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## ***Law as Instrumentality***

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# LAW AS INSTRUMENTALITY

JEREMIAH A. HO\*

*Our conceptions of law affect how we objectify the law and ultimately how we study it. Despite a century's worth of theoretical progress in American law—from legal realism to critical legal studies movements and postmodernism—the formalist conception of “law as science,” as promulgated by Christopher Langdell at Harvard Law School in the late-nineteenth century, continues to influence the inductive methodologies used today to impart knowledge in American legal education. This lasting influence of the Langdellian scientific conception of law has persisted even as the present crisis in legal education has engendered other reforms. However, subsequent movements of legal thought have revealed that the law is neither scientific nor “objective” in the way the Langdellian formalists once envisioned. After all, the Langdellian scientific objectivity of law itself reflected the dominant class, gender, power, and race of its nineteenth-century progenitors. Thus, by sustaining the illusion of scientific objectivity, the continued application of Langdellian pedagogy distorts our understandings of law and abridges individual explorations of pluralism, subjectivity, justice, and empowerment. Such prevailing false notions of neutrality in law leads to both disenchantment and hierarchy in legal practice, but worse it also distracts from meanings of law that would otherwise have led to empowerment and critique. In this way, legal scholars have clamored for a post-Langdellian legal conception to enable us to reach more relevant and emboldened meanings in law.*

*Prompted by such calls amidst the post-Recession crisis in the American legal academy, this Article offers such a new conception for theorizing meanings in law by locating law within its instrumentalities. “Law as instrumentality” obtains meaning by accepting law’s fragmentation and then observing, from fragmentation, the characteristics of its agency. The law is not*

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*a science; but it does embody human-made qualities of agency. This new instrumentality conception studies law's deliberate aesthetics as a way to explore law ontologically and critique its goals, its devices, its intentions, its significances, and its teleologies. From this conception, a broader methodology can arise to bring about a more relevant and empowering understanding of law to those who render it to life.*

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## I. INTRODUCTION

Lawyers are typically a pessimistic lot.<sup>1</sup> For better or worse examples of this age old observation have reared themselves noticeably during this present crisis in American legal academy and education<sup>2</sup>—a period that has drifted perilously on tides of the Great Recession.<sup>3</sup> Observations based on popular psychology tend to avoid being completely truthful on a particular subject.<sup>4</sup>

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1. See Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 39–41 (2001) (characterizing lawyers as pessimistic and describing the causes of such pessimism in lawyers).

2. See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html> [<https://perma.cc/AC6T-QSN4>] (“But improbably enough, law schools have concluded that life for newly minted grads is getting sweeter . . . . How do law schools depict a feast amid so much famine?”); Megan McArdle, *The Perils of Law School: A Chat with Paul Campos, Author of Don’t Go to Law School!*, THE DAILY BEAST (Sept. 24, 2012), <http://www.thedailybeast.com/articles/2012/09/24/the-perils-of-law-school.html> [<https://perma.cc/6UU5-4LCU>]. During the interview Campos stated, “Yes indeed, but the waterline has now risen so high that large portions of the classes at top ten law schools are struggling, so now there’s a ‘crisis.’” *Id.*

3. Jordan Weissmann, *What Do Lawyers and Bankers Have in Common? They Lost Jobs in 2011*, THE ATLANTIC (Jan. 10, 2012), <http://www.theatlantic.com/business/archive/2012/01/what-do-lawyers-and-bankers-have-in-common-they-lost-jobs-in-2011/251130/> [<https://perma.cc/3EJ3-P4GG>].

4. See Peter Brooks, *Law, Therapy, Culture*, 13 YALE J.L. & HUMAN. 227, 237 (2001) (discussing the Supreme Court’s substituting of “popular psychology” for “common sense” in a

Every once in a while, however, an observation reveals a beacon of truth.<sup>5</sup> Not long after national enrollment amongst law schools began to decline and the outside world took notice with scrutiny in 2011,<sup>6</sup> the word, “crisis,” was first uttered within the legal academy.<sup>7</sup> From its initial nervous whisper, this utterance of crisis did not go unheard.<sup>8</sup> At first, there were defensive stances of denial.<sup>9</sup> Very shortly, nonetheless, the facade of denial gave way to reveal a deep sense of anxiety—the contagious kind that spreads rapidly amongst a group of pessimistic individuals.<sup>10</sup> Once the anxiety set in, the halls of the American legal academy, as narrow as they are hallowed, served as an echo chamber, repeating and amplifying and ruminating over the notion of crisis until the noise became a collective cry of distress.<sup>11</sup> Then not long after, distress crystallized into action by law school and university administrations and much of it was swift in a corporate sense: cut-backs on faculty scholarship monies,<sup>12</sup>

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criminal decision as “rhetorical self-blinding”); see also Mary L. Tenopyra, *A Scientist-Practitioner’s Viewpoint on the Admissibility of Behavioral and Social Scientific Information*, 5 PSYCHOL. PUB. POL’Y & L. 194, 197 (1999) (“[P]opular psychology that obtains considerable publicity is often at odds with scientific psychology.”).

5. See Kevin W. Saunders, *The Framers, Children, and Free Expression*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 187, 235 (2011) (noting how academic psychology and popular psychology are something in accord).

6. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 185 (2012); Weissmann, *supra* note 3.

7. See McArdle, *supra* note 2.

8. See, e.g., Bryant G. Garth, *Crises, Crisis Rhetoric, and the Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL’Y REV. 503 (2013); Campos, *supra* note 6, at 179.

9. See Segal, *supra* note 2 (“But improbably enough, law schools have concluded that life for newly minted grads is getting sweeter. . . . How do law schools depict a feast amid so much famine?”).

10. Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> [<https://perma.cc/QB9W-H8SC>] (“Law schools have hustled to compensate for these shifts by trying to make it look as if their graduates are more marketable, even hiring them as research assistants to offer temporary employment. But those strategies won’t fix legal education . . .”).

11. ABA COMM’N ON THE IMPACT OF THE ECON. CRISES ON THE PROFESSION AND LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (2009), <http://www.americanbar.org/content/dam/aba/migrated/lsc/legaled/value.authcheckdam.pdf> [<https://perma.cc/XYE7-RV4S>].

12. Fabio Arcila, Jr., *The Future of Scholarship in Law Schools*, 31 TOURO L. REV. 15, 19 (2014) (“In the past few years, these scholarship incentives have been reduced or withdrawn, a trend that is likely to continue into the foreseeable future.”).

buy-outs,<sup>13</sup> rebuke,<sup>14</sup> rumors of school closures,<sup>15</sup> reduction in staff,<sup>16</sup> and pull-backs on faculty hiring,<sup>17</sup> to name a few. Simultaneously, a series of how-to reform legal education articles and books bombarded the literature.<sup>18</sup> A blame game began to surface from all directions.<sup>19</sup> On a day-to-day level at law schools, reports of dramatic changes prompted by apprehension and concern at law school were not uncommon.<sup>20</sup> In studying all of these events as part of classic pessimistic behavior, these responses should not surprise ourselves; in times of real or perceived crisis, pessimists (lawyers and law professors included) will often abandon ship, reach for a raft of security, and internalize obsessively about self-preservation—all the while hopefully searching for a new course.<sup>21</sup>

13. Mary Moore, *New England Law Offers Faculty Buyouts, Dean Takes Pay Cut*, BOSTON BUS. J. (Nov. 1, 2013), <http://www.bizjournals.com/boston/news/2013/10/29/new-england-law-dean-pay-buyout.html> [<https://perma.cc/R65J-CWRC>].

14. See, e.g., ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 17 (2014) (“[L]aw schools’ current business model is not only unsustainable but immoral.”).

15. See Erin Fuchs, *The Law School Crisis Could Crush ‘Stand-Alone’ Schools*, BUS. INSIDER (Jan. 31, 2013), <http://www.businessinsider.com/which-law-schools-might-fail-2013-1> [<https://perma.cc/5CG5-V2RN>].

16. Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013), <https://www.wsj.com/articles/SB10001424127887323664204578607810292433272> [<https://perma.cc/5S6F-NMFD>] (reporting law schools’ faculty lay-offs after “having trimmed staff”); Debra Cassens Weiss, *Law Schools Cope With Declining Enrollment by Quietly Cutting Faculty*, ABA J. (July 16, 2013), [http://www.abajournal.com/news/article/law\\_schools\\_cope\\_with\\_declining\\_enrollment\\_by\\_quietly\\_cutting\\_faculty](http://www.abajournal.com/news/article/law_schools_cope_with_declining_enrollment_by_quietly_cutting_faculty) [<https://perma.cc/AVJ2-CGM6>].

17. *Law Schools Put Hiring Freeze on Faculty*, N.J. BUS. (Oct. 12, 2012), <http://www.njbiz.com/article/20121012/NJBIZ01/121019932/law-schools-put-hiring-freeze-on-faculty> [<https://perma.cc/9H6B-CSYE>].

18. See, e.g., Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 WIS. L. REV. 115 (2012); Farida Ali, *Globalizing the U.S. Law School Curriculum: How Should Legal Educators Respond?*, 41 INT’L J. LEGAL INFO. 249 (2013); Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643 (2013).

19. See, e.g., Paul Campos, *Stop Blaming the Law School Bubble on the 2007 Financial Crisis*, BUS. INSIDER (Feb. 3, 2013), <http://www.businessinsider.com/what-caused-the-law-school-bubble-2013-2> [<https://perma.cc/6N35-LQSE>]; Bruce Feldthusen, *Legal Profession in Turmoil: Let’s Blame the Law Schools*, CANADIAN LAW. MAG. (Dec. 3, 2012), <http://www.canadianlawyermag.com/4429/Legal-profession-in-turmoil-Lets-blame-the-law-schools.html> [<https://perma.cc/TC95-GDTX>].

20. See, e.g., Alicia Albertson, *New England Law Downsizing Enrollment, Faculty Size*, NAT’L JURIST (Nov. 11, 2013), <http://www.nationaljurist.com/prelaw/new-england-law-downsizing-enrollment-faculty-size> [<https://perma.cc/PL4B-3X8R>].

21. See F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 11–12 (1988).

At first, internalization from within the legal academy came most notably from Brian Tamanaha and his book, *Failing Law Schools*,<sup>22</sup> which prominently attempted to explain the economic causes of the post-Recession law school crisis.<sup>23</sup> Although Tamanaha was not the only one critiquing law schools from a financial perspective,<sup>24</sup> his work was arguably the most widely read and discussed.<sup>25</sup> In *Failing Law Schools*, Tamanaha argued that the post-Recession law school crisis had essentially two culprits. First, law school tuitions had surpassed inflation to amounts that heavily burdened students with outstanding debt upon graduation.<sup>26</sup> He culled through much empirical data to demonstrate the phenomena of this debt-to-inflation ratio.<sup>27</sup> But even as he cites an anecdotal example by comparing different generations of law students, his point was rather illustrative:

Law students in the seventies and early eighties who worked at corporate law firms during the summer could earn enough to cover the following year's tuition and perhaps some living expenses. This helped keep down the level of debt. Despite the dramatic increase in starting associate pay at corporate law firms that occurred in the early 2000s, the best-paying summer jobs today, which few students land, generate enough income for a student to pay half, at most, of one year's tuition at a top school.<sup>28</sup>

Such debt-to-inflation ratios, Tamanaha observed, would impede upon new law school graduates' options as they move into their careers.<sup>29</sup> Money, after all, gives one options in employment and life-style. But he was not finished yet; another causal reason for the crisis, Tamanaha observed, was that post-

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22. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

23. *See id.*

24. *See, e.g.*, PAUL CAMPOS, *DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012); Campos, *supra* note 6; McArdle, *supra* note 2.

25. *See generally* David Burk, Book Review, 63 J. LEGAL EDUC. 349 (2013) (reviewing BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012)); Charles Lane, *Book Review: 'Failing Law Schools' by Brian Z. Tamanaha*, WASH. POST (Aug. 3, 2012), <https://www.washingtonpost.com/opinions/book-review-failing-law-schools-by-brian-z-tamanaha/2012/> [<https://perma.cc/UY3A-S2L6>] (insert URL into Google.com search engine, then follow "Book Review: Failing Law Schools by Brian Z. Tamahana" hyperlink).

26. *See* TAMANAHA, *supra* note 22, at 108.

27. *See id.* at 108–09.

28. *Id.* at 109.

29. *See, e.g., id.* at 111–12 (citing an example with a law student named "Sarah").

graduation employment levels at law schools were in jeopardy.<sup>30</sup> The shrunken post-2008 legal job market was not able to allow the adequate match between the number of attorney jobs available and the number of new graduates that law schools were producing.<sup>31</sup> According to Tamanaha, instead of reducing the size of classes, “[l]aw schools responded to this abysmal job environment by *increasing* the number of students they enrolled in 2009, and yet again in 2010—thereby promising to throw out even more law graduates onto the saturated employment pool three years hence.”<sup>32</sup> Of course, he was not the sole voice to make these inspections on law school business practices.<sup>33</sup> Critics, both within legal education and beyond, similarly targeted the economics of law schools during this era of crisis.<sup>34</sup>

This opportunity for deep internalization in legal education, led by Tamanaha’s book, also prompted and stoked critiques of other aspects of legal education, particularly in the effects that recent cultural and generational shifts in law students have had on law schools and professionalism,<sup>35</sup> and also on the uses of new technology in law teaching.<sup>36</sup> At first, the discussion of cultural and curricular reform in law schools (particularly those that resembled the *Carnegie Report*,<sup>37</sup> *MacCrate*,<sup>38</sup> and *Best Practices*)<sup>39</sup> going into the Great Recession were sidelined briefly for a time, perhaps as the academy’s attention was honing in on too-big-to-fail characterizations of law school business and

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30. *Id.* at 145–60.

31. *Id.* at 167.

32. *Id.*

33. See generally STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013); CAMPOS, *supra* note 24.

34. See CAMPOS, *supra* note 24; HARPER, *supra* note 33; Henderson, *supra* note 33.

35. See, e.g., Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 N.Y.U. CLINICAL L. REV. 1 (2013); Susan Swaim Daicoff, *Expanding the Lawyer’s Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795 (2012).

36. Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199 *passim* (2013).

37. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

38. ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 137–41 (1992).

39. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

marketing practices rather than pedagogical reforms.<sup>40</sup> But as interest in the economic narratives of law schools began to even out, scholarly discussions regarding the old skills-versus-doctrinal debate in law teaching reignited—particularly because, in light of low employment statistics, the teaching of skills would, in theory, contribute to the competency and employability of students and graduates.<sup>41</sup> Still that shift proceeded cautiously,<sup>42</sup> and some articles in advocating skills and practice during this time took on a neoliberalist tone.<sup>43</sup> Others in the academy, such as Edward Rubin and Robin West, have called for more profound changes to the core philosophy of American law teaching and pedagogy at this time instead.<sup>44</sup> However, such critical observations have taken a backseat to more short-term solutions on teaching skills because an overhaul of legal pedagogy would require a deeper connection drawn between perspectives on the meaning of law itself and its underlying theory.<sup>45</sup> In short, despite all the crisis-talk and inward obsessions, the current subject matter of teaching of law students has a large body of technical insight and pedagogical discourse, but lacks any unifying sense of what modern law schools ought to look like beyond the nineteenth-century model promulgated by Christopher Langdell at Harvard Law School.<sup>46</sup>

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40. See Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, The Public, And The Legal Profession*, 44 CAL. W. L. REV. 219, 231 (2007) (“Langdell’s method endures because, although his pedagogy no longer makes sense, his system makes money.”).

41. See, e.g., Ali, *supra* note 18; Jennison, *supra* note 18.

42. See Benfer & Shanahan, *supra* note 35, at 5–6.

43. Margaret Thornton, *Legal Education in the Corporate University*, 10 ANN. REV. L. & SOC. SCI. 19, 23 (2014). Thornton writes that, in law schools, “[t]he discourse of skills also carries a subtext with it . . . with the term often being ‘used interchangeably with capacity, knowledge, expertise and so forth.’ Skills tend to play a special role in the neoliberal labor market and are privileged over critical and theoretical knowledge.” *Id.* (citation omitted).

44. See Edward Rubin, *The Future and Legal Education: Are Law Schools Failing and, If So, How?*, 39 LAW & SOC. INQUIRY 499, 507 (2014) [hereinafter Rubin, *Future and Legal Education*] (“What is its future and what should that future be? For that we need to adopt a broader perspective than the existing market for lawyers and a longer timeframe than the immediate crisis and its near-term resolution.”); WEST, *supra* note 14, at 23.

45. See Dolin, *supra* note 40, at 246–47 (“In this environment, it is extremely unlikely that meaningful change will come from within the academy. . . . Practitioners have been intimidated by the professorate, assuming that they know better than practitioners the best way to educate practicing lawyers. However, they do not.”).

46. WEST, *supra* note 14, at 27–35.



There have been *some* meaningful changes.<sup>47</sup> As an era of reckoning drew near, accountability—moral and economic—descended upon the academy like swift justice. Questions of relevance regarding American law schools and traditional legal education have steered many law schools to quickly add phrases such as “practice ready” and “experiential learning” alongside their traditional curricular programming and offerings in order to demonstrate that their current and prospective students would get their monies’ worth.<sup>48</sup> In earnest, law school institutions had thoughtful intentions when they strengthened such parts of the law school experience that had been previously auxiliary.<sup>49</sup> In theory and practice, this first wave of change had positive effects. Building up clinical legal education, externship, and pro bono requirements at law schools facilitates law graduate competency and, hopefully, marketability.<sup>50</sup> They also reflect an acknowledgement that law practice is something one learns, in part, by doing.<sup>51</sup> After all, was it not Holmes who said that the life of the law was not merely logic but also experience?<sup>52</sup>

More questionably, a second wave of change came along that mandated learning assessments in legal education.<sup>53</sup> In 2015, the American Bar Association (ABA) passed Standards 301, 302, 314, and 315 that required law schools to conduct learning assessments,<sup>54</sup> and subsequently the law schools began to obey.<sup>55</sup> Although some in the academy have urged for decades for law schools to implement learning assessments while others have vilified assessments,<sup>56</sup> the crisis precipitated the ABA to pass what had only been a

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47. Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 ELON L. REV. 193, 195–98 (2015).

48. *See id.*

49. *See* Marjorie A. Silver, *Symposium Introduction: Humanism Goes to Law School*, 28 Touro L. REV. 1141, 1171 (2012) (“Among other changes designed to expose students to what lawyers actually *do* in practice, we incorporated a requirement . . . that each of us spend a significant portion of the course teaching our students about alternatives to litigation.”).

50. *See* Knauer, *supra* note 47, at 196–98, 208.

51. *See id.*

52. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

53. ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2015–2016*, at 23 (2015).

54. *Id.* at 15–25.

55. David Thomson, *When the ABA Comes Calling, Let’s Speak the Same Language Assessment*, 23 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 68 (2014).

56. *Compare* GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* (2000), with Susan Hanley Duncan, *The New Accreditation Standards Are Coming to A Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 610 (2010).

proposal and now all law schools have begun in-house assessments of student learning and competency.<sup>57</sup> The undergraduate campuses of colleges and universities had been engaged in these practices since the early 1980s.<sup>58</sup> So when American legal education began to embrace the assessment movement in higher education, some suggested this embrace signified that law schools had finally caught up with the rest of American higher education.<sup>59</sup> Conferences regarding assessments have, since then, taken place on various law school campuses nationwide.<sup>60</sup> Faculty exchange of assessment rubrics have become more commonplace.<sup>61</sup> Thoughts of distilling teaching and pedagogy into metrics and measurables have consumed much faculty governance, of late.<sup>62</sup> On the surface, the learning assessment movement offers a solution with the theme of accountability prevalent during law schools in crisis-mode, particularly because law schools had been famous for little assessment action.<sup>63</sup> Law schools can now claim that they are being thoughtful or self-reflective in response to questions about relevance that have existed in the past several decades of law teaching. After redesigning business models and career engagement, measuring how law is taught and what students learn seems like one method to address the curricular and pedagogical issues that have haunted

57. MICHELLE R. PISTONE & MICHAEL B. HORN, *DISRUPTING LAW SCHOOL: HOW DISRUPTIVE INNOVATION WILL REVOLUTIONIZE THE LEGAL WORLD* 17 (2000), <https://www.christenseninstitute.org/publications/disrupting-law-school/> [<https://perma.cc/8B4T-PEVV>].

58. Peter T. Ewell, *Assessment, Accountability, and Improvement: Revisiting the Tension*, NAT'L INST. FOR LEARNING OUTCOMES ASSESSMENT, Nov. 2009, at 5–6 (citing Peter T. Ewell, *Assessment, Accountability, and Improvement: Managing the Contradiction* (American Ass'n for Higher Educ., May 1987)), [http://www.learningoutcomeassessment.org/documents/PeterEwell\\_005.pdf](http://www.learningoutcomeassessment.org/documents/PeterEwell_005.pdf) [<https://perma.cc/AQ8Y-B25Y>].

59. See Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661, 664–65 (2016) (“In light of these fundamental changes, criticisms, recommendations, and requirements, law schools must now be more deliberate in the planning of their curriculum so it is coherent, cohesive, and comprehensive.”).

60. See, e.g., *April 2014: Assessment Across the Curriculum*, INST. FOR LAW TEACHING & LEARNING (Apr. 2014), <http://lawteaching.org/conferences/april-2014-assessment-across-the-curriculum/> [<https://perma.cc/AB5C-W5B4>].

61. See, e.g., *Resources*, INST. FOR LAW TEACHING & LEARNING, <http://lawteaching.org/resources/> [<https://perma.cc/JA4T-3GRA>] (last visited Nov. 21, 2017).

62. Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 779–84 (2004).

63. *Id.* at 767 (“[F]irst-year law students typically receive course grades based entirely, or almost entirely, on single end-of-course essay exams. Using a single exam to measure law student performance contrasts markedly with earlier practices at American law schools.”).

American legal education for decades—issues that many have highlighted as reasons law schools have become irrelevant in the wake of the post-recession.<sup>64</sup> Perhaps this was an apt time to show the world that American legal education was finally on the move.

But while many have written about the pros and cons of assessment and explored exactly *how* to assess,<sup>65</sup> few people have contemplated the big, existential, “So what?” questions once law schools have done their assessments. What exactly are we trying to find through assessments? And will we find it? Genuine, thoughtful motivations to perform in-house assessments keep law schools accountable,<sup>66</sup> but political motivations for requiring assessments is not a moral response to the law school crisis. In this way, over-blown, chest-pounding hopes that assessments will overhaul American legal education ought to be suspect and tamed. The assessments movement in legal education is only skin-deep; it is a new fad.<sup>67</sup> Not only that, but the fad is one that officially ushers the view that law schools are now part of the age of neoliberalism and corporatized higher education institutions.<sup>68</sup> Should all of this give pessimists some pause? Absolutely. To be sure, done earnestly and correctly, learning assessments offer much utility to improve quality education. But the process is short-sighted when we neglect what we will do after the results of assessment have come in, and allow our results to

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64. Campos, *supra* note 6, at 180 (discussing the increase in tuition cost and the elimination of a political commitment to legal education); *id.* at 185 (noting drop in faculty-to-student ratio).

65. See Aizen, *supra* note 62; Niedwiecki, *supra* note 59.

66. Bonnie Urciuoli, *The Language of Higher Education Assessment: Legislative Concerns in A Global Context*, 12 IND. J. GLOB. LEGAL STUD. 183, 188 (2005) (quoting *The State of American Higher Education: What Are Parents, Students, and Taxpayers Getting for their Money?: Hearing Before the House Committee on Education and the Workforce*, 108th Cong. 1–3 (2003) (statement of Rep. John Boehner, Comm. Chairman)).

67. See Niedwiecki, *supra* note 59, at 666.

68. See Urciuoli, *supra* note 66, at 183–84 (“While most academics have never found any simple answers to this question, the corporate and government voices initiating these calls for assessment have tended for the past century to see higher education in terms of workforce preparation. Since 1980 or so, a globalized rhetoric of skills and workforce preparedness has emerged with which U.S. discourses of education, skills, and work have become tightly coherent. In effect, this has become the new global ‘common sense’ rhetoric of workforce preparedness. Moreover, this globalized neoliberal discourse has often taken place in conservative social and political contexts, giving it not only the aura of common sense but of moral correctness as well. In this discourse, the central point of educational assessment is the assessment of skills that have a workplace payoff, skills having become a general term for practices or forms of knowledge that fit a worker into a job. Education as a process of inculcating skills is ideally cast as a life-long investment in human capital. Such rhetoric of education and continual skill improvement deflects attention from the structural changes of late capitalism.”); Thornton, *supra* note 43, at 23.

skew responses that all is good with our status quo. In this way, the assessment process is also not completely objective and scientific.

This Article is about answering the yearning for a lasting, meaningful change to American law teaching philosophy in this time of crisis for American law schools. As Robin West has articulated, “just as we cannot address our economic crisis in a meaningful way without also addressing the existential, we cannot do the inverse of that either.”<sup>69</sup> A little over a century’s time of establishing and formalizing a significant tradition of American legal education has passed.<sup>70</sup> Yet still, law schools continue to impart knowledge and training using a pedagogy steeped in the nineteenth century<sup>71</sup>—while the current state of the law and law practice has surpassed a reliance on the common law, and while predominant ways of reaching doctrinal resolutions to new controversies and disputes do not always rely on reading ancient and seminal appellate decisions. It is no wonder why lawyers are pessimistic. We are taught to be that way as an indirect result of our current pedagogy.<sup>72</sup> The optimistic silver lining in this time of crisis ought to have been a moment of clarity that allowed us to examine with critical and scholarly eyes what relevance a methodology guided by “law as science,” in the Langdellian sense, remained presently. How we envision the law manifests in the pedagogy and methods of its study. What this Article offers is a new paradigm for conceptualizing meaning in law for the purpose of engendering more relevance and empowerment—a paradigm that can navigate beyond assessments, but more importantly, allow individuals to think rigorously and learn about the law in a more current and meaningful way. This Article’s ultimate recommendation for the American legal academy is to move toward a post-Langdellian conception of law that perceives and defines law by its deliberate instrumentalities, rather as a form of science. The ensuing pages, hopefully, will clarify the meaning of that heuristic shared by this Article’s title, “law as instrumentality.”

This Article theorizes the type of deep and profound reform that not only will help restrain the pessimists from jumping ship but changes that American legal education deserves. Apart from this Introduction, Part II of this Article will discuss the specific history and background of American legal education

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69. WEST, *supra* note 14, at 212.

70. Jennison, *supra* note 18, at 646 (“Christopher Columbus Langdell introduced the methodology currently known as the ‘case method’ to Harvard Law School in 1870, largely shaping modern legal education.”).

71. Dolin, *supra* note 40, at 222.

72. *Id.* at 224 (“The Socratic-Casebook method through which law students are taught is not only pedagogically ineffective, but is downright damaging to their mental and emotional health.”).

and the rise of the Langdellian case method pedagogy in American law schools. Part III will then examine the case method's effects on modern-day students. Finally, before the Article's conclusion, Part IV will introduce the instrumentality conception of law and its underlying philosophy that shifts away from the unified and scientific paradigm of the Langdellian scientific conception by theorizing law from fragmentation and then gathering meaning from the human-made aspects of law's agency. A brief exploration of what a law classroom situated by "law as instrumentality" might look like pedagogically will occur in Part IV as well.

## II. THE GHOST SHIP OF LANGDELLIAN FORMALISM

### *A. Origin and Influence in Methodology*

Our inquiry begins by lowering our sails in the late nineteenth century. Especially in the last several decades of historicism, some debate has emerged regarding the complete and total attribution of the case method to Christopher Langdell.<sup>73</sup> Although scholars have documented and mapped out a general insight regarding Langdell's law teachings, philosophy, and tenure at Harvard Law School,<sup>74</sup> some have suggested that much sifting and combing is still needed but may never be completely done in terms of a comprehensive study of the man.<sup>75</sup> After all, the archives at Harvard house some 7,000 pages of Langdell's own notes, taken on loose-leaf in his illegible hand, a majority of which remain yet to be deciphered.<sup>76</sup> Additionally, another several thousand pages of his papers were purposely destroyed in the 1940s, perhaps as suggested in a reactionary fit of the legal realists, based on ideological splits from the

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73. See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 *LAW & HIST. REV.* 277, 296–97 (2004). Kimball notes that

[p]articularly in regard to [Langdell's] signature teaching method, the revisionists maintained that Langdell did not invent case method or that, if he did, then he did not really practice it or that, if he invented and practiced it, then he really did not understand its nature and purpose. Demonstrated by their inconsistency, the purpose of these efforts was apparently to elevate a revered mentor, as in the case of Beale, or the favorite son of a law school, as with Columbia or Mississippi, or generally to demonstrate that "not literally all good things are first thought of in Cambridge."

*Id.* at 297 (quoting ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 372 (1921)).

74. See, e.g., *id.* at 278.

75. See *id.* at 330–31.

76. *Id.* at 281.

formalists.<sup>77</sup> All in all, not unlike our knowledge of many other figures in history, there will always be something unknowable and incomplete in our understanding of Langdell and his contributions to modern American legal education.<sup>78</sup> Over the years, that gap in our conscious knowledge of Langdell has likely supported our awe,<sup>79</sup> our reverence,<sup>80</sup> our vilification,<sup>81</sup> our parody,<sup>82</sup> and our revision of his legacy<sup>83</sup>—for whatever goals, such reactions have served

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77. See *id.* Kimball observed that “some 3,000 papers—possibly including letters, financial records, and lectures—were discarded in 1941” and that “this literal trashing of Langdell occurred contemporaneously with the high tide of Holmes’s ‘hagiography.’” *Id.* Kimball later described the hagiography of Holmes as a period when the legal realists interjected “a uniformly derogatory view of Langdell” that peaked at a “high water mark” with the destruction of Langdell’s papers when the realists dominated American legal thought. *Id.* at 304–05.

78. Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC: JALWD 151, 185 (2013) (“[I]n the legal profession for which he invented the signature pedagogical method, Langdell is virtually unknown.”).

79. Austen G. Fox, *Professor Langdell—His Personal Influence*, 20 HARV. L. REV. 7, 7–8 (1906) (eulogizing Langdell by noting that when he started teaching at Harvard students knew “that a great teacher had come among [them] and [they] were led to seek [him] out”).

80. WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 168–70* (1994) (defending Langdell against criticisms of his contributions to legal education and the case method).

81. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 907–08 (1933) (painting Langdell as misguided in his practice of law and how that translated to some of his development of the case method and why, “[d]ue to Langdell’s idiosyncracies, *law school law came to mean ‘library-law’*”).

82. GRANT GILMORE, *THE DEATH OF CONTRACT 5* (1974). Gilmore famously begins his book with a remark about the centennial development of Langdell’s work on contracts, specifically observing that “[i]t was just a hundred years ago that Christopher Columbus Langdell, like his namesake four centuries earlier, set sail over uncharted seas and inadvertently discovered a New World.” *Id.*

83. See Kimball, *supra* note 73, at 311 (observing that during the mid-twentieth century, “the scholarship on Langdell had ignored most of the evidence that would normally be considered in a scholarly analysis of a historical figure”).

our purposes.<sup>84</sup> Ultimately, however, such endeavors always fail in obtaining a definitive truth of the matter<sup>85</sup>: we can never really know a person.<sup>86</sup>

Of course, a funny irony one might draw from all of this is a parallel between the futility of completely getting to know a person, such as Langdell, and the way in which Langdell's nineteenth-century theorizing of law as science itself—presuming law to be unified and complete in nature, formalistic and objective in approach<sup>87</sup>—had its own futility and shortcomings as well.<sup>88</sup> The philosophical wheels in one's mind can readily churn away at reconciling those observations; but whatever shortcomings and contestations exist over fully crediting Langdell with the case method in American law schools, all controversies step aside for the fact that such a pedagogy has defined American law teaching for over a century's time.<sup>89</sup> That observation is, indeed, true, with ample examples to bolster it.<sup>90</sup> Arising in the 1870s, the case method was one of the features of the new law school model in American universities, promoted strongly by Harvard Law School through the teachings and innovations of

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84. See, e.g., Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. LEGAL EDUC. 656 (2015) (using Langdell as a counterpoint for developing active learning methods); see also GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977) (“[I]f Langdell had not existed, we would have had to invent him.”); GILMORE, *supra* note 82, 109 n.20 (alteration in original) (“Professor Sutherland reproduces an astonishing portrait of Langdell (‘painted . . . in the twenty-second year of [His] deanship’) which could perfectly well be a portrait of the original Christopher Columbus.”).

85. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 55 (1983).

86. See, e.g., John Henry Schlegel, *Book Review*, 14 LAW & HIST. REV. 369 (1996) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) and WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994)). In comparing two books on Langdell, Schlegel observes how one book's context was “infinitely deeper” than the other's but was still “simply not deep enough. No one's ever is, of course.” *Id.* at 372.

87. WEST, *supra* note 14, at 71 n.70 (noting that the Langdellian formalists believed in the “autonomy and completeness of the common law: the common law was autonomous from all other legal orders as well as from all other sources of authority, whether cultural or political, and it was sufficient to answer all questions, not just most”).

88. Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 249 (2002) (“While imputing the prestige of science to law, Langdell and those in his image simply fail to tell us exactly what the ‘legal scientist’ is *doing* to know law's ‘axioms.’”)

89. Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 520–21 (1991).

90. See *id.* at 527–31 (discussing Langdell's influence on the ideology of law as science and how that was taught to students at Harvard); see also *id.* at 531 (describing Langdell's development of the casebook); *id.* at 532 (discussing Langdell's recasting of the “professor's role” in the classroom through the Socratic method).

Langdell.<sup>91</sup> Although the use of appellate opinions in law teaching was not necessarily new,<sup>92</sup> the case method's wholesale pedagogical emphasis on court opinions was embraced as a novelty for the study of law,<sup>93</sup> which itself was fast becoming an academic discipline during this time.<sup>94</sup> Summarily, the case method's features involve the use of appellate court cases to demonstrate common law principles within a specific body of law.<sup>95</sup> Its signature classroom technique is two-fold: first, in the use of heavily-edited casebooks that contain appellate decisions selected to authoritatively illustrate a legal principle; and second, in the classroom use of the Socratic dialogue of inquiry-and-answer between lecturer and students, where the lecturer would question students on assigned case decisions and hypotheticals in order to extract significant legal rules and principles.<sup>96</sup>

Along with the eventual rise in prominence of Harvard's law school, the case method—as employed by Langdell and his peers—received gradual widespread adoption in the lecture rooms at other law schools in the country.<sup>97</sup> At first, other competing law schools were reluctant to use the method.<sup>98</sup> Eventually, over the twentieth century, however, the case method's popularity gradually gained traction and the acceptance of the method at law schools nationwide was systemic.<sup>99</sup> In modern-day American law schools, the Langdellian case method, despite augmentation with the problem method and other teaching techniques, still endures as the dominant form of instruction in classrooms.<sup>100</sup> Its influence in modeling and developing generations of

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91. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 468 (3d ed. 2005).

92. JAMES WILLIARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950); STEVENS, *supra* note 85, at 52, 66 n.14.

93. STEVENS, *supra* note 85, at 52–53.

94. *Id.* at 52.

95. *Id.* at 52–53.

96. PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 37–50 (2003).

97. Weaver, *supra* note 89, at 541 n.70 (“Harvard’s status within the education community contributed to the method’s acceptance at other schools.” (first citing Robert Maynard Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357 (1937); and then citing Eugene Wambaugh, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1, 3 (1906))).

98. *See* Weaver, *supra* note 89, at 541–42 (describing how “[t]he transition began slowly” and mentioning that, in 1894, the ABA had reported that the lecture method was still prevalent in law instruction).

99. *See* STEVENS, *supra* note 85, at 64 (observing statistically the rise in number of law schools in the early 1900s adopting the case method); *see also* Jennison, *supra* note 18, at 646–47.

100. Weaver, *supra* note 89, at 543–45.



American law faculty has been profound.<sup>101</sup> Internationally, the case method has its followers at law programs in other countries as well.<sup>102</sup> And even pop-culturally, the case method's notorious dialogic style of classroom teaching has seen its most acerbic Hollywood screen variants.<sup>103</sup>

But despite being a teaching method with only two major signature characteristics or components (the casebook and the Socratic dialogue),<sup>104</sup> these characteristics, in principle, underscore a larger conception of the law, one that was both personal to Langdell and reflective of the post-Antebellum age of American law and law schools: Langdell's case method was grounded in the formalist notion of law as science.<sup>105</sup> This conception embodied an ideal of the scientific methods applied to the study and practice of law, which Langdell considered as a scientific entity in nature.<sup>106</sup> The belief was that the result of this application would lead one to discover paradigmatic legal principles within the world and its disputes.<sup>107</sup> Although the law-as-science conception was not likely original to Langdell,<sup>108</sup> his notion of law as science possessed a certain rational empiricism that would have facilitated inquiries upon the law with favor toward a nineteenth-century scientific methodology.<sup>109</sup> So as science, the

101. See Weaver, *supra* note 89, at 544 (“At most law schools, one would have difficulty obtaining a teaching position if during the interview process he openly stated a preference for the lecture method. Junior faculty who consider other teaching methods may stick with the case method for fear of retaliation in the tenure process. Although faculty are free from such restraints once tenure is received, few alter their methods at this point. They have used the case method for many years and, because they received tenure, they have succeeded with that method.”).

102. See, e.g., Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60, 76 (2009) (mentioning how some law schools in China introduced teaching approaches in the late 1990s which borrowed from U.S. law schools, including the Langdellian case method and Socratic dialogue); see also Weaver, *supra* note 89, at 543 (noting that British law schools use the case method “to varying degrees”).

103. E.g. LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001); THE PAPER CHASE (Twentieth Century Fox Film Corp. 1973).

104. See KISSAM, *supra* note 96, at 37.

105. FRIEDMAN, *supra* note 91, at 468–69.

106. *Id.*

107. See Nancy Cook, *Law As Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 22 (2012) (“The science paradigm advocated by Langdell was rooted in the accepted wisdom of the time that the work of science was to uncover—to discover—immutable laws of nature.”).

108. M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 120 (1986).

109. *Id.* at 119. Hoeflich notes that Langdell's approach “had two components: empiricism and rationalism.” *Id.* In fact, such attributes added to the method's appeal with the figures at Harvard during Langdell's time:

It was the empirical aspect of Langdell's concept that was most consonant with

law must be studied accordingly. The oft-examined quotation from the preface of his original casebook on contract law alludes to the way Langdell conflated his scientific conception of the law with the learning of it:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.<sup>110</sup>

Scholars and critics alike have linked Langdell's conception of the law with the other developments at Harvard Law that were auxiliary and yet consistent to the rise of the case method in the lecture hall.<sup>111</sup> For instance, the law library's development as an important and central space in the law school, akin to the scientific laboratory, was a notable feature.<sup>112</sup> Other developments such as the curriculum,<sup>113</sup> the length of a law program,<sup>114</sup> faculty as full-time teachers

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Harvard President Eliot's and other contemporaries' ideas about science. Science was something that one did. The term connoted investigation and experimentation. Thus, Langdell argued that jurists and legal scholars were also empirical investigators. They sought for legal principles rather than physical rules. The sources of their raw data were not chemical compounds or heavenly bodies, but rather legal facts, facts to be found in appellate cases. The rational aspect of the Langdellian notion of legal science dove-tailed with the empirical aspect. The rational aspect of the Langdellian model quite simply was the belief that legal reasoning must be deductive.

*Id.* at 119–20. However, Hoeflich also notes that the deductive nature of Langdell's paradigm reveals how “Langdell's notion of law as a rational science, therefore, was anything but unique or innovative. Indeed, to a very large extent, the Langdellian concept of legal science simply echoed Mayes, Legaré, Stewart, Leibniz, and other earlier jurists.” *Id.* at 120.

110. C.C. LANGDELL, *A SELECTION OF CASES OF THE LAW OF CONTRACTS WITH REFERENCES AND CITATIONS* vi (1871).

111. See FRIEDMAN, *supra* note 91, at 466, 471–72.

112. Beatrice A. Tice, *The Academic Law Library in the 21st Century: Still the Heart of the Law School*, 1 UC IRVINE L. REV. 159, 164–65 (2011).

113. FRIEDMAN, *supra* note 91, at 471–72.

114. *Id.* at 466.

and scholars,<sup>115</sup> and faculty scholarship<sup>116</sup> all reflected this rational and empirical scientific conception.

An illustrative way of unpacking the Langdellian ideal of law as science in his case method is to explore the meaning and significance of its most defining heuristic: “thinking like a lawyer.” Although the origins of this phrase is unclear, it has characteristically tethered itself as the moniker of what American law schools do in training lawyers; and in doing so, serves nearly as an imprimatur of the Langdellian case method.<sup>117</sup> Indeed, to some certain extent, this purpose of the Langdellian law school exemplified his rationalist assumptions about the law; if the law is science, then the primary concern of a legal education would be to develop the legal mind—and “thinking” would extenuate that.<sup>118</sup> Over the years, the phrase has weathered both praise and criticism,<sup>119</sup> and yielded both patina and tarnish.<sup>120</sup> Standing from a twenty-first century vantage point, the phrase in this crisis time appears more tarnished than gilded. Yet, a simple exegetical close-read of the phrase itself helps us understand the Langdellian formalism for law and pedagogy that the phrase invokes.

First, “thinking like a lawyer” reveals a scientific conception of law in how its form appeals to the scientific inquiry of the nineteenth century.<sup>121</sup> Alternative pedagogical conceptions of law teaching could have been “arguing like a lawyer”—which would have emphasized rhetoric or even the concept of “law as rhetoric.” It could have also been “practicing like a lawyer”—which would have invariably conceived of “law as process,” or (gasp) “law as a trade,” bringing out excessive anxiety in Langdell and many of his Brahmin peers.<sup>122</sup> Here, however, the act of “thinking” is singled out as the sole thing that law

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115. *Id.*

116. See Kimball, *supra* note 73, at 283.

117. Larry O. Natt Gantt, II, *Deconstructing Thinking Like A Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 419 (2007) (“Scholars are unsure when the phrase ‘thinking like a lawyer’ first became popular, but they consistently trace the origin of the concept to the 1870s when Dean Christopher Langdell introduced the case method and Socratic method at Harvard Law School.”).

118. See *id.* (“Dean Langdell introduced this approach because he believed that law is a science and that the scientific method could be suited for use in legal education.”).

119. See Weaver, *supra* note 89, at 549–51; Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 610–11 (2007).

120. See Rubin, *supra* note 119, at 610–11; Weaver, *supra* note 89, at 595, 561–62.

121. Gantt, *supra* note 117, at 413, 419.

122. See Eric Shimamoto, Comment, *To Take Arms Against A See of Trouble: Legal Citation and the Reassertion of Hierarchy*, 73 UMKC L. REV. 443, 448 (2004) (describing the “image problem” that law schools faced as vocational schools that was eventually fixed by Langdell’s reforms).

schools must instill, displacing all other functions and engagements between a lawyer and the law.<sup>123</sup> This isolation of “thinking” is both significant and deliberate. “Thinking,” on one hand, could have been set up here to ignore all other things that a practicing lawyer would do; and conversely, it could also empirically represent *all* the things within a Langdellian sensibility that a practicing lawyer does—after all, one interpretation of Langdell’s notion for “mastering” the “certain doctrines or principles” of law as science is that any mastery begins categorically with thinking about the law.<sup>124</sup> Either way, “thinking like a lawyer” elevates mind over action and underscores that the pedagogical crux in Langdell’s case method is a type of inquiry or mental perspective that Langdell would have considered *lawyerly*.<sup>125</sup>

If the law is a science, then this type of inquiry would appear to be rigorous, but also lofty, and perhaps even abstract at times. It would not be menial or banal, but instead exists as a worthy type of thinking that, like the sciences and empiricism, deserved a place at the university. The use of “thinking” in “thinking like a lawyer” perhaps reflected the push for prominence of lawyers in the post-antebellum America of the nineteenth century.<sup>126</sup> Indeed, that is the perception that the case method, as it was classically used in law school lecture halls, attempts to convey as it purports to make law students think like lawyers.<sup>127</sup>

As the examination of appellate opinions proceeds, the Socratic dialogue between the professor and students about those case opinions attempts to approximate what scientists would do.<sup>128</sup> Regardless of whether that is truly what scientists do or not, the heart of that “thinking” or inquiry in the law course is inductive. The examination of a closed universe of cases typically assumes, in case method fashion, a method of discovery that helps to enlighten upon certain legal principles to be used to predict future outcomes of disputes.<sup>129</sup>

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123. Rubin, *supra* note 119, at 651–52.

124. See LANGDELL, *supra* note 110, at vi.

125. See Rubin, *supra* note 119, at 649.

126. BRUCE A. KIMBALL, THE “TRUE PROFESSIONAL IDEAL” IN AMERICA 107–08 (1995) (describing the law profession’s rise to prominence after the American Civil War).

127. See FRIEDMAN, *supra* note 91, at 472.

128. Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method A Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 270 (2007) (discussing case method as a “furtherance” of Langdellian belief in law as science and as such the method’s analytic nature).

129. See STEVENS, *supra* note 85, at 53 (citing REED, *supra* note 73, at 376, 378) (“Although the case class (and the Socratic method) were ultimately to be justified under a different rationale, their original purpose was to isolate and analyze the relatively few principles of the common law that the

This is typically where the inductive reasoning takes place. To glance even more narrowly into that inductive reasoning, the case method prompts students to render or intuit the results of cases by deciding categorically how similar or distinct they are to previous cases.<sup>130</sup> Moreover, there is rational, left-brain logic in the endeavor, which adds to the abstraction. Although the facts of cases might vary from dispute to dispute, one assumes under the Langdellian concept of law that the legal principles that guide the direction of cases are discoverable and unwavering and just. Put in such terms, at times, there is a dispassionate feel to this inductive reasoning—not unlike “higher mathematics,” according to Lawrence Friedman.<sup>131</sup> All in all, the “thinking” in “thinking like a lawyer,” as the case method’s use of the Socratic dialogue demonstrates, conveys the impression of a hermetic scientific method that discounts experimentation and experience as part of the scientific engagement, but one that favors studying legal concepts isolated in abstraction or in a vacuum.<sup>132</sup> This emphasizes that the case method differentiated itself from the “text-book method” of law school instruction that was the fashion in American law schools prior to Langdell’s ascendancy at Harvard in the 1870s.<sup>133</sup>

Another way that the phrase “thinking like a lawyer” reflects the case method pedagogy is in the way that the phrase case can conjure the concept of law as Langdell and the formalists envisioned. The phrase reveals its Langdellian conception of legal science if one asks just exactly what that lawyer was supposed to “think” about at the inception of the case method at Harvard. The discovery of isolated legal concepts in Langdell’s inductive case method presumes that the inquiry leads to a complete and organic version of the common law, devoid of contextual variables; again, this impression exemplifies Langdell’s conception of law as science, a science that stems from universal

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Harvard system postulated and to show how some (presumably non-Harvard trained) judges had deviated from them.” (footnote omitted)).

130. WEST, *supra* note 14, at 50 (discussing in law schools the prevalence of teaching “[t]he discernment of ‘likes’—the decision that this case is like that one, with which it shares some characteristics but not others, but not fundamentally like that one, with which it also might share some characteristics, but from which it is importantly distinguishable, and the identification of those relevant differences and similarities”).

131. FRIEDMAN, *supra* note 91, at 472.

132. *Id.* (“[Langdell’s] model of science was not experimental, or experiential; his model was Euclid’s geometry, not physics or biology. Langdell considered law a pure, independent science; it was, he conceded, empirical; but the only data he allowed were reported cases. If law is at all the product of society, then Langdell’s science of law was a geology without rocks, an astronomy without stars. Lawyers and judges raised on the method, if they took their training at all seriously, came to speak of law mainly in terms of a dry, arid logic, divorced from society and life.”).

133. *See id.* at 466–67.

principles evolved through time.<sup>134</sup> But the way Langdell considered the law as science and the way he described it harbored inconsistencies on the surface. First, he treated the law as if it was not evolving—that by sifting and culling through cases like sediment, a universal truth of the law could be scientifically and archeologically uncovered.<sup>135</sup> However, he also described how such common-law principles had evolved over time, for instance, in the way he organized cases chronologically in his contracts casebook to show a development.<sup>136</sup> Perhaps in this culling between good and bad cases, the more lawyers have thought about principles over the centuries, the more we arrived at the truth of these legal principles. Or perhaps the law never evolved; under a Langdellian, formalist sensibility, the law was always “there” in the natural world of cases, pre-dating humans in some mystical organic form, and merely waiting to be found for our judicial benefit<sup>137</sup>—or quite possibly the inconsistencies reveal some human sleight of hand. Moreover, not only does this idea of the completeness of the law seem stagnant, if, in whatever way, the law has really ceased to evolve; but also in the ritualized dogmatic practice of the case method, it would add an autopsy feel to the whole study of case law. To Langdell, however, the completeness of the law did not indicate stagnancy; but rather the presumption and belief that law was complete signaled its autonomy.<sup>138</sup> To Langdell, his observed scientific disposition of law suggested that law existed in nature apart from man, to be discovered, to be studied, but not to be augmented.<sup>139</sup> Thus, it is tempting to make the metaphoric analogy that Langdell’s case method was like the attempt to find a natural resource, and once found, its application to existing and future legal problems was unadulterated. In describing the importance of the law library, Langdell’s own words seem to allude to this:

We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is

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134. *See id.* at 473 (“The unity of some parts of the common law was a fact. Langdell’s abstractions, however, ignored the nature of law as a living system, rooted in time, place, and circumstance.”).

135. *Id.* at 472.

136. *Id.* at 469.

137. *See* Hoeflich, *supra* note 108, at 120.

138. Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 627 (2001) (noting that under Langdell’s conception of law was a direction toward “the way of law’s autonomy” and that “[l]aw, from this perspective, is an island complete unto itself”).

139. *See* Hoeflich, *supra* note 108, at 120.

to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.<sup>140</sup>

The law library was the laboratory and to find the law, we would go to its printed books.<sup>141</sup> So there, law was a science.

An important hidden assumption of Langdell's conception of the law was its perceived perfection. Buttressed by then-current values of objectivity and empiricism in the sciences, Langdell conceived of the law as "objective" and perfect as well.<sup>142</sup> Of course, in this way, like the sciences, law deserved a place for true academic prestige and study at the university, away from the connotations of previous incarnations of American law schools that emphasized rote-memory and daily recitations on the law.<sup>143</sup> The features of the Langdellian casebook exemplify this peculiar conception of law as this unique academic science. The original casebooks assembled and used at Harvard during Langdell's tenure were merely a collection of cases, without notes, and devoid of social or political contexts.<sup>144</sup> The cases reflected the English common law tradition; for instance, most of the cases in Langdell's contracts casebook were English cases while American cases were fewer and mostly from New York and Massachusetts courts.<sup>145</sup> Of course, questions of true objectivity would arise to challenge Langdell's assumptions in the canonical assembling of these cases for instruction, if they were to exemplify the perfect unity of the common law. But for Langdell, the dogma of the common law would allow him to ignore that point; after all, even in the preface of his casebook, he defended his selection of cases by pointing to "good" and "bad" cases:

[T]he cases which are useful and necessary for this purpose [of study] at the present day bear an exceedingly small proportion to all that have been reported. The vast majority 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,

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140. Christopher Columbus Langdell, Harvard Celebration Speeches (November 5, 1886), in 3 *LAW Q. REV.*, Jan. 1887, at 123–24.

141. *See id.*

142. *See* Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 *IND. L. REV.* 353, 360 (1995).

143. *See* STEVENS, *supra* note 85, at 54, 61–63.

144. FRIEDMAN, *supra* note 91, at 469, 482.

145. *Id.* at 469.

and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.<sup>146</sup>

There is an almost Darwinian survival-of-the-fittest feeling here—as Langdell described the process of collecting these artifact cases in his book.<sup>147</sup> And it was Darwin’s scientific theory that promoted a sense of objectivity.<sup>148</sup> Like species being guided by an invisible hand toward survival in evolutionary biology, the “fittest” cases and legal principles survived in Langdell’s world of legal science to be refined by thinking academically about them.<sup>149</sup> Other than the inclusion of good cases and the exclusion of bad ones, the process of finding such good cases in Langdell’s contracts casebook were divided and arranged topically, with cases in each topic presented in chronology, “showing an evolution of principles from darkness to light.”<sup>150</sup> Moreover, no statutes were included in his casebook.<sup>151</sup> With the casebook, students were to distill or find the legal principles contained in such cases and believe that such principles were fixed and able to resolve future cases.<sup>152</sup> Thus, the form of the Langdellian casebook was mimetic of Langdell’s creed about the common law as science. The casebook was both self-contained and empirical in presentation, hermetic unto itself and steeped strictly in a near-exegetical tradition of the common law.<sup>153</sup> All of these features of an untouchable perfection were the envisioned law to be “thought about” in “thinking like a lawyer.”

The more one examines the Langdellian case method in this partially destabilized and critical fashion, the more apparent that Langdell’s conception of “law as science” had some of the spirit of what law is—especially as embodied within the English common law tradition of law—but the conception

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146. LANGDELL, *supra* note 110, at vi–vii.

147. See STEVENS, *supra* note 85, at 55 (describing that the case method “was ‘scientific,’ practical, and somewhat Darwinian” and that “it managed to create an aura of the survival of the fittest”).

148. *Id.* (“[The case method] was based on the assumption of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses.”).

149. See Marcia Speziale, *Langdell’s Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 29 (1980) (“Langdell’s return to original sources—the cases, his activation of the classroom, and his preference for principles over maxims parallel nineteenth-century empiricist and evolutionist thinking.”).

150. FRIEDMAN, *supra* note 91, at 469.

151. *Id.*

152. Weaver, *supra* note 89, at 528–29.

153. FRIEDMAN, *supra* note 91, at 472, 482.



at times was also heavily and ironically artificial.<sup>154</sup> The exclusion of certain cases in his teachings, cases of “local diversity” for instance, over English canonical cases, was motivated by aspirations of elevating legal studies as a unitary science across the United States.<sup>155</sup> Accordingly, in assuming authority by presiding over the pedagogy and teaching methodology at Harvard in the 1870s, Langdell was able to elevate himself and his formalist conception; in Lawrence Friedman’s words “[t]here was only one common law; Langdell was its prophet. . . . Oceans could not sever the unity of common law; it was one and indivisible . . . .”<sup>156</sup> First was the sense of intellectual hierarchy that perpetuated itself; the common law was elevated and Langdell along with it.<sup>157</sup> Others have elaborated more functionally about Langdell’s sleight of hand, describing the results of situating himself at the head of this brand of formalism: “Langdell, the interpreter of the law, never let the reader know that it was he, rather than the ‘law,’ that created the discourse and conducted the analysis.”<sup>158</sup> Langdell’s conception reinforced a way to speak about the law that was detached from the subject in its formalism.<sup>159</sup> Rather, perceiving law as science led to viewing and dissecting law in assumptions of completeness and in isolating abstraction.<sup>160</sup> As a result, this formalist way of viewing the law bears a “hidden assumption of the autonomous [legal] subject,” which is theoretically problematic.<sup>161</sup> Langdell’s formalism “proceeded as if law itself was speaking to the reader and hence capable of creating its own meaning. ‘The law, like a subject, [did] things; doctrines [became] subjects, and [did] things to each other.’”<sup>162</sup> That view was what law’s complete autonomy implied and was created by “the objectification of law” where “legal rules are explained, analyzed, and criticized as if they were transcendental objects unaffected by analyzing subjects.”<sup>163</sup> In both method and content, Langdell’s “law as science” fetishized ways to view the law in perfected form and ignored “inconsistences” for an idealized perfection cast as scientific objectivity—even though it could

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154. *See id.* at 469–73.

155. *Id.* at 472.

156. *Id.*

157. *Id.*

158. Minda, *supra* note 142, at 381 (citing Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1632 (1991)).

159. *See id.* at 360.

160. *Id.*

161. *Id.* at 381. “Once the subject is revealed and articulated, legal scholars are confronted with a serious predicament.” *Id.* at 382.

162. *Id.* at 381 (alterations in original) (quoting David S. Caudill, *Pierre Schlag’s “The Problem with the Subject”*: *Law’s Need for an Analyst*, 15 CARDOZO L. REV. 707, 711 (1993)).

163. *Id.* (using Langdell’s contract case book as an example).

not have been truly objective or scientific if one had to discover the law by looking selectively backward in time in “printed books.”<sup>164</sup> Moreover, Langdell’s “law as science” was a science that ignored experimentation and context.<sup>165</sup> It left the lawyer as an observer, detached from law’s evolution because the common law was no longer assumed to be evolving. Accordingly, law was to be written about “in the passive voice” and to be “rigorously maintain[ed in] the detached demeanor of a scientist conducting a controlled experiment.”<sup>166</sup> No subject existed, apart from the law itself, in the legal principles drawn from the opinions that Langdell and his students examined in Harvard law courses—despite these opinion’s judicial authorships. Langdell’s own theory of the law—his own peculiar science—and methodology reveals that he was more or less an exegete.<sup>167</sup> The law was perfect—or perfected in abstraction—and as a lawyer, one could only think within the restrictions of that perfection, not beyond.

That was the dogma of Langdell’s legal science. His conception of law was taught and perpetuated through its case method dissection of common law cases to students at Harvard and then nationally thereafter. After World War I, numerous American law schools began to emerge, replicating the case method as American legal education’s conspicuous pedagogy in lecture halls throughout the United States.<sup>168</sup> Accordingly, generations of American law

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164. See Wai Chee Dimock, *Rules of Law, Laws of Science*, 13 YALE J.L. & HUMAN. 203, 209–10 (2001) (“Langdell’s scientific knowledge seems to have been quite perfunctory, oblivious not only to the historical challenge of science but also to the new developments taking place in the very century in which he was writing.”).

165. Minda, *supra* note 142, at 381 (citing Schlag, *supra* note 158, at 1632–62) (“In Langdell’s contract casebook, for example, law is a transcendental object unaffected by social and economic context.”); *id.* (“[A] debtor becomes personally bound to his creditor for the payment of the debt . . .” (alterations in original) (quoting Langdell, *A Brief Survey of Equity Jurisprudence*, 1 HARV. L. REV. 55, 68 (1887))); *id.* (“The debtor and the creditor are unnamed individuals who are the legal abstractions of Langdell’s analysis of commercial law.”).

166. *Id.* at 380.

167. Kunal M. Parker, *Representing Interdisciplinarity*, 60 VILL. L. REV. 561, 563 (2015) (“Langdell’s legal science’ was ‘gendered and classed and raced, depending for its authority on removing contestation, the voices of others, from the text and hermeneutics of the law.’ Most law professors were male and thoroughly schooled in Langdellian science; they had no experience with rhetoric or history and therefore reinforced the Langdellian idea that law is doctrine.” (footnote omitted) (quoting Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 516–17 (2002))).

168. Stephen R. Alton, *Roll over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 349–50 (2010).

students have “thought like lawyers” and objectified the law under Langdell’s conception of legal science.<sup>169</sup>

### *B. The Neglect of Realism*

While the widespread use of the Langdellian case method was solidifying in American law schools in the 1920s and 1930s, legal realism came to dominate American legal thought.<sup>170</sup> An earlier version of realism co-existed with the Langdellian formalists during the late nineteenth century, with Oliver Wendell Holmes, Jr., as one of its inspirational founding patriarchs.<sup>171</sup> Holmes, who taught at Langdell’s Harvard during the 1870s, withheld the beliefs of formalism and did not share Langdell’s concept that the common law was unified and complete.<sup>172</sup> Rather, Holmes’s concept of the common law embraced a “pragmatic historicism,” which relied on “experience as an objective source of knowledge.”<sup>173</sup> History has paired Langdell and Holmes against each other, but the rise of their respective schools of legal thought was not simultaneous. As Stephen Feldman has described, the realists followed the formalists in the period of legal modernism in American law, with Holmes’s ideas joined subsequently by the writings of Roscoe Pound and Benjamin Cardozo, and even later by the likes of Jerome Frank, Felix Cohen, and Karl Llewellyn.<sup>174</sup>

The realists assailed against Langdell’s formalist conception of law as science. Pound famously called Langdell’s formalism “mechanical jurisprudence.”<sup>175</sup> On the whole, the realists “denounced the abstract and decontextualized rationalism of Langdellian legal science as unrelated to meaningful social reality, unrelated to human experiences of the external world.”<sup>176</sup> They pointed out the fallacy of Langdell’s scientific objectivity: “Whereas Langdellian scholars claimed that their abstract reasoning enabled them to discover objective legal truths—the rules and principles of the common law—realists such as Felix Cohen belittled the Langdellian rules and principles

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169. *See id.* at 351.

170. STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 108–09 (2000).

171. *See* Kimball, *supra* note 73, at 304–05.

172. FELDMAN, *supra* note 170, at 108.

173. *Id.*

174. *Id.* at 108–11.

175. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

176. FELDMAN, *supra* note 170, at 110.

as ‘transcendental nonsense.’”<sup>177</sup> The realist movement took dominance of the high seas of American legal thought away from the Langdellian formalists, but from within the movement itself, there was a spectrum of disparity amongst its prominent thinkers.<sup>178</sup> Still, the realist reaction against the Langdellian notion of unity and objectivity of law as science was undeniable.<sup>179</sup> Ultimately, what the realists offered as a response to Langdellian formalism was to “cause[] the predicative value of doctrine to be seriously questioned.”<sup>180</sup> They questioned and torpedoed Langdell’s objectivity until that objectivity was substantially submerged.<sup>181</sup>

The realists did not exempt Langdellian innovations of the American law school from scrutiny.<sup>182</sup> Jerome Frank famously made his views known that “[t]he law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell.”<sup>183</sup> In a more hypothesized tone, Karl Llewellyn later expressed his views about the Langdellian dependence on appellate cases

177. *Id.* at 110–11. Feldman uses an example from Felix Cohen to further elaborate the realist philosophical differences:

For instance, to determine whether a court has jurisdiction over a corporation, a Langdellian would ask, “Where is the corporation?” The Langdellian then ostensibly would turn to abstract rules and principles to resolve this question—concluding, let’s say, that the corporation is in New York. But Cohen argued that despite the Langdellians’ pretensions, their rules and principles would not produce a determinative outcome in this case. “Clearly the question of *where a corporation is*, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation,” Cohen wrote. “It is in fact, a question identical in metaphysical status with the question . . . ‘How many angels can stand on a point of a needle?’”

*Id.* at 111 (alteration in original) (emphasis added) (quoting Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935)).

178. STEVENS, *supra* note 85, at 156 (“The Realist ‘movement’ thus gave the impression of being more firmly established than in fact it was. The distance between [Jerome] Frank at his most extreme and [Karl] Llewellyn at his most constructive could not have been greater.”).

179. *Id.* (“The major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based on the objectivity of the black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed to be value-free.”).

180. *Id.*

181. *See id.* (“The Realists went a long way toward killing the idea of ‘the system’ altogether. All legal logic came under suspicion.”).

182. *Id.* (“[T]he value of [the Realists’] capacity to question accepted tenets of law and legal education cannot be denied.”).

183. Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723, 726 (1933).

by contrasting it with the case approach used in business schools: “Consider, for example, the possibility of building up our so-called cases out beyond the judicial opinion into something resembling the completeness of the cases gathered for the Harvard Business School.”<sup>184</sup> In their own respective right, Frank and Llewellyn, as realists, both beckoned for the kind of practical training for lawyers that steered beyond Langdell’s case method.<sup>185</sup> Yet, the questioning fell short of leading to deep and comprehensive changes in existing Langdellian legal pedagogy: “The criticism of the case method came under fire in the 1920s and 1930s from legal scholars of the Legal Realist movement, even while it continued as part of American law school training.”<sup>186</sup> There were, of course, some noticeable modifications: the inclusion of clinical legal education and the contextualization of social sciences into the law school curriculum with new courses that were interdisciplinary.<sup>187</sup> But heavy dependence on appellate opinions in law school classes persisted.<sup>188</sup> The Socratic dialogue continued to be employed in lectures.<sup>189</sup> In spite of adding supporting materials alongside cases in the law casebook,<sup>190</sup> the core of the text was still comprised of topical collections of appellate case opinions. Accordingly, “[d]espite the realist critique, the use of the case method as a pedagogical tool for developing exacting analyses of a legal problem continued to be used throughout the twentieth century and remains a part of law school instruction.”<sup>191</sup>

Some irony exists in this neglect, particularly when one notes how the realists dominated over the American legal academy in the early decades of the twentieth century. One would have believed that the realists’ disagreement with Langdell would have prompted some significant changes to Langdell’s case method pedagogy in American law teaching. But at the core of realism, if the law was not Langdell’s Darwinian notion of science any longer, the law had become a social science. Perhaps this transition was why law schools continued

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184. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948).

185. See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 587–89 (1987).

186. Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT’L L.J. 335, 367 (2006).

187. See STEVENS, *supra* note 85, at 158–60.

188. Katcher, *supra* note 186, at 368.

189. See STEVENS, *supra* note 85, at 157.

190. GILMORE, *supra* note 84, at 88 (“What were called non-legal materials . . . became ‘Cases and Materials’ to indicate that studying law no longer meant studying cases which, according to Langdell, were our ‘experimental materials.’”).

191. Katcher, *supra* note 186, at 368 (citing I THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 24 (Steve Sheppard ed., 1999)).

to use the case method long after the age of American legal realism, even when other movements of legal thought emerged such as legal process in the 1950s,<sup>192</sup> and then in the 1970s and thereafter, schools such as law and economics, critical legal studies, feminist legal theory, law and literature, and critical race theory.<sup>193</sup>

With the realists, law was not science, but social science.<sup>194</sup> This conception embedded itself in the case method pedagogy, creating a neat retrofit to Langdell's case method rather than a wholesale move to another entirely new instructional practice. According to Friedman, "Langdell's system was repackaged as a superior kind of skills training; . . . the method taught the student how to 'think like a lawyer.' This meant mastering the law school brand of mental acrobatics, along with the fine art of argument . . ." <sup>195</sup> Perhaps this lack of change reflects the limitation of realist conceptions of law from being totally and completely different from formalism. In any event, as a result of this retrofit, the objectification of law that had underscored the practice of Langdell's case method remained in some shape in later case method usage in law schools.<sup>196</sup> Even past the last century, whether advertently or not, professors have instilled that objectification to students in their law classes, even though legal theorists no longer subscribe to Langdellian conceptions.<sup>197</sup> The form of the case method, as used in American law schools today, replicates the ceremony of objectification, even if law as science has been replaced by something else.<sup>198</sup> The examination of law through the indoctrinated rituals of professorial questioning-and-answering, the perceived primacy of appellate case decisions, and the same line-up of subject courses in the first-year curriculum since Langdell's Harvard days suggest that, devoid of the Langdellian scientific perspective of law, the remnant form of Langdell's methodology might still be steering students and scholars toward a similar type of regard for the law.<sup>199</sup> And all of this continuance of the case method has been the status quo for decades.<sup>200</sup> In terms of pedagogy then, what American

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192. FELDMAN, *supra* note 170, at 120 (describing the rise of the legal process school in the 1950s).

193. *See* Minda, *supra* note 142, at 367.

194. *See* Alton, *supra* note 168, at 356 (citing GILMORE, *supra* note 84, at 87). Alton further states that, thanks to the realists, we also see law as an art. *Id.* at 358.

195. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 36 (2002).

196. *See id.*

197. *See* Minda, *supra* note 142, at 380–83.

198. *See id.*

199. WEST, *supra* note 14, at 43–48 (noting that law schools teach a "moral relativism").

200. *Id.* at 46.

law schools have been sailing on since the legal realists is the ghost ship of Langdell.

In an existential observation about American law schools in the post-Recession crisis, Robin West has suggested the cause and implications of the hesitancy to move beyond Langdell's case method, despite modern rejections of Langdell's conception of law:

Contemporary law students are receiving the benefit of a belated recognition that in his desire to separate the study of law from the study of society Langdell was spectacularly wrong: law is not autonomous from other cultural, economic, historical, and philosophical forces, and should not be studied as such. Today's law students are the better for it; they have a more realistic, as well as far richer, understanding of law as a consequence than did their counterparts in Langdell's classrooms.

Nevertheless, the added sophistication that comes from interdisciplinarity does not in any obvious or automatic way contribute to the articulation of what a lawyer is or should be, or what education a student should have to become one. It does not, that is, fill the gap left by our rejection of the Langdellian understanding of the lawyer as a member of a learned profession immersed in the study of the common law. We simply have not articulated such a post-Langdellian conception, and all the interdisciplinary studies in the world on the nature of law, rather than lawyering, will not imply one: we will not have one, that is, until we have a faculty committed to producing one, and acting on it.<sup>201</sup>

West attributes the cause of this hesitancy to jump ship to some other vessel of teaching to a lack of faculty perspective collectively on the teaching of law students—a missing “post-Langdellian conception”<sup>202</sup>—and not an academic perspective of law's nature, which as West criticizes is what students receive from modern law courses.<sup>203</sup> The implication of hanging on to the traditions and practices of law teaching is how inappropriate or effective the current

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201. *Id.* at 154–55.

202. *See id.*

203. *Id.* at 155 (“Students learn law today not from the rarified perspective of the appellate lawyer, but rather, increasingly, from an academic perspective that is immersed in some aspect of the legal system but for essentially nonprofessional reasons, or from clinicians immersed in practice, but not from an idealized or particularly critical perspective.”).

conception is for training lawyers.<sup>204</sup> In other instances, West has identified in her own words how the use of the case method leads to problematic objectifications of law, illustrating how the propagation of Langdell's case method leads to legalism that distracts from serious engagement with the idea that law can further justice.<sup>205</sup> Her arguments on whether or not law ought to further justice and how such notions should be taught to law students buttress her own specialized imperative that law schools must move toward a post-Langdellian conception.<sup>206</sup> Nevertheless, she is correct to diagnose that a post-Langdellian conception is amiss in legal education even though more than a century of American legal history has passed since the decline of Langdell's concept of law as science.

Others have concurred with West.<sup>207</sup> Part III will examine more implications of this incongruity between American legal pedagogy and history.

### III. THE CASE METHOD & OBJECTIFICATION OF THE LAW

In observing the historical movements of American jurisprudence, one need not search far and wide for criticisms that the nature of the law is ever slow-moving in comparison to advances in social reality. Such criticisms emerge rather easily after a cursory search. Whether scholarly observations of lag and sluggishness have been used to describe progress of certain bodies of law<sup>208</sup> or the entirety of jurisprudence itself,<sup>209</sup> one consensus is that “the legal system was peculiarly slow to reflect changes in the larger culture, partly because of the specialized nature of the legal profession and partly because of the investment of professionals in the status quo.”<sup>210</sup> Similarly, as law's derivatives, the legal profession and legal education both embody comparable rhythms toward progress.<sup>211</sup> Like progress in law, “[a]dmittedly, change often

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204. *Id.* at 154–55 (“Nevertheless, the added sophistication that comes from interdisciplinarity does not in any obvious or automatic way contribute to the articulation of what a lawyer is or should be, or what education a student should have to become one.”).

205. *Id.* at 51, 57–59.

206. *Id.* at 66.

207. See Alton, *supra* note 168, at 363.

208. See, e.g., Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 418 (2015) (remarking how “[c]hange in property law is slow”).

209. See, e.g., Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 70 (2006).

210. G. Edmund White, *Transforming History in the Postmodern Era*, 91 MICH. L. REV. 1315, 1323 n.21 (1993) (citing Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967)).

211. See Alton, *supra* note 168, at 361–62.



comes rather slowly to legal education; after all, the law has always tended to be a backward-looking profession.”<sup>212</sup> Resistance is more often the norm.<sup>213</sup> Conflated together, all of these remarks about the behavior of law and lawyers prompts one to ask in the context of the legal profession whether lawyers as pessimists tend to persist in orthodoxy more than they would if they were more collectively optimists.

At first, Langdell’s reforms at Harvard Law School were not exempt from resisters.<sup>214</sup> Early in his period of pedagogical innovations at Harvard, the introduction and use of the case method in the classroom met some staunch reluctance from both legal educators and the bar alike.<sup>215</sup> The account in *The Centennial History of Harvard Law School*, which attributed the case method to Langdell, recounted that “[t]o most of the students, as well as to Langdell’s colleagues, [the case method] was [an] abomination.”<sup>216</sup> More specifically,

[h]is attempts were met with the open hostility, if not of the other instructors, certainly of the bulk of the students. His first lectures were followed by impromptu indignation meetings—“What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: ‘What’s the law?’”<sup>217</sup>

The contemporary bar had its harsh skepticisms: “Practitioners had always had some doubts about the case method, both intellectually and politically. As early as 1876 the *Central Law Journal* had condemned the system ‘which we understand to involve a wide and somewhat indiscriminate reading of cases—some of them overruled.’”<sup>218</sup> The editors of the *Central Law Journal* had expressly disclaimed any approval of the case method.<sup>219</sup> They also noted how

212. *Id.* at 361.

213. See, e.g., JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 13 (1914) (“Opposition to innovation is deeply rooted in human nature.”); see also White, *supra* note 210, 1323 n.21. White points out that conversely to a steady adherence to status quo due to investment, there is threat to ideology that holds people back and impinges change; in other words, there is “the phenomenon of limits on the capacity of humans to embrace certain data within their consciousness—the ‘imprisoning’ features of ideology. Changes in the larger culture may not be perceived by legal actors, given their consciousness, as ‘changes’ at all.” *Id.*

214. HARVARD LAW SCH. ASS’N, *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817–1917*, at 35 (1918).

215. STEVENS, *supra* note 85, at 58.

216. HARVARD LAW SCH. ASS’N, *supra* note 214, at 35.

217. *Id.*

218. STEVENS, *supra* note 85, at 57 (quoting *The Higher Legal Education*, 3 CENT. L.J. 539, 540 (1876)).

219. *The Higher Legal Education*, *supra* note 218, at 540 (“We do not wish to be understood as approving the system of teaching law introduced by Prof. Langdell . . .”).

the rise of the case method pedagogy had “excited great and bitter controversy” that led to the establishment of the law school at Boston University.<sup>220</sup> The allusion to a certain underlying concern or fear for how the profession might be perceived seemed to lurk beneath the surface of the *Journal*’s observations:

The strength of our impressions is that the reading of carefully selected judgments of the courts, could, in a course of legal study, profitably be made subsidiary to the attending of lectures and the study of approved textbooks; but we doubt the wisdom of relying on case-reading to the extent to which, as we understand it, Prof. Langdell’s system goes.<sup>221</sup>

This possible prediction that the law would be subjugated resembles the tension against the trade night-school law schools that sprang in the early twentieth century to accommodate ethnic minorities who wanted to attend law schools and enter into the profession but were more or less excluded from the learned classes at law schools such as Harvard.<sup>222</sup> It seemed more politically motivated than accurate. In fact, the trade school model was inconsistent with Langdell’s intentions for starting the use of the case method at Harvard; he had intended the case method to elevate the legal studies, not automatize it.<sup>223</sup>

True to effect, however, the journal editors got it right that students would skip his classes. In the first term of introducing the case method, Langdell’s “students were bewildered; they cut Langdell’s classes in droves; only a few remained to hear him out.”<sup>224</sup> By the end, the class was left to seven students—devotees who were then known as “Kit’s Freshmen” or “Langdell’s Freshman.”<sup>225</sup> But students did not leave because they thought they could *wing* the learning of critical lawyering skills on their own.<sup>226</sup> More likely Langdell’s

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220. *Id.*; see also FRIEDMAN, *supra* note 91, at 470 (“The Boston University Law School was founded in 1872 as an alternative to Harvard’s insanity.”).

221. *The Higher Legal Education*, *supra* note 218, at 540.

222. STEVENS, *supra* note 85, at 39–40, 49 n.49, 100–02.

223. FRIEDMAN, *supra* note 91, at 472. Friedman recounts that “Langdell’s proudest boast was that law was a science, and that his method was highly scientific.” *Id.* The scientific attributes ascribed to his method played into the tension of perceptions that legal education was either vocational or rigorous scholarly training. In fact, within the history of American legal training, “[a] principle of vocational training struggled against a principle of scientific training.” *Id.* In this way, “Langdell’s new method was antivocational.” *Id.*

224. *Id.* at 470.

225. *Id.*

226. *See id.*

students left because they could not find the relevance of what Langdell taught through his case method—“overruled” decisions.

Inadvertently or otherwise, Joseph Beale echoed this irrelevancy when he recounted that Langdell’s law “sometimes seemed too academic; and many of his students said, if they did not really feel, that his teaching was magnificent, but it was not law”<sup>227</sup>—particularly as Langdell called English cases by Lord Hardwick “comparatively recent” and “was believed to regard modern decisions as beneath his notice.”<sup>228</sup> The peculiar academic nature of Langdell’s classroom teaching proved to be pedantic: “The dialogues in Langdell’s classes went slowly, and covered very little ground, compared to the lecture method.”<sup>229</sup> As an immediate reaction, colleagues at Harvard returned to their previous methods of law teaching.<sup>230</sup>

Of course, eventually, the case method became the status quo that the legal academy heavily invested in.<sup>231</sup> In 1906, James Ames, dean of Harvard Law School from 1895 to 1910, and who has received some attribution regarding the popularizing of the case method, remarked that

the most fruitful change of all was the revolution effected by Langdell in the mode of teaching and studying law,—a revolution now so complete that most persons hear with surprise that, when his ‘Cases on Contracts,’ was first used, his disciples were a mere handful and known as ‘Langdell’s freshmen,’ a name given as a term of reproach but received as a title of honor.<sup>232</sup>

Ames had been one of those seven freshmen.<sup>233</sup> Perhaps this artifact was truly why Ames was hyperbolic in sentiment when he paid Langdell his tributes in 1906, upon Langdell’s death, by saying that “[i]n the last ten years [Langdell’s]

227. Joseph H. Beale, Jr., *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906).

228. *Id.*

229. FRIEDMAN, *supra* note 91, at 470.

230. *Id.* It is also interesting to note that a decade after the case method was instilled at Harvard, “Langdell’s personal mode of teaching changed. With his eyesight rapidly deteriorating, he gave up Socratic questioning and began to lecture, imparting his own analysis of the cases that students were assigned to read.” Kimball, *supra* note 73, at 294 (first citing Beale, *supra* note 227, at 9; and then citing Joseph H. Beale, Jr., *Papers and Discussion Concerning the Redlich Report*, 4 AM. L. SCH. REV. 91, 106–07 (1916)).

231. James Barr Ames, *Professor Langdell—His Services to Legal Education*, 20 HARV. L. REV. 12, 13 (1906).

232. *Id.*

233. FRIEDMAN, *supra* note 91, at 470.

method has conquered its way into a majority of American law schools”<sup>234</sup> and that “it is a constant satisfaction that this man of genius was permitted to see his views dominating legal education throughout the United States.”<sup>235</sup> But in terms of the case method, “the leading universities had ‘received the faith’ by 1891,”<sup>236</sup> and “[u]ltimately, every major and most minor law schools converted to case-books and the Socratic method.”<sup>237</sup> In large part, the method’s success was due to a gradual ability for law schools aspiring for prominence in the university setting to use it to reflect conformance to a growing elitist trend that had started at Harvard.<sup>238</sup>

To be sure, some have observed positive attributes and consequences for using the case method. There were financial benefits and efficiencies. As Robert Stevens has observed, “[t]he vast success of Langdell’s method enabled the establishment of a large-size class.”<sup>239</sup> Specifically, under Langdell’s deanship at Harvard, the case method allowed a class of 75 students to be led by one faculty member: “Its Socratic aspect justified the abandonment of the recitation and the quiz, the ‘exercises’ used at good schools relying on the lecture method.”<sup>240</sup> The economics established by this new faculty-student ratio meant less expensive courses to run at Harvard; indeed, “[a]ny educational program or innovation that allowed one man to teach even more students was not unwelcome to university administrators. The ‘Harvard method of instruction’ meant that law schools could be self-supporting.”<sup>241</sup> This self-substance seemed attractive to law schools.

In terms of pedagogical benefits, others have identified them in the case method as well. Approached by the Carnegie Foundation in 1913 to evaluate

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234. Ames, *supra* note 231, at 13.

235. *Id.*; see Kimball, *supra* note 73, at 293–94 (discussing the “revisionist” nature of the tributes to Langdell in 1906, following his death, especially in contrast to Ames’ works as dean of Harvard that maintained Langdell’s legacy).

236. STEVENS, *supra* note 85, at 57.

237. FRIEDMAN, *supra* note 91, at 471.

238. STEVENS, *supra* note 85, at 63. Stevens notes that the case method succeeded because of institutional elitism and the race to achieve academic status: “No doubt part of the method’s popularity was snobbism; once elite law schools had decided to approve of the system, those aspiring to be considered elite rapidly followed.” *Id.*; see also *id.* at 60–63 (narrating the “Harvardiz[ing]” of law schools at various American universities such as Columbia, Northwestern, Chicago, Cincinnati, Wisconsin, Hastings, Yale, and Valparaiso).

239. *Id.* at 63.

240. *Id.*

241. *Id.* (citation omitted).

the case method in American law schools, German law professor, Josef Redlich,<sup>242</sup> wrote in his resulting report that the case method was more analytically demanding for the law student over the older textbook method:

Consequently as the [case] method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected: the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method.<sup>243</sup>

Redlich also qualified his praise by noting his hesitancy with the case method's embodiments of a scientific conception of law, calling the heavy analogy between law and science "inaccurate"<sup>244</sup>—and by regarding the nature of American law, as driven by common law practices, to have buoyed the case method's success.<sup>245</sup>

On similar evaluations of praise as Redlich, others have dived further into observations of the case method's analytical demand. Paul Carrington offered a catalogue of benefits that observed the case method's capability to foster mental discipline and independent habits of learning the law;<sup>246</sup> its development of lawyerly judgment;<sup>247</sup> its helpful comprehension of common law

242. Kimball, *supra* note 73, at 290.

243. REDLICH, *supra* note 213, at 39.

244. *Id.* at 55. In his view, Redlich found that "the analogy between legal science and physical science so frequently drawn by modern American lawyers in their discussions of method is, in everything that concerns nature and method, itself inaccurate." *Id.* This had implications for the case method's "unqualified rejection of the lecture from the curriculum of the university law schools, and the extraordinary slighting of literary aids to the study of law," as it "seems an error and a prejudice which has its origin in an undoubted exaggeration of the value of the analytic method in and for itself; and possibly also in an exaggeration of the value in scientific instruction of 'method' in general." *Id.* at 54; *see also id.* at 55 ("Prominent though experimental and inductive methods are in the sciences which serve physical research, we press a generalization much too far when we make of the inductive method the sole criterion of scientific intellectual activity.").

245. *Id.* at 35 ("I said, further, that the fundamental reason for [the case method's] success is to be found in the present condition of American law, and within this especially in the unshaken authority of the common law. Unchecked by the voluminous output of statutory law, in all conceivable fields of law and in all the states of the Union, the law of America has still remained, above all things, common law.").

246. Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 745–46 (1995).

247. *Id.* at 747.

traditions;<sup>248</sup> its promotion of moral consciousness;<sup>249</sup> and its narrative power to draw attention.<sup>250</sup> In commenting about Carrington's indicated list of benefits, Judith Welch Wegner has questioned "whether these benefits are directly attributable to the 'case method' or to the use of the 'Socratic method' of questioning in conjunction with the study of cases."<sup>251</sup> Regardless of this distinction, Welch then considered that "other benefits might be added" to Carrington's list:

the potential for development of "deep knowledge," the chance to participate in the "construction" of knowledge that fosters memory and self-confidence, the opportunity to teach about the legal process and lawyering as well as about how to read cases and engage in critical analysis, the power of learning in an authentic context that resembles at least to some degree the actual practice setting, and the educational force of gaining certainty in the face of pre-existing doubt.<sup>252</sup>

In likewise fashion, Russell Weaver has also noted how the heavy emphasis of cases factually contextualizes the legal situations for students and can "stimulate greater student interest" than reading summaries of legal issues from a textbook.<sup>253</sup> Similar to Carrington, Weaver also noted how the case method teaches students how to dissect the different parts of a case opinion,<sup>254</sup> facilitates learning of critical analysis by compelling in-class inquiry into cases,<sup>255</sup> develops mental "toughness" and quick thinking skills,<sup>256</sup> allows learning law in a precedent-driven system,<sup>257</sup> imparts comprehension of a legal process that is inductive,<sup>258</sup> and instructs upon the functions of a lawyer.<sup>259</sup> Others have

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248. *Id.* at 749–54.

249. *Id.* at 754–59.

250. *Id.* at 746.

251. Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867, 927 (2009).

252. *Id.*

253. Weaver, *supra* note 89, at 547–48; *see also* David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 B.Y.U. EDUC. & L.J. 307, 328 (2000).

254. Weaver, *supra* note 89, at 549.

255. *Id.* at 549–52.

256. *Id.* at 552–53.

257. *Id.* at 553.

258. *Id.* at 553–57.

259. *Id.* at 558–61.

echoed Carrington, Welch, and Weaver's emphases that the case method promotes critical and intellectual rigor.<sup>260</sup>

Of course, opposing views about the method also exist—and in plenty of forms. Specific criticisms, particularly from law faculty, over the pedagogical side effects of Langdell's case method have always persisted—criticisms that echo the contemporary scrutiny of the method during Langdell's days at Harvard, but also ones that dip deeper into its murky waters to uncover more of its shortcomings and treachery. Never mind Jerome Frank's unflattering criticisms about the case method in the 1930s, which asserted inter alia, that under the case method, students “do not study cases” truly as the method had claimed,<sup>261</sup> that “[s]tudents trained under the Langdell system are like future horticulturists confining their studies to cut flowers”,<sup>262</sup> and that the method's most profound “fault is in its naive assumption of the inviolability of the *stare decisis* doctrine and its corollaries.”<sup>263</sup> Or one could forgo for now, Grant Gilmore's later acerbic indictments in the 1970s, which noted that “[a]t least in Langdell's version, [the case method] had nothing whatever to do with getting students to think for themselves; it was, on the contrary, a method of indoctrination through brainwashing.”<sup>264</sup> In tone, both Frank and Gilmore's twentieth-century remarks seemed to rail against the widespread acceptance of the case method, trying to arouse mutiny in the academy by flinging contempt for Langdell and his method into the air. And according to John Schlegel's passing quip, uncovered in Bruce Kimball's relatively recent historiography on Christopher Langdell, Grant Gilmore might have succeeded.<sup>265</sup> But aside from Frank, Gilmore, and the trashing of the Langdellian method for the sake of mutiny (or even just the sake of trashing it), the crux of some of the negative insights toward the Langdellian case method points to its categorical failing to teach law in its entirety—that the pedagogy is propped with the purpose to

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260. See Garner, *supra* note 253, at 328–29 (asserting that the case method makes students self-sufficient and teaches about the law's complexity).

261. Frank, *supra* note 81, at 910.

262. *Id.* at 912.

263. *Id.* It could be worse: “They resemble prospective dog breeders who never see anything but stuffed dogs.” *Id.*

264. GILMORE, *supra* note 82, at 13.

265. See Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take As Law”: The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883, 17 LAW & HIST. REV. 57, 60 (1999) (noting that John Henry Schlegel's mentioning some of the reverent considerations for Langdell's “golden age” for American law teaching might have ended when Grant Gilmore “started several of us off trashing it” (quoting Schlegel, *supra* note 86, at 369)).

accomplish too much, and as a result, has assumed too much.<sup>266</sup> Redlich alluded to this problem when he wrote that a result of the case method as the dominant way of teaching law in American law schools is that “the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features.”<sup>267</sup> The teaching of principles and doctrines under common law through the case method was “being most excellently performed” at the law schools that Redlich observed, but that did not mean, in his opinion, that instruction on other traditions and points of the law were being accomplished.<sup>268</sup> Grant Gilmore, aside from tone, made a similar statement that the case method’s effect was a type of suppression of the actual state and history of the law:

Since 1800 the principal characteristics of American law had been its chaotic diversity, its sensitivity to changing conditions, its fluidity, its pluralism. All that had to be suppressed. . . . It is also fair to say that the Langdellians, both in their casebooks and their treatises, performed major surgery on what their chosen English cases had been about when they were real cases in a real England. England became our never-never land, our Shangri-La, our Utopia.<sup>269</sup>

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266. See, e.g., W. Burette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 84 (1997) (noting Edward Phelps’ complaint that “the case method ‘attempt[s] too much’ for the time available and the capacity of the average student and that “[t]o plunge a student into this chaos [of cases], with his powers untried and imperfect, and his knowledge of principles incomplete, to grope his way through it as best he may, and to triangulate from case to case, supposing that he is getting forward when he is only going astray, is not to educate him, but tends rather to make him proof against education” (alterations in original) (quoting Edward J. Phelps, *Methods of Legal Education*, 1 YALE. L.J. 139, 140–41 (1892))).

267. REDLICH, *supra* note 213, at 41.

268. See *id.* at 43 (“But here, also, it seems to me that the historical scaffolding of the English common law, as a general introduction to the analytical study of Anglo-American law, is extremely desirable and of the greatest importance. A scientifically constructed survey of the main sources of the common law and of their relation to one another; of the concepts of customary and positive law; a short external history of the law, which should include the origin and development of the English courts of justice; a brief exposition and development of the nature and extent of the concept of equity; a description of that institution so important for Anglo-American law, the Reports, and of the concept of precedent; finally also a glance at the phenomenon of statutory law (legislation) and its nature and forms; all these things and much else connected with them ought to be furnished the students at the beginning of their studies, before their introduction to the analytical study of the cases. The fact that this ground can be covered only in elementary and summary fashion need not prevent the presentation from being thorough and scientific.”).

269. GILMORE, *supra* note 84, at 48 (footnote omitted).



Law was a distortion and the method reflected this distortion—a method that was then used to teach law in American law schools. Therein the ironies of a presumed completeness, unity, and autonomy in a method with shortcomings emerge.

Three decades ago, Duncan Kennedy explored the social and political ramifications of that distortion on American law students.<sup>270</sup> In his memorable crit-laden fashion, Kennedy claimed how law school itself is an ideology, a sentiment that implies his views on the distortion of law, which made clearer sense when he unpacked the consequences of seeing that ideology for what it was:

To say that law school is ideological is to say that what teachers teach along with basic skills is wrong, is nonsense about what law is and how it works; that the message about the nature of legal competence, and its distribution among students, is wrong, is nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense.<sup>271</sup>

Seemingly echoing Gilmore's claim of "indoctrination by brainwashing" but going even deeper, Kennedy illustrated how the distortion had been embedded as the status quo of American law schools and its ensuing effects on law students:

Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the linkback that completes the system: students do more than accept the way things are, and ideology does more than damp opposition.<sup>272</sup>

Kennedy's reflections on the distortion of law were just as scathing as Gilmore's; for instance, the Socratic dialogue was characterized as "pseudoparticipation."<sup>273</sup> But his lengthier ruminations drew out more clearly than Gilmore the distortion's profound potency and harm. From an examination of what takes place in the typical Socratic dialogue, "[i]t quickly emerges that neither the students nor the faculty are as homogeneous as they at first appeared."<sup>274</sup> That striation, undemocratic at its core in Kennedy's

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270. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 54–75 (David Kairys ed., 3d ed. 1998).

271. *Id.* at 54.

272. *Id.*; GILMORE, *supra* note 82, at 13.

273. Kennedy, *supra* note 270, at 56.

274. *Id.*

description, appears as ominous and tense as those moments in a horror flick when recent converts to a destructive cult recognizes that they've been *had*—and not in a good way. But in Kennedy's version, the converts continue to perpetuate the hierarchy; they continue the path of becoming lawyers, up the ranks of profession to eventually steer the industry and field.<sup>275</sup>

Simultaneously, Kennedy criticized the case method for falsifying both the intellectualism of the law and the practice of lawyering.<sup>276</sup> As for how the case method presented intellectualism of the law, Kennedy found it to be underwhelming: “The actual intellectual content of the law seems to consist of learning rules—what they are and why they have to be the way they are—while rooting for the occasional judge who seems willing to make them marginally more humane.”<sup>277</sup> Was that all there was to the law—just these rules, likely from cases, and some hope for a meager judicial morality? Kennedy's reference to Langdell's inductive legal science here is glaring. Yet, the case method distorts more than that—particularly in regard to lawyering. Skills are taught under the case method, but taught in a twisted “mystified” way that obscures what skills and lawyering are. Like others before him, Kennedy contended that the case method substituted notions of lawyering wholesale with the false primacy of inductive legal reasoning by noting how under the case method, “law emerges from a rigorous analytical procedure called legal reasoning”<sup>278</sup>—one “which is unintelligible to the layperson but somehow both explains and validates the great majority of the rules in force in our system.”<sup>279</sup> His remark here connected the proverbial “thinking like a lawyer” (legal reasoning) with the idea of law's completion (Langdell's formalism), and served up an underhanded swipe at the case method's inductive reasoning. Then he attacked the content of law courses. Specifically, he noted how the law courses segregated each legal doctrine issue into “a tub on its own bottom,” which misled students from learning “an integrating vision of what law is, how it works, or how it might be changed (other than in any incremental, case-by-case, reformist way).”<sup>280</sup> That isolation parallels the isolation between legal reasoning and lawyering that Kennedy found was what law schools perpetrated, again distorting what law and lawyering was: “‘Legal reasoning’ is sharply

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275. *Id.* at 72.

276. *Id.* at 59–60.

277. *Id.* at 57.

278. *Id.* at 59.

279. *Id.*

280. *Id.*

distinguished from law practice, and one learns nothing about practice.”<sup>281</sup> The consequence ultimately “disables” students from the profession.<sup>282</sup>

The curricular holdovers from Langdell also perturbed Kennedy. Recapitulating on the “tubs on their own bottoms” motif, Kennedy criticized the segregation of law courses, particularly in the first-year curriculum, as a deliberate, intentional set of separations<sup>283</sup> that distorted the reality of law.<sup>284</sup> He observed that “peripheral subjects,” such as philosophy of law, history of law, legal process, and law clinical courses, that give context to the law were not readily taught as part of the core curriculum because law schools, preferring inductive reasoning, perceived these other courses as not promoting the “‘hard’ objective, serious, rigorous analytic core of law.”<sup>285</sup> Instead, law schools trivialized these contextual courses as more or less cosmetic, part of the “finishing school for learning the social art of self-presentation as a lawyer.”<sup>286</sup> In this respect, Kennedy here seemed to echo Redlich’s hesitancy more than a half-century earlier in regards to the case method’s heavy emphasis of analytical rigor over teaching the context of law—except unlike Redlich, who was a German outside observer hired by the Carnegie Foundation, Kennedy was observing as an insider, from within the American legal academy (Harvard, no less), long after Langdell’s case method had become the status quo.<sup>287</sup>

Kennedy lamented for an alternative: “A more rational system would emphasize the way to learn law rather than rules, and skills rather than answers. Student capacities would be more equal as a result, but students would also be radically more flexible in what they could do in practice.”<sup>288</sup> He hinted at how the distortion of law through the case method achieved disparity in the way the Langdellian set-up in law schools created a setting for “enforced cultural uniformity.”<sup>289</sup> If the analytical, inductive rigor of “thinking like a lawyer” has been the categorical substitute or proxy for what the law was or what lawyers did—or at least how law schools have used it since Langdell—and if the reason for inductive reasoning relied on Langdell’s original beliefs in the

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281. *Id.* at 60.

282. *Id.*

283. *Id.* at 59–61 (“The curriculum as a whole has a rather similar structure . . . ad hoc.”).

284. *Id.* at 61 (“Entering students just don’t know enough to figure out where the teacher is fudging, misrepresenting, or otherwise distorting legal thinking and legal reality.”).

285. *Id.* at 61.

286. *Id.*

287. Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 408 n.53 (1971); Dean H.F. Stone, *Papers and Discussion Concerning the Redlich Report*, *supra* note 230, at 91.

288. Kennedy, *supra* note 270, at 65.

289. *Id.* at 69.

completeness, unity, and autonomy of the common law, then the idea of what was law and how to uncover and study it under the case method was like what Redlich had said: inaccurate. A more “realistic” idea of law has been siphoned off only to be reflected by a peculiarly small and limited set of behaviors that served to reinforce a distorted idea of the norm.<sup>290</sup> The cultural implications were significant here as Kennedy illustrated how that small set of behaviors end up fetishized at the top of a hierarchy that appeared oppressive, especially to diverse law students.<sup>291</sup> What the case method did with its distortion of law was to develop in law students “skills that incapacitate rather than empower, skills that will help you imprison yourself in practice.”<sup>292</sup> The minority law student learned that the skill of assimilation was the oar of survival.<sup>293</sup> Meanwhile, everyone who entered the system “accept[ed] the system’s presentation of itself as largely neutral, as apolitical, meritocratic, instrumental, a matter of craft,” even though the reality of law was not that way.<sup>294</sup> Not only was the outcome a grim one for legal education as the pedagogy installed as the status quo was based on a distortion of law, but what was worse in Kennedy’s view was that it fostered dispassion, detachment, disengagement, and disenchantment with the law.<sup>295</sup>

Kennedy is not alone in being political and socially critical of the case method. Commentators have also attacked the case method’s blindness toward a plurality of learning styles and capacities in students.<sup>296</sup> Accordingly, in this vein, some have also emphasized how the case method fetishizes abstract reasoning over a more inclusive set of critical lawyering skills.<sup>297</sup> Others have examined the psychological aspects of the case method and even unflatteringly

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290. *See id.* at 68.

291. *See id.* at 70.

292. *Id.*

293. *See, e.g., id.* (“Lower-middle-class students learn not to wear an undershirt that shows, and that certain patterns and fabrics in clothes will stigmatize them no matter what their grades. Black students learn without surprise that the bar will have its own peculiar forms of racism, and that their very presence means affirmative action, unless it means ‘he would have made it even without affirmative action.’”).

294. *Id.* at 72.

295. *See id.* at 73 (referring to a “private self” that students create).

296. *See* Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 185 (1986) (asserting that the case method fails to account for “individualized learning styles and capacities”).

297. *See, e.g.,* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996).

portrayed aspects of it as “infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values.”<sup>298</sup> Scholars have also observed that the way law schools teach the law exalts cold, hard doctrine over the “human aspects of lawyering—variously called empathetic, affective, feeling, altruistic, and service aspects of lawyering.”<sup>299</sup> Even more incisively, other scholars have bemoaned that the case method’s sole weight on appellate opinions obscures the importance of doctrinal analysis to the exclusion of fact analysis in law practice, which can arguably shift the emphasis away from the doctrine.<sup>300</sup>

In her existential assessment of law schools, Robin West sees the case method’s distortion-dispassion correlation as harboring serious implications for teaching justice in law schools. West differs from others who link the case method to amorality.<sup>301</sup> Instead, she finds that contemporary American legal education produces a legalist way of engaging in the law that is due to the sense of processual fairness students pick up in case method reasoning starting in the first year and in the method’s preference for performing horizontal equity, of treating like cases alike.<sup>302</sup> Again, the case method’s artificial and distorted placement of analytical rigor as superior lies at the heart of this conditioning of law students. Coupled with the legacy of Langdellian formalism that still remains, the result, as West maintains, marginalizes the thoughts and teachings on justice, which bodes terribly for instilling a normative sense of jurisprudence in law students.<sup>303</sup>

These scholarly and critical observations about the case method largely target the distortion of law behind the method. It has not been hard for scholars to surmise that behind the distortion reflected in the case method rests the mandate of Langdellian nineteenth-century formalism to objectify law, according to its late nineteenth-century virtues.<sup>304</sup> To see larger, more damaging implications in that objectification of law, postmodernist critiques of Langdellian formalism offer such implications for contemporary legal

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298. Stone, *Legal Education on the Couch*, *supra* note 287, at 407.

299. Carrie Menkel-Meadow, *Narrowing the Gap By Narrowing the Field: What’s Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 595–96 (1994) (footnotes omitted).

300. Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 722 (1996).

301. WEST, *supra* note 14, at 56.

302. *Id.* at 51–52, 56.

303. *Id.* at 88.

304. *See id.* at 101–02.

education that are even more basic and fundamental than the disconnect between teaching law and justice that West had indicated.<sup>305</sup>

As a tradition or mode of analysis concerned with and effected by questions of instability, postmodern experiences of the law have challenged modernist conceptions of law for embedded assumptions and establishments of objective and complete unity in the law as part of the project of legal modernists to find objective truth in reality.<sup>306</sup> In this way, juxtaposition of Langdellian formalism and postmodernism allows us to see—from a phenomenological way, and even perhaps in an exaggerated way—the trappings of the conception of law as science: “What postmodernists do is intensify dissatisfaction with the *narrowness* of professional knowledge about law.”<sup>307</sup> Specifically, postmodern jurisprudence’s obsession with the politics of form and the concept of the subjective in law has much to say about Langdellian formalism.<sup>308</sup> While Langdell’s formalism perpetuated certain ideals about law—its completeness, autonomy, neutrality, etc.—and reinforced those ideals through its form—the case method—to the point of objectifying the law as its own living, breathing entity, postmodernism critiques the gaps in that endeavor, noting that, underneath the sorcery, the ideals and norms are never that neutral, complete, or objective.<sup>309</sup>

Most notably, the politics of form and the concept of subjectivity in postmodern legal thought has focused on the missing subject in Langdellian conception of law and its associated problems.<sup>310</sup> According to postmodernist thought, Langdell’s legal conception of law as science objectified law in a way that hid its first human author, Langdell, and its subsequent authors as well.<sup>311</sup>

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305. *See id.* at 27, 105–06.

306. Minda, *supra* note 142, at 354.

307. *See id.* (“Until recently, legal theorists were unaware of the influence of legal modernism. Indeed, legal thinkers did not become aware of the existence of legal modernism until a rival perspective, postmodernism, appeared in the legal academy and challenged the visions, ideas, and practices of modern legal thinkers.”).

308. *See id.* at 374.

309. *See* WEST, *supra* note 14, at 70–71, 71 n.70; Pierre Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1637 (1990); Minda, *supra* note 142, at 354.

310. *See* Schlag, *supra* note 158, at 1632–34, 1637.

311. *See id.* at 1646 (“Recall that the occasion for conceiving Langdellian formalism as grounded in a transcendental order of the object was the almost invariable effacement of the individual subject (e.g., ‘Chris Langdell’) whenever he spoke of law.”); *see also id.* at 1637 (quoting 1 JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS 39 (2d ed. 1935) (“It is assumed by most authorities that if the

As Pierre Schlag has observed, much of this veiling or “effacement” of the author was effectuated through ritualized rhetoric of the law as well as the act of inductive legal reasoning.<sup>312</sup> Taking his contracts casebook as a prime example, Schlag notes how Langdell interchanges authorial viewpoints depending on whether he was writing about the law or whether he was writing about pedagogy:

[W]henever Chris [Langdell] addresses a matter of pedagogy in his preface, the “I” is all over the place. And yet, quite mysteriously, as soon as the law makes its appearance in the preface, the “I” vanishes. Chris disappears. Dean Langdell is removed. Even you, the reader, begin to experience a certain ego loss. Could it be God? Is it love? No, it’s law—law and science: ‘Law, considered as a science, consists of certain principles or doctrines.’<sup>313</sup>

Ritualized and repeated in this way, the law as voiced and written by Langdellian formalists loses its authors and instead the impression is that “[c]ontract law does things; the rules speak, the doctrine evolves and develops” and “[m]odern legal scholars have since followed Langdell’s example; accounts of the subject are rare in contemporary legal scholarship because subjectivity is sublimated in legal forms and because only certain kinds of subjects can be vested in these legal forms.”<sup>314</sup> As Gary Minda seems to suggest, the Langdellian vision of legal science encouraged this mimicry—“to write in the passive voice and to rigorously maintain the detached demeanor of a scientist conducting a controlled experiment”<sup>315</sup>—which has resulted in experiences of the law by modern legal scholars that have been “somehow ‘constrained’ and ‘bounded’ by law’s professional method of analysis and orientation.”<sup>316</sup> What is worse is the myth of disengagement: “And, yet, in removing *their* subjective presence from their discussion of the law, modern legal scholars have also assumed that they are capable of excluding their own personal subjective identities from their work.”<sup>317</sup> They “assume, in other words, that they are becoming relatively empty, abstract, and universal subjects-in-control of the

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*judges did not make, but discovered the law*, then in the absence of legislation the law must remain what it has always been, and therefore by a process of backward projection, it is argued that unless the courts changed the law the law must have been the same in 1200 that it is today.” (emphasis added)).

312. *Id.* at 1646–56.

313. *Id.* at 1633–34 (second alteration in original) (footnotes omitted) (citing KENNETH BURKE, A GRAMMAR OF MOTIVES 355 (1945); and then quoting LANGDELL, *supra* note 110, at vi).

314. Minda, *supra* note 142, at 380.

315. *Id.*

316. *Id.*

317. *Id.* at 380–81.

law.”<sup>318</sup> The problem with this ritualized uniformity and passivity that tries to mimic the scientific, as Minda implies, is that all of this falsity, pretense, and subordination trickles down to professional inculcation, which is what law schools are tasked to do: “Hence, the expression ‘thinking like a lawyer’ makes sense because it is thought that all lawyers think alike.”<sup>319</sup>

The established ritual of rhetoric in legal reasoning not only subordinates its subjects but also its act of concealing through language and the overshadowing of subjects by the objectification of law makes any inquiries about that author difficult to achieve. Here is how that emphasis of inductive legal reasoning creates this hermetic problem as it contributes to the objectification of law and at the same time minimizes the subject: “[L]egal rules are explained, analyzed, and criticized as if they were transcendental objects unaffected by analyzing subjects.”<sup>320</sup> These attributes of rhetoric and reasoning under Langdell is the crux of a popularized formalist style.<sup>321</sup> In this way, the law achieves objectification because “the law is a transcendental object unaffected by social and economic context”<sup>322</sup> and the result is prevention “from confronting the hidden assumption of the autonomous legal subject.”<sup>323</sup>

But postmodernism has recontextualized the subject in law as anything but an autonomous being. A “serious predicament” for legal scholars is revealing that “the subject is a problem” because “[t]here are many different subjects who interpret the law.”<sup>324</sup> How does one justify the law as transcendental, neutral, complete, and autonomous when “the meaning of law depends on the various constructions of different subjects”?<sup>325</sup> The identities of the “subjects-in-control of the law” matter.<sup>326</sup> The revelation that law is “man-made”—not its own living scientific entity that reflects universal truths of the world—reflects humanity (and undoubtedly has reflected a certain kind of humanity, even under

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318. *Id.* at 381.

319. *See id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 382.

325. *Id.*

326. *Id.* at 381.



Langdell's order).<sup>327</sup> Meanwhile, we lack a language to articulate the law in this way, or reference points for this more realistic or truthful point of view about law. This predicament is debilitating for legal scholars because it makes them confront subjectivity. Likewise, as the politics of form and subordination of the self/subject is reflected in the case method through the same rhetoric and legal reasoning, the predicament is also debilitating—or couched in Duncan Kennedy's terms, disabling—because in its continued use of the case method with its objectification and distortions of law, law schools pass these same problems of the subject in law to their students.<sup>328</sup>

This postmodern critique suggests that Langdell's dispassionate, disengaged version of law and the case method subverts the human in law by concealing subjectivity through its rhetoric and formalist style and emphasizing an idealized, legalistic objectivity. The lack of focus on the subject—in the context of law school students—and the myth that the subject does not exist has serious ramifications. “Langdellian formalism reduces the subject to a subordinate, trivial role, the performance of that trivial role remains essential to the ‘reading’ of the object order of law.”<sup>329</sup> If that is the case, then American legal education is an ineffectual life raft floating on waters now revealed to be deeper and more treacherous than we have known. Its methodology is irrelevant and disempowering.

Yet, even with such postmodernist commentary nearly two decades ago, American law schools continue to rely on Langdellian pedagogy.<sup>330</sup> Since even the realists, the academy has long-recognized the Langdellian conception of law as science as having some virtues but altogether unencompassing as a way to study and develop law,<sup>331</sup> yet still the shell of the case method traps law schools from progressing forward.

Prior to the recent crisis of legal education, Edward Rubin, in a critical stance against the Langdellian case method, hypothesized reasons why the case method still persisted in law schools, despite its outdatedness.<sup>332</sup> He argues that the case method's “very obsolescence” had engendered an appearance of its “immutab[ility]” so hard that “it seems less a tradition than a fact of nature.”<sup>333</sup>

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327. *Id.* at 382 (“This inquiry can be threatening and, indeed, frightening to many contemporary legal thinkers because it potentially exposes how legal codes, texts, professional habits, and grammar constitute subjectivity in the law.”).

328. See generally Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1683–86 (1996).

329. Schlag, *supra* note 158, at 1637.

330. See Rubin, *supra* note 119, at 642.

331. *Id.* at 635–36.

332. *Id.* at 613–15.

333. *Id.* at 613–14.

First, the boat seems hard to rock. Additionally, Rubin observed that the complacency created by the fiscal powerhouses of law schools as money makers for universities and law faculty members as beneficiaries reduce any competing urge to change the status quo.<sup>334</sup> Now there's reluctance to rock the boat. And finally, Rubin offers one more reason that law schools have kept the case method, which in part is self-defeating: faculty members at law schools tend to read "a false appearance of modernity" into the case method.<sup>335</sup> In staying on the boat and not rocking it, we tell ourselves that the boat is truly state-of-the-art in order to justify continual refrain from rocking the boat. Moreover, "[o]ur failure to progress paints the Langdellian original with false colors of modernity, misleading us into thinking that the rationales for his curriculum correspond to our current understanding of law, society, and education."<sup>336</sup>

Ten years have passed since Rubin's observations.<sup>337</sup> At least one of his proffered justifications—the fiscal health and financial stability of law schools—is no longer quite the case because of the current and recent crisis of legal education.<sup>338</sup> They are, borrowing another of Duncan Kennedy's phrases, quite the fiscal "tubs on their own bottoms" as they might have been.<sup>339</sup> With that prong no longer true, justification for keeping the case method afloat in contemporary American law schools seems even more uncertain—especially if the only reasons are the first and third ones that Rubin mentioned. In an updated but still critical view about the future of legal education in 2014, Rubin has given two trends in society that may propel changes in legal education whether law schools like it or not.<sup>340</sup> First is the rise of a knowledge-based economy, in which "the increasing complexity of society in general" and "legal expertise, as knowledge, is more central to the sources of wealth in that new economy," will require a restructuring of law schools that may include additional years and intensity of instruction.<sup>341</sup> Currently, because law schools still "retain[] an approach to pedagogy developed before Dewey, Piaget, Montessori, and all the other founders of twentieth-century educational theory," they "teach at the same

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334. *Id.* at 614–15.

335. *Id.* at 615.

336. *Id.*

337. *See id.* at 611.

338. *Id.* at 614; WEST, *supra* note 14, at 16–17.

339. *See* Kennedy, *supra* note 270, at 59.

340. Rubin, *Future and Legal Education*, *supra* note 44, at 507–08.

341. *Id.* at 510.

level of specificity in all three years. In effect, they are teaching three years of second-year courses.”<sup>342</sup> Instead, Rubin suggest a graduated approach where the first year is “more introductory and foundational” and the third year is more interactive and advanced so that it “give[s] students an opportunity to work in a more participatory and interactive manner and to investigate one area of law in more detail.”<sup>343</sup> The result is more subjectivity, empowerment, and relevance in learning law and practice so that students “develop an appreciation for the complexity of modern law and an understanding of the ways to deal with, and take advantage of, that complexity.”<sup>344</sup>

Another concerning trend that Rubin examines is the teaching of social justice in law schools: “The second major social trend that is directly relevant to legal education is the ongoing demand, both moral and political, for social justice.”<sup>345</sup> The relevance is two-fold. First, intertwined with the knowledge revolution is the rising need for “people to enforce their traditional rights to the new products that our knowledge-based economy is producing.”<sup>346</sup> Technology’s drive to complexity in life will translate to protection and enforcement of individual rights whether in private commercial law or criminal law.<sup>347</sup> Second, such advancements and corresponding legal services will need to be equally distributed and accessible to avoid social injustice.<sup>348</sup> But for now, “[t]he challenge is that the law school curriculum, in its present form, is designed to train students to provide legal services to corporations, wealthy individuals, and prosperous small-town elites, not to the working classes or the underprivileged.”<sup>349</sup> Rubin’s fault with the Langdellian method here, in the realm of teaching justice, is similar to Robin West’s dissatisfaction.<sup>350</sup> Others in the academic world have similarly observed justice teaching as a goal of contemporary law schools.<sup>351</sup>

Rubin’s reasons for changing legal education and pedagogy should prompt concern. But if the fundamental pedagogy of law schools detaches the student from the law in the way that the commentators above have described in service

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342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 513.

346. *Id.* at 514.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Cf.* WEST, *supra* note 14 at 154–55.

351. *See, e.g.,* Peter L. Davis, *Why Not A Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 *HAMLIN L. REV.* 513 (2007); Anthony D’Amato, *Rethinking Legal Education*, 74 *MARQ. L. REV.* 1 (1990).

of a model of law that overly objectifies and distorts the reality of the law and the control and instrumentality of the law, then how do law schools expect to empower their students to be capable legal thinkers, as well as stay relevant to the actual nature of the law? Are law schools just drifting on by, and is there a conception that could support a new pedagogy?

Part IV will introduce one concept that seeks to address these issues.

#### IV. INSTRUMENTALITY CONCEPTION

To merely reconfigure the case method is to engender further justifications for the method's continuing use and legacy in American legal education. Consequently, the response in Part IV charts more fundamentally toward creating a contemporary conceptualization of law rather than transplanting the practices of the Langdellian method into new waters—essentially allowing it to linger afloat in American law schools for educating and influencing further generations of lawyers.<sup>352</sup> The intent here is to broaden and change existing pedagogical traditions by conjuring the topic of law school study and inquiry—that is, law—in ways beyond the system of a nineteenth-century scientific legal paradigm in hopes to avoid the kind of objectification discussed in Parts II & III, and to bring the Subject (or Subjects) of law explicitly into the study of it. To arrive at this solution requires finding one underlying conception of law—not necessarily an all-encompassing one, but a conception that will generate newer and less constricting ways to teach law and lawyering; a conception that is less empirical and hopefully less arrogant in its ambitions; one that can better facilitate pluralism while focusing on relevance and empowerment. This task is possible if we stop trying to categorize what law is in a formalist way and instead begin examining and working with its characteristics, inherent aesthetics, and effects. Thus, the idea of law as instrumentality seeks to do so in this manner.

Previous parts of this Article have inferred and explored the fallacies of categorizing law as a unified body and how that distortion seeps into pedagogical methods with critically problematic results.<sup>353</sup> In part, the movements of American legal thought that have followed Langdellian formalism—from American legal realism to postmodernism—have exposed such fallacies by their separate reactions to the assumption of law's complete

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352. See GILMORE, *supra* note 82, at 13 (referring to the case method as “indoctrination through brainwashing”).

353. See *supra* Section II.A.

unity and autonomy.<sup>354</sup> Each movement, in its own thought, has identified gaps to the law that defy unity.<sup>355</sup> Such observations could indicate either that these gaps exist in a present state of modernism or that the modernist movement has been entirely superseded by postmodernity.<sup>356</sup> Although it seems more convincing that postmodernity is the current era,<sup>357</sup> both observations suggest that achieving unity in law is ultimately impracticable.<sup>358</sup> To know this truth of the matter, but to continue preoccupied over unity and autonomy is debilitating after a while—especially if that *while* has lasted for more than a century. Why then, other than intellectual and academic complacency,<sup>359</sup> do we still justify teaching only a limited set of approaches to the law by adhering to a pedagogy that embraces those fallacies? Despite our modern considerations and presumptions of law and its practices, why are we still setting sails to chase after a mythical beast in the ocean in the way Langdell had once chased?

Conversely, studying law under a concept of its instrumentality does not send our students out to uncover a singular unitary body of law only to watch them crash on rocky shores. Law is not a mythical beast lurking out in the high seas for hunt. Borrowing from Gertrude Stein, “there is no *there there*”<sup>360</sup> in that endeavor; no beast of that mythos awaits our capture, but only intellectual cruelty in its mandate and the high possibilities of being led off-course, of academic ship-wrecks, and rumors transmitted across the high seas about legal education’s demise.

Instead, there are qualities existing in law and its practices that prompt and beckon exploration. When we experience the law, we experience its characteristics and effects.<sup>361</sup> Studying and teaching law by starting with its instrumentalities is one way of accessing the inquiry into law and the various qualities and characteristics of its agency without the prerequisite of a ritual

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354. See Minda, *supra* note 142.

355. See *id.*

356. *Id.* at 388–89.

357. See *infra* Section IV.B.

358. See Minda, *supra* note 142, at 389–90.

359. See Rubin, *supra* note 119, at 614 (describing the narrow self-interest of law faculty that implies complacency).

360. GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937) (emphasis added). Stein used the phrase to describe her sentiments about visiting her childhood home in Oakland, California. *Id.*

361. See Jennifer L. Culbert, *Shattering Law: Encounters with Love in Billy Budd*, 28 QUINNIPIAC L. REV. 765 (2010) (“When this experience [of law] is described, it is usually represented as an experience of being subject to an external or internal will that uses the promise of physical harm, moral suffering, psychological pain, or social distress, to deprive us of the opportunity to achieve or enjoy some desired end.”).

established by the case method that is no longer justified by Langdellian formalism. In fact, a conception of law based on instrumentality deconstructs the assumptions of law under formalism by studying law's aesthetics and agency detached from grand narratives and ideologies. To move from grand ideologies, we must start with some instability;<sup>362</sup> and instrumentality offers enough multiple meanings to be a starting point.

### A. Etymology

In law, the word “instrumentality” has its resident usage and definitions, but both its technical uses and meanings reveal some degree of instability as well. Under *Black's Law Dictionary*, “instrumentality” is defined primarily as “[a] thing used to achieve an end or purpose”<sup>363</sup> and then secondarily as “a means or agency through which a function of another entity is accomplished, such as a branch of a governing body.”<sup>364</sup> The word has its anchors in several different bodies of law, and both primary and secondary meanings appear readily in usage. In tort law, “instrumentality” appears in *res ipsa loquitur* and strict liability cases and doctrines, typically serving as strawman or proxy for broadly describing the harmful conduct or items that a tortious actor can control to set in motion.<sup>365</sup> In the law of business associations, instrumentality appears in the corporate veil doctrine as the “thing” that corporate actors use to shield their illicit activities behind the legal entity.<sup>366</sup> In the criminal context, the Earl Warren majority opinion in *Terry v. Ohio*<sup>367</sup> used the phrase, “instrumentalities of the crime,” in part to describe items directed in the act of police stop and frisk.<sup>368</sup> Of course, more seemingly benign uses of “instrumentality” exist, for

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362. Cf. FELDMAN, *supra* note 170, at 163 (“[P]ostmodern legal theorists constantly question the ostensible stability of particular words as well as entire legal texts.”).

363. *Instrumentality*, BLACK'S LAW DICTIONARY 919 (10th ed. 2014).

364. *Id.*

365. See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 438 (Cal. 1944) (“[T]he doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.”); *E. I. Du Pont De Nemours & Co. v. Cudd*, 176 F.2d 855, 858 (10th Cir. 1949) (discussing “dangerous instrumentalities” in strict liability).

366. *In re Hoffmann*, 475 B.R. 692, 699 (Bankr. D.Minn. 2012) (describing the corporation as “the alter ego or mere instrumentality of the shareholder” in the test required to pierce the corporate veil).

367. 392 U.S. 1 (1968).

368. *Id.* at 25.

instance, in federal statutory guidelines where “instrumentality” could be a state or private agency<sup>369</sup> and, of course, in employment law in the realm of entrustment and agency.<sup>370</sup> The word in its current legal usage does not appear in some modern legal dictionaries such as those reaching back to the late nineteenth or early twentieth centuries—for instance, Irving Browne’s *Common Words and Phrases*<sup>371</sup> or the 8th edition of Bouvier’s *Law Dictionary*.<sup>372</sup> However, in English law, “instrumentality” is listed in Frederick Stroud’s *Judicial Dictionary*: “[A] Solicitor is entitled to a charge for his costs on property recovered or preserved through his ‘instrumentality.’”<sup>373</sup> Stroud’s *Judicial Dictionary* specifically references the use of “instrumentality” in an 1885 Chancery opinion by an English court that referred to the agency of an attorney and his work.<sup>374</sup>

From the examples above and others, we can see that the term embodies a degree of instability and malleability, appearing in both public and private areas of law; as a business entity or commercial activity; or a dangerous item or an item in use of perpetrating a crime; or as an item possible of being controlled and used for a purpose. The word, “instrumental,” at the root of “instrumentality,” helps to connote usefulness or qualities in furthering a purpose<sup>375</sup> and ultimately connects “instrumentality” to its meaning in legal usage: agency.<sup>376</sup> But the degree of non-specification in the idea of agency connotes neutral ambivalence—almost ironically, a democratic one—that has allowed the word, “instrumentality,” to be used in both benign and harmful legal contexts, as noted above.<sup>377</sup> Of course, in legal theory and philosophy, the “instrumental” root in “instrumentality” could also connote the theory of pragmatic instrumentalism that has considerable relevant dominance in American legal discourse.<sup>378</sup> This Article relies on the suffix, “ity,” in “instrumentality” however, to sustain its ambivalence from direct associations

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369. *E.g.*, *Service for Public Institution or Instrumentality*, Idaho Unempl. Ins. Rep. (CCH) ¶ 1357.45.

370. *See* RESTATEMENT (SECOND) OF AGENCY § 239 (AM. LAW INST. 1958).

371. *See* IRVING BROWNE, COMMON WORDS AND PHRASES (1883).

372. *See* BOUVIER LAW DICTIONARY (8th ed. 1914).

373. 2 F. STROUD, THE JUDICIAL DICTIONARY, OF WORDS AND PHRASES JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS 988–89 (2d ed. 1903).

374. *Id.* (quoting *In re Wadsworth* [1885], CH 29 at 517).

375. BLACK’S LAW DICTIONARY, *supra* note 363, at 919.

376. *Id.*

377. *See supra* Section IV.A.

378. *See* ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 23 (1982).

with that school of thought. Instrumentality here can be “pragmatic” or not—just like law’s instrumentality can be “pragmatic” or not. But in one aspect or another, despite some variance, all of the results of this quick etymology in modern legal vernacular points to “instrumentality” in law as a quality describing a purposeful function in its form.

Outside of law, the plain-meaning of “instrumentality” shares some overlapping characteristics to its usage in law, as non-legal dictionaries continue to denote the word’s agency function;<sup>379</sup> however, some dictionaries recognize the word’s function more explicitly as a quality and not the thing itself.<sup>380</sup> As an example, *Merriam-Webster* lists its primary definition of “instrumentality” as “the quality or state of being instrumental.”<sup>381</sup> Similarly, the *Oxford English Dictionary (OED)* registers the meaning in the primary as “[t]he quality or condition of being instrumental; the fact or function of serving or being used for the accomplishment of some purpose or end; agency.”<sup>382</sup> Secondarily, the *OED* defines the word as “[t]hat which serves or is employed for some purpose or end; a means, an agency.”<sup>383</sup> In tracing its usage historically, the *OED* lists discovery of its early usage in religious contexts in the fifteenth century, in examples of criticizing the agencies of a passive faith and the physical world in relation to salvation and the Divine.<sup>384</sup> A related word, “instrumentalness,” has a usage around the same time, also in the religious context—also pejoratively describing the failings of human nature.<sup>385</sup> Its root words—“instrument” and “instrumental”—both have varied extensions in history. The *OED* lists “instrument” as being used later, though in a law context, to describe “a formal legal document.”<sup>386</sup> The word, “instrumental,” had its “subservient” use and meanings in the fourteenth century.<sup>387</sup> This earlier use of “instrumental” and the later “instrument” suggests that the actual root of the word “instrumentality” might be “instrumental” and that its legal

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379. 3 OXFORD ENGLISH DICTIONARY 1052 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

380. See *Instrumentality*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/instrumentality> [<https://perma.cc/N27A-G2A7>] (last visited Nov. 6, 2017); OXFORD ENGLISH DICTIONARY, *supra* note 379, at 1052.

381. MERRIAM-WEBSTER ONLINE, *supra* note 380.

382. OXFORD ENGLISH DICTIONARY, *supra* note 379, at 1052.

383. *Id.*

384. *Id.*

385. See *id.* (quoting reference to Satan’s instrumentality).

386. *Id.* at 1051.

387. *Id.*



connotations was borne out of the intervening use of “instrument” to refer to documents that carried some agency of accomplishing legal effect.

From close readings of the *OED*'s identified earliest uses of “instrumentality,” one could gather that “instrumentality” was used in a much more materialistic and earthly connotation, associated with mankind and not with the works and power of God. Indeed, this conclusion could be bolstered by associations of the root word, “instrumental,” (rather than “instrument”) with the material.<sup>388</sup> But, as is presently within the *OED*, the word, “instrumentality,” even despite materiality, has a broad usage with an emphasis on the forms and qualities of agency.<sup>389</sup> Both religious and secular examples conveying this observation are attached to the word's primary and secondary meanings; beneath the primary meaning in the *OED*, the word's qualitative connotations of agency have described human religious faith (“Physical[] instrumentality”), civil government (“instrumentality of men”), and even the handiwork of a particular person (“instrumentality of Churchill”).<sup>390</sup> Its secondary meaning as having an agency for some purposeful end has been used to compare the limits of physical nature versus God's omnipotent capabilities (“the subsidiary Instrumentalities of Nature”),<sup>391</sup> a type of philosophical agent of faith (“[t]he moral and intelligent instrumentality”),<sup>392</sup> illicit human corruption in governance (“human instrumentality”),<sup>393</sup> and an active force in transforming civilization (“powerful instrumentalities”).<sup>394</sup> In this way, it seems that the word's currency is both in its slippage to fit different contexts or modify various subjects, and in its underlying objective to describe the qualities of purposefulness or capabilities of something or someone—even if, as in one of the religious examples above, it describes a capability (of men) that is not as useful compared to something else (God or the Divine). Henceforth, as discussed below, law as “instrumentality” relies heavily on this explicit meaning of quality.

Other associations with the word “instrumentality” are also possible. Beyond the legal and theoretical ideas of pragmatic instrumentalism, “instrumentality” in the larger vernacular could also remotely allude to John Dewey's political pragmatic theory of instrumentalism “that thought exists as

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388. *See id.*

389. *Id.* at 1052.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

an instrument of adjustment to the environment.”<sup>395</sup> Again, the “instrumental” word-root is the culprit. But likewise, here, as in law, the use of “instrumentality” rather than “instrumental” seeks to advocate for a similar ambivalence rather than a wholesale import of that theory. Also, the possible allusion to both legal and non-legal philosophies ought to point to the word’s slippage.<sup>396</sup> As we will see below, by emphasizing an umbrella usage, the word’s instability likens its use here with some—though not all—indefinable qualities of the postmodern condition.<sup>397</sup> It offers an extensive and versatile use—though it is ultimately not completely comprehensive or, at least, so comprehensive that it swallows its meaning.<sup>398</sup> Also what has instrumentality might also be relative to whom or what that instrumentality serves. And lastly, the irony for now is that the word could quite possibly embody a teleological posture through its aesthetics and functions to describe agency or goals—which some approaches to postmodernism tend to reject.<sup>399</sup> Facetiously, the

395. OXFORD ENGLISH DICTIONARY, *supra* note 379, at 1052.

396. See FELDMAN, *supra* note 170, at 38.

397. *Id.*

398. In this way, the postmodern resonance or slippage in reading the word “instrumentality” for the purposes of establishing a conception of law in this Article harkens to the debate in critical legal studies about the functions of queer and feminist theories. For instance, Shannon Gilreath has observed that:

Queer theory, with its celebration of sexual violence and death and its pointed rejection of law as a means to change, is anchored in this kind of unreality because it is detached from gay people’s experiences. This is not to say, of course, that those people postulating queer theory are not entitled to a claim to experiences that matter or are real, but only to say that *queer theory proceeds from a posture that is swallowed by its particularities*. . . . Queer theory is, in this respect, either remarkably cruel or its progenitors are really quite far removed from the realities most women and gay people face. Force and sexual abuse seem a lot less like a lovely academic game of charades when you are the one with the fist in your face. As an opposite of queer theory, “A feminist theory and practice attempts to account for the fracturing of reality, and then to make reality whole again.”

Shannon Gilreath, *Feminism and Gay Liberation: Together in Struggle*, 91 DENV. U. L. REV. 109, 137 (2013) (emphasis added) (footnotes omitted) (first citing ANDREA DWORKIN, *LIFE & DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN* 118 (1997); and then quoting Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN’S L.J. 25, 52 (1989)). Because of its implicit normative nature, as we will see, *infra* Section IV.B, the “law as instrumentality” here resembles feminist theory in comparison to Gilreath’s narrowly described gestures toward reality.

399. Anthony E. Cook, *Foreword: Towards A Postmodern Ethics of Service*, 81 GEO. L.J. 2457, 2466 (1993) (“After all, one of postmodernism’s objectives is to expose the unspoken normative and

metaphysical conceit would be “instrumentality’s” inherent “instrumentalism” or “instrumentality.” As later parts of this section will show, this conception embraces approaches to postmodernism that recognizes teleology.<sup>400</sup> What is clear here, for now, is that “instrumentality,” for the purposes of this Article’s premise, can and ought to embody a certain degree of vagueness.

The negotiation of this word between its broad definitions as a legal term of art and its even more expansive applications in the plain language is where this Article seeks to begin using the fluid currency of the word for application within the thought of law as instrumentality. Of course, this etymology is quick and not exhaustive. But in this brief explication, the study reveals that “instrumentality” embodies an inherent strawman quality that prompts further dissection. Its limits, of course, are not endless; indeed, its contours are also fitted within the characteristic of agency or facility for the purpose, agency, or *ends* of something else.

That something else, of course, could be law itself. Importing the definition and slippage of the word above, studying law as instrumentality could mean learning the law and its practices by starting from instability and reaching toward the qualities of instrumentality in law first in order to examine and seek meaning—looking at moments where the law has instrumentality and when the law fails to embody it. From there, these observations of instrumentality lead us to an ontological perspective that uncovers multiple possible perspectives of what law is; what its purpose is; how it is created and practiced; where or in what form is it situated; what reasoning goes into that practice; who creates, practices, or benefits from the law; what condition is the political system that embodies law; what theories and histories have shaped its perpetuation in form and content; and so on.<sup>401</sup> Instrumentality provides the tangible pressure point that provokes intellectual and practical meanings. By looking at the qualities of a law that purports to have agency in fulfilling certain goals, a study based on “law as instrumentality” would seek out various types of questions to achieve understanding and knowledge.

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teleological commitments snuggled away in discourses claiming neutrality, objectivity, and functional universality.”).

400. See *infra* Section IV.B.

401. See Rubin, *supra* note 119, at 640–41 (discussing that to study law and practice as “a modern social orientation, is to observe the totality of . . . behaviors” that bridge legal knowledge, functions of law and lawyering, and the effects of law on individuals and societies).

### B. *Ontology*

In terms of a historical and chronological characterization, many have argued that postmodernity is the era presently before us.<sup>402</sup> First, one could look physically at the current reality and posit that postmodernity is the “situation in which we find ourselves.”<sup>403</sup> The physical and material side of this postmodern “situation” reflects, as J.M. Balkin notes, “an era of industrial practices and mass organization and production applied not to material objects like automobiles but to products of the mind—art and music, knowledge and information, accounting and other service industries.”<sup>404</sup> In his historical description of postmodernity, Adam Todd alludes to this transcendence of technology from modernist industrial production, “when western societies adjusted to the use of machines in the home and workplaces,”<sup>405</sup> to a time and space postmodernly “when people are becoming accustomed with computers, easily accessible information, and high technology.”<sup>406</sup> That is the material realization of change or “upgrade” from the era of modernity into postmodernity. But technology’s progression from realizing the production of material items in industry—which was characteristic of modernity<sup>407</sup>—to realizing the production of information is only the start of defining postmodernism because postmodernity is not just about the physical transition,<sup>408</sup> it is also about the social and cultural consciousness in reaction to that transition to information. Jean-François Lyotard describes this reaction as “incredulity toward metanarratives.”<sup>409</sup> Others have supplemented their characterization of postmodernity beyond empirical observations about technology and information, by observing the “skepticism” people have toward the dominance of grand theories during modernity.<sup>410</sup> In postmodernity, both

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402. FELDMAN, *supra* note 170, at 9 (“[W]e are presently in the midst of the postmodern era.”); J. M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1967–68 (1992) (“[P]ostmodernism is the cultural era in which we live—the era of postmodernity.”). *See generally* JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1979).

403. Balkin, *supra* note 402, at 1972.

404. *Id.* at 1974.

405. Adam G. Todd, *Painting A Moving Train: Adding “Postmodern” to the Taxonomy of Law*, 40 U. TOL. L. REV. 105, 110 (2008).

406. *Id.*

407. *See* Balkin, *supra* note 402, at 1974.

408. *Id.* at 1972. Not only is postmodernism a “situation in which we find ourselves,” as Balkin describes, it is also “a cultural response to that situation.” *Id.*

409. LYOTARD, *supra* note 402, at xxiv.

410. *See, e.g.*, Todd, *supra* note 405, at 110–12.

historical chronology and cultural psychology work in tandem to define this era.<sup>411</sup> So much so that Stephen Feldman has collapsed the observations regarding the historical and cultural attributes of this time when he affirms how this current era is postmodern rather than modern.<sup>412</sup> And consequently, the reflection that we are in a postmodern era leads to conclusions that “products or laws coming out of this period might be considered or labeled postmodern.”<sup>413</sup> This extrapolation may seem too simplistic or circumstantial as a label. But there is method to this conclusion. To challenge modernist avowals “that postmodernism affects only certain segments of contemporary life”<sup>414</sup> and that “[t]here is no postmodern law,”<sup>415</sup> Balkin points out that the technological production itself of law is postmodern:

The industrial model of production—where production is reinterpreted according to discrete units of production measurable in temporal or spatial categories—has already arrived in law. We already have the seventy-hour billed week, the canned brief, the 500-person law firm churning out mountains of paper to prove its value to its corporate clientele. We already have mass-produced litigation and mass-produced judicial administration to deal with it. Already most federal judicial opinions are written by twenty-five-year olds, so that the language of opinions does not really mean what it says, because it was not said by the persons whose meaning really counts.<sup>416</sup>

In this way, returning to Todd’s bluntly-stated considerations that laws such as the *Religious Freedom Restoration Act* and others are postmodern laws

411. See Balkin, *supra* note 402, at 1972 (“[P]ostmodernism is both a cultural situation and a set of claims about how that culture should be interpreted, altered and continued.”).

412. FELDMAN, *supra* note 170, at 9.

413. Todd, *supra* note 405, at 110 (citing Balkin, *supra* note 402, at 1969).

414. Robert Post, *Postmodern Temptations*, 4 YALE J.L. & HUMAN. 391, 396 (1992) (reviewing FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991)).

415. *Id.*

416. Balkin, *supra* note 402, at 1974. To observe the industrialization of law practice that further substantiates his response to modernist challenges regarding the reality of postmodernity, Balkin adds that

[o]lder conceptions of professionalism have already been supplanted by an industrial model where service is defined in terms of discrete units of production that can be duplicated and evaluated on a mass scale. The lawyers let go by large New York law firms after the 1987 stock market crash quickly learned that employment practices in service sectors, and even in professional service sectors, had mutated into a model of employer-employee relations quite like those that Ford or General Motors applied to blue collar workers.

*Id.*

because of their enactment after modernity,<sup>417</sup> Todd's assertions possess justification.

Beyond chronology, this Article's interest in postmodernity focuses on postmodernism's cultural and philosophical approach to reality and power.<sup>418</sup> In contrast to a modernist fixation on objectivity or grand theories, the postmodern psychology is skeptical of categorical truth—or in Lyotard's words “metanarratives”<sup>419</sup>—and focuses on inquiry and observations that reveal multiple narratives and subjectivity in reality;<sup>420</sup> it accomplishes such revelation by recognizing slippage and, as a result, rendering multiple meanings.<sup>421</sup> In doing so, the rendering of meanings is often fixated with exposing where power lies.<sup>422</sup> In the postmodern era, the search to expose power is where the skepticism toward grand narratives as a response to new historical progress of technology and information collides with the vast commodification that result. Whoever holds the key to that advancement and commodification holds the power. Skepticism of that progress has the ability to expose power and the hegemony that replicates that power. Because the Langdellian conception of law replicates hierarchy and thus withholds power, it is within this sentiment that this Article embeds as subversion the instrumentality conception of law.

In examining the instrumentalities of law in the law classroom, we conceptualize the law postmodernly. By isolating its instrumentalities, we can evaluate and find meaning in the form and aesthetic of law first without assuming the success of a grand idea—such as objectivity—although we might

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417. Todd, *supra* note 405, at 110.

418. Linda Nicholson & Steven Seidman, *Introduction to SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 7* (Linda Nicholson & Steven Seidman eds., 1995) (describing that postmodernism possesses “the tendency in elements of [other critical theories] to forget that what they were calling ‘reason’ or ‘history’ or ‘women’ came out of a particular context and were implicated in relations of power”).

419. LYOTARD, *supra* note 402, at xxiv.

420. Minda, *supra* note 142, at 384–87.

421. *See id.* at 386 (“Postmodernism emerges in response to the crisis and predicaments intensified by contemporary pragmatic and ironic criticism. These new forms of legal criticism have brought attention to the need for tolerance of diversity existing in the larger culture. Without doubt, the ‘buzz word’ in the academy today is multiculturalism. Multiculturalism is about diversity and culture. Its appeal is based on the belief of many women, gay, and non-white Americans that the discourse of modern law has erected a barrier that excludes minority perspectives and discourses from active participation in the deliberative processes of the law. In their writing about the law, contemporary legal thinkers, whether they be pragmatist or ironist critics, reveal, wittingly and unwittingly, how legal texts, discourses, codes, and canons of legal interpretation deny the existence of alternative and different notions of the self.”).

422. Todd, *supra* note 405, at 126–27 (citation omitted).

recognize that the law being studied might have been ascribed to it. In this way, if we are dealing with a law premised on objectivity or autonomy, we begin to fracture such formalist notions. Then as we decode the instrumentalities to find meaning, that interpretive act reveals the construct of law, which invariably implicates human subjectivity. We can pose descriptive questions about the underlying purpose of that law and how it is effectuated: *What goals or policies does the law accomplish or seeks to accomplish? And how do the aspects of its form and practice do that? And to what extent are these instrumentalities successful?* Or we can ask questions about the actors (or the Subject(s)) within that instrumentality. First, we can ask and study what skills are involved in creating that instrumentality: *How does the actor or subject control such instrumentalities to accomplish those goals behind a certain law? Procedurally or strategically through a type of reasoning? How could we do it better?* But then, more importantly, we can also ask questions that lead us to answer who has power within the law: *Who accomplishes those goals through law as instrumentality? Whose goals are they? Who benefits, directly or indirectly? Who can access that instrumentality?* Finally, though some may not regard this next gesture as postmodern, we can critique philosophically and normatively: *Are such goals just or moral? Are they socially or politically efficacious? Are they political goals? Are there any bigger goals? Should there be other goals that the instrumentalities of this law do not fulfill?* An instrumentality conception, in this way, serves as a broad reference point that uses law's aesthetics in order to critique it and, as a result, understand and learn about law beyond its autonomous facade; it does not accept goals behind a certain instrumentality in law and therefore does not embrace the teleology that a certain law seeks to demonstrate. In fact, relying on a law's instrumentality, the instrumentality conception provokes discussions on the success and failings of such instrumentality, the degrees of accomplishments of such goals behind law, and the subjects that are empowered and disempowered by the law.

But the instrumentality conception is not merely descriptive in this way. Its eventual fixation could be partly teleological, in a normative sense. Some might argue that this fixation on teleology prevents the instrumentality conception from being truly postmodern in theory; after all, postmodernism has the tendency to fixate on a deconstructive mode to the exclusion of seeking normativity.<sup>423</sup> According to some, postmodernism's rejection of grand theories—which is an effective way of eviscerating formalist ideas of objectivity in law—can interfere with any ability to encourage normative

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423. See Schlag, *supra* note 309, at 1631.

aspirations in law at all;<sup>424</sup> its ironic perseverations can be nihilistic and hinder that transformative gesture—and some may even argue that transformation and normativity are not postmodernism's intentions.<sup>425</sup> But to consider postmodernism in this theoretical way only is to value it narrowly and in some ways to treat postmodernism as itself a grand theory—a premise that it seems to reject.<sup>426</sup> Other schools of thought on postmodernism disagree; there are perspectives about postmodernism that allow it to liberate inquiries beyond irony.<sup>427</sup> But even according to Balkin, postmodernism can have goals.<sup>428</sup> Using the postmodern mode of deconstruction, for example, Balkin notes that even

[t]ranscendental deconstruction has a goal; its goal is not destruction but rectification. The deconstructor critiques for the purpose of betterment; she seeks out unjust or inappropriate conceptual hierarchies in order to assert a better ordering. Hence, her argument is always premised on the possibility of an alternative to existing norms that is not simply different, but also more just, even if the results of this deconstruction are imperfect and subject to further deconstruction. Such a deconstruction assumes that it is possible to speak meaningfully of the more or the less just.<sup>429</sup>

We come to this conclusion about postmodernism and normativity only however, according to Todd, if postmodernism is kept theoretical in mind to show an “awareness” and not too literally used and externalized as reality itself.<sup>430</sup> In fact, viewing postmodernism as an approach rather than a theory

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424. See Todd, *supra* note 405, at 117.

425. *Id.* at 114.

426. See *id.* at 112 & n.55.

427. *Id.* at 115.

428. J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1141 (1994).

429. *Id.* (footnotes omitted) (referencing J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 124–27 (1993)).

430. Todd, *supra* note 405, at 116 (“Postmodernism, when used pragmatically, provides tools for dealing with the problems arising in the postmodern era. . . . Postmodernist laws or labeling laws postmodern can ‘get the job done’ better than any other method for uncertain areas of the law. When subjects of the law are in flux and difficult to regulate through regular normative means, postmodernism can be a useful tool for creating regulation where none would be possible otherwise. Thus, postmodern awareness can act as a tool to achieve normative human purposes.” (footnotes omitted)); see also Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer’s Toolbox*, 85 VA. L. REV. 151, 179 (1999) (“If one doggedly tried to follow postmodern insights to their



has been a way to balance its workings in legal studies.<sup>431</sup> If one values postmodernism as an approach or methodology to legal studies and not plainly as a mere theory, then postmodernism and the instrumentality conception are again aligned. The alignment is in the conception's approach for accessing a sense of law's ontology through its instrumentality. In this way, the instrumentality conception may use a law's agency to unravel understandings that break away false notions of objectivity and to evaluate it more critically. But at the same time, that unraveling should also push toward the advancement of law for larger humanistic and social purposes—toward some teleology that allows for the subjective to come through and for true empowerment. Whether from a constructivist perspective or otherwise, the instrumentality conception allows us to question the law in a way that recognizes the human subject within it and not in a way that assumes some intangible objectivity or some other type of essentialism. We own the law; it does not own us without collective, social agreement.<sup>432</sup>

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furthest reaches, then everything would be deconstructed, including those postmodern insights; imagine traveling continually outward until being caught suddenly in the gravitational field of an interstellar black hole that was sucking everything, including yourself, into its abyss. So, to avoid such a deconstructive implosion, we always at some point manage to stop: to talk, to communicate, to write, to whatever." (footnotes omitted). Feldman continues to note that:

Even the most unmitigated postmodernist ultimately uses some postmodern insights as if they were tools or instruments—to express a point of view. Hence, the use of postmodern insights in such an instrumental manner does not necessarily render a writer's position or point of view prosaic. In fact, for what it's worth, although I have criticized Sunstein and Smith as modernist writers who domesticate postmodern insights, I usually find their work more interesting than that of other modernist writers who seem to have no grasp of postmodernism at all. And I typically find the work of a thorough-going postmodernist such as Schlag even more interesting and provocative. Most important, the work of postmodern deconstruction does not become trite merely because any text can be deconstructed. To the contrary, if there are postmodern paths to justice, they lie in the deconstructive disclosure of the ever-present tacit assumptions and cultural values that always hide or marginalize some metaphorical Other—an oppressed and subjugated subcultural group.

*Id.* at 179–80 (footnotes omitted).

431. See Todd, *supra* note 405, at 119. Todd observes that the use of labeling something in law as postmodern shows how "postmodernism can be a constructive tool for appreciating and critiquing laws that come out of, and contain, postmodern characteristics. . . . The law's fragmentation, inconsistency, and flux are identifiable traits that demonstrate the law's boundaries and limitations, particular in contrast to modernist laws and rules. As such, the act of labeling is a positivist exercise." *Id.* (footnotes omitted).

432. See Minda, *supra* note 142, at 382. Minda reminds us of the problem for legal theorists once the human subject of the law is no longer ignored: "If the meaning of law depends on the various constructions of different subjects, then 'law' remains problematized by the identity of the subjects-in-control of the law." *Id.* This reminder would suggest that law is, indeed, not objective and autonomous, but authored by various human subjects—or in Minda's words, "subjects-in-control of the law." *Id.*

Thus, the same questioning from above can and ought to be applied to critique and to study not merely law or particular bodies of law, but also political systems and institutions that effectuate the law, the process of creating law, and conceptualizations of law: *How are the instrumentalities of a certain law or a legal regime furthering the ends of liberalism? Neoliberalism? Morality? Distributive justice? Or just fair deals between private actors?* Similarly through instrumentality, we can seek out questions in regard to a particular legal doctrine: *What instrumentalities allow the parol evidence rule to accomplish judicial efficiency? Can it be better? Should we be concerned about judicial efficiency when the matter of establishing a meeting of the minds involves a tremendous forfeiture for one party?* Or ideas about law: *Does pragmatic instrumentalism have any instrumentalities as a way of creating and interpreting law?*

Through an ontological observation and critique that bears on the law's descriptive, normative, and practical instrumentalities, studying law in this way in spirit results in a methodology that can reveal the philosophies, the realities, the practice, the falsehoods, the inefficiencies, the histories, the politics, and many other things about the topic of law—without having to assume its completeness in the method. The method does not have to be inductive, nor does the Socratic method need to be wholly abandoned. They should just become options, among others, at the law school podium. The law has agency potential and thus has qualities that assume instrumentalities, which then reveal other characteristics and motivations we place upon the law. Whether law *ought* to have agency (or not) is a philosophical and metaphysical question that can also be part of the lecture hall debate for future lawyers as well: *Why should the law embody instrumentality? How do we contribute to that instrumentality?* This perspective stretches this instrumentality conception as an epistemology. In comparison, although the concept that “law as science” does assert in its content a normative assumption that law ought to be scientific, the phrase is more descriptive because of the more concrete object of its modifier (science). Steering our inquiry and definition of law toward its instrumentalities and away from a presupposed scientific nature makes the inquiry less confining and, hopefully, much more resonating in meaning.

### *C. The Instrumentality Methodology in Four Steps*

Within this Article's subtext has been the ontological idea that one's conception of law affects how one objectifies law and thus how one studies

it.<sup>433</sup> In that way, as this subsection will show, the instrumentality conception is no different than the Langdellian conception in the way that can be translated into a methodology. However, as we will see as well, the instrumentality conception's broader and more neutral preoccupation leads to a more encompassing style of gathering meaning in law. Under the instrumentality conception, a methodology for investigation of law by its instrumentalities can be framed in four sequential steps: (1) establishing instability or gaps in law that in part fractures formalism; (2) observing the fragments of law created by the instability that exemplify instrumentality; (3) forming meaning about law from such instrumentality; and (4) connecting meaning with relevance and empowerment. Using a course on the law of contracts as an example hopefully illustrates an application of these four sequential steps.

First, a first-year contracts course could create a contextual instability by beginning without law at all, but rather a societal want or need—for instance, the desires for human survival and societal advancement.<sup>434</sup> The tension here is the supposition that without a system (or even a plan), achieving these desires or needs might be very difficult or impossible. The instability is further externalized if we notice that in order to advance or even survive, resources must be shared between individuals framed possibly by a sense of cooperation.<sup>435</sup> Agreements are helpful to facilitate the cooperative exchange of resources within a society.<sup>436</sup> But how does a society, in order to advance or even survive, make sure that its members are able to agree to exchange resources and thus cooperate? Human nature, after all, keeps its limits on altruism. Hence, a need emerges for a system of contract-making to verify that agreements are made and kept, and to give recourse when agreements fail. Now the instability is in the qualities of what that system of agreements would look like. Historical examples of contracting can now be brought into the course to show students how past societal traditions have created these systems by using law. What specifically does this legal system of contracting need to emphasize? Perhaps a legal system of contracting needs to recognize trust, good faith,

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433. See *supra* Part III.

434. See, e.g., THOMAS HOBBS, *LEVIATHAN* 189–90 (Penguin Books 1951) (1651); John Locke, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT: SECOND TREATISE ON GOVERNMENT* (1690), reprinted in *SOCIAL CONTRACT* 3, 10–11 (Oxford Univ. Press 1962); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* (1762), reprinted in *BASIC POLITICAL WRITINGS* 141 (Donald A. Cress ed. & trans., Hackett Publ'g Co. 1987).

435. Anita L. Allen, *Social Contract Theory in American Case Law*, 51 *FLA. L. REV.* 1, 15 (1999) (“Appeal to a social contract can foster the spirit of cooperation and compromise.”).

436. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

fairness, honesty, and clarity as important values in agreement-making.<sup>437</sup> Perhaps such a legal system ought to underscore individual freedom to make contracts—as much freedom as the political body that houses such a legal system would allow.<sup>438</sup> Or perhaps it should just dictate that individuals must cooperate or suffer some societal punishment. We would need rules of law to further the values selected within the various governing ways agreements could be made. Now suddenly the instability seems less unstable, and we start to see the instrumentality of law arising in the realm of contracts.

From sociological and anthropological imperatives about agreement-making, the course can now move into step two of harvesting the specifics of a system of contracting law. From the fragments of what values a contract law system might promote in order to sustain and advance a society, students can be made to examine specifically what kinds of rules such a system requires by looking at the system of contracting that has developed in American jurisprudence. There might be need for rules on how parties form agreements, who can form agreements, and what happens when formed agreements are then breached. All of these rules ought to, in their own ways, reflect the overarching societal goals of human survival and advancement but along the way the combination of values of trust, freedom, honesty, good faith, and anything else that buttresses the agreement-making process must also be reflected. What students should encounter at this stage are the gaps that prompt them to ponder what else do they need to know; or prod their curiosities to find out what such rules look like in form, and how the law can make happen the endorsement of the societal values it serves.

Step three requires actual engagement with instrumentality—here in contract law, that would mean encountering the form in which such instrumentality arises through reading cases and statutory material, such as the Uniform Commercial Code, the Second Restatement of Contracts, or the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). It could also mean encountering the content of instrumentality in the rules of contract law and seeing for instance, that the rules of contract formation in

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437. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

438. E.g., Christina Eberl-Borges & Su Yingxia, *Freedom of Contract in Modern Chinese Legal Practice*, 46 GEO. WASH. INT’L L. REV. 341, 345 (2014) (“[I]n China, freedom of contract is granted—unlike in Western legal systems—by ordinary law, not by the Constitution. It follows that no special constitutional protection applies to freedom of contract in China. This is a substantial difference from freedom of contract in the Western sense.”).

American jurisprudence require, in part, an externalized offer and acceptance process, in which a meeting of the minds is approximated.<sup>439</sup> The instrumentality of these rules might be examined in multiple layers: *How do these rules serve to create agreements? How easily do these rules serve to create and facilitate contracts? What are required and how are they externalized by facts, language, and conduct of parties? How do all of these rules combined serve the ends of societal advancement?* Or in the same realm of contract formation, students can be asked to see that the consideration requirement in American contracting tradition tries to underscore the value and importance of voluntary inducement and freedom of contracting.<sup>440</sup> *How do the rules for consideration effectuate those values? What contours are highlighted in such rules—e.g. bargained-for exchange and immediacy—that supposedly reflect such values?* They might be asked to contrast consideration rules in American contracting traditions with the lack of consideration requirement in other contracting systems internationally.<sup>441</sup>

Here, students can continue their evaluation of the law by tying their inquiries here to previous inquiries in step one about the advancement of societal goals—whether the nature of whatever law being discussed fulfills those goals that the course acknowledged in step one. But step three is also the moment in the sequence where students begin acquiring reasoning skills by reading cases or breaking down complex statutory rules and materials. If the course emphasizes American contract law, step three is where students receive training on reading cases critically, but also practically; where students learn the level of authorities in contract law; where students interpret statutory materials, contractual documents, or both; where students are introduced to factual analysis and making inferences to facilitate legal arguments and possibly other skills a professor would reasonably ascertain as essential for law students to acquire in encountering contracts materials. Thus, step three is both knowledge-based and skills-based.

In teaching with a pedagogy that emphasizes law as instrumentality, step four is where hopefully students uncover meaning within the law that is relevant and empowering to them. For instance, continuing with the lesson on contract formation, step four might be where students learn how to use the instrumentalities of the rules for formation to argue objectively and

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439. See RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981).

440. *Id.* at § 71.

441. See, e.g., Amy Lee Rosen, *Chinese Contract Formation: The Roles of Confucianism, Communism, and International Influences*, 20 U. MIAMI INT'L & COMP. L. REV. 189, 189 (2013) (“China only requires offer and acceptance whereas the United States requires mutual assent and consideration . . .”).

persuasively on behalf of parties in litigation. Now we move from instrumentality in a knowledge-based inquiry to instruction that is strictly more experience-based. Essentially, the exercise illustrates instrumentality or agency in the relevant skills of lawyering while it personalizes that engagement of skills. Another exercise might draft students into learning how to craft contract formation provisions or rules that better effectuate the societal goals that ought to be reflected in such rules, but are also mindful of how certain parties and entities do business. Specifically, this exercise might just involve legislating over one rule or statute but it would also allow students to see instrumentality in language that effectuates law, or see instrumentality in the legislation of laws. Again, the exercise is experiential but the experience seeks to personalize the engagement by placing the student as the subject of the law. Or perhaps another exercise here in step four could be transactional: how do we as attorneys draft agreements that abide by rules of formation and to maintain the best interest of clients? The students can be given a factual scenario involving the negotiation of a transaction (a house, an important service, a requirements contract over goods, etc.) and some differing parameters for each party. Then they are asked to draft agreements that follow the rules of formation, advance the personal goals of each party, and maintain the value society places on free exchange of resources for advancement. Here, this example illustrates instrumentality within legal documents but also develops drafting skills and experience needed for those students who are headed to transactional practice. Hopefully as they gather the knowledge on the law's instrumentalities in the context of formation rules in contracts, these exercises allow them to transfer that knowledge to create a more meaningful interaction with the law and lawyering. By allowing them to take the meaning they have obtained in their observations about instrumentalities in steps one to three and transfer such learning to experiences in step four, students understand that they are the subjects of law. Step four reveals both relevance and empowerment—relevance in seeing how lawyering requires both knowledge and skills regarding the instrumentalities of law and empowerment in the active experience in manipulating and controlling those instrumentalities in the law classroom laboratory.

Thus, reaching from instability to the qualities of the contract formation law that underscores its instrumentality shows students both the qualities and the content of the law on contracting behavior in a particular society. After students' interactivity in acquiring knowledge about the law through such qualities in their study of the cases, statutes, and materials, their experiences of such knowledge in step four in the lawyering process—whether arguing, rule-making, or drafting in the context of simulation—creates empowerment for the

students for engaging in law in the classroom laboratory. Through instrumentality, they become the *Subjects* that give the *Object* of law its animating life.

Other types of law courses can be taught using the instrumentality conception. A good use of the four-step process is in the law of remedies, for when essentially laws fail—its instrumentality breaks down in remedial relief—and equity must be invoked in order to achieve desired goals of justice or redress.<sup>442</sup> Legal remedies are inadequate in certain situations—perhaps money is not fast enough or suitable enough to address a nuisance dispute, or not sufficient enough to deal with infringement of civil rights.<sup>443</sup> Or perhaps it is a declaration of some sort that a claimant requires, rather than money.<sup>444</sup> In this context, the fragmentation of law occurs contextually as law's failing (step one). Within the gaps of that fragment, students must find the purpose of remedies and seek out the instrumentality of equitable relief (step two). Equitable relief in its various forms through case law and statutes demonstrate to students an alternative route to redress by governing conduct or allowing a judicial proclamation.<sup>445</sup> Then students must acquire actual knowledge of equity and its functions through cases and discussions of how equity functions—for instance, learning the types of declaratory remedies, injunctive relief, and specific performance orders available and learning how to build a case for such devices (step three). Finally, students work through simulations where they draft persuasive requests for equitable relief, and in particular not overlooking the ability to craft the remedy portion of a hypothetical that essentially a court would adopt to enjoin another's conduct (step four). They can also critique the limits of what can be accomplished. *Did the remedy that they drafted ultimately accomplish something that was sincerely efficacious or just?* Lawyers must know what it is they are reaching for and how to do all of these things. They should also know the difference between the constructs and limits of jurisprudence. Hopefully, by teaching equity through instrumentality, students understand the concepts of law and equity and are empowered with transfer of that knowledge, not only in litigating toward a remedy, but also in crafting and then critiquing a remedy.

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442. DAN B. DOBBS, *THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 84 (2d ed. 1993).

443. *Id.* at 86 (discussing the adequacy rule for equity); *see also id.* at 90 (discussing “constitutional rights” as a category subject to equitable relief).

444. *See id.* at 53.

445. *Id.*

*D. Instrumentality in the Curriculum*

Within an instrumentality conception, there might also be further benefits in the law school curriculum. By viewing law as instrumentality, an indirect consequence might be the democratizing of courses that were once segregated by subject matter division and given more importance if they were doctrinal courses as opposed to interdisciplinary courses or contextual ones—such as legal history, race and the law, feminist legal theory, law and philosophy, jurisprudence, and the like. The hierarchy could erode to elevate the significance of these courses that were once considered, according to Duncan Kennedy, as part of the “finishing school” of being a lawyer,<sup>446</sup> or those that reflect diversity and plurality in the curriculum if the approach to teaching law as instrumentality in doctrinal classes is also transferred to these classes by questioning where is the instrumentality of law in relation to the subject matter. In other words, the law as instrumentality conception is broad enough to apply to such courses precisely if such courses are taught in a way that makes students see the instrumentality of law within a historical, jurisprudential, comparative, theoretical, or otherwise contextual narrative. In this way, the pedagogy works into the relevance of courses in upper-level law programming. Moreover, for courses framed within a certain perspective—such as race, gender, or sexuality—an instrumentality conception across the curriculum would enable the exploration of subjectivity in law without perceptions of content marginalization raised by the dominance of doctrinal courses that tend to objectify law. By de-emphasizing the objectification of law, an instrumentality conception would be more conducive to valuing subjectivity in the academy. This, in turn, would bode well for pluralism in law teaching.

Likewise, as law as instrumentality emphasizes students’ capabilities and role in facilitating instrumentality, clinical and experiential learning opportunities in law schools would have a better co-curricular alignment. For instance, law schools could more thoughtfully program curricular sequences to balance out the transfer of learning from traditionally doctrinal courses (such as contract law) with associated advanced doctrinal courses (such as commercial law or business associations) or skills courses (such as contracts drafting), or both, in upper-level offerings, and finally experiences in likeminded clinical courses or externships (such as transactional clinics or work in commercial litigation). The empowerment effect in the instrumentality conception might create more meaningful experiences for students in those upper-level experiential opportunities. The fundamental courses in the first

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446. Kennedy, *supra* note 270, at 61.



year would converse with experiential learning opportunities and courses in the second and third years of study.

Ultimately, this pedagogy through instrumentality responds to students in ways that juxtapose them as the Subjects of law by instilling their relevance in the material and facilitating their empowerment. Learning is goal oriented.<sup>447</sup> Relevance facilitates learning.<sup>448</sup> Law as instrumentality is a more relevant pedagogical concept because it responds to reasons why people attend law schools: to become lawyers.<sup>449</sup> What studying instrumentality does is ask the student to explore how the law works and what can be accomplished through its creation and its practices—what lawyers need to know about the law and its application.<sup>450</sup> Thus, as seen in the examples above, teaching through this instrumentality conception can lead to more immediate engagement.<sup>451</sup> In addition, this conception allows for teaching and inquiry on the contextual and philosophical questions about the law that add to law's profound personalization and meaningfulness for students.<sup>452</sup> One way to encapsulate the trajectory of this method is by positing its reverse-engineering approach to the law. Let us just assume that that the law is ultimately unknowable. But aspects of the law that are observable ought to be used for study—its functions, its accomplishments, its qualities and characteristics, its authors, its degrees of effectiveness for accomplishing goals through practice and theorizing, even the failings of its instrumentalities, and the teleological assumptions of those instrumentalities. In practical and moral terms, our answers to such questions as posed by all of these observations are what the instrumentality conception attempts to render in its immediacy.

## V. CONCLUSION

Rather than self-destructive behaviors akin to rocking the boat or jumping ship, this Article has tried to conjure a sense of redemption through progress by charting a new direction in the philosophy of teaching in American legal education—one that is reflective of plurality and hopefully enlivens thoughtful, critical, and energizing debates in the academy for the rescue and salvation of American legal education. As introduced in these pages, the instrumentality

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447. Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 264–65 (2011) (discussing goal-oriented learning).

448. *Id.* (discussing relevance in learning).

449. *See, e.g.*, Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1, 56 (2012) (noting “most people attend law school to become lawyers”).

450. *See supra* Section IV.C.

451. *See supra* Section IV.C.

452. *See supra* Section IV.C.

conception directs us away from the objectification of law by not embracing the aesthetic preferences of the Langdellian formalists but looking more ontologically in the belief that the instrumentalities of law can lead to the acknowledgment of subjectivity and eventually, meaning and understanding. The only objectification of law that occurs in this instrumentality conception does so in larger relation to the Subject of the law because the conception allows us to acknowledge our study more transparently when the act of inquiry involves acknowledging our own sifting through of the fragments of law in order to draw relevant meaning that emboldens our capabilities to advance law and also to critique that advancement. A perspective from instrumentality, thus, tames the law for its Subject—for our students, and ultimately for us, as we all bring law to life. Henceforth, this conception allows us to transfer the meaning of law back to an instrumentality within our control.

To be sure, the former conception of law as science and its reflected pedagogy in the case method has had its place in the study of law and training of lawyers, and ought to have a presence in the future, as it would have within an instrumentality conception—just like case law has its continuing importance in our legal system. But it would become only one kind of method, amongst a variety of methods in the same way that case law is only one kind of law. Thus, the dominance of the case method should be lessened to make way for other methods and realities of law; and it would be lessened within the instrumentality conception.

Ultimately, this conception, as methodology, seeks to reveal law's relevance and use its demonstrative experiences to empower individuals. Lawyers have agency, and thus transitively, they personify the instrumentality of law as well.<sup>453</sup> Accordingly, future legal inquiries through instrumentality will lead to questioning how lawyers contribute or embody agency. This hope at the heart of that conception's directive is to reveal the human in law in order to better educate lawyers. American law schools and legal education also possess agency and instrumentality. Our current and future students will become the stewards and captains of legal knowledge, thought, and practice long after the current cries of crisis have passed. The instrumentality conception would imbue them with knowledge and technique relevant to their present and future stations in the law and engages them to find meaning and

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453. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *BUFF. L. REV.* 973, 1027 (2005) ("What defines the technical as a sphere of social practice, in other words, is lawyers' commitments to an *aesthetic* of instrumentality, not simply to an instrumentalist politics or project.").

power inwardly so that they do not just learn to think like lawyers but also to transform. This vast and noble possibility in the lecture halls of law schools is ultimately the instrumentality that the academy must embody in revealing law's meaning.