post, *supra* note 71, at 2373.

clearly sees.⁹⁰ I also want to suggest that these theories are all *equally* basic to our understanding of the First Amendment’s guarantee of the freedom of speech, just as they are. To think otherwise—to believe that our theories should instead gather along the tidy lines of a lexical ordering or, worse, along the lines of some grand theory of free speech—is I believe simply to misunderstand what these theories can and should do for our doctrines. To see why this is so, however, we will first need to put the relation between constitutional theory and doctrine in a new conceptual light. And to do that we will need turn to, of all things, a fable.

B. Free-Speech Fables and Democratic Parables

Consider the story-in-miniature told by one of the great luminaries of the German Enlightenment, Gotthold Ephraim Lessing:

A marten eats the grouse;
A fox throttles the marten; the tooth of the wolf, the fox.⁹¹

There is also a moral to this tiny tale, as Lessing tells it: “The weaker are always the prey to the stronger.”⁹² The truth of this questionable lesson is, for our purposes, immaterial. The relevant question is instead structural: what is the relation between the story and the lesson, the fable and its moral? Analytically, on one side we have before us the vivid scenery of a picture, the particulars depicted by the story: the concrete facts of martens darting after plump grouses, of martens being hunted down by sleek foxes, and of foxes being snatched

⁹⁰ See *id.* at 2374.

⁹¹ In fact, the fable is borrowed from von Hagedorn. Nancy Cartwright, *Fables and Models*, 65 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 55, 59, 59 n.8 (1991). As will become clear, in this discussion I am closely following Cartwright’s exposition of this point and her theory of scientific models more generally.

⁹² *Id.* at 57.

up in the jaws of the wolf. On the other side is not a living scene but a string of abstractions—the weaker, the stronger, the relation of being-prey-to. So our question could be reformulated to ask: how do the lush facts of the fable relate to all the aloof abstractions of its moral? How do the particulars connect to the general?

For Lessing the answer has two dimensions, one ontological and the other epistemological: “The general exists only in the particular and can only become graphic [*anschauend*] in the particular.”⁹³ Only the first of these, the ontological, matters for us here: the abstraction, Lessing says, *exists through* the concrete story, and *only* there. But what does *that* mean? Consider another example, offered by the philosopher Nancy Cartwright:

What did I do this morning? I worked. More specifically, I washed the dishes, then I wrote a grant proposal, and just before lunch I negotiated with the dean for a new position in our department. A well-known philosophical joke makes clear what is at stake: ‘Yes, but when did you work?’ It is true that I worked; but it is not true that I did four things in the morning rather than three. ‘Working’ is a more abstract description of the same activities I have already described when I say that I washed dishes, wrote a proposal, and bargained with the dean.⁹⁴

Working is not something that you do alongside the dishes or preparing a grant proposal; it is instead a more general way of characterizing those things that you *did* do, an abstract way of capturing of all those concrete details that actually filled your morning hours.⁹⁵ Nor is the case that what you did while working bears some kind of resemblance to something called ‘work’. As Lessing says of his fable:

What similarity here does the grouse have with the weakest, the marten with the weak, and so forth? Similarity! Does the fox merely *resemble* the strong and the wolf the strongest or *is* the former the strong, the latter the strongest. He *is* it.⁹⁶

⁹³ *Id.* at 59.

⁹⁴ *Id.* at 60.

⁹⁵ Note that the relation here is not the same as between genus and species. There is no conjunction of genus and differentiae that would make what Cartwright did that morning, work, rather than, say, the relief from it—as washing dishes after negotiating with a surly dean could well have become. *See id.* at 61.

⁹⁶ *Id.* at 59-60.

Cartwright, again quoting Lessing, helpfully recasts the point:

The relationship between the moral and the fable is that of general to the more specific, and it is ‘a kind of misusage of the words to say that the special has a similarity with the general, the individual with its type, the type with its kind.’ Each particular is a case of the general under which it falls.⁹⁷

Fables are not *like* their morals in some metaphysically mysterious sense of likeness, nor are the morals concealed somehow within their fables, as if the fable were just one of those optical illusions that squinting hard enough at will unlock for its hidden picture.⁹⁸ Instead, the fable *fits out* [*einkleiden*] the moral of the story, much as you fit yourself out with a wardrobe when starting a new job.⁹⁹ There is no property of weakness disguised in the fluttering grouse or the flailing marten; nor is ‘strength’ somehow there alongside the slash of the fox’s paw, or the chomp of the wolf’s bite. The abstractions of the moral—the weakness and strength, the preying-upon—just *are* there, concretely, in the characters of the fable, and those particulars are our way of understanding those abstractions.¹⁰⁰

Just the same is true, Cartwright claims, of the relationship between abstract and concrete terms generally—as in her special case of physical theory. Fables, after all, show us how to “transform the abstract into the concrete.”¹⁰¹ But that transformation does not imply identification. And Cartwright is clear that by saying that generals exist through particulars she is not claiming that they are reducible to each other. Saying that you were working this morning when you were washing the dishes adds something that simply saying you were washing the dishes fails to convey. That is because ‘work’ brings with it its own living tissue of abstract relations—invoking with it concepts like ‘value’ and ‘leisure’ and

⁹⁷ *Id.* at 60.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ For an account of how this insight—the epistemological side of Lessing’s point—figures in scientific thinking, *see* RONALD GIERE, *SCIENCE WITHOUT LAWS* 84-118 (1999).

¹⁰¹ Cartwright, *supra* note 91, at 57.

even ‘dignity’¹⁰²—that do not follow from nor need they bear on the act of dunking plates into sudsy water. We can understand what is happening in the fable before mentioning its moral, just as we can understand what it means to soap the glasses before learning that it was also work. And yet, as the example of the fable shows, the abstract moral nevertheless exists for us only through the concreteness of the story, by being fitted out by the particulars of the fables we tell.

Lessing’s lesson for constitutional theory is, I believe, as immediate and direct as Cartwright believes it is for scientific theories.¹⁰³ What is true of our fables, I want to suggest, is also true of our law. Constitutional law just *is* a collection of many fables—or, as I have called them here, a collection of *models* that we use to fit out the “simple and absolute words” of our Constitution.¹⁰⁴ To see the truth of this claim we need look no farther than the standard model of the heckler’s veto problem and where it got its start: in the story that I told at the beginning of this chapter, of *Feiner’s* confrontation with the surly Syracuse mob. That story just *is* our way of fitting out the principle that courts have ever since taken it to stand for—its moral of neutrality. It is our fable for the heckler’s veto, complete with a focus on what I have called the clash of speakers, usually a political minority pitted against a menacing majority, against whom the police move to keep the peace. In case after case since, from the infamous Civil Rights cases down to *Bible Believers*, we can therefore see the courts as dutifully fitting out the scenes depicted in the pleadings before them with the same roles of the same drama that unfolded on the streets of Syracuse half a century ago—of the

¹⁰² This is of course why employment law scholars can rightly claim to *discover* that much of what women traditionally did at home was *uncompensated work*—a thought that may not occur to somebody who does not regard a mother’s washing dishes as *working*.

¹⁰³ See Cartwright, *supra* note 91, at 62-68; see also Nancy Cartwright, *Models: Parables v Fables*, in BEYOND MIMESIS AND CONVENTION 19 (2010).

¹⁰⁴ Post, *supra* note 71, at 2355.

law arriving on the scene only to silence the already unpopular, of the fabled weak being conquered by the stronger.

The way this works in detail—the way we cash out what might feel more like a metaphor than an analysis—I want to suggest is also quite close to the way Cartwright sees physical laws coming to be fitted out with models.¹⁰⁵ As Cartwright explains, in the context of Newton’s second law of motion:

Once we know how to pick the characters, we can construct a fable to ‘fit out’ Newton’s [second] law by leaving them alone to play out the behavior dictated by their characters: that is what I called . . . a model for a law of physics. For Lessing’s moral, he picked the grouse and the marten. Now we can look to see if the grouse is prey to the marten. Similarly, we have the small mass m located a distance r from the larger mass M . Now we can look to see if the small mass moves with an acceleration GM/r^2 (since $GM/r^2=F/m$). If it does, we have a model for Newton’s law.¹⁰⁶

Many of the same features, I believe, can be found in our First Amendment doctrine. Take, once again, the heckler’s veto. On the one hand we have a principle like that of neutrality, structurally not unlike the physical principle articulated by the universal law of gravitation ($F=mGM/r^2$), telling us both what characters and relations to look for—speakers riling up a crowd with her words, police stepping in to silence her—and what *normatively* to think of those relations.¹⁰⁷ The fable, on the other hand, makes those characters and relations concrete; the story brings the abstract moral or principle to life, in a visible clash of voices in which the government is seen to be picking sides. Thus the story of Feiner on his soapbox fits out the principle of neutrality—building what I have called a *model* of that principle—much as a two-body system fits out or models the physical interactions revealed by Newton’s universal law of gravitation, or as the swing of the simple pendulum fits out the

¹⁰⁵ See generally Cartwright, *supra* note 103.

¹⁰⁶ Cartwright, *supra* note 91, at 63.

¹⁰⁷ On this latter point the doctrinal and the physical models diverge: a physical model tells us what is *true* in the model, while the doctrinal tells what *ought* to be true. I discuss this difference in Chapter 3, in terms of direction of fit.

harmonic oscillator governed by its own force function ($F = -kx$). The laws of physics come to life in the particulars of these models,¹⁰⁸ just as our First Amendment principles gather concreteness in the telling of stories like Feiner's. Those stories—our free-speech fables—transform the generality of a principle like neutrality into the memorable particulars of a plot.

These fables have more than just an illustrative or pedagogic point. They are also our way of applying and extending the morals we tell with those fables; they are our tools for devising rules out of the principles we take our doctrine to stand for and for reapplying those principles to future cases.¹⁰⁹ In the case of physical theory, once we have gotten the hang of how to fit out a law we can begin to draw up hypotheses about how that still-idealized system will work in detail.¹¹⁰ It is only a short step from seeing that a moon swirling around a planet fits out the law of gravitation to making specific claims about the interactions and properties of those bodies—as in Cartwright's example, what the moon's acceleration must be (GM/r^2). Constitutional doctrine, once again, works much the same way. As we already saw in the case of the heckler's veto, once we have a principle like neutrality or anti-standardization in hand we have an indication of what doctrinal *rule* would make sense. The relation here is not quite like that in the physical model: there is no deducing a doctrinal rule from a principle as those in the exact sciences can deduce hypotheses from their mathematized models.¹¹¹ But that is not to say that doctrinal principles impose *no* limits: neutrality would not tolerate a rule saying heckled protestors

¹⁰⁸ See *id.* at 62-63.

¹⁰⁹ The account I give here is only of *principled* constitutional decision-making, where, as Post puts it, the decision-makers strive to implement constitutional objectives. I do not mean to suggest that all constitutional decisions need be or are this principled. Indeed, Post's story of the evolution of Holmes' First Amendment jurisprudence from *Schenck* to *Abrams* suggests just the opposite. See Post, *supra* note 71, at 2361-63. But I believe the same story as I tell above can be retold for the fitting out of a doctrinal rule with a model or, alternatively, for the coining of a rule as the lesson of a parable. The choice is ours, after all, as to how high we climb up the ladder of abstraction, just as the choice is always ours as to which ladders we choose to climb. See Cartwright, *supra* note 103, at 21-22.

¹¹⁰ See Ronald Giere, *How Models are Used to Represent Reality*, 71 PHIL. SCI. 742, 744 (2004).

¹¹¹ See Cartwright, *supra* note 103, at 22.

sympathetic to the current administration should be defended and others not, just as anti-standardization would not brook the closing of the public streets to all but those boosting the police. Doctrinal rules may not proceed from an argument by *modus ponens*, but they do proceed from *some* argument.¹¹²

These models, our fables, do more than just fit out doctrinal rules. They also guide our application of those rules to new cases. Once we have learned to focus our attention on the right relations and characters indicated by a moral, there is no strict boundary to the uses we can make of that moral or a well-fitted fable. A story of wolves and martens can become one about big-box stores stealing customers from the mom-and-pop shops, just as Feiner's story can speak to the case of an unpopular professor shouted down from her podium. We thus fit and refit our free-speech fables from case to case, from one fact pattern to the next. And thus the courts have applied the standard model of the heckler's veto to cases that look much like Feiner's, and even occasionally to cases that do not, as the majority in *Bible Believers* showed.

So far I have spoken only of doctrine, but where does First Amendment *theory* fit in with all of this? For that we will have to turn our attention away from the models fitting out our doctrines to the *source* of their principles. And that means we must also leave behind fables like Lessing's and look instead to another literary device: the parable. Consider again how Justice Holmes introduced the theory of free speech practically synonymous with his name: not by rattling off a constitutional principle like neutrality, nor by invoking any clearly theoretical apparatus—none of the usual *-isms*. He instead tells a story of a kind—an intellectual autobiography in brief doubling, he says, as a theory of our Constitution.¹¹³ That

¹¹² There are also discernible strengths and weaknesses of such arguments, even if not strictly logical in nature. See Scott Brewer, *Relevancy*, EVIDENCE 1, 44-49 (2017).

¹¹³ 250 U.S. 616, 630 (1919).

story, as Post rightly sees, is what led jurists like Holmes and thinkers like William James to embrace the epistemology (and, arguably, the semantics)¹¹⁴ now associated with American pragmatism.¹¹⁵ And, indeed, the metaphor of the marketplace clearly resonates with the pragmatic theory of truth defended by a classical pragmatist like James or a neo-pragmatist like Rorty.¹¹⁶

But it is all too easy to lose sight of the fact that what Holmes recounts in *Abrams* is primarily, indeed originally, a story—the story of what Americans like Holmes came to believe after limping home from the battlefields of Antietam and Ball’s Bluff, and what many other Americans later came to feel after losing a generation of doughboys to the trenches in France. That story eventually came to be fitted out with many lessons—pragmatism in philosophy, the neutrality principle in First Amendment jurisprudence. But the important point is that, as it stands, what Holmes tells in *Abrams* is simply that—a story drawn from our democratic history, but lacking a clear lesson. This is what Cartwright, again thinking of scientific models, has likened to a parable,¹¹⁷ a story like that of the prodigal son¹¹⁸ or of the workers in the vineyard.¹¹⁹ They are stories much like fables, but told without their morals written in; stories whose lessons are uncertain, if not, like Plato’s parable of the cave, tantalizingly opaque. In the exact sciences, according to Cartwright, these parables frequently appear in the form of “unrealistic” models: models like Galileo’s thought experiment, depicting balls rolling down impossibly frictionless surfaces.¹²⁰ The relevant lesson is simply that in the case of parables, unlike fables, “the prescription for drawing the

¹¹⁴ See ROBERT BRANDOM, PERSPECTIVES ON PRAGMATISM 35-55 (2011)

¹¹⁵ See generally LOUIS MENAND, THE METAPHYSICAL CLUB (2001); BRANDOM, *supra* note 114, at 43-45.

¹¹⁶ See Post, *supra* note 71, at 2360.

¹¹⁷ Cartwright, *supra* note 103, at 29-30.

¹¹⁸ Luke 15: 11-32.

¹¹⁹ Matthew 20: 1-16.

¹²⁰ Cartwright, *supra* note 103, at 19-20.

right lessons come from elsewhere” than the story itself.¹²¹ We must look beyond the story, ideally to “a good set of well-understood more abstract concepts,” to figure out how to climb the ladder of abstraction from the story to its truth.¹²²

What I want to suggest is that a story like Holmes’s, his First Amendment theory, just *is* one of the parables from which we draw our doctrinal morals. We take from Holmes the parable of a marketplace where fighting faiths trade freely, and climb from that to the moral of neutrality under the First Amendment. And the way we do that—the way we tease a specifically First Amendment moral out of a broadly democratic story—is by looking to the “more abstract concepts” that we have set before us by the Constitution itself: that “Congress shall make no law . . . abridging the freedom of speech.” The abstract relations and characters found in those words frame the pattern of a more particular First Amendment principle: they focus our attention, broadly, on what government may or may not do in relation to the many forms of expression fitting out our understanding of speech. Thus, proceeding along the lines laid down by those words, the principle of neutrality mandates that the government shall not curtail speech simply for what it says. The parable, viewed in light of the “simple, absolute words” of the First Amendment, thus yields a principle for shaping our free-speech doctrine, by being fitted out with as many fables—as many doctrinal models—as arising circumstances demand. And this is true, moreover, of all our First Amendment theories: as true of Meiklejohn’s parable of the citizens wisely voting their agendas at the town-hall as it is of Post’s parable of the citizen just trying to have a say in the future of her country. We set up the ladders of abstraction in light of the First Amendment, in the hopes of climbing from these democratic parables to the practicable principles that frame our doctrine.

¹²¹ *Id.* at 29.

¹²² *Id.*

What I have claimed, then, is that the relation between theory and doctrine in the First Amendment just is this telling of stories and drawing of morals in Lessing's sense, or—what is the same—of discovering principles to be fitted out with models in Cartwright's sense. At the surface level—the level of doctrine—we proceed by fitting out our free-speech principles, like that of neutrality or anti-standardization, with fables like Feiner's, and drawing from that conjunction particular rules of decision for judges to enforce and Justices to refine from time to time. But the principles themselves are not simply written into the words of the First Amendment; the Justices and lawyers who thought up the regime of neutrality did not read it out of a catalogue of constitutional concepts. They discovered it. And where they found the inspiration for that discovery was exactly where Holmes taught us to look: in the stories of our country's democratic experience, in our unfinished book of democratic parables.

C. Some Morals about Models

There are some further lessons that we can draw from this way of conceptualizing the relation between theory and doctrine—lessons due not so much to a literary thinker like Lessing but to a philosopher like Cartwright. And one of the most important is that there is simply no reason to believe that the fables we tell for the First Amendment will apply *universally*. As Cartwright points out, even a concept like 'work' hardly can be said to apply with total generality: is it really fair to say, as a pre-school teacher once did to her, that a child's work is play? Sometimes, that is, fables do not quite fit; models fail to model. Nowhere is that more obvious than when we try to apply the implications of a fable's moral to an ill-fitted case: if a child's play really is her work, what would a child do with her time off? And that, of course, was also the lesson of *Bible Believers*. Trying to make the principle

of neutrality and the standard model fit the facts of that case led, as we saw, to some very peculiar anomalies— anomalies that, we can now say, were just the consequences of trying to make the moral of neutrality and the usual fables we tell about it fit facts that just will not bear out that lesson or those fables.

Post recognizes this point, though in less stylized terms. But, as we saw, he nevertheless thought it important that First Amendment doctrine also exhibit *some* kind of order—important enough to recommend a formal arrangement of different theories as a way of ensuring smoother passage through those rough doctrinal waters. But there is a final lesson that we can draw from this way of conceptualizing the doctrine-theory relation that, I believe, should lead us to decline Post’s recommendation, indeed to decline seeing doctrine in such terms at all.

That lesson is implicit in the way that Lessing thinks his fable fits the moral it teaches. The first step to appreciating it is by seeing a point that Cartwright has emphasized, that a moral is always true of its fable, but not necessarily much beyond it.¹²³ It is not universally true, in other words, because all too often the fables we tell are pitched at a level of abstraction too unrealistic to fit many other situations terribly well. Translating that point to physics leads Cartwright (and Giere) to deny that scientific laws—themselves a kind of moral on this account—are ever strictly true beyond their models: the force function describing a model pendulum, because pitched a level of unrealistic abstraction, will not accurately predict the motion of a steel ball strung from a chain in the presence of even a weak magnetic field. And this is equally true of First Amendment doctrine. As Post points out, no First Amendment principle or theory extends to *all* cases and contexts.¹²⁴ At some point the doctrinal principle, like the physical law, simply mislead: oftentimes the laws of

¹²³ Cartwright, *supra* note 91, at 66-67.

¹²⁴ Post, *supra* note 71, at 2373-74.

physics lie,¹²⁵ and sometimes the rule leads us to intolerable anomalies, as I have argued the standard model of the heckler's veto did in *Bible Believers*.

But what is it that governs and constrains our sense of when a model does or does not fit? In the case of applying a moral and its fable to a new set of facts (like Lessing's moral as one about corporations putting others out of business), or a familiar scientific model to a new phenomenon (Newton's principle of gravitation to a three-body system), there are plausible cognitive-psychological stories to be told about what makes those models seemingly "fit" or not the concrete facts they seek to depict—stories explaining why, for instance, we believe the plastic-and-metal models displayed in biology classrooms really "fit" the double-helical chemical structure we believe DNA to consist of.¹²⁶ But what is it that constrains the models that we choose to apply in the context of law, and hence what decides the arrangement we should give to doctrines and theories when they inevitably come into conflict?

This question and its answer bring us back to the beginning, in the way I have tried to frame and argue for the anti-standardization model of the heckler's veto problem in this chapter. The heckler's veto, I pointed out, begins as a *problem*. Nearly all of us will agree—and the Court has already said—that allowing a heckler's veto is simply out of the question. But if the account I have told here is correct, we and the Court have somehow sensed what the Constitution requires before we have fitted it out with the models that, I have claimed, tell us what its abstract morals—its simple, absolute phrases and the principles we derive from them—actually say and therefore require. This would seem to create something of a

¹²⁵ See generally NANCY CARTWRIGHT, HOW THE LAWS OF PHYSICS LIE (1983); see also GIERE, *supra* note 100, at 84-96.

¹²⁶ See GIERE, *supra* note 100, at 118-146.

puzzle: how is it possible to sense the limits of our Constitution if these fables and morals, doctrinal models and centering principles, are the measure of constitutionality?

The solution, I believe, lies in an ambiguity we have nearly lost sight of in the last century of constitutional theorizing: the ambiguity of constitutionality itself. As Joseph Fishkin and William Forbath have recently argued,¹²⁷ there in the context of economic regulation under the Constitution, there are in fact two senses of constitutionality recognizable in our tradition: constitutionality in its strict sense, meaning whatever the formal legal document requires (a big-C constitutionality), and constitutionality in a looser, more fluid, broadly cultural sense (a little-C constitutionality), based on shared understanding of what we take to be politically basic in our tradition and institutions. Big-C constitutionality is what preoccupies courts and their clerks, lawyers and their clients: in the terms I have used throughout, constitutionality in the sense of the fables and morals we draw from the language of the Constitution by fashioning doctrinal models. But little-C constitutionality is a distinct current of thinking about law that is also larger than law. At its broadest and most reflective it is a kind of political economy, a theory about what kind of social world our politics ought to make possible and help bring about. It is what guides our selection of the democratic parables we tell, by making them worthy of telling and retelling. In this little-C sense there are obviously many constitutions: as many as there are political economies we can think up. And there is no one constitution that has ever had absolute dominance in American life, because no one that is “truly” *our* constitution.

Without pressing too deeply into this vast subject, all I want to suggest is that when Post says that “the purpose of doctrine is to institutionalize constitutional objectives,”¹²⁸ he is slurring over two senses of *constitutional*. If by that he means that that doctrine implements

¹²⁷ See generally Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B. U. L. REV. 671 (2014).

¹²⁸ Post, *supra* note 71, at 2362.

objectives that are somehow latent in the Constitution, or are ascribed to the formal document by some theory—a book of parables—uniquely a creature of or confined to big-C constitutional discourse, I think he misstates the actual role of what we call theory and its relation to doctrine. If, however, Post means by that only that our doctrine implements the little-C constitutional objectives—our sense of what is intolerable from a broadly political economic point of view—then I think he draws the right lesson on theory but the wrong lesson for the law. For if what I have argued in this chapter is true, that what constrains the use we make of doctrinal models is our sense of what is constitutionally intolerable, then there is no reason to believe that there will ever be any order to our First Amendment theories—no ranking to the democratic parables we rehearse, whatever that would mean. We tell the parables we do because they make constitutional sense, in a little-C sense, of what our Constitution says: they fit out that document’s big, bold, absolute phrases as circumstance and need demands.

The thirst for some unifying order to doctrine is nevertheless as unquenchable in law as it apparently is in physics.¹²⁹ But as Langdell saw, our Constitution is simply not like a tidy conceptual system, nothing like the absolutes he imagined standing behind the common law. Instead, there are problems to be solved, questions to be answered—pressing needs requiring immediate redress.¹³⁰ Only if we let ourselves slip back into our old Langdellian habits—only if we let ourselves be seduced by a vision of yet another absolute—will a lexical or another other formal ordering feel like anything other than the analytical sleight-of-hand, the sort of intellectual parlor trick that Realists like those at Hopkins and a philosopher like Dewey long ago taught us how to see past.

¹²⁹ See CARTWRIGHT, *supra* note 125, at 11.

¹³⁰ See, e.g., *id.* (noting that, in physics, “[w]e construct different models for different purposes, with different equations to describe them”).

And so the challenge of reconciling First Amendment theory with doctrine is not a question of order, whether it be a formal arrangement capturing the way the current Court prioritizes those theories and doctrines or, for that matter, a grand theory setting the Constitution in its best light. The challenge lies instead in reconciling ourselves to the prosaic facts about the way we in fact learn and use those doctrines and theories—to the fact that our constitutional theory sounds as much in fables as it does in physics.

V. Conclusion

That thought brings us back to the very beginning. If what I have argued in this dissertation is correct, then the only way we can achieve the promise of our Constitution is by telling these parables, by drawing up the morals fitted out with the fables, that together make constitutional sense. That, of course, is preeminently the work of lawyers. And as Langdell and the Legal Realists taught us, that is also the task of a reborn science of law: the distinctively modern task of discovering and elaborating and defending the models that will fit out not only our Constitution, but our statutes and common law, in ways that will serve our law by coming to serve something beyond it. This task is an old one—as old as the Western legal tradition itself. And it embodies the hope of countless men and women who for nearly a thousand years have built up our law, sometimes consciously, often quite courageously, along the institutional, cultural, and intellectual lines of a science. It remains for us now to fulfill that hope by making that science a fully modern one. It remains for us, finally, to achieve our law.

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