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Law and Phrenology

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COMMENTARY

LAW AND PHRENOLOGY

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As the intellectual credentials of American law become increasingly dubious, the question arises: how has this discipline been intellectually organized to sustain belief among its academic practitioners? This Commentary explores the nineteenth-century pseudo-science of phrenology as a way of gaining insight into the intellectual organization of American law. Although there are, obviously, significant differences, the parallels are at once striking and edifying. Both phrenology and law emerged as disciplinary knowledges through attempts to cast them in the form of sciences. In both cases, the "sciences" were aesthetically organized around a fundamental ontology of reifications and animisms — "faculties" in the case of phrenology, "doctrines" and "principles" in the case of law. Both disciplines developed into extremely intricate productions of self-referential complexity. In both cases, the disciplinary edifice was maintained by disciplinary thinkers who sought confirming evidence of the truth (and value) of their enterprise and who went to great lengths to avoid disconfirming evidence. Finally, the surface plausibility of both disciplines was maintained through a tacit reliance on folk beliefs (folk-frames and folk-ontologies) that were recast in professionalized jargons. Both the similarities and the differences between phrenology and law lead to a fundamental question: does the discipline of law know anything, and if so, what?

> Let us dismiss prejudice, and calmly listen to evidence and reason; . . . let us inquire, examine, and decide. These, I trust, are the sentiments of the reader; and on the faith of their being so, I shall proceed . . . to state very briefly the principles . . . .[1]

In 1840, phrenology was a confident science, promising clear and certain knowledge concerning the mental attributes and behaviors of human beings. It was a time of exhilarating new possibilities, of discoveries compounding discoveries. There were conferences and symposia. There were professional associations. There were lengthy learned tomes and scholarly journals. The first issue of the *American Phrenological Journal* had just appeared in October of 1838.[2] And when George Combe, the renowned phrenologist, came to deliver his lectures in New Haven in February and March of 1840, he drew a large crowd. The audience, "for numbers and respectability, [was] such as rarely falls to the lot of a public lecturer in [that] city."[3] It seemed as if the new discipline would go on forever.

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1 . . . of Phrenology itself." GEORGE COMBE, A SYSTEM OF PHRENOLOGY 6 (Boston, March, Capen, Lyon & Webb 1839).

2 *See* 1 AM. PHRENOLOGICAL J. 1 (1838).

3 *Mr. Combe's Lectures at New Haven, Ct.*, 2 AM. PHRENOLOGICAL J. 372, 372 (1840) (quoting NEW HAVEN REC., Mar. 21, 1840).

This discipline of phrenology was devoted to the identification of basic brain functions and their manifestations in cranial features. The basic principles and framework were established by Dr. Franz Joseph Gall.[4] By sifting through an impressive array of empirical data, Gall sought to uncover the fundamental affective, moral, and intellectual faculties of human beings. He believed that the identification of these faculties — everything from "Benevolence" to "Individuality" to "Causality" — enabled the classification of various human types and behaviors, and provided a fundamental explanation of human behavior.

Although Gall was principally interested in establishing a scientific explanation for human behavior, many found his phrenological account immensely useful in predicting human behavior. Gall's discoveries soon found practical applications in such varied contexts as criminology, the treatment of mental illness, moral and intellectual education, and all manner of business.[5] Nelson Sizer, a renowned American phrenologist, even suggested that phrenology could enable a lawyer to "learn to read the dispositions and talents of his jury, or the witnesses in a case."[6] In early nineteenth-century America, phrenology showed considerable promise as a tool for what is now called social engineering. Success seemed near.

But, it was not to be. By most current accounts, phrenology has not fared well. Before we examine the pathways of its decline, however, it behooves us to try to understand what was at stake. This is not to say that we should adopt "the internal perspective." There can be no question here of trying to make the materials of phrenology the best they can be. But something might be learned by trying to understand how the phrenologists went wrong.

I. THE FOUNDATIONS OF PHRENOLOGY

Gall, the acknowledged founder of phrenology, was born on March 9, 1758.[7] He was a handsome man with a pleasant countenance and a broad "noble head."[8] Indeed, the towering forehead seems to have been a characteristic feature of a good number of important phrenologists, including J.C. Spurzheim, George Combe, and Charles Caldwell.[9]

Gall wished to transform the study of brain functions, then called psychology, into a science.[10] Above all, Gall believed that he had to

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[4] *See* COMBE, *supra* note 1, at 44; Edwin Clarke, *Gall, Franz Joseph*, *in* 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 47, 47–48 (David L. Sills ed., 1968).

[5] *See Utility of Phrenology*, 1 AM. PHRENOLOGICAL J. 144, 146 (1839).

[6] NELSON SIZER, FORTY YEARS IN PHRENOLOGY 395 (New York, Fowler & Wells Co. 1888).

[7] *See id.* at 381.

[8] *Id.* at 380–81.

[9] *See id.* at 379–84.

[10] *See* ROBERT M. YOUNG, MIND, BRAIN AND ADAPTATION IN THE NINETEENTH CENTURY 16 (1990).

rescue this nascent field from the conjectures and constructions of metaphysicians and speculative philosophers. As Gall saw it, the philosophers' categories — sensation, attention, comparison, reasoning, desire, and so on — might prove helpful to the philosophical project of understanding the mind, but they were quite useless in explaining differences among species, and among individuals within the human species.[11] Gall believed that a taxonomy of a completely different order was required. He stated:

> We need faculties, the different distribution of which shall determine the different species of animals, and their different proportions of which explain the difference in individuals. All bodies have weight, all have extension, all are impenetrable in a philosophical sense; but all bodies are not gold or copper, such a plant, or such an animal. Of what use to a naturalist the abstract and general notions of weight, extent, impenetrability? By confining ourselves to these abstractions, we should always remain in ignorance of all branches of physics, and natural history.
>
> This is precisely what has happened to the philosophers with their generalities. From the most ancient to the most modern, they have not made a step farther, one than another, in the exact knowledge of the true nature of man, of his inclinations and talents, of the source and motive of his determinations. Hence, there are as many philosophies as pretended philosophers; hence, that vacillation, that uncertainty in our institutions, especially in education and criminal legislation.[12]

Gall thus set out to identify the fundamental faculties through scientific observation of data. He jettisoned the philosophers' speculations and abandoned the proverbial philosopher's armchair in favor of a naturalist methodology. He meticulously examined animal behavior, "family life, schools, the jails and asylums, medical cases, the press, men of genius, and the biographies of great or notorious men."[13]

Gall's empirical investigations were guided by what came to be known as the cerebral localization hypothesis.[14] The key notion underlying this hypothesis was a correlation between function and locale: as Gall saw it, the brain is subdivided into various cortical organs that each serve as the unique locale for certain functions. According to this hypothesis, various parts of the brain are dedicated to certain innate functions — the various moral, affective, and intellectual faculties. Gall supported the cerebral localization hypothesis with analogical arguments: given that nature has created particular apparatus for seeing, hearing, salivating, and so on, "why should she have made an excep-

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[11] *See id.* at 18.

[12] 1 FRANCOIS JOSEPH GALL, ON THE FUNCTIONS OF THE BRAIN AND OF EACH OF ITS PARTS 88–89 (Winslow Lewis, Jr. trans., Boston, Marsh, Capen & Lyon 1835); *see also* 6 *id.* at 246–47 (asserting that Gall was exploring "fundamental qualities" themselves, while others confined themselves to exploring only the attributes common to these qualities).

[13] YOUNG, *supra* note 10, at 19.

[14] *See id.* at 23–24.

tion in the brain? Why should she not have destined this part, so curiously contrived, for particular functions?"[15]

In developing this theory of cerebral localization, Gall was inspired by his repeated observations of an apparent correlation between an individual's particular behavioral tendencies and his cranial features. As a child, and later as a university student, Gall observed that those who learn by heart with great facility have "large prominent eyes."[16] Gall's repeated observation of such correlations between behavior and cranial features gradually solidified into a firm conviction: "I recalled my early observations, and immediately suspected, what I was not long in reducing to certainty, that the difference in the form of heads is occasioned by the difference in the form of the brains."[17] The specific explanation that Gall gave for the correlation was that the prevalence of a particular faculty in an individual was reflected in the size of the organ in the individual's brain which, in turn, was manifested in the size and appearance of that person's cranium.[18] The existence of a particularly developed faculty in an individual (or an animal) would thus correspond to certain cranial prominences.

This conviction provided a scientific basis for testing the existence of Gall's fundamental faculties. Through cranioscopic examination, Gall could test for the presence of a particular propensity or faculty. Indeed, the ability to correlate cranial features to the presence of fundamental attitudes or behaviors allowed for an independent confirmation of the presence (or absence) of an innate faculty. All together, Gall identified twenty-seven fundamental faculties that, in isolation or in combination, could serve to explain human behavior.

Gall's method was very much in keeping with early nineteenth-century science. His method provided an empirical basis for distinguishing between attitudes and behaviors linked to specific innate faculties and those traceable either to combinations of faculties or to exogenous or accidental influences. Through scientific observation of countless samples, Gall sought to induce the identities of the fundamental human faculties as well as their tell-tale manifestations. He also used the accumulated data to confirm the existence of the faculties.

This approach was a kind of "reflective equilibrium" *avant la lettre* in which the principles of phrenology — namely, the faculties — would be tailored to empirical observation and judgment while empirical observation and judgment would be guided by the phrenological

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[15] 2 GALL, *supra* note 12, at 99–100; *see also Phrenology: Its Origin and Early History, with a Consideration of Some of the More Common Objections to It*, 1 AM. PHRENOLOGICAL J. 33, 37 (1838) ("We mean . . . not that the brain *is* the mind, but that it is the *organ* or *instrument* of the mind's operations.").

[16] 1 GALL, *supra* note 12, at 58.

[17] *Id.* at 59.

[18] *See* YOUNG, *supra* note 10, at 38.

framework. Observation and correlation served to connect the crucial parameters of Gall's taxonomy: striking behavior, fundamental faculty, cortical organ, and cranial prominence.

Gall's framework has been helpfully schematized as follows:[19]

STRIKING BEHAVIOR (talent, propensity, mania)	*implies* – > < – *causes*	FACULTY (innate instinct)	*implies* – > < – *causes*	CORTICAL ORGAN (activity varies with size)	< – *implies* *causes* – >	CRANIAL FEATURE (size varies with underlying organ)

Once the fundamental faculties were identified and defined, Gall and the other phrenologists were able to deploy them to explain human behavior. As an example, consider the faculty known as "Acquisitiveness," or what Spurzheim identified as "Covetiveness."[20] This faculty, ostensibly situated at "the anterior inferior angle of the parietal bone," produces a general tendency to acquire.[21] Acquisitiveness is a largely formal faculty: it acquires its specific content or particular direction from the other faculties with which it is combined. In a collector of objects of natural history, for example, Acquisitiveness is combined with Individuality. "[I]n a collector of old coins, Acquisitiveness and Veneration are large."[22]

Viewed in isolation, the faculty of Acquisitiveness may seem vulgar and selfish, as Combe conceded. Yet as he pointed out, Acquisitiveness is absolutely crucial to the development of civilization:

> In the faculty of Acquisitiveness, . . . the Phrenologist perceives an instinct prompting the human being, after his appetites of hunger and thirst are appeased, and his person protected against the elements of heaven, to labor from the mere delight of accumulating; and to the ceaseless industry which this instinct produces, is to be ascribed the wealth with which civilized man is every where surrounded. It prompts the husbandman, the artisan, the manufacturer, the merchant, to activity in their several vocations; and, instead of being necessarily the parent only of a miserable and degraded appetite, it is one of the sources, when properly directed, of the comforts and elegances of life.[23]

Of course, it is also true that when "the pursuit of wealth becomes the business of life, Acquisitiveness, usurps the place of the moral sentiments, perverts the intellect, and becomes the source of the greatest evils."[24] Thus, like many faculties, Acquisitiveness has both a negative and a positive side.

As an objection to the faculty of Acquisitiveness, the phrenologists faced a familiar, indeed recurrent argument. Critics argued that the fundamental faculty of Acquisitiveness was neither fundamental nor a

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[19] This schema is taken from YOUNG, cited above in note 10, at 36.

[20] *See* COMBE, *supra* note 1, at 191.

[21] *Id.*

[22] *Id.* at 197.

[23] *Id.* at 196.

[24] *Id.*

faculty, but rather a derivative abstraction traceable to what we would now call the process of socialization.[25] The social institution of property itself, critics argued, promotes the tendency to Acquisitiveness. The short answer, for phrenologists, was that this argument had things exactly backwards. According to the phrenologists, the very idea of property springs from the faculty of Acquisitiveness. Indeed, "the laws of society are the consequences, and not the causes, of its existence."[26]

One of the most striking aspects of phrenology was its detailed character. Because phrenologists were quite astute in understanding the relations among categories within their taxonomic framework, phrenology developed into an intricate multi-layered field. From the very beginning, Gall recognized that one of the most difficult tasks in his method was to determine "which classes of behavior represented fundamental faculties" and which represented a combination or aggregation of fundamental faculties.[27] Such a subtle and difficult problem required a sophisticated understanding of how to correctly individuate the fundamental units of the system.[28]

Gall's solution was to attempt to find extreme manifestations of the ostensible faculty and to ascertain whether they varied independently of other known faculties. If they did, then the ostensible faculty was truly fundamental. In this way, Gall could distinguish spurious faculties and combinations of faculties from the true animating agencies of the system — the fundamental faculties:

Amativeness
Philoprogenitiveness
Adhesiveness
Combativeness
Destructiveness
Secretiveness
Acquisitiveness
Self-Esteem
Love of Approbation
Cautiousness
Eventuality [and Individuality]
Locality
Form
Vocabulary
Language
Coloring
Tune
Number
Constructiveness

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[25] *See id.* at 197.
[26] *Id.* at 198.
[27] YOUNG, *supra* note 10, at 35.
[28] *See id.*

Comparison
Causality
Wit
Ideality
Benevolence
Imitation
Veneration
Firmness[29]

Once phrenologists identified the fundamental faculties, they turned to refining, relating, and reconciling the various categories of phrenology. This work constituted the bulk of phrenological research and scholarship. The discipline evolved through a kind of internal elaboration; through careful craftsmanship, the phrenologists sought to refine their own categories to produce a framework at once elegant and practicable. They expended tremendous effort to the proper definition and elaboration of faculties, as well as to the elimination of spurious faculties. Similarly, they spent great effort ascertaining how best to relate the various definitions of the fundamental faculties to various observable behaviors or attitudes in human beings.

The vast bulk of this work of categorical construction, refinement, and harmonization consisted of careful case analysis. Combe's rejection of "Perception" as a distinct faculty provides a good example. Through case analysis, Combe sought to demonstrate that what others called "Perception" was actually a mode of action of a number of intellectual faculties.[30] He compared the case of Milne, who had an acute perception of form though he could not perceive some colors, with other cases involving persons who could perceive visual symmetry but could not recognize melody.[31] For Combe, these were all cases of individuals who "possess[ed] acute powers of perception as to one class of objects," but still were "quite unable to perceive others."[32] Combe deduced that if perception were a fundamental faculty, then it would not be selective in this way concerning its objects. Accordingly, perception could not be a fundamental faculty, but was instead "a mode of action of the faculties which form ideas."[33] For Combe, then, perception might be called a quality of other fundamental faculties. It was this kind of careful sifting through cases that enabled the identification of the fundamental units of phrenological analysis.

The discipline of phrenology involved not only a complex horizontal differentiation, but also an intricate vertical organization, one that was sensitive to the various levels of abstraction. The aesthetic preci-

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[29] For Gall's discussion, see 3 GALL, cited above in note 12, at 141–316, and 4 GALL, cited above in note 12, at 1–247.

[30] *See* COMBE, *supra* note 1, at 468.

[31] *See id.* at 469.

[32] *Id.*

[33] *Id.* at 468.

sion and the methodological clarity of the phrenological taxonomies are evident in Combe's account of Spurzheim's work:

> Dr. Spurzheim divides the faculties into two orders, FEELINGS and INTELLECT, or into *affective* and *intellectual* faculties. The feelings are subdivided into two genera, PROPENSITIES and SENTIMENTS. He applies the name *propensities* to indicate internal impulses, which invite only to certain actions; and *Sentiments* designate other feelings, not limited to inclination alone, but which have an emotion of a peculiar kind superadded. Acquisitiveness, for example, is a mere impulse to acquire; Veneration gives a tendency to worship, accompanied with a particular emotion, which latter quality is the reason of its being denominated a Sentiment.
>
> The second order of faculties makes us acquainted with objects which exist, their qualities and relations; and they are called *intellectual*. They are subdivided by Dr. Spurzheim into four genera. The first includes the external senses and voluntary motion; the second, those internal powers which perceive existence; or make man and animals acquainted with external objects, and their physical qualities; and the third, the powers which perceive the relations of external objects. These three genera are named *perceptive faculties*.[34]

Phrenology, of course, did not always display such precision and careful craftsmanship. Indeed, phrenology, like other disciplines, had its share of crude mechanistic thinking. In phrenology, such thinking continuously sought, in a reductive fashion, to produce highly simplistic linear linkages between faculties and behaviors.

The mechanistic tendency was particularly prevalent in the later attempts to produce comprehensive restatements of phrenology. Many of these summaries were well intentioned — designed to reduce confusion and complexity. Nonetheless, many were deeply flawed — insufficiently sensitive to the qualities of mind necessary to a true discipline. These later efforts were bent upon a kind of summarization of the science of phrenology through propositional restatement. These efforts had an instrumental goal — to make phrenology more practically useful and to defend phrenology from critics' claims of internal contradiction. Here, then is one such attempt to restate the fundamental doctrines of phrenology:

> In the early study of Phrenology, the cranial subdivisions were supposed to be very minute and therefore complicated. It was owing to the attempt to locate the district of all the traits that serious contradiction developed throughout the entire reasoning.
>
> The old charts made by pioneer students, such as Spurzheim and Gall, that later met further development by Broussais, Combe and others, were given over due consideration and accepted as practically standard theories, by later students; much to the sacrifice of the constructive building of the science.
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> Many traits are found to exist in the same districts, running relatively or homogeneously throughout given areas; thereby, making it impossible,

[34] *Id.* at 105.

> in some cases, to set aside any minute point, or location on the brain that directly bears upon a single trait.
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> To avoid this erroneous and complicated method of phrenologic reasoning, the Humanology chart is designed as a more generalized system of divisional analysis; readily perceivable and fundamentally correct.
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> . . . .
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> The . . . enumerated districts are sufficient to designate all important brain centers and functions; also to form a basis for the study of Phrenology. *The traits of a district are pronounced only when the district is full and prominent, otherwise the functions are weak and adverse.*[35]

Apart from these lapses into crude mechanistic accounts, phrenology proceeded cautiously through careful internal self-development. As a result of this incremental process, phrenological knowledge became at once extremely nuanced and quite voluminous.

This is not to say that critics did not raise many objections to phrenology. One objection was that the validity of its findings invariably depended upon the ability to measure the various organs — something that could not be easily achieved. Hence, it was suggested that the breadth of the organs could not be ascertained because "the boundaries of them are *not sufficiently determinate*."[36]

The answer to this point was straightforward. As suggested by one eminent phrenologist, "although the boundaries of the different organs cannot be determined with mathematical precision, . . . yet, in a single case, an accurate observer may make a very near approximation to the truth."[37] The phrenologists argued that the various boundaries of the organs could very well be defined with sufficient precision *"for all practical purposes."*[38]

Critics also suggested that the boundaries of the organs were "purely ideal" — not rooted in the thing itself. The phrenologists' response was again straightforward: the critics' argument goes too far to be sensible. In order to accept the anti-phrenologists' arguments, one "must be prepared to maintain, that the boundaries of a hill or hillock are purely *ideal*, and depend in *every* instance on the *fancy* of the measurer."[39] As the phrenologists saw the matter, this was, of course, a proposition too absurd to be admitted. They argued that, at least for practical purposes, it was quite possible to develop a uniform system for the comparison of organ sizes. Combe suggested using the following categories to denote the relative gradations in organ size:[40]

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[35] JOHN BRYCE ADAMS, TEXT BOOK OF HUMANOLOGY: THE COMPLETE SCIENCE OF HUMAN-ANALYSIS 31–32 (1922).

[36] COMBE, *supra* note 1, at 82 (emphasis added).

[37] *Id.*

[38] *Id.* at 83 (emphasis added).

[39] *Id.*

[40] *Id.* at 88.

Very small	Moderate	Rather large
Small	Rather full	Large
Rather small	Full	Very Large

A refinement of this scale was suggested by another phrenologist, Captain Ross, who advocated the use of an explicitly quantitative scale — one that would allow greater differentiation and thus greater precision:[41]

1.	8. Rather small	15.
2. Idiocy	9.	16. Rather large
3.	10. Moderate	17.
4. Very small	11.	18. Large
5.	12. Rather full	19.
6. Small	13.	20. Very large
7.	14. Full	

In Captain Ross's twenty-point scale, every other number was identified by name. The intermediate figures served to "denote intermediate degrees of size, for which," as Combe put it, "we have no names."[42] The advantage of Captain Ross's scale was, as he saw things, considerable: because the values of the variables at the extreme (Idiocy to Very large) could be known, the values toward the middle of the scale could be derived in a relative manner.[43]

II. The Critique of Phrenology

Despite all of these conceptual refinements, despite the cautious case analysis, and despite its sundry practical applications, phrenology failed to live up to its ambitions. The simple explanation is that Gall and the other phrenologists had their ontology wrong. The fundamental faculties (as such) did not exist. They were not linked to the size of cranial organs. Further, the cranial organs did not bear any relation to cranial prominences. For all of their detailed inquiries, their sorting of countless cases, and their remarkable attempts to synthesize their research into fundamental faculties, principles, or laws, the phrenologists failed.

The interesting question is *how* was this failure occasioned? What precisely enabled the phrenologists to fail in such a spectacular way? Put another way, the question is how did the phrenologists manage to sustain their failure for the better part of a century? The question deserves close inquiry because phrenology was not just any kind of disciplinary failure.

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[41] *Id.*

[42] *Id.*

[43] *See id.*

It was a grand failure that attracted countless adherents — including some very intelligent men. It was a failure that sustained professional associations, symposia, treatises, and journals. The phrenologists assembled an elaborate structure of detailed information and thus, phrenology became a kind of expert domain. The question arises, what enabled all of this detailed expertise to flourish, even though its fundamental ontology and its grounding structure were deeply flawed?

The question is particularly salient because some of the phrenologists were quite sincere in their ambition to establish a genuine science — one informed by careful empirical observation of cases. Unlike their predecessors, the speculative philosophers and the metaphysicians, the phrenologists were committed to and did indeed perform countless case studies and case analyses. Given such sustained encounters with empirical data — the real world of human comportment — how did phrenologists fail to recognize that their own hypotheses, their own methodological presuppositions, were not true? After inspecting so many craniums, how did they fail to realize that the cranioscopic hypothesis was wrong?

These questions are of interest not only for those who seek to understand the evolution of phrenology, but also for those who seek to understand the development of other expert disciplines. The answers have much to do with the ways in which the phrenological paradigm was constructed. It was an amalgamation of animisms and reifications; of self-referential complexity, of self-legitimations and folk beliefs. The internal organization of phrenology gave its practitioners what they wanted most: the belief that they knew something and that this something was useful — even good. It also gave them an elaborate construct that could be deployed to deny conflicting evidence and to counter opposition — without dealing seriously with either.

A. Animism and Reification

In the context of nineteenth-century thought, Gall's phrenological taxonomy enjoyed certain intellectual advantages over the taxonomies of other fields. Gall's predecessors, such as Locke, had devised categories of mind in order to show that the mind was adapted to *reaching true inductions*. In attempting to vindicate the adaptation of mind to *true* understanding, Locke and the other philosophers necessarily introduced a normative element into their analysis and their taxonomies. Indeed, the classificatory schemes of the metaphysical philosophers were aimed at understanding the idealized operations of the mind in performing its idealized epistemological operations — namely, the production of *true inductions*.[44]

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[44] *See* YOUNG, *supra* note 10, at 15–19.

Gall, by contrast, sought to avoid these idealizing tendencies, favoring a more functionalist approach instead. His interest was not in grounding certain *correct* epistemic operations of mind, but rather in understanding how the mind actually functioned. This meant two things. First, it meant dropping the normative orientation: the thing to be explained was not correct operations of mind, but operations of mind as these actually occurred (whether correct or not). Second, his work explained not simply the knowing or understanding mind, but more broadly, the interacting and behaving mind.[45] Indeed, as one commentator put it, "Gall's position on this issue is in some respects a striking anticipation of the adaptational or functional view of psychology which was developed half a century later in the wake of the theory of evolution."[46]

But for all his functional orientation, Gall's explanatory categories lapsed back into a *faculty explanation*, with all of its attendant circularities.[47] How did Gall explain certain behavior such as aggression? There was a faculty for aggression. How did Gall explain a facility for language? There was a faculty for language. How did Gall explain altruistic behavior? There was a faculty for benevolence.

The structure of this kind of explanation is simple. Behaviors are classified into descriptive categories. The descriptive categories are hypostatized and projected back onto an agency, a potentiality, or a faculty whose defining character is its ostensible capacity to produce the behavior in question. The agency, potentiality, or faculty is then offered as an explanatory cause of the behavior.[48]

The core problem with this kind of explanation lies in the unthinking transformation of classifications designed to describe behavior (for instance, aggression) into effective ontological agencies (the Destructiveness faculty). There is thus a kind of unthought and unexamined transposition from epistemic heuristics to ontological actualities. Such transposition is a *generalized* ontologizing effect of language and of rhetoric. The ontological actualities produced by this transposition have nothing going for them except the generalized ontologizing effects of language and our failure to notice these effects.

The transposition from descriptive classification to ontological actuality occurs readily — indeed, almost automatically. Such a transposition is occasioned by three concurrent conflations. The epistemic classifications are erroneously transubstantiated into robust ontological entities that are part of the world to be explained. As the epistemic classifications are transubstantiated into robust ontological entities, they are typically reified: they become determinate object-forms with stabilized identities. And in the transition from epistemic classification

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[45] *See id.* at 17.

[46] *Id.*

[47] *See id.* at 21–22.

[48] *See id.* at 22.

to ontological agency, they are endowed with animistic properties. They become capable of producing behaviors, actions, and the like.

Such repeated conflation is precisely what happens in Gall's explanations of brain functions. His explanations are reminiscent of Moliere's physician who, when asked to explain how opium induces sleep, answers that opium has a dormitive principle.[49]

B. Self-Referential Complexity

When a faculty explanation takes hold, all sorts of entities are posited into existence. These entities become the fundamental units of analysis. In phrenology, the fundamental units of analysis were none other than the fundamental faculties: these became the tacit ontological forms through which brain functioning and human behavior were explained.[50]

It is precisely because the fundamental ontological entities were imaginary that all manner of complex relations could be established among them. Because the units of analysis lacked any robust or stabilized referent, virtually anything could be said about how they were related to each other.

Without any stabilized referent for the fundamental faculties, phrenologists could produce a great deal of complexity, including numerous interpretations and applications of the fundamental faculties. They could perform classic analytical operations, such as specification, subdivision, and entailment, in an endless array of combinations without much risk of running into serious resistance from their putative object of study. The predictable result was a great deal of complexity. Indeed, as the Fowlers put it:

> If the students of law and medicine must study constantly some ten years before they can be admitted to practise, what amount of preparation — of both original talent and of acquired knowledge, are required to fit one for the practice of a science far more complex and extensive than both law and medicine united? — a science embracing within its vast range all the ever-varying emotions and mental manifestations of the human mind — all the never-ending phenomena of thought, feeling, opinion, and conduct appertaining to man! *Let any one undertake to calculate, arithmetically, the number of changes that can be rung on the thirty-seven faculties in all their different degrees of development, and he will find them to be inconceivably great . . . .*[51]

This production of internal complexity helped sustain belief. Indeed, the internal complexity of a discipline often contributes to maintaining belief among its practitioners. Practitioners become so focused

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[49] *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 18–19 (Walter Kaufmann trans., Vintage Books 1966); YOUNG, *supra* note 10, at 22.

[50] *See* YOUNG, *supra* note 10, at 2–3.

[51] O.S. FOWLER & L.N. FOWLER, PHRENOLOGY PROVED, ILLUSTRATED, AND APPLIED 417–18 (New York, O.S. & L.N. Fowler, 10th ed. 1842) (emphasis added).

on the intricacies of minute disciplinary issues and problems that their attention is diverted from any recognition that the entities and the discipline are a kind of collective imaginary. Friedrich Nietzsche made this point succinctly with respect to Kant:

> But let us reflect; it is high time to do so. "How are synthetic judgments *a priori possible?*" Kant asked himself — and what really is his answer? *"By virtue of a faculty"* — but unfortunately not in five words, but so circumstantially, venerably, and with such a display of German profundity and curlicues that people simply failed to note the comical *niaiserie allemande* involved in such an answer. People were actually beside themselves with delight over this new faculty, and the jubilation reached its climax when Kant further discovered a moral faculty in man — for at that time the Germans were still moral and not yet addicted to *Realpolitik*.
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> . . . A time came when people scratched their heads, and they still scratch them today. One had been dreaming, and first and foremost — old Kant. "By virtue of a faculty" — he had said, or at least meant. But is that — an answer? An explanation? Or is it not rather merely a repetition of the question? How does opium induce sleep? "By virtue of a faculty," namely the *virtus dormitiva*, replies the doctor in Molière . . . .[52]

Nietzsche's observation obviously has broader applications. Generally, the existence of internal complexity within a discipline imparts to its practitioners a kind of confidence in the discipline itself and a corresponding inability to engage in critical questioning of its root ontology and methodological operations. The internal complexity and internal differentiation of a discipline are experienced as a confirmation of the profundity and accuracy of its truths. Among phrenologists, this internal complexity prevented them from recognizing their flawed methodological assumptions as well as the error of their shared and mistaken belief in an imaginary ontology.

Given the commitment of phrenologists to careful examination of empirical data, it nonethless remains interesting that their numerous case studies did not shake them out of their mistaken ontology. Indeed, given their examination of thousands upon thousands of human skulls, it is striking that these empirical observations did not lead the phrenologists to abandon their entire taxonomy as well as the flawed cranioscopic hypothesis.[53] Part of the answer to this puzzle is that Gall and the phrenologists, despite their professed commitment to scientific examination of the empirical data, wanted to believe.

C. The Legitimation of Phrenology

Although many phrenologists were not serious scientists, but rather hacks or charlatans, this was manifestly not true of Gall and other

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[52] NIETZSCHE, *supra* note 49, at 18–19.

[53] *See* YOUNG, *supra* note 10, at 38.

eminent phrenologists. The question thus is: how could someone like Gall, who was committed to serious investigation of data, be taken in by such a flawed ontology and such mistaken theories? Part of the answer is that Gall was not even-handed with his own methodological commitments. Although he professed the need for careful and impartial examination of nature, in deploying this methodology he sought confirmation of his hypotheses. Gall would adduce evidence tending to support the existence of a relation between behavior, cortical organ, and cranioscopic configuration. But Gall had no fixed criteria, no standard, no threshold at all, for deciding what constituted supporting evidence.[54]

By contrast, if evidence seemed to falsify the crucial phrenological hypotheses, Gall and the other phrenologists almost invariably sought to explain away the data. Hence, when Gall encountered a case involving large, projecting eyes (supposedly a sign of intelligence and good memory) coupled with a rather unremarkable memory, he explained that the large eyes were probably due to rickets or hydrocephalus.[55] Similarly, when it was reported that Descartes' skull was remarkably small in the anterior and superior regions of the forehead (where the cortical organ for rationality was ostensibly located), Spurzheim explained this away by noting that Descartes was not nearly so great a thinker as previously supposed.[56]

Phrenologists thus employed a shifting burden of proof: data tending to confirm the veracity of phrenology were accepted immediately as evidence and treated as true, while anomalies, falsifying data, and critical commentary were treated as presumptively false and rejected. The phrenologists interpreted evidence from a vantage that presumed that they were already in possession of secure and certain knowledge. For them, the burden was on the critics and the unbelievers to demonstrate the contrary:

> If the functions of the brain had been already ascertained by some method of inquiry of a more satisfactory nature than that resorted to by Dr. Gall, we might have argued, with some fairness, that if his observations were inconsistent with those already obtained, they could not possibly be true. But when it is notorious that all other methods of investigation *have failed* to unfold the mystery of the cerebral functions, it is as obvious as the noonday sun, that no information which we may possess can enable us to decide, *a priori*, and *without any examination of the evidence*, that his mode of inquiry is fallacious and its results untrue.[57]

In one sense this defensive orientation is characteristic of any professional discipline that, by definition, understands itself to be already

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[54] *See id.* at 40–41.

[55] *See id.* at 43.

[56] *See id.*; *Phrenology in France*, 82 BLACKWOOD'S EDINBURGH MAG. 665, 671–72 (1857).

[57] *On the Merits of Phrenology*, 2 AM. PHRENOLOGICAL J. 433, 437 (1840).

possessed of certain knowledge and methods.[58] But all professional disciplines are not defensive or closed in all the same ways. The defensive posture of the phrenologists was particularly pronounced.

In the later stages of phrenology, any distinction between phrenological knowledge and its advertisements for itself collapsed. Phrenology became a discourse of self-celebration. The ironic result was that, as phrenological knowledge became increasingly stressed and less credible, the normative claims about its usefulness and moral worth became increasingly inflated and more grandiose.[59]

The phrenologists thus insulated themselves and their discipline from any productive confrontation with criticism. Phrenology's research program, in effect, became little more than a reiteration of its own internal architecture, its own self-same truths. To the extent that it survived, it did so for exactly the same reasons that it failed: the field and its practitioners were insulated from criticism by the phrenologists' desire to believe. *They wanted to believe*. And thus, they disregarded whatever threatened their beliefs.

D. Folks and Phrenology: The Production of Belief

One thing that made phrenology possible was its close tie to folk beliefs. From the perspective of folk beliefs, the cerebral localization hypothesis, the cranioscopic hypothesis, and Gall's twenty-seven fundamental faculties seemed perfectly sensible.

The cerebral localization hypothesis tracked a folk frame linking function and locale. In all manner of folk beliefs about the body, housing, religion, architecture, work, and the like, there is a metonymic link between function and locale. The phrenologists and their contemporaries could thus easily believe that various locales of the brain were linked to different functions. In Gall's phrenological work, this belief drew support from an explicit analogy to other bodily organs.[60] Inasmuch as bodily organs (the stomach, the liver, the kidneys) are dedicated to certain bodily functions, it seemed reasonable to suppose that the same principle might apply *within* an organ (specifically, the brain). This incompletely theorized analogy helped yield the cerebral localization hypothesis.

The phrenologist's cranioscopic hypothesis likewise tracked folk beliefs. The cranioscopic hypothesis holds that the size of a cortical organ is correlated to its power. The bigger the organ, the greater its power. The plausibility of this supposition stemmed from a perceived correlation between magnitude and capacity. The idea of a link between the two is a *folk frame* that is instantiated in all manner of folk

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[58] *See* STANLEY FISH, *Anti-Professionalism*, *in* DOING WHAT COMES NATURALLY 215, 244–46 (1989).

[59] *See generally* SIZER, *supra* note 6, at 394–95 (extolling the virtues and usefulness of phrenology).

[60] *See* 2 GALL, *supra* note 12, at 99–100.

beliefs about physics, biology, sexuality, war, and so on. One need only add the reasonable supposition that cranial size reflects the magnitude of the various cortical organs, and phrenology's cranioscopic hypothesis becomes eminently believable.

Furthermore, in its description of the fundamental faculties, phrenology incorporated various folk beliefs about human character and temperament. The faculties identified by Gall were already coterminous with character traits identifiable throughout Western culture. Benevolence, acquisitiveness, amativeness, combativeness — these were all character traits well known and easily recognized among the populace. What Gall identified as faculties, folk belief described variously as temperament (such as bilious or lymphatic) or as character (such as greedy or aggressive). Phrenology's ontology of fundamental faculties thus tracked and tapped into a pre-existing folk ontology of temperament and character. Phrenology reconstructed a folk ontology already in force into a mildly more scientific jargon. Indeed, "the quintessence of phrenology's appeal was . . . in its ability to shelter and legitimize existing beliefs by recasting them in a scientific mould."[61]

Thus, by replicating a folk ontology in a slightly more professionalized jargon, phrenology was able to draw upon pre-existing folk beliefs while nonetheless representing its knowledge as scientific and rooted in actual scientific empirical investigation. This double aspect — (1) the tracking of a folk ontology, (2) in a jargon seemingly independent of that folk ontology — gave phrenology its considerable rhetorical power.

In addition, phrenologists often made their "science" track popular moral and political beliefs. Much phrenological work was explicitly racist, ascribing inferior physiological capacities to non-white races.[62] Moreover, case diagnoses performed with phrenological terminology tended to coincide and blend with specific folk beliefs. For instance, one phrenologist's diagnostic analysis of Chief Justice Marshall found that his head was "remarkable for its fine proportions."[63] Chief Justice Marshall's head displayed "a strong preponderance" of the "higher sentiments and higher intellect."[64] The organs of Comparison, Causality, Individuality, Benevolence, Reverence, Firmness, Conscientiousness, and Ideality were "noticeably large," while the organs of Self-esteem and Love of Approbation were "but moderate."[65] The phrenologist

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61 R.J. Cooter, *Phrenology and British Alienists, c.1825–1845: Part II: Doctrine and Practice*, 20 MED. HIST. 135, 138 (1976), *quoted in* THOMAS HARDY LEAHEY & GRACE EVANS LEAHEY, PSYCHOLOGY'S OCCULT DOUBLES: PSYCHOLOGY AND THE PROBLEM OF PSEUDOSCIENCE 92 (1983).

62 *See* JAMES P. BROWNE, PHRENOLOGY AND ITS APPLICATION TO EDUCATION, INSANITY, AND PRISON DISCIPLINE at xxxiv–xxxv (New York, Scribners, Welford & Co. 1869).

63 *Character of Chief Justice Marshall*, 1 AM. PHRENOLOGICAL J. 382, 383 (1839).

64 *Id.*

65 *Id.* at 383–84.

then concluded on a celebratory note, weaving folk beliefs about Chief Justice Marshall with phrenological truth:

> We will now see how admirably his organisation was fitted, not only to constitute a great judge, but *such* a judge as he is known to have been.
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> . . . With an intellectual region so large and well balanced, Judge Marshall had little difficulty in acquiring all the knowledge necessary to the formation of judgment . . . . But intellect alone is not sufficient to constitute the judge. The feelings should all be active, but should act in harmony. There should be a large organ of Conscientiousness. This is but the organ of a blind feeling, but it acts as a power in giving a strong desire to discover the truth — and the whole truth — and in exciting the intellect to greater effort when in search of truth. This, we have remarked, was a very large organ in the head of Judge Marshall. . . . His organs of Reverence and Benevolence being large, these, connected with his moderate Self-esteem, rendered him a most *patient listener*.[66]

Finally, the plausibility of phrenology was supported by the accomplishments and instrumental gains that it promised. Phrenologists promised that their science would be useful in the day-to-day affairs of men. Particularly in its later days, serious scientists abandoned phrenology, and practical entrepreneurs joined the phrenological enterprise. The switch in orientation from the pursuit of science to the rendition of instrumental services was well captured by Sizer, who wrote in 1882, "Fifty years ago people asked: 'Is Phrenology true?' Now they ask, in regard to its uses, 'Does it benefit mankind?'"[67] Phrenology promised to accomplish what few other forms of learning could deliver. Phrenology promised men nothing less than control over their lives:

> Before phrenology was known, the wisest of men had no means of deciding, with anything like certainty, the talents or character of a stranger; and hopeful mothers looked upon their darlings as so many angelic blanks, each likely to realize her fondest expectations. Now phrenology tells her how to guide the wayward and encourage the timid, and thus reach desired results . . . . There is ten times more in men and women than they realize, and their relation to business and effort could be wonderfully improved if they knew their just powers and weaknesses; and in like manner the moral and social happiness might be greatly enhanced.[68]

Phrenology promised both order and progress. As one commentator put it, "[r]egularity yet change, order yet progress — this was the service of the organismic metaphor celebrated by phrenology."[69]

On the side of order, phrenology claimed that certain organic laws governed the development and behavior of mankind and that the secret to human fulfillment and happiness lay in knowing and observing

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[66] *Id.* at 384–85.

[67] SIZER, *supra* note 6, at 10.

[68] *Id.* at 395.

[69] ROGER COOTER, THE CULTURAL MEANING OF POPULAR SCIENCE 112 (1984).

those laws. In an era in which religious beliefs were rapidly eroding, phrenology promised to restore order and meaning to the universe.[70] On the side of progress, phrenology championed "the regeneration of the individual."[71] Phrenologists invoked lessons about their faculties to promote middle class morality and Victorian virtue. Combe's treatise preached temperance, cleanliness, regular habits, individualism, and property rights and warned against spicy foods, living by stagnant waters, insubordination, and absenteeism.[72] He cautioned his readers about the overdevelopment of the faculties. On the one hand, excessive philoprogenetiveness would result in "pampering and spoiling children."[73] On the other hand, excessive amativeness would yield "innumerable evils" and render individuals unfit for the clergy (where chastity is a requirement).[74]

Particularly in its later days, phrenology sustained itself not so much by advancing the acquisition of knowledge or understanding (that simply was not happening), but rather by demonstrating that its existing body of knowledge was useful to social and individual achievement. But even as early as 1839 the American Phrenological Journal devoted an entire serial article to illustrating the utility of phrenology, its truth being simply assumed: "we believe that — *Phrenology is useful, because it is true.* With the premises we have laid down, this proposition requires not proof but illustration. As we have said, we take for granted its truth. It is therefore useful."[75]

In these ways, phrenology came to be closely associated with folk culture — with the practical day-to-day hopes and needs of men and women. "It became popular because of its novel familiarity."[76] In its later days, belief in phrenology was promoted not so much by demonstrating the validity of its fundamental ontology and fundamental principles, but rather by highlighting its usefulness — that is, its ability to advance individual achievement and to promote the social good.

III. LAW

Despite the obvious differences between the rhetorical, intellectual, and social organization of phrenology and American law, there are some striking similarities. We will attend to the similarities first, and then explore the differences.

Phrenology and law both emerged as disciplinary knowledges through attempts to cast them in the form of sciences. Both "sciences" were aesthetically organized around a fundamental ontology of reifica-

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70 *See* LEAHEY & LEAHEY, *supra* note 61, at 100.

71 *Id.* at 95.

72 *See* COOTER, *supra* note 69, at 121.

73 COMBE, *supra* note 1, at 118.

74 *Id.* at 113.

75 *Utility of Phrenology*, *supra* note 5, at 144, 146.

76 LEAHEY & LEAHEY, *supra* note 61, at 109.

tions and animisms — "faculties" in the case of phrenology, "doctrines" and "principles" in the case of law. Each discipline developed into an extremely intricate production of self-referential complexity. In both cases the disciplinary edifice was maintained by practitioners who sought confirming evidence of the truth (and later the normative value) of the disciplinary enterprise and who went to great lengths to avoid disconfirming evidence and disenchanting encounters. In law in particular, the legitimation of the enterprise has been understood to be an essential aspect of the enterprise itself. Finally, the surface plausibility of both enterprises — phrenology and law — was maintained through tacit dependence on folk beliefs (folk-frames and folk-ontologies) that were re-cast in a professionalized jargon.

A. Law as Science

Much of the systematization of the discipline of American law occurred in the late nineteenth century when the training of lawyers was transformed from guild apprenticeship to professional university education. Much of the conceptual groundwork for this transformation is typically attributed to Christopher Columbus Langdell, the first Dean of the Harvard Law School.[77] Langdell stands in much the same relation to the discipline of American law as Gall stands to phrenology. Both played a crucial part in establishing their respective disciplines as sciences. Both served a critical role in defining the fundamental ontological units of their respective sciences — faculties in the case of Gall's phrenology and doctrines and principles in the case of Langdell's law. Moreover, both had enduring influences on the internal aesthetic of their respective disciplines.

Although Gall and the phrenologists were never able to secure a place for phrenology in the university, Langdell and his brethren enjoyed remarkable success. But the going was not easy. To firmly ensconce law within the university, it was necessary to establish its intellectual credentials. Not only did universities have to be convinced that law was somehow an appropriate and reputable discipline worthy of study in its own right, but the profession of lawyers and judges also had to be convinced that university training in law was helpful and necessary for practice.

In the early 1800s, law was often viewed not so much as a discipline, but as a kind of handicraft.[78] Although a few law schools had been in existence for many years, most legal training was still accomplished through apprenticeships.[79] To the extent that law was essen-

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[77] *See* HARVARD LAW SCH. ASS'N, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817–1917, at 26–27 (1918).

[78] It had not always been so. In Europe, law was one of the pillars of the medieval university. *See* David S. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 AM. J. COMP. L. 653, 700–01 (1987).

[79] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 318–22 (2d ed. 1985).

tially a kind of craft, it was not at all apparent why universities should engage in its teaching or study. As Christopher Columbus Langdell put it, "[i]f law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it."[80]

Langdell, of course, strongly supported the vision of law as science. Indeed, he had been brought to the law school by a chemist, President Eliot of Harvard University, who was already prepared to embrace this conception of law.[81] When Langdell and his followers conceptualized law as a science, they thought of science in its nineteenth-century sense: science as rational ordering based on observation.[82] Onto this traditional nineteenth-century sense of science, legal thinkers grafted a nascent twentieth-century sense of science as empirical method. Langdell was explicit in analogizing law to the natural sciences. He conceived of judicial opinions as specimens ready for observation or dissection:

> We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoölogists, all that the botanical garden is to the botanists.[83]

In 1892, William Keener, Dean of Columbia College of Law, put it this way:

> Under this system the student is taught to look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the mineralogist. It should be remembered that the student is not simply given the specimen and asked to find out as best he can what it is, but each specimen is accompanied by an elaborate explanation and classification.[84]

Langdell was so convinced that law was a science — not a craft — that, in what has now become an entrenched and pervasive practice, he favored hiring young teachers who had little or no experience in the practice of law. Indeed, when Langdell retired from his deanship in 1895, three of the eight faculty members, namely Ames, Beale, and Williston, had joined the faculty as young men with little experience in practice.[85]

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[80] A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 85 (1887) [hereinafter HARVARD COMMEMORATION].

[81] *See id.* at 97–98.

[82] *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 29–30, 55–70 (1994).

[83] HARVARD COMMEMORATION, *supra* note 80, at 86–87.

[84] *Methods of Legal Education*, 1 YALE L.J. 139, 144–45 (1892) (section by William A. Keener).

[85] *See* ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 190 (1967).

Critical to the Langdellian representation of law as a science was the central role that Langdell accorded to cases. Cases were the *specimens* to be studied. They were to be studied for the *doctrines* and the *principles* that they embodied. The vehicle that enabled this study was the casebook — a compendium of cases selected and organized by the law professors to inculcate the law. In its time, one of the most significant and controversial aspects of the casebook approach was its firm rejection of legal treatises and lectures as instruments of law school instruction.[86]

Langdell and his brethren systematized a purportedly unruly array of cases into a pyramidal structure of clean, conceptual doctrines, linked to each other by a series of principles. They subdivided law into discrete fields, such as contracts or torts, each with its own foundational aesthetic. Thus Langdellian synthesis accomplished an impressive formalization of law. As Christopher Columbus Langdell himself put it:

> The vast majority [of cases] are useless, and worse than useless, for any purpose of systematic study. 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.[87]

In this formalization, several aspects were critical for the representation and development of American law.

First, the Langdellian vision posited a specification of the formal ontology of the law — the critical identities or forms that American law takes. The Langdellian vision pre-figured law as a collection of "doctrines and principles."[88] These artifactual forms became the precincts where law was to be found. Law was to be found not in mindsets, or attitudes, or habits or skills, or anything of the sort, but instead in propositional statements cast as discrete object-forms. This aesthetic of law has lasted until the present day. The stabilization of identities presumed into existence by this formal ontology of the law is what enables such claims as the assertion that law is "objective" and "neutral." It is this presumption that law exists in the manner of object-forms that enables the objectivist colloquialisms that law can be "found" and that judges should "apply" the law, not "make" it.

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[86] *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 25–26 (1995).

[87] C.C. LANGDELL, *Preface to the First Edition* of SELECTION OF CASES ON THE LAW OF CONTRACTS at viii–ix (2d ed., Boston, Little, Brown & Co. 1879).

[88] *Id.* at vii (emphasis added).

A second critical aspect of the Langdellian formalization was its creation of an autonomous sphere of law. By positing that American law "consists of certain principles or doctrines . . . traced in the main through a series of cases,"[89] the Langdellian formalization gently shifted the principal situs of law away from the courts and their cases toward the legal academy and its doctrines and principles. According to the Langdellian formalization, the case decisions of the courts were merely the embodiments through which doctrines and principles were expressed and developed. To be sure, the "original sources" must be closely examined in order to arrive at the proper distillation of case law into doctrines and principles. But the distillation — the declaration of what the law is — would be the special province of the law school. What the Langdellians wanted, in short, was to follow the path of the German legal academics with their "detailed, systematic, sustained, and comprehensive works of scholarship."[90]

In this endeavor, the Langdellians faced a problem very much the same as that faced by Gall in his attempt to identify the "fundamental faculties." Langdell's problem was how to identify the true and correct doctrines and principles. Unlike Gall, Langdell apparently never fashioned a clear methodology to accomplish this kind of task beyond the rather abstract requirements of consistency, coherence, hierarchy, and conceptual boundary maintenance.[91]

A third critical aspect of the Langdellian formalization was that it posited an internal order to law — an order marked by consistency, coherence, hierarchy, and conceptual boundary maintenance. This order could be identified by examining the original sources, the judicial opinions in which the order would appear. The task of the Langdellian scholar was to unearth the order, these principles and "essential doctrines,"[92] from their sometimes befuddled, inadequate, and incomplete expression in the case law. Langdell not only gave his fellow scholars their own distinct field of objects to study, but he also provided them with an academic mission, the same academic mission that would be performed by law students themselves — namely, the close examination of case law and the arrangement and classification of "essential doctrines."[93]

The Langdellian formalization was in many respects similar to Gall's efforts to render the study of the human brain and human behavior a scientific enterprise. One notable difference has been of lasting significance. Gall sought to establish categories of a functional

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[89] *Id.*

[90] SCHLEGEL, *supra* note 86, at 27; *see id.* at 46.

[91] For a discussion of these aesthetic requirements, see SCHLEGEL, cited above in note 86, at 37, and Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6–11 (1983).

[92] LANGDELL, *supra* note 87, at ix.

[93] *See* John Henry Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1529–30 (1984) (book review).

character to *explain* individualized human behavior. Langdell's fundamental categories — his doctrines and principles — by contrast, were prefunctional. Langdell did not identify fundamental doctrines and principles in order to *explain* how some judicial decision was *actually* reached. Instead, Langdell formulated doctrines and principles in order to enable the recognition of correct (and incorrect) case law decisions. His categories of doctrines and principles were thus, from the very beginning, designedly *normative* in character — aimed at judging which judicial decisions were law (and which were not).

Moreover, the objects of study — the case law decisions — were themselves already rigorously idealized. Langdellian science concentrated not on the outcomes or meanings of a case, broadly understood, but rather on its "holding" or its "doctrine." The result is that the Langdellian science operated within an idealized realm of its own creation. This idealization of the objects of study was in contrast with the functional ambitions of phrenology. In a sense, the Langdellian effort was much closer to the aesthetics of the metaphysical philosophers than to the kind of functional science that Gall sought to establish. Just as Locke sought to understand the categories of mind that would ground the ability of human beings to reach true inductions,[94] Langdell wished to identify the categories of law — the doctrines and principles — that would ground the ability to reach correct legal decisions.

Yet despite his idealizing tendencies, Langdell's commitment to the empirical analysis of case opinions seems to have been sincere. In a gesture that would be repeated by many generations of American legal thinkers — particularly among the great number who came to be educated at Harvard Law School — Langdell sought to distill the law from an empirical examination of case law "specimens." For American legal thinkers, even late into the twentieth century, this empirical survey of case law, and the integration of *useful* case law into the Langdellian taxonomy, came to be synonymous with "knowing" the law.

B. Principles, Doctrines, and Other Reified Animisms

The Langdellian distillation of case law into fundamental legal doctrines and principles was an exercise in clarification, systematization, and classification. As in the case of phrenology, however, the doctrines and principles of the new legal science were not just descriptive classifications. Langdell's doctrines and principles were not just helpful heuristic devices for the sorting of case law. They were the law itself. Hence, they came to be cast as robust object-forms with stabilized identities. Indeed, this reification was an important aspect of the reductive ambitions of the Langdellian project — to state the

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[94] *See supra* pp. 887–88.

"fundamental" and the "essential" doctrines and principles, so as to simplify the law. This reductive gesture would find strong echoes throughout the history of American law — in the codification movements of the late nineteenth century,[95] in the seriatim ALI restatements of the twentieth century,[96] in the attempts to subject law to the discipline of grand normative "theory" of the late twentieth century,[97] and even in the structuralist representations of doctrine of Critical Legal Studies scholars.[98]

Not only were the Langdellian categories reified, but they were endowed with animistic properties: they were cast as agencies capable of shaping the development of the law. As Langdell put it, "[e]ach 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 traced in the main through a series of cases . . . in which it is *embodied*."[99] In Langdell's law, doctrines and principles were doing some amazing things — and doing them, fully animated, all by themselves. Hence Langdell would say, "Equity will . . . annex to such a contract an obligation directly to B . . . ."[100] For Langdell, Equity was always annexing this, or annexing that, or creating this obligation or that one — and doing so all by itself, without the assistance of courts or counsel. Indeed, Langdell said as much: "Many equitable obligations are created . . . by equity alone . . . . For example, it is by force of equity alone that an equitable obligation follows the property . . . ."[101]

The construction of these "doctrines" and "principles" as ontologically robust, reified, animated agencies was neither a stylistic idiosyncrasy nor mere metaphorical excess. Rather, the stylistic formalism of Langdell's mode of expression was essential to his substantive representation of law.[102] Just as it was essential to phrenology that phrenologists believe in the equation of fundamental faculties with the functions of various cortical organs and that they believe that the faculties caused certain behaviors, it was essential to the Langdellian project that Langdell and his followers believe in the equation of fundamental doctrines and principles with law and that they believe that these doctrines and principles governed the development of law. To sustain that sort of belief, the doctrines and principles had to be

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95 *See, e.g.*, *Codification*, 20 AM. L. REV. 1 (1886).

96 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS (1981).

97 *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY at vii–xv (1977).

98 *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1701 (1976).

99 LANGDELL, *supra* note 87, at viii (emphasis added).

100 C.C. Langdell, *A Brief Survey of Equity Jurisprudence*, 1 HARV. L. REV. 55, 71 (1887), *reprinted in* C.C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISPRUDENCE 17 (1905).

101 *Id.* at 67.

102 For a contemporary demonstration of the connection between linguistic formalism and legal formalism, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520–35 (1988).

cast as reified animated agencies. For law to be law, it was absolutely necessary not only that case decisions conform to certain coherent patterns, but that something exist that could be equated to law itself and that would *make* these decisions conform to certain coherent patterns.

The foundational gesture of Langdellianism is the same as that of phrenology. A certain pattern is abstracted from the data (here case law decisions). The pattern is then projected back onto imagined reified enabling agencies — such as "doctrines" and "principles." The enabling agencies are then equated with law and, quite fortuitously, found to be at once generative of and constraining upon the official decisions of judges and other officials.

At various points in the late twentieth century, belief in the Langdellian agencies of certain "essential doctrines and principles" broke down. With the onslaught of legal realism, the travails of legal process, the corrosive contributions of consequentialist reasoning, the normative adventures of rights and principles jurisprudence, and the reductive stylizations of microeconomics and Critical Legal Studies, much was added to the legal repertoire.

C. The Persistence of the Langdellian Paradigm

In the contemporary American legal academy, it is widely assumed that Langdellianism is "history." The dominant assumption is that "we are all realists now" and that, even if some of us are not realists, we are all far more sophisticated than Langdell at any rate. Indeed, one would be hard-pressed to name many contemporary self-avowed Langdellians. To the contrary, among late twentieth-century American legal thinkers, it is almost *de rigueur* to "reject" or "renounce" Langdellianism as misguided, if not downright looney.[103]

The very fact that virtually all American legal thinkers explicitly "reject" or "renounce" Langdellianism is usually understood in the American legal academy to spell the demise of the Langdellian paradigm. Indeed, the very fact that Langdellianism is roundly rejected throughout the legal academy is often taken to be conclusive evidence that Langdellianism has been overcome.

This conclusion, however, is something of a non sequitur. Such "rejections" of Langdellianism are, after all, nothing but mere *representations* of belief. They are statements made by legal thinkers about what they believe; they are, in short, beliefs about the speaker's beliefs. But there's the rub: what a person *says* he believes and what he *does* believe are not necessarily (or perhaps even usually) the same thing. Still less can an obvious identity be presumed between one's beliefs and one's practices.

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[103] *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 467 (1988) (book review).

This assumption that one's beliefs have a regulative force on one's other beliefs is, once noticed, rather incredible. How then have American legal thinkers come to believe that their explicit renunciation of Langdellianism is tantamount to overcoming Langdellianism? The answer is decidedly ironic: the routine supposition among American legal thinkers that one's beliefs are regulative of what one believes in practice is itself a psychological mimesis of Langdellianism. Just as Langdellianism holds that declared law is regulative of law in practice, American legal thinkers presume that their declared beliefs about their own legal beliefs are regulative of their legal beliefs in practice.

This unwitting psychological mimesis is emblematic of the hold that the Langdellian paradigm continues to exercise on American legal thought. Specifically, the Langdellian paradigm is still with us in ways that, by virtue of its continued dominance, remain largely unnoticed. This disciplinary self-effacement is neither strange nor surprising: it is instead one of the ways in which a disciplinary paradigm can achieve success.

A disciplinary paradigm can achieve success by depriving its participants of the ability to recognize its foundational gestures, thereby enabling the paradigm to be projected and thus "re-discovered" endlessly on new terrain — in case after case. The inability of the participants to recognize the foundational gestures ensures that the search for the disciplinary object is neither consummated nor discontinued.[104] The search is never consummated because the disciplinary object does not exist *as such*: it is a construction of the foundational gestures — gestures that remain invisible to the participants. At the same time, and also ironically, the inability of the participants to recognize the foundational gestures helps maintain interest in the search because the searchers keep "finding" evidence confirming the truth of the paradigm on the new terrain — in case after case, jurisprudence after jurisprudence.

One aspect of the Langdellian paradigm that is still very much in force is the supposition that "the law" is located in and can be found in such artifacts as the Langdellian "doctrines and principles." To be sure, the list of authorized artifacts has grown to include not only doctrines and principles, but policies, tests, values, techniques, models, methods, and theories as well. But what remains the same are the assumptions that the law is to be "found in," "contained in," "located in," and "provided by" such artifactual entities. Although all of these entities have different properties within the American "legal cosmology,"[105] they each share certain interesting artifactual attributes: each of these artifacts (from "doctrine" to "theory") is endowed with some

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[104] *See* JOHN MOWITT, TEXT: THE GENEALOGY OF AN ANTIDISCIPLINARY OBJECT 40–41 (1992).

[105] *See generally* REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 57–60 (1995) (describing "legal cosmology" as the underlying assumptions

power to regulate its object-field and each is at once a repository and an agency of "the law."

Interestingly, although new artifacts have been explicitly added to the legal repertoire, the new additions bear the marks of Langdellian artifactuality. Hence the late twentieth-century acceptance of "legal theory," which to many American legal thinkers seemed a radical and irresponsible departure from "solid doctrinal work," turned out to be well within the Langdellian orthodoxy. Just as Langdell sought to integrate cases into the organizing taxonomy of "certain doctrines and principles," late twentieth-century thinkers sought to integrate certain doctrines and principles into an organizing taxonomy of theory. To put it perhaps too bluntly, "legal theory" has often been little more than Langdellianism raised to the second power — a doctrine of the doctrine — a meta-doctrine that, like the original, was addressed at least nominally to courts and purported to direct their legal decisions. Often such "theory" was praised and criticized by other legal academics using criteria typically used to evaluate doctrine: is the "theory" determinate, realizable, practicable, anchored in authority, internally coherent, and the like? And like court-issued law generally, "legal theory" was often portrayed as neutral in provenance and intent, autonomous in character, context-transcendent in scope, and regulative of its object-field.

This process by which the stamp of Langdellian artifactuality is impressed upon new additions to the American legal repertoire is repeated endlessly, automatically. Ostensible departures from the Langdellian paradigm are almost immediately reappropriated.[106] For instance, one of the purportedly "revolutionary" modifications of Langdellianism was the recognition that social and institutional agents known as "courts" or, more generically, "decisionmakers" contribute to the development of the law. Langdell originally established a law so pure, so formal that it mysteriously worked all by itself: doctrine did things to other doctrines seemingly unassisted by any human or institutional agency. Ironically, as soon as social agents, such as "the court," were recognized within the legal repertoire, they became imprinted with the marks of Langdellian artifactuality. Hence, the American legal thinker's dominant image of "the court" is pervasively legalicized: the court is an agency whose identity is fashioned in the image of American law. It is a constellation of specific legal duties, obligations, and powers — a construction of legalist discourse.

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upon which the legal system is built and arguing that these "conceptual and practical building blocks" vary among different cultures).

[106] For one example of this reappropriation, consider Robin West's use of Stanley Fish's "interpretive community." *See* Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 267–68 (1993) (using the interpretive community notion as the grounds to "consider not just alternatives to received meanings of constitutional phrases, but alternatives to received understandings of the idea of constitutionalism and the idea of law" as well).

Although "the court" may be a term that points to a social agency that exceeds legality, in American legal thought, this social agency is nonetheless cast in the Langdellian aesthetic. "The court," as the expression is understood in American legal thought, is itself cast as a construction of the law.

The same imprinting of the Langdellian aesthetic occurs with other markers that ostensibly point toward the social. Hence, no sooner are signifiers, such as "social construction," "culture," "practices," "politics," and the like, introduced to American legal thought than they become domesticated by and reconfigured in the image of the Langdellian aesthetic.

This pattern of domestication and reconfiguration can be seen at work in the interdisciplinary context as well. Whether the talk is of microeconomics, deconstruction, Frankfurt school critical theory, history, or whathaveyou, legal thinkers are forever recasting foreign disciplines in the Langdellian aesthetic. It is in this way, for instance, that what Stanley Fish calls the "interpretive community" becomes reified into an identifiable authority otherwise known as the American legal profession.[107] It is in this way too that the careful epistemological nihilism of Ronald Coase[108] becomes petrified into a foundation for countless "constructive" prescriptions on how to improve the efficiency of the law.[109] This domestication and reconfiguration continues when Foucault enters the legal academy and is promptly offered as an authority for the Supreme Court.[110] And the same pattern is seen again when the perspectival anti-formalist moments of American pragmatism are used to privilege the perspectives of certain highly stereotypical classes of "the oppressed."[111]

The raw improbability of these projects is testimony to the continued hold of the Langdellian paradigm. What is improbable is not examining law from the perspective of a Fish, a Coase, a Foucault, a James; such perspectives might produce some understanding of what law is, what it is not, and of what its limitations are. What is completely improbable is the prospect of transforming any of these perspectives *into* law. Moreover, it is improbable from both the legal and the extra-legal perspectives. From the perspective of the legal, it is doubtful that many agents charged with making or finding law would adopt any of these approaches. From the perspective of the extra-legal, Fish, Foucault, and company, exhibit a certain resistance to their

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107 *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982).

108 *See* George L. Priest, *Gossiping About Ideas*, 93 YALE L.J. 1625, 1635 (1984) (book review).

109 The early editions of Richard Posner's *Economic Analysis of Law* evidence this prescriptive use of transaction cost analysis. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17–18 (1st ed. 1973).

110 *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783, 802–07 (1989) (using the writings of Foucault to refashion the constitutional right of privacy).

111 Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1708 (1990).

assimilation into the law form — particularly, the Langdellian law form.

The efforts of legal thinkers to transform such improbable sources of knowledge into law are symptomatic of the continued hold of the Langdellian paradigm. These efforts are typical of what one does — what one is supposed to do — as a legal thinker. The task is to subsume, subordinate, and envelop new material, new contexts, and new problems within the Langdellian aesthetic. For elite legal thinkers, the task is basically to police law's empire, to guard its gates, to restate its timeless truths, and to deliver up new colonies.

This brings us to another aspect of the continued hold of the Langdellian paradigm. Despite significant contributions from ostensibly anti-Langdellian corners of the academy — legal realism, Critical Legal Studies, law and society, microeconomics — the self-image and persona of the legal thinker remain largely the same. In the time of Langdell, the self-image of the legal thinker was that of a judge of the judges. The legal thinker sifted through legal opinions to distill the kernel of truth: certain doctrines and principles. Conforming precedent would be approved; non-conforming precedent rejected. In the late twentieth century, the list of artifacts to be judged and the kinds of issues to be adjudicated has grown. But the role of the legal thinker as a kind of meta-judge remains the same.

In short, ever since Langdell, the fundamental paradigmatic activity has been one of sorting, evaluating, adjudicating, and subsuming things so that they become, or become subordinate to, the Langdellian aesthetic. Like the judges whom they imitate, legal thinkers understand themselves to be engaged in the enterprise of "doing law." American legal thinkers have introjected into their own disciplinary paradigm the standards, the criteria, the rituals, the forms of knowledge, the idioms, the local ideologies, the habits, the proficiencies, and the professional deformations of those they claim to study — the courts, the judges, and the legislators. They are, in short, like anthropologists who "have gone native" with their own tribe.

D. The Self-Referentiality of Law

One result of this introjection is that the discipline of American law curiously collapses its objects of study with its method of study. The objects of study often bear such names as doctrines, principles, policies, and tests. These, it turns out, are the fundamental units of analysis employed in explaining and understanding law itself. As a result, law becomes a vigorously self-referential universe — one in which the various units of analysis are used to identify, explain, and understand other units of analysis and vice versa.[112]

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[112] *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935). Circularity itself is not the problem: rather, the problem is *what* circularity

The circularity of American law is pervasive. To engage in the enterprise of American legal thought is not only to argue in a circle, but also to argue with elements whose identities are the intersections of various circles. Even fundamental units are composed of a variety of chains of signification. For instance, the juridical entity known as a "constitutional right" is constituted as a more or less stabilized intersection of linguistic formalism (the text), primitive psychologism (the framers' intent), naive instrumentalist social theory (means/ends analysis), and moral animism (principles and values). These and other chains of signification intersect and blend with each other to produce what legal thinkers call a "constitutional right." Hence, the very identity of a unit of analysis is an intersection of various other units of analysis.

In consequence, the fundamental terms of analysis remain radically underspecified and, perhaps more to the point, radically unspecifiable. At the end of the twentieth century, a great many plausible things can thus be said about the fundamental units of analysis. For example, any of the following propositions can still be maintained:

> something is not law because it is not just;[113]
> something is law even though it is not just;[114]
> something is law because it is just;[115] or
> something cannot be at once law and just.[116]

The problem is not, as some would have it, a lack of "rigor." Rigor was never a possibility. The object of study — for instance, what is called a "right" — is ontologically constituted in a way that defies rigor: it is protean, pluralistic, and relational, except, of course, when it is fixed, monistic, and autonomous.

Not only is there no disciplinary method for identifying what counts as one doctrine, one principle, or one unit of analysis — the problem of individuation faced, but not answered by Langdell — but it turns out that there is also no specified method for distinguishing the doctrines, principles, or units of analysis that are authentic from those that are spurious. To put it simply, in American law, there is no method because there is no specified core ontology, and there is no specified core ontology because there is no method.

In addition, there is no accepted specification of the rules of transformation. It remains unclear, for instance, how a principle might or might not affect a doctrine (or vice versa) or how a theory is supposed to affect principles and doctrines. To take a simple example, consider

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hides and *what* it reveals. Specifically, the problem arises when circularity, by "working" so smoothly, hides something that is interesting and discloses something that is not.

113 *See, e.g.*, William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 639 (1994).

114 *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 628–29 (1958).

115 *See* RONALD DWORKIN, LAW'S EMPIRE 97 (1986).

116 *See* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 941, 943 (Mary Quaintance trans., 1990).

the relation between a "rule" and the "reason behind the rule." In some cases, the reason behind the rule virtually determines the rule's content. In other cases, the reason behind the rule justifies, but has no significant effect on the rule's content. It is in this way that the relationship between a "rule" and the "reason behind the rule" is contextual.

Because the units of analysis lack any robust or stabilized referent and because the relations that can possibly be established among these units of analysis are radically underspecified, a great many (often incompatible) things can be said about how the various units of analysis relate to each other or to actual judicial decisionmaking. This phenomenon, which in Critical Legal Studies parlance is called "indeterminacy,"[117] does not simply occur "externally" — in the counterpositioning of legal doctrines or other legal artifacts. The indeterminacy arises "internally" as well — within a "single" legal artifact. In other words, when legal thinkers refer to "rules" or "rights," there is a profound sense in which they literally do not — and, moreover, cannot — know what they are talking about.[118] Every "rule," "right," or other legal artifact is a locus not only of determination, but of nondetermination as well.

In law, as in phrenology, the underspecification of the fundamental units of analysis, their relation, and the ways in which they are identified allows practitioners to produce a great deal of complexity. Throughout the twentieth century, this complexity has blossomed. A series of operations and questions facilitated the creation of ever more detailed analytical sub-categories, exceptions, predicate conditions, and the like. These operations and questions could be repeated at each new level of law's conceptual organization. Questions such as: What counts as evidence? What is the burden of proof? What is the appropriate procedure for taking cognizance of this issue? Does this institutional body have jurisdiction? What do these terms mean? How does this term modify that one? Are these terms sufficiently well specified? On whose authority? Is this authority valid? On what grounds?[119]

The legal-process thinking that emerged in the American legal academy of the late 1950s and early 1960s celebrated such detailed

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[117] For a brief discussion of various indeterminacy claims, see Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1683 n.195 (1991).

[118] For elaboration, see Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. (forthcoming Dec. 1996) (discussing the paradoxical ontology of "law"); Pierre Schlag, *Rights in the Postmodern Condition*, *in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 263, 302–03 (Austin Sarat & Thomas R. Kearns eds., 1996); Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 226–27 (1994).

[119] *Cf.* Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 107–08 (1959) (asking a similar series of questions).

inquiry.[120] In this conceptual universe, there was no reason for the process of questioning ever to end. For every answer given, a host of questions could be asked again, repeatedly, interminably. Much of the overwrought and overconstructed character of contemporary trials, Supreme Court opinions, and law review articles is traceable to the exasperatingly picayune aesthetic of this mid-century jurisprudence.[121]

Of course, legal thinkers have made numerous attempts to systematize law through the imposition of reductive schemes: everthing from the late nineteenth-century codification movements to the late twentieth-century "legal theory." But despite these attempts at systematization, the complexity of American law has proliferated. Ironically, every reductive effort seems to have produced yet more complexity. This perverse effect results from the failure of any reductive effort to take hold completely. Such failure is, in turn, predictable given the non-determination at the heart of the legal ontology: there is nothing determinately there to reduce down to.

To a large extent, this self-referential complexity has bolstered belief in law. In its vastness, this self-referential complexity both enabled and confirmed the possibility of making seemingly sophisticated moves within the edifice of law itself. The promise was that a mastery of law combined with sufficient native intellectual power would enable the performance of some truly admirable intellectual operations. In the solemn words of Henry Hart:

> Thus, the Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law and impersonal and durable principles for the interpretation of statutes and the resolution of difficult issues of decisional law.[122]

The very magnitude and grandeur of the discipline of law — its impressive collection of ostensible bits of knowledge — contributed mightily to the sense that there was truly something there. Indeed, the vastness and the magnitude of the edifice made it difficult for anyone to believe that an enterprise possessed of so much information could be almost entirely bereft of knowledge or insight.

Moreover, the self-referential complexity of law led to a disciplinary orientation toward the micro-context. Faced with the daunting mass of legal materials, legal thinkers, law teachers, and law students often eschewed big questions in favor of purportedly small-scale questions. The result of this preference for resolving "concrete legal

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120 *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at cxxxviii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (reprinting the unpublished tentative edition of 1958).

121 *See* RICHARD A. POSNER, OVERCOMING LAW 75–77 (1995).

122 Hart, *supra* note 119, at 99.

problems," this micro-perspective, was to render a great deal of nonsense seemingly quite plausible.

For example, if one asks whether a single appellate opinion is elegant in mastering its "tensions,"[123] it is easy to forget that an appellate opinion is but a small moment in a vast and ugly enterprise of case-crunching and citation-mongering. Similarly, if one asks whether comparative negligence is more efficient than contributory negligence, it is easy to forget that negligence law, with its intense fact-specific inquiries, its preposterous range of damage awards, and its expensive, quasi-cartelized personnel, is a decidedly odd place to look for efficiency in the first place. Likewise, if one is forced to consider whether it is more reasonable to use a seven factor *ALI Restatement (Third)* test or a five factor *ALI Restatement (Second)* test, it is easy to forget that it would be most reasonable to dismiss the question itself as prima facie unreasonable. And, again, if the question is whether this or that moral justification is right, one could easily forget that, in law, moral argument is largely a sales technique — the jurisprudential equivalent of advertising.

By indulging an instinct for the small scale, American legal thinkers can forget just where they are: the context is obliterated. The small-scale orientation enables legal thinkers to believe that they *know* something — for they have mastered the details of one very small area extremely well. But, ironically, their claim to *know* this one small area depends upon the resolution of large-scale questions that they have studiously avoided. And ultimately, the value of any conclusion they draw depends upon the strength of the large-scale answers that they unwittingly provide to questions they have not asked.[124]

Still, legal thinkers seem to believe, or at least to act as if, they know something. Yet the belief that legal thinkers *know* anything is on no more solid ground than the belief that phrenologists knew anything. Phrenologists, after all, also had a massive assemblage of bits of information. It has turned out, of course, that this knowledge was wrong. Although phrenology achieved a massive integration of many carefully arranged propositions, the phrenologists did not really know anything. What phrenologists knew was nothing more than what other phrenologists believed they knew, and what they knew was not knowledge.

Legal thinkers may well face the same predicament. What legal thinkers know is what other legal thinkers believe they know. Legal thinkers know how other legal thinkers will think about things — what kinds of arguments they are likely to make, what sources they

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123 *See* JAMES BOYD WHITE, *The Judicial Opinion and the Poem*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107, 117–19, 135 (1985).

124 This is why one of the most difficult and vulnerable moments in writing a conventional law review piece is in the delimitation of its jurisdiction. It is almost always an intellectually unjustifiable operation that nonetheless must be performed in order for the work to even begin.

will draw upon, what values and concerns they will invoke, and what conclusions they will offer.[125] This knowledge is, in short, knowledge of the beliefs shared by particular kinds of persons — namely, persons who have undergone the same formal legal training.

Knowing such beliefs allows legal thinkers to operate competently within the web of beliefs known as "law." In this minimalist sense, one might say law "works." Mastery of these beliefs and knowledge of their self-referential organization, however, guarantees nothing about the status of those beliefs. It suggests nothing about whether the web of belief is true, insightful, ethically appealing, or intellectually interesting.

For those who operate within this self-referential web of belief, knowledge of the ropes, the knowledge of how to "move" within the system, produces the illusion that they have knowledge of the law. The ability to produce results, outcomes, and conclusions that are accepted by the relevant community operates to confirm the sense that the members of the legal community actually possess knowledge of the law. Because legal actors see each other "doing law," they come to believe that they too know how to do law. Further, they come to believe that there is a knowledge of the law, a discipline, that informs their knowledge of how to do law.

This belief structure is similar to the structure of the faculty-thinking of phrenology. The perception of successful legal acts (winning a case) is attributed to a performance (the "doing of law") that is attributed back to a "knowing" of the ropes that is then reified and attributed back to a "discipline" of law, namely, the "knowledge" of an imaginary object-form known as "the law." At the same time, knowledge of the law is held to be crucial to the knowledge of how to operate within the legal system that is held to produce the competent doing of law that is then assumed to translate into successful legal acts.

The self-referential universe can be diagrammed as follows:

KNOWLEDGE OF THE LAW (e.g., knowledge of the discipline of law — of legal doctrines, principles, statutes, etc.)	*enables* -> *confirms* <-	KNOWING THE ROPES (e.g., knowledge of how to argue in court, how to draft legal documents, and how to conduct negotiations)	*enables* -> *confirms* <-	COMPETENT "DOING OF LAW" (e.g., competent performance of legal argument)	*enables* -> *confirms* <-	SUCCESSFUL LEGAL ACTS (e.g., winning a case, closing a deal, or settling a dispute)

Those who believe in "law" operate within this self-referential universe. Not surprisingly, most criticism voiced by American legal thinkers of law teaching or legal scholarship has occurred within the

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125 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 100 (1990).

confines of this schema. Most of the internal criticism lies in challenging one or more of the various connections between knowledge of the law, at one end, and performing successful legal acts, at the other end.

The great success of this self-referential universe of American law, of course, is that unlike phrenology, tremendous consequences — mandatory incarceration, forcible reallocation of wealth, even death — often turn upon "the doing of law." When so much turns upon this "doing," it is easy to project the apparent power of "the doing" back to a knowledge that ostensibly informs the "doing" — namely, knowledge of the law. The seriousness and even validity of "knowledge of the law" becomes affirmed through the manifest importance of the results that it seems to produce. Similarly, the crucial ethical, political, and practical significance of successful (and unsuccessful) acts of law produces powerful (ethical and psychological) incentives for those involved in the practice of law to believe that they "know" what they are doing — and that there is a "knowledge" of law that informs their doing of law.

This brings us to the self-legitimating aspects of law. Like the phrenologists, legal thinkers since the beginning of the academy have been oriented toward producing legitimations of their discipline. Like the phrenologists, they have wanted to believe. For the legal academics, not only were their jobs at stake, but also their status as academics. Belief in law has allowed legal thinkers to believe that they possess a discipline, a body of knowledge — if not a science, at least an expertise. It has also provided a certain degree of psychological tranquility: the belief in law has, in the absence of a widely-held public religion, served to comfort people in the thought that the social world is organized in a rational and normatively appealing manner. It has thus seemed to many legal thinkers as if much has been at stake.

E. The Self-Legitimating Character of Law

Like the phrenologists then, American legal thinkers have been oriented toward the legitimation of their discipline. They have sought to validate, to justify, and to rationalize law. In striking contrast to phrenology, which claimed to describe and explain the actual, American law was, from its Langdellian beginnings, already framed in terms of an idealized ontology.

Langdellian science was *normative* from the very beginning. It was normative in the sense that it sought to develop norms that would allow the identification and regulation of idealized entities — namely, judicial opinions (which, in turn, would themselves announce idealized entities, namely, norm-forms). Although phrenology was devoted, at least at its inception, to the explanation of actual human behavior, Langdell's law was devoted from the very beginning to the adjudication of the "correctness" of already highly idealized objects — namely judicial decisions.

The implications of this point are interesting and important and have been long-lasting. From the very beginning, Langdell's law was at once an articulation as well as a legitimation of the law. Langdell's law, like subsequent American law, was constructed to be at once what it was, as well as its own justification. The circularity, the self-referentiality of law, was thus built into its core ontology.

American law is a kind of normative Mobius strip. Its identity is to be both what it is and what it ought to be. This self-legitimating self-referentiality has played a large role in insulating law from serious critique.[126] Indeed, criticism of law is stunted at the outset, for there can be no statement of what the law is apart from an idealizing rendition of this law. Similarly, there can be no statement of what the law ought to be apart from a recognition of what it is.

F. Folk Ways, Folk Lore, and Folk Law

Like phrenology, the discipline of American law has tracked, evoked, and incorporated folk-ontologies and folk-frames. Thus the views of human nature and human beings that are represented in American law are consonant with folk understandings. For instance, throughout the common law and statutory law we find pictures of human beings cast in a rather simplistic folk psychologism. This psychologism represents human beings as essentially rational, self-directing individuals animated by mental states described variously as intentional, reckless, or negligent. This image of the individual subject as free-willed is complemented (and counterpoised), as in folk culture, with a more deterministic vision demarcated by notions of coercion, duress, compulsion, insanity, and the like.

The law likewise casts its operations within a folk frame of binary oppositions such as:

mind/body;

idealism/materialism;

reason/power;

public/private.

These binary oppositions, which describe the structure of folk belief, are evoked in the very structure of law. For example, in the folk frame, as in American law, reason and reasoned discourse are seen as distinct from and regulative of the exercise of power, behavior, and the like. Folk belief is thus incorporated in the very basic organization and structure of law.

Similarly, law evokes folk myths of order, salvation, perfection, and progress. Much of the action of law is described in soothing narratives that promise that these myths will be realized or maintained. Indeed,

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[126] *Cf.* Cohen, *supra* note 112, at 838 (pointing out that "if the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or badness of any law").

a great deal of the controversy within American law concerns conflict between various (often theological) narratives of redemption. Such recurrent narrative conflicts pit

order against progress;

security against freedom;

stability against change.

Finally, a great deal of substantive law tracks not only narrative myths, but also emotional complexes. The structure of criminal causes of action can be understood in terms of anger. Much of property law — for instance, the action of trespass — can be understood in terms of fear: fear of loss of control, fear of contamination, and the like. One reason that trials are so gripping in American culture, and so often featured as vehicles of entertainment, is that they are premiere arenas in which forbidden emotions can be experienced — authentically or vicariously — without fear of censure. They facilitate the organized and scripted release of aggression, hatred, and even sadism.

IV. Why Law Is Different from Phrenology

One of the major differences between law and phrenology is that the latter was ultimately subject to empirical refutation, but the former is not. In part, this difference has to do with the relationship between each discipline and its objects of study. Phrenological knowledge encompassed aspects of physical nature that are relatively observer-independent (i.e., brains and skulls). Consequently, neither phrenology nor its successor sciences were necessary for their objects of study to do their work: the brain and the skull do their work perfectly well (or perfectly badly) whether they are being studied by a discipline or not. But the reverse was not true. Because phrenology advanced statements about brains and skulls, its knowledge was ultimately subject to constraint and verification in terms of these designated aspects of physical nature.

Law is very different. What counts as law in American society is a function of what those who are authorized (a deliberately vague term) say it is. This ambiguous and Protean provenance for law makes the discipline of American law much more vulnerable, much more fragile because there is no subject-independent nature to sustain the beliefs of American legal thinkers. In a related sense, however, this same provenance makes the discipline of American law much more resilient because there is no possibility of falsifiability independent of the beliefs of those who are authorized to say what the law is.

In contrast to phrenology, the relations of the discipline of law to its objects of study are quite complicated. The discipline of law rests on a fundamental ambiguity in the referent of that crucial term

"law."[127] The term "law" refers to the legitimate decisionmaking of authorized bodies such as courts. Law is thus a kind of *authoritative action.* The term "law" also refers to the intelligent source that is supposed to govern this authoritative action. Law is thus a kind of intelligent knowledge. Because the expression "law" refers both to authoritative action and intelligent knowledge, the expression is ambiguous. Consider the following permutations: Law means . . .

intelligent knowledge;

authoritative action;

intelligent knowledge constraining authoritative action;

authoritative action expressed as intelligent knowledge.

Obviously, many other permutations are possible. Simply adding the following qualifiers — "always," "often," "sometimes," "only," "essentially," "generally," or "ideally" — at strategic places produces a great many other permutations.

The important thing to recognize, however, is not just the ambiguity, but also that the ambiguity and its associated slippage cannot be eradicated without losing crucial aspects of what is called "law." The reason is simple: what is called law is, among other things, the relations between law as authoritative action and law as intelligent knowledge. The plurality of such relations is sufficient to render the term "law" ambiguous and slippery. There is more, however: it turns out that each sense of law (intelligent knowledge and authoritative action) is the source for the specification of the other. Hence, something is law (in the sense of authoritative action) to the extent that the authoritative action is generated or constrained by the relevant intelligent knowledge (as opposed to, for instance, prejudice, power, or politics). Similarly, something is law (in the sense of intelligent knowledge) to the extent that the intelligent knowledge is drawn from and reflective of the relevant authoritative action (as opposed to, for instance, moral judgments, political yearnings, or personal values).

This mutual self-constitution of the two senses of "law" cannot be specified within the discipline. It cannot be specified because — from Joseph Beale to Ronald Dworkin — the discipline of American law is itself grounded on this circular ambiguity. The circular ambiguity of law as authoritative action and law as intelligent knowledge is itself introjected into the discipline of American law.

It is the presence of this ambiguity within the discipline of American law that enables legal thinkers to claim for themselves rather remarkable powers to say what the law is: given enough will, it always remains possible to affirm that intelligent knowledge governs authoritative action. Joseph Beale, for instance, was remarkably confident in the power of legal academics to contribute to the formation of law:

[127] There are many other constitutive ambiguities, but these are not of concern at this point. *See supra* pp. 906–08.

> The teachers of law today have an increasing influence, and one which is comparable in degree with the part played by the judges, in the development of the law; and their power to mould professional opinion is likely to increase in the future more rapidly than that of the judges.[128]

This confidence — born of Langdellian science — has remained. Like Beale, Ronald Dworkin affirms a rather remarkable power of the legal thinker to say what the law is. The introduction of one of his books begins modestly enough: "We will study formal legal argument from the judge's viewpoint . . . because judicial argument about claims of law is a useful paradigm for exploring the *central, propositional aspect of legal practice*."[129] By the end of the book, the law of the academy has turned veritably into Law's Empire:

> What is law? . . . Law's Empire is defined by attitude, not territory or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. Law's attitude is constructive: it aims to lay principle over practice to show the best route to a better future, keeping the right faith with the past.[130]

In *Law's Empire*, law as authoritative action is profoundly — indeed, amazingly — responsive to law as intelligent knowledge.

Although the circular ambiguity of law is introjected into the discipline of law, it is obviously not introjected jot for jot. Still, certain similarities are worth noting. The discipline of law does not merely strive to study its objects (intelligent knowledge), but like law itself, strives to regulate and to adjudicate their value and identities (authoritative action). Thus, the discipline of law, under various banners, assumes for itself the status of the law of law. Whether as Langdellian systematization, ALI Restatement, or legal theory, the discipline of law desires to be the law of law. This is why legal scholarship is often written in the idiom, aesthetic, and rhetoric of a legal brief. It is also why legal thought sometimes sounds more like rulings from the bench than like scholarly engagement.[131] The introjection of the circular ambiguity of law into the discipline also helps explain why elite and nonelite members of the legal professoriate alike often assume a tone of anguished solemnity and somber grandeur in expressing their legal thought: they literally believe that they and their legal thought are responsible for the direction of the Court, the future of the rule of law, even the welfare of the nation.

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128 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 40 (1935).

129 DWORKIN, *supra* note 115, at 13–14 (emphasis added).

130 *Id.* at 413.

131 Hence, for instance, when one commentator dismisses recent criticisms of rights, he sounds eerily like a judge granting a motion to dismiss for failure to state a cause of action: "[the attack on rights] is based on confusion and on a failure to make necessary distinctions. The attack is best aimed at particular rights, not at rights as such. In its usual form, it depends on a misunderstanding of what rights are and of what they do." Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 729 (1995).

The introjection of law's circular ambiguity into the discipline is in a sense quite advantageous. Even as the discipline claims to be involved in a rational or scholarly enterprise, it nonetheless can pattern itself after the authoritative acts of state agents, such as courts and legislatures. Insofar as the expressions of the state in the form of judicial opinions, statutes, and regulations can be expected to endure, so can the discipline that so helpfully organizes, rationalizes, and represents these expressions as intelligent knowledge. As long as the discipline shows obeisance to the authoritative legal forms, it enjoys the backing of the state. This disciplinary advantage is a rather remarkable one: the disciplinary knowledge of law can be true not because it is true, but because the state makes it true.

The liberal state itself, with its commitments to reason, requires something like this discipline not merely to function, but to constitute itself as the liberal state. Insofar as the legitimacy of the actions of state agents (judges, legislators, and the like) rests upon the claim that these agents *know* what they are doing, there is a powerful incentive to produce a legal knowledge, a form of knowing that is distinctly legal. Not only must this "legal knowledge" be *knowledge* — exhibit the aesthetic, the semblance of a discipline — but it also must be distinctly *legal* — capable of resisting or domesticating the knowledge claims of other disciplines. Thus, whether or not a discipline of law is possible or even coherent, the state demands its existence, its creation, and its maintenance (even if only as an illusion). Law is the language of the state, and the discipline is its keeper.

Thus, merely by subordinating intellectual endeavor to the idioms, habits, concerns, anxieties, and cognitive orientations embodied in the legal materials and legal institutions, American legal thinkers can maintain their discipline.[132] It is, of course, an interesting question what it is that is being maintained. To appreciate this point is to take cognizance of a perverse possibility: given the circular ambiguity at the heart of law, it is possible to arrive at a state of affairs in which the *intelligent knowledge* of the discipline becomes subservient to the *authoritative action* of law. In this condition, the intelligent knowledge would serve primarily as a rationalization, a legitimation of authoritative action. This, of course, is very close to the state of affairs that phrenology reached toward its later stages: a state in which its "intelligent knowledge" came to consist almost wholly of praise for its own diagnostic and predictive powers.

Phrenology ultimately ran up against certain external barriers — the brutal reality of physiological nature. In contrast, it is not altogether clear what cold, hard realities can keep the development of law or its discipline in check. Unlike phrenology, law and its discipline are well positioned to proliferate — to assert their rule with ever more

[132] For a description of the "unity of discourse" of legal scholars with judges, see Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1859–65 (1988).

intensity in ever more precincts. And of course, given the circular ambiguity, it is not at all clear *what* it is precisely that is being asserted or *who* or *what* precisely is doing the asserting. These are questions that the discipline of law, for understandable reasons, fails to pose, let alone answer, in any intellectually serious way.

V. RECONSTRUCTION

The breakdown of Langdell's vision of law as science throughout the twentieth century has occasioned many attempts to find or reconstruct the intelligent knowledge of the law. In some cases, as in legal realism, the attempt has been to find a better basis for the science. Even today, one can still find the manifestations of a professional desire to reinstitute the discipline of law as a science. Richard Posner, for instance, once expressed this desire in his afterword to the inaugural issue of *The Journal of Legal Studies*:

> The aim of the *Journal* is to encourage the application of scientific methods to the study of the legal system. As biology is to living organisms, astronomy to the stars, or economics to the price system, so should legal studies be to the legal system: an endeavor to make precise, objective, and systematic observations of how the legal system operates in fact and to discover and explain the recurrent patterns in the observations — the "laws" of the system.[133]

The old dream dies hard. Although few legal thinkers today would advertise their jurisprudence as "science," the desire for a systematic, rigorous, demonstrable knowledge — the longing for a law of law — remains.

One sees it still in the recent interdisciplinary movements. The efforts of American legal thinkers to borrow from the most "rigorous" of the social sciences and the humanities can be understood as an attempt to repair and redeem the disintegrating disciplinary structure of American law. By borrowing from microeconomics and analytical philosophy, the most elite law schools attempt to "reconstruct" their disciplinary edifice, to "rethink" their disintegrating formalizations, and to "restate" their claim of authority to say what the law is.

If these popular metaphors of "restatement," "rethinking," and "reconstruction" have any plausibility, it is because of a faith that something remains worth restating, rethinking, or reconstructing. But what remains there is the pseudo-scientific Langdellian ontology. So even as they "restate," "rethink," and "reconstruct," American legal thinkers do so with and within the terms of the pseudo-scientific Langdellian ontology. American legal thinkers still use the units of analysis known as doctrines, principles, policies, tests, and their aesthetic equivalents to explain and justify other doctrines, principles, policies, tests, and their

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

aesthetic equivalents. And they continue, despite what they say they believe on this matter, to speak and write as if those are the precincts where law is to be found.

The irony is that, from an intellectual standpoint, the Langdellian ontology is pervasively flawed. The fundamental units of analysis, as suggested earlier, are a locus of non-determination. This non-determination at the very foundation of law enabled both the rise and the collapse of law as science. To the extent that this ontology remains the groundwork after the fall, it also enables the emergence and destruction of every subsequent jurisprudence (even the most improbable). It enables the rise of the new jurisprudences, because there is no ontological ground to keep them out. And it enables their fall, because, in their reductionist attempts to determine law to be *this* kind of thing (as opposed to many other kinds of things), they are all utterly improbable.

Perhaps we have now reached the point where this improbability is self-evident. Consider, as an example, the vision of law as art, as literature.[134] Now to be sure, one might find, here or there in the case law, a well-composed opinion or a well-turned paragraph. But there is nonetheless something deeply strained in a vision that would see American law through the lens of art. It is hard to see just what kind of aesthetic sensibility would allow the verbiage of the state codes, the C.F.R., or Supreme Court opinions to be apprehended as an art form. Of course, it is not as if art cannot be found in American law. It can — that is what non-determination implies. But to try to understand American law as a kind of literature is a bit like trying to apprehend Soviet Communism as a movement dedicated to sponsoring "socialist realism."

Others think of American law as the realm of practical reason, of phronesis, of pragmatism.[135] But in this vision too, something is fundamentally askew. Not only is there an inescapable emptiness to these terms,[136] but despite their genial and accommodating emptiness, they manage to remain dissonant with the character of American law. For practical reason, phronesis, or pragmatism to be plausible, it would seem necessary that they operate in a context in which such orientations could register their results. And that context is missing. Given the massively overwrought and irrationally over-reasoned character of American law at present, the most "reasonable" or "practical" thing to do would be to *not do it*. If practical reason, phronesis, or pragmatism have anything to contribute to the enterprise of American law, it is to counsel exit and abandonment.

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[134] *See, e.g.*, WHITE, *supra* note 123, at 77–106.

[135] *See generally* Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) (discussing the role of pragmatism in law).

[136] *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 410 (1990).

Still others think of law as an extension of moral philosophy.[137] This view also seems somewhat odd. After all, it is difficult to see what kind of morality it is that would systematically overlook the leveraging, the deception, the intimidation, the aggression, the harassment, and the waste that comprise so much of the actual practice of law.

Many others believe that law is (or ought to be) ruled by efficiency considerations. In this belief too, there is something awry. In the face of the extraordinary complexity of American law and its massive piling on of transaction costs, it is difficult to understand why anyone would even dream that this massive bureaucratic maze was designed to produce efficiency.

The interesting thing, then, about the various recent attempts to recast American law in the image of literature, practical reason, philosophy, or microeconomics, among others, is the stunning improbability of such reconstructions. What all these reconstructions have in common is *a strikingly implausible master claim* — that law is a kind of literature, that law is the forum of practical reason, that law is the handmaiden of moral philosophy, or that law is efficiency in action. If such improbable visions have taken root in the legal academy, it is because the Langdellian paradigm has already done the groundwork. The convergence of a vigorously self-referential disciplinary practice, an instinct for the micro-context, a state-sponsored desire to legitimate law, and a tracking of folk belief has eclipsed the raw improbability of these visions and enabled them to thrive. Ironically, the very improbability of these visions has made them all the more successful. Indeed, it is precisely because law is so little like a work of literature, so pervasively unreasonable, so often morally obtuse, and so frequently inefficient that there is so much for legal thinkers to say about how to improve the law in accordance with these various visions.

VI. CONCLUSION

Now in one sense, a limited rhetorical sense, there is something to admire here. American law is apparently one discipline that has been able to sustain its intellectual credentials by representing itself in the most extravagant and improbable ways.[138] In another sense, however, perhaps we are to understand the increasing improbability of the erstwhile attempts to refurbish the intellectual image of law as a sign of increasing desperation — as an indication that the discipline of American law has lost whatever intellectual bearings it may once have had.

Still, even as the new jurisprudential visions take hold, there is an important sense in which the discipline of law remains eerily unmodi-

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137 *See, e.g.*, DWORKIN, *supra* note 115, at ix.

138 *See* STANLEY FISH, *The Law Wishes to Have a Formal Existence*, *in* THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 141, 156 (1994).

fied — impervious to any and all "reconstructions." The intellectual identity of the archetype may change, but the artifacts and the professional mission remain the same: sifting through the cases and other legal artifacts, devising taxonomies, diagnosing pathologies, policing the boundaries of law's empire, and turning anything and everything into norm-forms. Even the most ambitious and subtle jurisprudential projects seem to succumb to this politics of form. In the end, every opinion tends to become, if not a law, at least a comprehensive jurisprudence. Phrenology is dead. But law endures.