

Rhetoric of Academe

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Reason and its bodyguard of general notions is now the conservative, mind-enslaving factor. Experience is the liberating power.¹

I HAD RECENTLY BEEN LOOKING into what I termed the “academic rhetoric” in legal tests, that is, in the sense of elements discerned from precedent. It appears that over time, judges had lessened their reliance on case law precedent and increasingly relied on academic sources. As I explored the proposition (which may or may not be true), I was waylaid by the interesting early days of formal legal education in the United States. I noticed that at the end of the nineteenth century, legal education moved from the practical to the academic. With that transformation, the prestige of a law degree was then purchased with an education that failed to actually train students how to be lawyers. I conclude that we are still paying a price for the prejudices of the past.

I. Early Years

In the early 1800s, lawyers trained lawyers through forms of clerkships.² Such law schools, as there were, grew out of those law offices and were staffed by practicing lawyers.³ The law schools were not generally affiliated with universities.

Then the law schools took over the trade, or vocational institutions, and either supplemented or substituted the old “on the job” training with a new academic approach. By 1870, the preface to Blackstone’s *Commentaries* noted the increasing number of lawyers coming to the bar by way of law schools.⁴

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1. JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 93 (Beacon Press 1968) (1920).

2. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 24 (1983).

3. Gene R. Shreve, *History of Legal Education*, 97 HARV. L. REV. 597, 598–99 (1983) (reviewing STEVENS *supra*, note 2).

4. Thomas M. Cooley, *Preface* to 1 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* xxvii (4th ed. Chicago, Callaghan and Co., 1899).

The “crucial period in the development of legal education [was] the last third of the nineteenth century.”⁵ Dean Langdell at Harvard Law School was the emblematic re-inventor of the law school: he urged a view of legal education as a purveyor of “science,” as opposed to a “species of handicraft” unsuitable for association with the great universities.⁶ As a scientific and academic institution, the new law school’s three-year, Socratic method, formalized approach was touted as the only way towards a professional license to practice.⁷ Law, like medicine, was to be professionalized and distinguished from the dubious “trades.”⁸ The late 1800s edition of Blackstone’s *Commentaries* made the express contrast between the trade of the law—a source of money if little else for the practitioner—and the science of its academic study.⁹

The compendium of cases confronting the uneducated lawyer was chaotic.¹⁰ Thus, the “scientific” Blackstone came to the rescue: aspiring lawyers, who might otherwise be trained only “at the desk of some skillful attorney [in the] mechanical parts of the business,”¹¹ might instead study the material as a science. Blackstone was an admirer of Henry Finch’s 1625 *Law or a Discourse Thereof* and regarded it as having shown how to reduce the chaos of cases to “a regular methodological science.”¹² Blackstone thus announced the transformation of legal education from apprenticeship to the academic process.¹³ Where vulgar trades were learned in guilds and, quite literally, in the streets, sciences by contrast were to be taught in the robed, serene, and hallowed halls of academe.

Dean Langdell later reported that when he arrived at the law school in 1870,

5. Mark Bartholomew, *Legal Separation: The Relationship Between the Law School and the Central University in the Late Nineteenth Century*, 53 J. LEGAL EDUC. 368, 369 (2003).

6. Address by Dean Langdell, Harvard University “Quarter-Millennial” Celebration (Nov. 5, 1887), reprinted in 3 LAW Q. REV. 123, 124 (1887); Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 843 (1981–82) [hereinafter *Mirror*].

7. *Mirror*, *supra* note 6, at 843.

8. See Bartholomew, *supra* note 5, at 379.

9. 1 BLACKSTONE, *supra* note 4, *Preface* at xxviii (internal citation omitted).

10. See 1 BLACKSTONE, *supra* note 4, *Preface* at vi, xxx.

11. 1 BLACKSTONE, *supra* note 4, at 29.

12. Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 105 (2003) (quoting WILLIAM BLACKSTONE, *An Analysis of the Laws of England, in TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND* v (3d ed. Oxford, Clarendon Press, 1771) (1762)).

13. *Id.* at 107.

it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books. . . . [T]he library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history is to the zoologists, the botanical garden to the botanists.¹⁴

To Dean Langdell and his colleagues at the turn of the nineteenth century, the study of the law was a scientific, book-based endeavor. Law was made science by suggesting that its principles were discoverable—much as physical laws were discoverable—and that the great segments of law might, as Linnaeus mapped the species, be arranged into natural hierarchies. “Natural” law, cited after all in the Declaration of Independence, endorsed the one true, abstract law. This was a science consisting of “certain principles and doctrines” by which decisions of judges could be measured.¹⁵ After all, from the seventeenth century on—without much pause—the physical sciences had brought forth astonishing fruit as a direct result of their principled organization of concepts, theories, and modes of enquiry. Universities had since modeled themselves on those structures. This success had a pronounced effect on the social “sciences” and informed their creation and investigation.¹⁶ So too the law schools, hitherto stepchildren in the university setting, aspired to full membership and the associated prestige of scientific success.

II. The Professor

After the American Revolution, Tapping Reeve, a practicing lawyer, began what was likely the first formal approach to teaching law in the United States. He gathered students in his parlor in Litchfield, Connecticut, and, by 1784, had built a special room next to his house to take in additional students.¹⁷ Instruction at the Litchfield Law School included both lectures on principles of law and moot court.¹⁸

14. Langdell, *supra* note 6, at 124. See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* 225 (1992).

15. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 12, 13, 18, 59 (1974). Justice Benjamin N. Cardozo alludes to this in BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 77, 77–78 (1921) (noting the nineteenth-century belief that there was “an exact rule for every case to be reached by an absolute process of logical deduction”) (quoting Roscoe Pound, *Juristic Science and The Law*, 31 *HARV. L. REV.* 1047, 1048 (1918)). See also Roscoe Pound, *A Comparison of Ideals On Law*, 47 *HARV. L. REV.* 2, 13 (1933).

16. See HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 554 (1949).

17. Litchfield Historical Society, *A History of the Litchfield Law School*, <http://www.litchfieldhistoricalsociety.org/history/histlawschool.html> (last visited Oct. 1, 2006).

18. *Id.*

In the next century, the emphasis for instructors moved from expertise in the practice of law to academic expertise. "What qualifies a person . . . to teach law, is not experience in the work of a lawyer's office . . . but experience in learning law."¹⁹ And so professors were hired not for career success but for their academic promise. Before 1865, there was "no strictly academic legal professional."²⁰ But by the 1870s and into the 1880s, legal training—and legal associations such as the American Bar Association—had expressly disengaged from the "baseness of everyday law practice"²¹ to adopt the prestige and constricting of the profession to those who could afford three years of school taught by fulltime professors without much of a notion of the courtroom. The process was well under way in the 1940s with the evisceration of most alternative forms of legal training, such as unaccredited law schools, night and part-time schools, and clerkships with lawyers. Ultimately, by the 1970s, law office apprenticeships were largely abolished.²²

III. The Academic Text

As with the prestigious liberal arts college professors they so dearly desired to emulate, law professors researched, wrote, and published. The one hundred years after the 1870s saw a revolution of discourse in the legal profession. The balance of studied texts shifted from judges' opinions and commentaries that summarized those opinions to include the writing of academia. This academic discourse was often in the form of law review articles written by professors with little practical experience and edited by law students with no experience at all.²³ Where in England the common law analytic continued its focus on the practical review of judges' opinions, in the United States a more formal academic text supervened. "[T]he English [legal] teacher emphasizes what the judge has said; the American [legal] pro-

19. JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 37 (1978) (quoting Dean Langdell).

20. Bartholomew, *supra* note 5, at 384.

21. *Id.* at 386 (quoting MORTON HORWITZ, *ESSAYS ON SIMON E. BALDWIN* 23 (Charles C. Goetsch ed., Hartford 1981)).

22. Shreve, *supra* note 3, at 603; *see* STEVENS, *supra* note 2, at 205.

23. Law Journals: Submissions and Rankings, <http://lawlib.w/u/LJ/index.aspx> (last visited Oct. 1, 2006) (providing a list of 1334 journals). *See also* JOURNALS INCLUDED IN CONTENTS PAGES FROM LAW REVIEWS PUBLISHED IN THE UNITED STATES <http://tarlton.law.utexas.edu/tallons/xcu.html> (last visited Oct. 1, 2006) (listing almost 800 journals).

fessor explains what the judge should have said.”²⁴ The American Legal Institute’s *Restatements*, too, were developed to help make sense of the deluge of opinions swamping the United States courts in the first quarter of the twentieth century (a deluge which has only increased since).²⁵ The *Restatements* provided a “concise statement of the principles of law as enunciated in thousands of cases”²⁶ With so many opinions to choose from, however, the “re-staters” became “creators” of the law, increasingly cited by appellate opinions rather than the other way around. And academia went beyond the scientific discernment of the law from cases to discernment *ex cathedra*, as it were. At least one now central area of law—contracts—was, in great part, the invention of a law professor who went on to join the United States Supreme Court.²⁷

IV. The Great Divide

There is almost the taint of original sin in this portrait of practical lawyering, juxtaposed with the pure science of a law school professor. This helps explain the ambiguous relationship between law schools and the practice of law, between the black-robed authors of abstract multifactor legal tests and the lawyers trying cases. This idea of a taint puts some perspective on the clinical professors’ second-class citizenship in their law schools. And, this makes some sense of the less-than-useful first year associate: law school simply does not train for practice. The contrast of a noble “science” with practical lawyering points to the role the profession has had in its own slander, and the perpetuation of the imprudent, but popular, disreputable portrait of trial lawyers.

24. STEVENS, *supra* note 2, at 133 (quoting Arthur Goodhart, “an American who became professor of jurisprudence at Oxford in 1930”).

25. *See id.* at 131–33.

26. Ronald D. Rotunda, *The Influences of the American Law Institute’s Proposed Restatement of the Law Governing Lawyers*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2001), <http://www.fed-soc.org/Publications/practicegroupnewsletters/professionalresponsibility/pp010201.htm> (last visited Sept. 30, 2006).

27. The professor was Oliver Wendell Holmes. GILMORE, *supra* note 15, at 6, 18, 20–21. *See also* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549 (2003) (noting that “this classical model owed more to Holmes’s imagination than to a careful reading of case law”). I have not, myself, sorted the irony of the positivistic Justice Holmes, who gave us the epigrammatic “this body of dogma or systematized prediction which we call the law.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 458 (1897). In contrast, Professor Holmes divined the law of contracts without much regard to the decided cases. Others have noted the “mystery” of the relationship between Holmes’s pragmatic judging and his debt to philosophy. *See, e.g.*, RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 58–59 (2003).

V. Learning Law

The Blackstone *Commentaries* approach was one in which the principles of law were surgically extracted, and so defined, from selected cases. This approach later gave way to the casebook method. While the useful taxonomies of the *Commentaries*, reincarnated in the *Restatements* and later still in state compendia, such as the work of Bernard Witkin,²⁸ became a staple of the practicing lawyer's diet, the association between these commentators and their academic cousins never weakened. My colleagues and I studied law as it was made; we read *Marbury v. Madison*²⁹ on the role of the Supreme Court and judicial review, *Palsgraf v. Long Island Railroad Company*³⁰ on torts, and, of course, *Bibb v. Navajo Freight Lines*³¹ (recall the noble mudguards case exploring the scope of the Dormant Commerce Clause). These cases were taught as examples of law erupting, like the shockwave of an expanding nova. We followed the unprecedented development within the conflict between law and technology, among developing social or economic structures, and of an older—or sometimes newer (*Brown v. Bd. of Education*³² and perhaps *Roe v. Wade*³³)—legal regime. This was a law that always developed and progressed, aside from deviations and blots upon the evolution³⁴ which, by its very exception, established the predominant movement.

But behind the advancing shockwave appears the time-consuming, mundane, and less tumultuous sorting out of accepted law and its application to specific cases. Later, there is the routine application to familiar facts, until the doctrine is so sufficiently woven into the fabric of our assumptions that it is not questioned, is not litigated, and is not the staple of our work. The difference, then, between the path of academe and that of the practicing lawyer and judge is captured by the metaphor of this ever-moving shockwave: law schools focus on history-making Supreme Court opinions, commentators, and law review articles examining legal developments—the “science” (as Dean Langdell might have said) being the evolving taxonomy of doctrine. Perhaps it is not so much science as the history of the science. It is as if

28. See, e.g., BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW (10th ed. 2005).

29. 5 U.S. (1 Cranch) 137 (1803).

30. 162 N.E. 99 (N.Y. 1928).

31. 359 U.S. 520 (1959).

32. 347 U.S. 483 (1954).

33. 410 U.S. 113 (1973).

34. Cases such as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Lochner v. New York*, 198 U.S. 45 (1905), *Korematsu v. United States*, 323 U.S. 214 (1944), and *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) come to mind here.

doctors learned about the cardiovascular system by studying William Harvey or aspiring astronomers only by reading Newton.

This legal science has little apparent regard for the practical work of a lawyer, which is focused on using the mundane law—in any guise, any doctrine, however categorized—to solve a practical personal or business problem. Lawyers and judges care about facts; doctrine is a means to tell a story, to dress it for consumption by the legal machine. At the practical level, advocates assert wildly inconsistent affirmative defenses and claims to see which might settle best with the facts as they develop. Where an appellate court might be accused of fudging the facts in the interest of a coherent opinion, trial lawyers may be accused of ignoring the niceties of legal doctrine, including raw relevance, to highlight—or blot out—an engaging fact.

VI. Empirical Law

To be sure, the old “science” of law in the form of compendia is, in fact, a daily resource: now we do use the *Restatements* and Witkin’s summaries, but we are as far from the academy as we ever were. Lawyers read law review articles and Supreme Court opinions rarely and not for their doctrinal nicety, but when they need to because they provide the strongest package for their facts. Once in the profession, and not before, the lawyer finally learns the trade.

Science versus the practical arts: but this is, after all, a false division based on an antiquated “natural law” view of the material. The profession did, once, think of law as a science—a platonian realm of discoverable principles, a “sort of mystical absolute.”³⁵ The discovery of hidden law from its evidence—i.e., court cases—is what Justice Story perhaps thought “law” meant in *Swift v. Tyson*.³⁶ But then Brandeis and Holmes, as *Swift* was overruled in *Erie Railroad Company v. Tompkins*,³⁷ stated the contrary: the “law” is as judges implement it, the practical prediction of the mundane operation of the courts.³⁸ Few today believe the law exists as a sort of platonian realm, discoverable via scientific investigation, hypothesis, and testing, separate from the daily grist of its application.

35. GILMORE, *supra* note 15, at 107.

36. 41 U.S. (16 Pet.) 1, 18 (1842).

37. 304 U.S. 64 (1938). *See also* *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (objecting to the fallacy of a “transcendental body of law”).

38. Holmes, *supra* note 27. Justice Cardozo calls this the “catastrophic” experience of litigation. CARDOZO, *supra* note 15, at 128.

Yet a powerful academic rhetoric remains, and in its discrimination against the practice of law, it continues to produce lawyers incapable of lawyering. Judge Posner, who also teaches at the University of Chicago Law School, still notes the “formalist” structure in which “law students want to think they’re being initiated into a deep mystery”³⁹ and writes, “law could do with some demystification.”⁴⁰ Many of our law school classes are taught by professors whose only courtroom experience was to watch the judges for whom they clerked—and that usually at the appellate level. Really, this is odd. It is peculiar that contracts would be taught by a professor who has never negotiated or litigated a contract. Or that torts could be taught by someone with no experience litigating a mass tort action or with no first-hand experience in a personal injury contingency case. Of course, there are a host of courses with enormous historical importance and essential to a lawyer’s understanding of the legal system—courses that do not lend themselves to a “practical” approach. But surely the default ought to be the contrary of what it is now, which is to disparage the trade and assume a dubious worth of the “clinical” approach.

And those writing tomes, treaties, and commentaries ought to have a sense of the consequences of theory. I mean, that is, the real consequences: in courts, boardrooms, and offices of legal services, as humans try to negotiate deals with each other and settle disputes within their family. There are consequences, serious ones. The adoption of abstract, impractical tests, whether originally located in the *Restatements* or law review articles, causes loss of predictability and great expense in the trial courts.⁴¹

Indeed, the shockwave of legal development and the hard work of case-by-case implementation are of a piece. And the trial judge addresses the twin aspects. The judge is beset, on the one side, by academic tomes of the *Restatement*, law reviews, and appellate opinions with nine-part balancing tests where each factor must be evaluated for its position on some spectrum. On the other side, the court manages discovery, settlements, case management, routine trial rulings, and limits on testimony. Here, judgment and experience, and not doc-

39. POSNER, *supra* note 27, at 63.

40. *Id.* at 73.

41. See, e.g., James F. Byrne Jr., *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 ARIZ. L. REV. 1021, 1021 n.4 (1973) (discussing how Arizona has adopted the *Restatements* when not inconsistent with other Arizona law). I have previously written on the costs of abstract multifactor tests. Curtis E. A. Karnow, *Paying the Price of the Burden of Proof*, RECORDER, Oct. 31, 1991, at 6, 9. See, e.g., *Exacto Spring Corp. v. Comm’r of Internal Revenue*, 196 F.3d 833 (7th Cir. 1999).

trine, rule the day. Those who deal with rapidly mutating and shifting technologies, data, and interests are acutely aware of the limited role of abstract doctrine, even when it comes to what appear to be classic contract issues. By the time the law is “discovered” and generally accepted, much of the world will have long passed it by. Clients have no interest or use for the lengthy legal analysis of cases. There is usually little use in attempting to compare the doctrine among circuits’ or states’ doctrine, for often there is none. As Judge Wyzanski said of the Sherman Act,⁴² “it is delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern.”⁴³

VII. The New Teaching as of Old

Successful legal education must, in addition to the introduction to doctrine and its history, present the practice of law in its true context. That context is not the law school. It is the world of business, families, prisons, trial courts, and communities. Until lawyers can exercise their legal judgment in those contexts, they are not fitted for the practice of law. During the “dot-com” boom, we saw a number of law schools (as well as business schools) introduce new departments, courses, and clinics devoted to rapidly emerging technology and intellectual property law issues. By necessity, the instruction was practical, that is, focused on responses in the absence of decisive, established doctrine. Some of these courses and clinics remain, tightly knitting a study of old opinions and new trial court cases. These are examples for practical training. Below, I make three suggestions for how a legal education may better prepare students for the practice of law.

A. The Courses

First, the courses. These must be treated with an importance equal to contracts, torts, secured transactions, tax, and the like. That is, these should not be “pass/fail”; some must be required, and they should be taught by professors on tenure track or with tenure. The courses will train and test students in the application of the law, including (under supervision) in courts, at negotiating tables, and for advising clients. The courses will emphasize judgment, practicality, and utilizing the law within reasonable bounds to advance the interests of the clients. The work will include advocacy, mediation, negotia-

42. 15 U.S.C. §§ 1–12 (2000).

43. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953).

tion skills, and written memoranda. These courses will not be electives or relegated to the extracurricular joys of moot court: development of these skills is mandatory. A model here includes clinical work in the second and third year, coupled with internships either in a fourth year, over summers, or some other period.

B. The Teachers

Second, the teachers. It is not enough to have clerked for the Supreme Court, except, perhaps, for a course on appellate procedure and the workings of the Court. But for those courses outlined above, only those with experience in the area are competent. The usual qualifications—prestigious clerkships, law review, publications, and such—will always be desirable, but these must not act as sole qualifications. If law schools hire teachers who have both (1) the scholarship and raw intelligence we associate with our best professors, as well as (2) the experience in law practice, then the marked distinction between the “part time” practitioner and the full-time tenured professor will dissolve. The teachers here would not be relegated to beyond the pale of “clinical” courses; their expertise would be used to instruct in the skills I outline above *in the context of* the classic courses, such as contracts, tax, real property, torts, and so on.

C. The Community

Third, the community. As a function of the two suggestions above, law schools would be increasingly integrated into the communities that surround them, that is, the legal communities of judges and lawyers, as well as the social community, which would provide the reality check law students need and utilize the help law students can provide. Just as a lawyer without a client is an oxymoron, so a law school isolated from the community may be tangled in the pursuit of theory unmoored from its rationale.

VIII. A Caveat in Conclusion

My emphasis on the practical can be misunderstood; I do not suggest law schools teach mechanical skills or provide vocational training. I do not exclude the need for intellectual rigor and excellence in analytical thinking and writing. These remain essential abilities of any good lawyer. Mastery of legal history and the development of doctrines, the ability to analyze and intertwine complex facts and complex legal principles—the intellectual, or academic pursuit, as it were—is

truly inextricably linked with the development of the practical judgment we expect from the best lawyers and judges. The rhetoric of academe, and its concomitant authoritative instruction, acts (as any language can) as a binding element, bonding judges and lawyers over time and attaching the legal community to those it serves and those who support it. For if judges do not have such a common ground, the law cannot act as the binding element for the larger society, nor can judges decide the cases in the interstices of settled law, which is, after all, where they spend most of their time.

Law may be a practical thing, manifested only in what courts do in fact,⁴⁴ but there must be a tethering of that practical discretion. The tether is the teaching succored by the academy. This is instruction as authoritative teaching,⁴⁵ as if the law were an objective story, ramifying throughout its history and enfolding its students—just as they are sent out into the world—in the cold, sparkling comfort of doctrine and its abiding language.

44. CARDOZO, *supra* note 15, at 126; Holmes, *supra* note 27, at 457. A wonderful book, by one of Cardozo and Holmes's progeny, is Richard Posner's *Cardozo: A Study in Reputation*. See RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* (Univ. of Chi. Press 1990). Posner is a good example of the teacher I have in mind: he is Chief Judge of the Seventh Circuit, teaches at the University of Chicago Law School, and writes. A lot.

45. See PHILIP RIEFF, *FELLOW TEACHERS* (1975) (Professor Reiff—one of my teachers—here announces his jeremiad, emphasizing the authoritative implementation of the past as essential to morally powerful teaching).

