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Jeremiah A. Ho

University of Massachusetts School of Law - Dartmouth, jho@umassd.edu

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LAW AS INSTRUMENTALITY

*Jeremiah A. Ho**

ABSTRACT

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

* Assistant Professor of Law, University of Massachusetts School of Law. I would like to thank Emma Wood, Jessica Almeida, and Erica G. Sylvia for research assistance. Also, much thanks to the University of Massachusetts School of Law for funding this research.

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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 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

For better or worse, examples demonstrating the age-old observation that lawyers are typically a pessimistic lot¹ have reared themselves noticeably during this present crisis in American legal academy and education²—a period that has

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., 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). In the interview, Campos states: “Yes indeed, but the waterline has now

drifted perilously on tides of the Great Recession.³ Observations based on popular psychology tend to avoid being completely truthful on a particular subject.⁴ Every once in a while, however, an observation reveals a beacon of truth.⁵ Not long after national enrollment amongst law schools began to decline and the outside world took notice with scrutiny in 2011,⁶ the word, “crisis,” was first uttered within the legal academy.⁷ From its initial nervous whisper, this utterance of crisis did not go unheard.⁸ At first, there were defensive stances of denial.⁹ Very shortly, nonetheless, the facade of denial gave way to reveal a deep sense of anxiety—the contagious kind that spreads rapidly amongst a

risen so high that large portions of the classes at top ten law schools are struggling, so now there’s a “crisis.” <http://www.thedailybeast.com/articles/2012/09/24/the-perils-of-law-school.html>

³ Jordan Weissmann, *What Do Lawyers and Bankers Have in Common? They Lost Jobs in 2011*, THE ATLANTIC MONTHLY, (Jan. 10, 2012, 1:30 PM EST), <http://www.theatlantic.com/business/archive/2012/01/what-do-lawyers-and-bankers-have-in-common-they-lost-jobs-in-2011/251130/#>.

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 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) (maintaining that “popular psychology that obtains considerable publicity is often at odds with scientific psychology”).

⁵ 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 Jordan Weissmann, *What Do Lawyers and Bankers Have in Common? They Lost Jobs in 2011*, THE ATLANTIC MONTHLY, (Jan. 10, 2012, 1:30 PM EST). <http://www.theatlantic.com/business/archive/2012/01/what-do-lawyers-and-bankers-have-in-common-they-lost-jobs-in-2011/251130/#>.

⁷ McArdle, *supra* note __.

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); Paul Campos, *The Crisis of the American Law School*, 46 U. Mich. J. L. Reform 177 (2012).

⁹ David Segal, *Is Law School a Losing Game?*, THE NEW YORK TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html> (“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?”).

group of pessimistic individuals.¹⁰ 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.¹¹ 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,¹² buy-outs,¹³ rebuke,¹⁴ rumors of school closures,¹⁵ reduction in staff,¹⁶ and pull-backs on faculty hiring¹⁷ to name a few. Simultaneously, a series of how-to reform legal education articles and books bombarded the

¹⁰ Lincoln Caplan, *An Existential Crisis for Law Schools*, THE NEW YORK TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (“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 Commission on the Impact of the Economic Crisis on the Profession and Legal Needs, *The Value Proposition of Attending Law School*, (2011) available at <http://www.americanbar.org/content/dam/aba/migrated/lsc/legaled/value.authcheckdam.pdf>.

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.”).

¹³ Mary Moore, *New England Law offers Faculty Buyouts, Dean takes Pay Cut*, BOSTON BUSINESS JOURNAL (Nov. 1, 2013), <http://www.bizjournals.com/boston/news/2013/10/29/new-england-law-dean-pay-buyout.html>.

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 also immoral.”).

¹⁵ Ashby Jones and Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, THE WALL STREET J. (July 15, 2013), <https://www.wsj.com/articles/SB10001424127887323664204578607810292433272> (reporting law schools faculty lay-offs after “having trimmed staff”).

¹⁶ 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.

¹⁷ *Law Schools Put Hiring Freeze on Faculty*, NEW JERSEY BUSINESS (Oct. 12, 2012) <http://www.njbiz.com/article/20121012/NJBIZ01/121019932/law-schools-put-hiring-freeze-on-faculty>.

literature.¹⁸ A blame game began to surface from all directions.¹⁹ On a day-to-day level at law schools, reports of pandemonium and fury, and long days and nights at the office were not uncommon.²⁰ 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.²¹⁻

At first, internalization from within the legal academy came most notably from Brian Tamanaha and his book, *Failing Law Schools*,²² which prominently attempted to explain the economic causes of the post-Recession law school crisis.²³ Although Tamanaha was not the only one critiquing law schools from a financial perspective,²⁴ his work was arguably the most widely read and discussed.²⁵ In *Failing Law Schools*, Tamanaha

¹⁸ See, e.g., 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); Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 Wis. L. Rev. 115 (2012).

¹⁹ See Paul Campos, *Stop Blaming the Law School Bubble on the 2007 Financial Crisis*, BUSINESS INSIDER (Feb. 3, 2013); Bruce Feldthusen, *Legal Profession in Turmoil: Let's Blame the Law Schools*, CANADIANLAWYERMAG.COM (Dec. 3, 2012), <http://www.canadianlawyermag.com/4429/Legal-profession-in-turmoil-Lets-blame-the-law-schools.html>.

²⁰ Jason M. Dolin, *Opportunity Lost: How Law Schools Disappoints Law Students, The Public, and the Legal Profession*, 44 CAL. WESTERN L. REV. 219, 236 (2007) (“It should come as no surprise that the ABA committees that set law school standards are dominated by those who have succeeded and are comfortable in the current system: law school deans and professors.”).

²¹ See F.A. Hayek, *The Fatal Conceit* (1988).

²² Brian Z. Tamanaha, *FAILING LAW SCHOOLS* (2012).

²³ See generally *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); Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177 (2012).

²⁵ See generally David Burk, *Book Review*, 63 J.L. EDUCATION 349 (2013); Charles Lane, *Book Review: 'Failing Law Schools' by Brian Z. Tamanaha*, THE WASH. POST (Aug. 3, 2012). <https://www.washingtonpost.com/opinions/book->

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.²⁶ He culled through much empirical data to demonstrate the phenomena of this debt-to-inflation ratio.²⁷ 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.²⁸

Such debt-to-inflation ratios, Tamanaha observed, would impede upon new law school graduates' options as they move into their careers.²⁹ Money, after all, gives one options in employment and life-style. But he was not finished yet; another casual reason for the crisis, Tamanaha observed, was that post-graduation employment levels at law schools were in jeopardy.³⁰ 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.³¹ 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

[review-failing-law-schools-by-brian-z-tamanaha/2012/08/03/e7054c9c-c6df-11e1-916d-a4bc61efcad8_story.html?utm_term=.9a436e554f0b](http://www.brian-z-tamanaha.com/2012/08/03/e7054c9c-c6df-11e1-916d-a4bc61efcad8_story.html?utm_term=.9a436e554f0b).

²⁶ See Tamanaha, *supra* note __, at 136-40.

²⁷ See *id.*

²⁸ *Id.* at 109.

²⁹ See *e.g. id.* at 111-12 (citing an example with a law student named “Sarah”).

³⁰ *Id.* at 145-60.

³¹ *Id.*

in 2009, and yet again in 2010—thereby promising to throw out even more law graduates onto the saturated employment pool three years hence.”³² Of course, he was not the sole voice to make these inspections on law school business practices. Critics, both within legal education and beyond, similarly targeted the economics of law schools during this era of crisis.³³

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,³⁴ and also on the uses of new technology in law teaching.³⁵ At first, the discussion of cultural and curricular reform in law schools—particularly ones that resembled the *Carnegie Report*,³⁶ *MacCrate*,³⁷ and *Best Practices*³⁸—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 marketing practices rather than pedagogical reforms.³⁹ But as interest in the economic narratives of law

³² *Id.* at 167.

³³ See generally Steven J. Harper, *THE LAWYER BUBBLE* (2013); William D. Henderson, *A Blueprint for Change*, 40 *Pepp. L. Rev.* 461 (2013); Paul Campos, *DON’T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR’S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012).

³⁴ Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 *NYU 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).

³⁵ Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 *J. Legal Prof.* 199 (2013).

³⁶ William M. Sullivan et al., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

³⁷ American Bar Association, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 138-41 (1992) [hereinafter *MACCRATE REPORT*].

³⁸ Roy Stuckey et al., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

³⁹ See Dolin, *supra* note __, at 231 (“Langdell’s method endures because, although his pedagogy no longer makes sense, his system makes money.”).

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.⁴⁰ Still that shift proceeded cautiously, and some articles in advocating skills and practice during this time took on a neoliberalist tone.⁴¹ 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.⁴² However, such critical observations have seemed to have taken a backseat for more short-term solutions on teaching skills because an overhaul of legal pedagogy would require a deeper connection drawn amongst perspectives on the meaning of law itself and its underlying theory.⁴³ 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 lack 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.⁴⁴

There have been *some* meaningful changes. As an era of reckoning drew near, accountability—moral and economic—came fast upon the academy like swift justice. Questions of relevance regarding American law schools and traditional legal education has 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

⁴⁰ See, e.g., Ali, *supra* note __; Petersen Jennison, *supra* note __.

⁴¹ Margaret Thornton, *Legal Education in the Corporate University*, 10 *Ann. Rev. L. & Soc. Sci.* 19, 23 (2014) (discussing that in law schools the “discourse of skills also carries a subtext with it . . . with the term often being ‘used interchangeably with capacity, knowledge, expertise and so forth’ and that ‘[s]kills tend to play a special role in the neoliberal labor market and are privileged over critical and theoretical knowledge.’” (citation omitted)).

⁴² 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*]; West, *supra* note __, at 23.

⁴³ See Dolin, *supra* note __, at 247.

⁴⁴ West, *supra* note __, at 27-35.

get their monies' worth.⁴⁵ In earnest, law school institutions had thoughtful intentions when they strengthened such parts of the law school experience that had been previously auxiliary.⁴⁶ 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.⁴⁷ They also reflect an acknowledgement that law practice is something one learns, in part, by doing. After all, was it not Holmes who said that the life of the law was not merely logic but also experience?⁴⁸

And then there were changes that were a bit more questionable. A second wave of change came along that mandated learning assessments in legal education.⁴⁹ In 2015, the American Bar Association (hereinafter "ABA") passed Standards 301, 302, 314, and 315 that required law schools to conduct learning assessments,⁵⁰ and subsequently the law schools began to obey.⁵¹ Although some in the academy have urged for decades for law schools to implement learning assessments while others have vilified assessments,⁵² the crisis precipitated the ABA to pass what had only been a proposal and now all law schools began in-house assessments of student learning and competency.⁵³ The undergraduate campuses of colleges and universities had been

⁴⁵ See, e.g., Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 *Elon L. Rev.* 193 (2015).

⁴⁶ See Marjorie A. Silver, *Symposium Introduction: Humanism Goes to Law School*, 28 *Touro L. Rev.* 1141 (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.").

⁴⁷ See generally Knauer, *supra* note __.

⁴⁸ Oliver Wendell Holmes, Jr., *THE COMMON LAW* 1 (1881).

⁴⁹ American Bar Association, *2015-2016 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* 15-25 (2015).

⁵⁰ *Id.*

⁵¹ David Thomson, *When the ABA Comes Calling, Let's Speak the Same Language Assessment*, 23 *Perspectives: Teaching Legal Res. & Writing* 68 (2014).

⁵² Cf. 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).

⁵³ Pistone & Horn, *supra* note __.

engaged in these practices since the early 1980s.⁵⁴ So when American legal education began to embrace the assessments movement in higher education, some suggested this embrace signified that law schools had finally caught up with the rest of American higher education.⁵⁵ Conferences regarding assessments have, since then, taken place on various law school campuses nationwide.⁵⁶ Faculty exchange of assessment rubrics have become more commonplace.⁵⁷ Thoughts of distilling teaching and pedagogy into metrics and measurables have consumed much faculty governance, of late. 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 lacking little assessment action.⁵⁸ Law schools can now claim that they are being thoughtful or self-reflective in response to questions about relevance that have existed in 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 American legal education for decades—issues that many have highlighted as reasons law schools have become irrelevant in the wake of the post-recession. Perhaps this was an apt time to show the world that American legal education was finally on the move.

⁵⁴ Peter T. Ewell, *ASSESSMENT, ACCOUNTABILITY, AND IMPROVEMENT: REVISITING THE TENSION 5* (2009) (citing Peter T. Ewell, *Assessment, Accountability, and Improvement: Managing the Contradiction* (1987)); Dolin, *supra* note __, at 224.

⁵⁵ Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing A Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 *Clev. St. L. Rev.* 661, 664 (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.”).

⁵⁶ See, e.g., *April 2014: Assessment Across the Curriculum* (conference), INST. FOR LAW TEACHING & LEARNING (Apr. 2014), <http://lawteaching.org/conferences/april-2014-assessment-across-the-curriculum/>.

⁵⁷ See, e.g., *Resources*, INST. FOR LAW TEACHING & LEARNING (last visited Mar. 5, 2014), <http://lawteaching.org/resources/>.

⁵⁸ Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 *Duke L.J.* 765, 767 (2004).

But while many have written about the pros and cons of assessment and explored exactly how *how* to assess, few people have contemplated the big, existential “So what?” questions to ask 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, 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. 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.⁵⁹ 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. The process is short-sighted when we neglect what we will do after the results of assessment have come in, but rather allow our results to 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 [w]e cannot address our economic crisis in a meaningful way without the existential, we cannot do the inverse of that either.”⁶⁰ A little over a century’s time of establishing and formalizing a significant tradition of American legal education has passed.⁶¹ Yet still, law schools continue to impart knowledge and training using a pedagogy steeped in the nineteenth century⁶²—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

⁵⁹ See Bonnie Urciuoli, *The Language of Higher Education Assessment: Legislative Concerns in A Global Context*, 12 Ind. J. Global Legal Stud. 183, 183-84 (2005).

⁶⁰ West, *supra* note __, at 212.

⁶¹ Peterson Jennison, *supra* note __, at 646.

⁶² Dolin, *supra* note __, at 222.

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.⁶³ 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 purposes to engender more relevance and empowerment—one 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 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.”

Apart from this Part I Introduction, Part II of this Article will discuss the specific history and background of American legal education 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 also occur in Part IV as well.

In its intentions, the Article seeks out to theorize 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.

⁶³ Dolin, *supra* note __, at 222.

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.⁶⁴ Although scholars have documented and mapped out a general insight regarding Langdell's law teachings, philosophy, and tenure at Harvard Law School,⁶⁵ 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.⁶⁶ 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 remains yet to be deciphered.⁶⁷ 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 ideologies splits from the formalists.⁶⁸ All in all, not unlike our knowledge of many other figures in history,

⁶⁴ 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.” (quoting Alfred Z. Reed, *Training for the Public Profession of the Law* (New York: Carnegie Foundation for the Advancement of Teaching, 1921), Bulletin no. 15, p. 372.).

⁶⁵ See generally *id.*

⁶⁶ See *id.* at 330-31.

⁶⁷ *Id.* at 281.

⁶⁸ 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 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.

there will always be something unknowable and incomplete in our understanding of Langdell and his contributions to modern American legal education.⁶⁹ Over the years, that gap in our conscious knowledge of Langdell has likely supported our awe,⁷⁰ our reverence,⁷¹ our vilification,⁷² our parody,⁷³ and our revision of his legacy⁷⁴—for whatever goals such reactions have served our purposes.⁷⁵ Ultimately, however, such endeavors always fail in obtaining a definitive truth of the matter. We can never really know a person.⁷⁶

⁶⁹ 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.”).

⁷⁰ Austen G. Fox, *Professor Langdell—His Personal Influence*, 20 *Harv. L. Rev.* 7-8 (1906) (eulogizing Langdell by noting at the start of his teaching at Harvard students knew “that a great teacher had come among us and we were led to seek you out”).

⁷¹ William LaPiana, *LOGIC AND EXPERIENCE* 168-69 (1994) (defending Langdell against criticisms of his contributions to legal education and the case method).

⁷² 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’”).

⁷³ Grant Gilmore, *THE DEATH OF CONTRACTS* 5 (1974) (famously beginning 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”) (citations omitted).

⁷⁴ See Kimball, *supra* note __, 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”).

⁷⁵ 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 Gilmore, *THE AGES OF AMERICAN LAW* 42 (1977) (“[I]f Langdell had not existed, we would have had to invent him.”); Gilmore, *Death of Contract*, *supra* note __, at 13 n. 20 (“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.”).

⁷⁶ See e.g. John Henry Schlegel, *Book Review of Kronman, Anthony, The Lost Lawyer & LaPiana, William, Logic and Experience*, 14 *Law & History Review* 369 (1996). In comparing two books on Langdell, Schlegel observes

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, formalist and objective in approach⁷⁷—had its own futility and shortcomings as well.⁷⁸ 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 steps aside for the fact that such a pedagogy has defined American law teaching for over a century's time.⁷⁹ That observation is, indeed, true with ample examples to bolster it.⁸⁰ 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 Langdell.⁸¹ Although the use of appellate opinions in law teaching was not necessarily new,⁸² the case method's wholesale pedagogical emphasis on court opinions was embraced as a novelty for the study of law,⁸³ which itself was fast becoming an academic discipline during this

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.

⁷⁷ West, *supra* note __, 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").

⁷⁸ Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. Rev. 227, 249 (2002) (describing that "[w]hile 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.'").

⁷⁹ Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517, 520-21 (1991).

⁸⁰ 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).

⁸¹ Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 468 (3d ed. 2005).

⁸² James Williard Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950); Robert Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICAN FROM THE 1850S TO THE 1980S* 52 n. 14 (1983).

⁸³ *Id.* at 52-53.

time.⁸⁴ Summarily, the case method's features involve the use of appellate court cases to demonstrate common law principles within a specific body of law.⁸⁵ 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 secondly, 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.⁸⁶

Along with the eventual rise in prominence of Harvard's law school, the case method—as employed by Langdell and his peers there—received gradual widespread adoption in the lecture rooms at other law schools in the country.⁸⁷ At first, other competing law schools were reluctant to use the method.⁸⁸ 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.⁸⁹ 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.⁹⁰ Internationally, the case method has its followers at law programs in other countries as well.⁹¹ Its influence in modeling and developing generations of American law faculty has been profound.⁹² And even pop-culturally, the

⁸⁴ *Id.* at 52.

⁸⁵ *Id.* at 52-53.

⁸⁶ Philip C. Kissam, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 37-50 (2003).

⁸⁷ Weaver, *supra* note ___, at 596 n. 70.

⁸⁸ *See id.* 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).

⁸⁹ *See* Stevens, *supra* note ___, at 64 (observing statistically the rise in number of law schools in the early 1900s adopting the case method); *see also* Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 *Cath. U. L. Rev.* 643, 646-47 (2013).

⁹⁰ Weaver, *supra* note ___, at 543-45.

⁹¹ *E.g.*, Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 *J. Legal Educ.* 60, 76 (2009).

⁹² *Id.* at 544.

case method's notorious dialogic style of classroom teaching has seen its most acerbic Hollywood screen variants⁹³

But despite being a teaching method with only two major signature characteristics or components (the casebook and the Socratic dialogue), 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.⁹⁴ This conception embodied in an ideal of scientific methods as applied to the study and practice of law, which Langdell considered as a scientific entity in nature. The belief was that the result of this application would lead one to discover paradigmatic legal principles within the world and its disputes.⁹⁵ Although the "law-as-science" conception was not likely original to Langdell, 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.⁹⁶ So as science, the law must be studied

⁹³ *E.g. Legally Blonde* (Metro-Goldwyn-Mayer 2001); *The Paper Chase* (Twentieth Century Fox Film Corp. 1973).

⁹⁴ Friedman, *supra* note ___, at 468-69.

⁹⁵ See Nancy Cook, *Law As Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. Rev. 21, 22 (2012).

⁹⁶ M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 Am. J. Legal Hist. 95, 119 (1986). 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 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 dovetailed with the empirical aspect. The rational aspect of the Langdellian model quite simply was the belief that legal reasoning must be deductive.

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.⁹⁷

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. 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.⁹⁸ Other developments such as the curriculum,⁹⁹ the length of a law program,¹⁰⁰ faculty as full-time teachers and scholars,¹⁰¹ and

Id. at 119-20. However, Hoeflich also notes that 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.

⁹⁷ C.C. Langdell, *A SELECTION OF CASES OF THE LAW OF CONTRACTS WITH REFERENCES AND CITATIONS* vi (1871).

⁹⁸ 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).

⁹⁹ Friedman, *supra* note ___, at 471-72.

¹⁰⁰ *Id.* at 466.

¹⁰¹ *Id.*

faculty scholarship¹⁰² 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, “thinking like a lawyer” has characteristically tethered itself as the moniker that American law schools do in training lawyers, and thus serving nearly as an imprimatur of the Langdellian case method.¹⁰³ 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.¹⁰⁴ Over the years, the phrase, “thinking like a lawyer,” has weathered both praise and criticism, and yielded both patina and tarnish. 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. 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.¹⁰⁵ Here, however, the act of “thinking” is singled out as the sole thing that law schools must instill, displacing all other functions and engagements between a

¹⁰² See Kimball, *supra* __, at 283.

¹⁰³ 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).

¹⁰⁴ *Id.*

¹⁰⁵ 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).

lawyer and the law. 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 reading 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.¹⁰⁶ Either way, the phrase “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.”

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.¹⁰⁷ 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.” 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.¹⁰⁸ 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.¹⁰⁹ This is typically where the inductive reasoning takes place. To glance even more narrowly

¹⁰⁶ Langdell, *supra* note ___, at vi.

¹⁰⁷ Bruce A. Kimball, THE TRUE PROFESSIONAL IDEAL IN AMERICA: A HISTORY 107-08 (1995) (describing the law profession’s rise to prominence after the American Civil War).

¹⁰⁸ 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).

¹⁰⁹ Stevens, *supra* note ___, at 53.

into that inductive reasoning, the case method prompts students to render or intuit the results of cases by deciding categorically how similar they are to previous cases or how distinct they are.¹¹⁰ 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 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.¹¹¹ 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 a vacuum.¹¹² This emphasizes 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.¹¹³

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 principles evolved through time.¹¹⁴ But the way Langdell considered the law as science and the way his described it harbored inconsistencies on the surface. First, he treated the

¹¹⁰ West, *supra* note __, at 50.

¹¹¹ Friedman, *supra* note __, at 472.

¹¹² *Id.* at 472.

¹¹³ *See id.* at 466.

¹¹⁴ *See id.* at 473 (“The unity of the 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.”)

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.¹¹⁵ 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. Perhaps in this culling between good and bad cases, the more lawyers of 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—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.¹¹⁶ 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. 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 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.”¹¹⁷ The law library was the

¹¹⁵ *Id.* at 472.

¹¹⁶ Rob Atkinson, *Law As A Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. Rev. 621, 627 (2001).

¹¹⁷ Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 Law Q. Rev. 123, 124 (1887).

laboratory and to find the law, we would go to its printed books.¹¹⁸ 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. 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. 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.¹¹⁹ 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.¹²⁰ 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, and the great extent to which legal treatises are a repetition of

¹¹⁸ *See id.*

¹¹⁹ Friedman, *supra* note __, at 482.

¹²⁰ *Id.* at 469.

each other, being the cause of much misapprehension.¹²¹

There is an almost Darwinian survival-of-the-fittest feeling here—as Langdell described the process of collecting these artifact cases in his book.¹²² And it was Darwin’s scientific theory that promoted a sense of objectivity.¹²³ 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.¹²⁴ 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.”¹²⁵ Moreover, no statutes were included in his casebook.¹²⁶ 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. 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.¹²⁷ 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

¹²¹ Langdell, *supra* note __, at vi.

¹²² See Stevens, *supra* note __, 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”).

¹²³ *Id.*

¹²⁴ Accord 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 conceptions “parallel nineteenth-century empiricist and evolutionist thinking”).

¹²⁵ Friedman, *supra* note __, at 469.

¹²⁶ *Id.*

¹²⁷ *Id.* at 482.

common law tradition of law—but the conception at times was also heavily and ironically artificial. 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.¹²⁸ 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”¹²⁹ First was the sense of intellectual hierarchy that perpetuated itself; the common law was elevated and Langdell along with it.¹³⁰ 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.”¹³¹ Langdell’s conception reinforced a way to speak about the law that was detached from the subject in its formalism. Rather, perceiving law as science led to viewing and dissecting law in assumptions of completeness and in isolating abstraction. As a result, this formalist way of viewing the law bears a “hidden assumption of the autonomous legal subject,” which is theoretically problematic.¹³² 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.’”¹³³ 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

¹²⁸ *Id.* at 472.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 *Ind. L. Rev.* 353, 381 (citing Pierre Schlag *The Problem with the Subject*, 69 *Tex. L. Rev.* 1627, 1721 (1991)).

¹³² *Id.* at 381-82.

¹³³ *Id.* at 381 (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)).

unaffected by analyzing subjects.”¹³⁴ 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 not have been truly objective or scientific if one had to discover the law by looking selectively backward in time in “printed books.”¹³⁵ Moreover, Langdell’s “law as science” was a science that ignored experimentation and context.¹³⁶ 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.”¹³⁷ 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.¹³⁸ 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 the 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, the emergence of numerous American law schools replicated the case method as American legal education’s conspicuous pedagogy in lecture halls throughout the United States.¹³⁹ Accordingly, generations of

¹³⁴ *Id.* (using Langdell’s contract case book as an example).

¹³⁵ Accord 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.”).

¹³⁶ Minda, *supra* note __, at 381.

¹³⁷ *Id.* at 380.

¹³⁸ Kunal M. Parker, *Representing Interdisciplinarity*, 60 *Vill. L. Rev.* 561, 563 (2015).

¹³⁹ 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).

American law students have “thought like lawyers” and objectified the law under Langdell’s conception of legal science.

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.¹⁴⁰ An earlier version of realism had co-existed with the Langdellian formalists during the late nineteenth century, with Oliver Wendell Holmes, Jr., as one of its inspirational founding patriarchs.¹⁴¹ Holmes, who taught at Langdell’s Harvard during the 1870s, withheld the beliefs of formalism and did not share Langdell’s concept that that common law was unified and complete.¹⁴² Rather, Holmes’ concept of the common law embraced a “pragmatic historicism,” which relied on “experience as an objective source of knowledge.”¹⁴³ 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’ 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.¹⁴⁴

The realists assailed against Langdell’s formalist conception of law as science. Pound famously called Langdell’s formalism “mechanical jurisprudence.”¹⁴⁵ 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.”¹⁴⁶ They pointed out the fallacy of Langdell’s scientific objectivity: “Whereas Langdellian scholars claimed that

¹⁴⁰ Stephen M. Feldman, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 108-09 (2000).

¹⁴¹ See Kimball, *supra* note __, at 304-05.

¹⁴² Feldman, *supra* note __, at 108.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 108-10.

¹⁴⁵ Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

¹⁴⁶ Feldman, *supra* note __, at 110.

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 as ‘transcendental nonsense.’¹⁴⁷ 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.¹⁴⁸ Still, the realist reaction against the Langdellian notion of unity and objectivity of law as science was undeniable.¹⁴⁹ Ultimately, what the realists offered as a response to Langdellian formalism was to “cause the predicative value of doctrine to be seriously questioned.”¹⁵⁰ They questioned and torpedoed Langdell’s objectivity until that objectivity was substantially submerged.¹⁵¹

The realists did not exempt Langdellian innovations of the American law school from scrutiny.¹⁵² Jerome Frank famously made his views known that “[t]he law student, should learn while

¹⁴⁷ *Id.* at 110-111. 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 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 (quoting Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935), in *THE LEGAL CONSCIENCE* 33, 34-37 (1960)).

¹⁴⁸ Stevens, *supra* note __, at 156.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² *Id.*

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.”¹⁵³ In a more hypothesized tone, Karl Llewellyn later expressed his views about the Langdellian dependence on appellate cases 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.”¹⁵⁴ 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.¹⁵⁵ 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.”¹⁵⁶ There was, 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.¹⁵⁷ But heavy dependence on appellate opinions in law school classes persisted. The Socratic dialogue continued to be employed in lectures. In spite of adding supporting materials alongside cases in the law casebook,¹⁵⁸ 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

¹⁵³ Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723, 726 (1933).

¹⁵⁴ Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. Legal Educ. 211, 215 (1949).

¹⁵⁵ See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577, 587-89 (1987).

¹⁵⁶ Susan Katcher, *Legal Training in the United States: A Brief History*, 24 Wis. Int’l L.J. 335 (2006).

¹⁵⁷ See Stevens, *supra* note __, at 158-60.

¹⁵⁸ Grant Gilmore, *THE AGES OF AMERICAN LAW* 88 (1977).

twentieth century and remains a part of law school instruction.”¹⁵⁹

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—even when other movements of legal thought emerged such as legal process in the 1950s,¹⁶⁰ 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—law schools continued to use the case method long after the age of American legal realism.¹⁶¹

With the realists, law was not science, but social science.¹⁶² 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.”¹⁶³ 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. Even past the last century, whether advertently or not, professors have instilled that objectification to

¹⁵⁹ Katcher, *supra* note __, at 368 (citing I THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 24 (Steve Sheppard ed., 1999)).

¹⁶⁰ Feldman, *supra* note __, at 120 (describing the rise of the legal process school in the 1950s).

¹⁶¹ See Minda, *supra* note __, at 367.

¹⁶² See Alton, *supra* note __, at 356.

¹⁶³ Lawrence M. Friedman, AMERICAN LAW IN THE 20TH CENTURY 36 (2002).

students in their law classes, even though legal theorists no longer subscribe to Langdellian conceptions.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ And all of this continuance of the case method has been the status quo for decades. In terms of pedagogy then, what American 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 society 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

¹⁶⁴ Minda, *supra* note __, at 382-83.

¹⁶⁵ *Id.*

¹⁶⁶ West, *supra* note __, at 43-46 (noting law schools teach a "moral relativism").

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.¹⁶⁷

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”¹⁶⁸—and not an academic perspective of law’s nature, which as West criticizes is what students receive from modern law courses.¹⁶⁹ The implication of hanging on to the traditions and practices of law teaching is how inappropriate or effective the current conception is for training lawyers.¹⁷⁰ 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.¹⁷¹ Her arguments on whether or not law ought to further justice and how such notions should be taught to law students buttresses her own specialized imperative that law schools must move toward a post-Langdellian conception.¹⁷² 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.

¹⁶⁷ *Id.* at 154-55.

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 155.

¹⁷⁰ *Id.* at 154.

¹⁷¹ *Id.* at 51, 57-59.

¹⁷² *Id.* at 66.

Others have concurred with West.¹⁷³ 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 law¹⁷⁴ or the entirety of jurisprudence itself,¹⁷⁵ 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.”¹⁷⁶ Similarly, as law’s derivatives, the legal profession and legal education both embody comparable rhythms toward progress. Like progress in law, “[a]dmittedly, change often comes rather slowly to legal education; after all, the law has always tended to be a backward-looking profession.”¹⁷⁷ Resistance is more often the norm. 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.¹⁷⁸

At first, Langdell’s reforms at Harvard Law School were not exempt from resisters. Early in his period of pedagogical

¹⁷³ Alton, *supra* note __, at 363.

¹⁷⁴ See, e.g., Ezra Rosser, *Destabilizing Property*, 48 Conn. L. Rev. 397, 418 (2015) (remarking how “[c]hange in property law is slow”).

¹⁷⁵ See, e.g., Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 70 (2006).

¹⁷⁶ G. Edmund White, *Transforming History in the Postmodern Era*, 91 Mich. L. Rev. 1315, 1323 n. 21 (1993) (referencing Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50 (1967)).

¹⁷⁷ See Alton, *supra* note __, at 361.

¹⁷⁸ Josef Redlich, *The Common Law and the Case Method in American University Law Schools* 13 (1914) ; see also White, *supra* note __, 1323 n. 21.

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. The account in *Centennial History of Harvard Law School*, which attributed the case method to Landgell, recounted that “to most of the students, as well as to Langdell’s colleagues, [the case method] was an abomination.”¹⁷⁹ 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?’ ” ’ ”¹⁸⁰ 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 indiscriminating reading of cases—some of them overruled.’ ”¹⁸¹ The editors of the *Central Law Journal* had expressly disclaimed any approval of the case method.¹⁸² They also noted how 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.”¹⁸³ 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 study, profitably be made subsidiary to the attending of lectures and the study of approved textbooks; but we doubt the wisdom of the relying on

¹⁷⁹ THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 35 (Harvard Law School Ass’n ed., 1918).

¹⁸⁰ *Id.*

¹⁸¹ Stevens, *supra* note __, at 57 (quoting *The Higher Legal Education*, 3 Cent. L. J. 540 (1876)).

¹⁸² *The Higher Legal Education*, *supra* note __, at 540 (“We do not wish to be understood as approving the system of teaching law introduced by Prof. Landell[.]”).

¹⁸³ *Id.*; see also Friedman, *supra* note __, at 470 (“The Boston University Law School was founded in 1872 as an alternative to Harvard’s insanity.”).

case-reading to the extent to which, as we understand it, Prof. Langdell's system goes.¹⁸⁴

This possible prediction that the law would be subjugated resembles the tension against the trade night-school law schools that sprang in the early 20th 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. 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.

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."¹⁸⁵ By the end, the class was left to seven students—devotees who were then known as "Kit's Freshmen" or "Langdell's Freshman."¹⁸⁶ But students had not left because they decided they could "wing" the learning of critical lawyering skills on their own. More likely Langdell's students left because they could not find the relevance of what Langdell taught through his case method—"overruled" decisions.¹⁸⁷

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 was not law"¹⁸⁸—particularly as Langdell called English cases by Lord Hardwick "comparatively recent" and "was believed to regard modern decisions as beneath his notice."¹⁸⁹ The peculiar academic nature of Langdell's classroom teaching proved to be

¹⁸⁴ *The Higher Legal Education*, *supra* note __, at 540.

¹⁸⁵ Friedman, *supra* note __, at 470.

¹⁸⁶ *Id.*

¹⁸⁷ *See id.*

¹⁸⁸ Joseph H. Beale, Jr., *Professor Langdell—His Later Teaching Days*, 20 *Harv. L. Rev.* 9, 10 (1906).

¹⁸⁹ *Id.*

pedantic: “The dialogues in Langdell’s classes went slowly, and covered very little ground, compared to the lecture method.”¹⁹⁰ As an immediate reaction, colleagues at Harvard returned to their previous methods of law teaching.¹⁹¹

Of course, eventually, the case method became the status quo that the legal academy heavily invested.¹⁹² In 1906, James Ames, dean of the 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 ‘Landgell’s freshmen,’ a name given as a term of reproach but received as a title of honor[.]”¹⁹³ Ames had been one of those seven freshmen.¹⁹⁴ 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 [Landgell’s] method has conquered its way into a majority of American law schools”¹⁹⁵ and that “it is a constant satisfaction that his man of genius was permitted to see his views dominating legal education throughout the United States.”¹⁹⁶ But in terms of the case method, “the leading universities had ‘received the faith’ by 1891,”¹⁹⁷ and “[u]ltimately, every major and most minor law schools converted to case-books and the Socratic method.”¹⁹⁸ In large part, the method’s success was due to a gradual ability for law schools aspiring for prominence in the university setting to

¹⁹⁰ Friedman, *supra* note __, at 470.

¹⁹¹ *Id.*

¹⁹² James Barr Ames, *Professor Langdell—His Services to Legal Education*, 20 Harv. L. Rev. 12, 13 (1906).

¹⁹³ Ames, *supra* note __, at 13.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; see Kimball, *Langdell Problem*, *supra* note __, 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).

¹⁹⁷ Stevens, *supra* note __, at 57.

¹⁹⁸ Friedman, *supra* note __, at 471.

use it to reflect conformance to a growing elitist trend that had started at Harvard.¹⁹⁹

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.”²⁰⁰ 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.”²⁰¹ 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.”²⁰² This self-sufficiency 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 the case method in American law schools, German law professor, Josef Redlich,²⁰³ 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 precisely upon 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

¹⁹⁹ Stevens, *supra* note ___, at 63.

²⁰⁰ *Id.* at 63.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Kimball, *Langdell Problem*, *supra* note ___, at 290.

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.²⁰⁴

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"²⁰⁵—and by regarding the nature of American law, as driven by common law practices, to have buoyed the case method's success.²⁰⁶

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,²⁰⁷ its development of lawyerly judgment,²⁰⁸ its helpful comprehension of common law traditions,²⁰⁹ its promotion of moral consciousness,²¹⁰ and its narrative power to draw attention.²¹¹ 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, as discussed below."²¹² Regardless of this distinction, Welch then considered that to Carrington's list

other benefits might be added: the potential for development of 'deep knowledge,' the chance to participate in the 'construction' of knowledge that

²⁰⁴ Redlich, *supra* note ___, at 39.

²⁰⁵ *Id.* at 55.

²⁰⁶ *Id.* at 35.

²⁰⁷ Paul Carrington, *Hail! Langdell!*, 20 Law & Soc. Inquiry 691, 745-46 (1995).

²⁰⁸ *Id.* at 747.

²⁰⁹ *Id.* at 749-54.

²¹⁰ *Id.* at 754-59.

²¹¹ *Id.* at 846.

²¹² Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 Rutgers L. Rev. 867, 927 (2009).

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.²¹³

In likewise fashion, Russell Weaver has also noted how the heavy emphasis of cases factually contextualizes the legal situations for students and “stimulate greater student interest” than reading summaries of legal issues from a textbook.²¹⁴ Similarly to Carrington, Weaver also noted how the case method teaches students how to dissect the different parts of a case opinion,²¹⁵ facilitates learning of critical analysis by compelling in-class inquiry into cases,²¹⁶ develops mental “toughness” and quick thinking skills,²¹⁷ allows learning law in a precedent-driven system,²¹⁸ imparts comprehension of a legal process that is inductive,²¹⁹ and instructs upon the functions of a lawyer.²²⁰ Others have echoed Carrington, Welch, and Weaver’s emphases that the case method promotes critical and intellectual rigor.²²¹

Of course, opposing views about the method also exist—and in plenty form. 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

²¹³ *Id.* at 927.

²¹⁴ Weaver, *supra* note ___, at 547-48.

²¹⁵ *Id.* at 549.

²¹⁶ *Id.* at 549-52.

²¹⁷ *Id.* at 553-53.

²¹⁸ *Id.* at 553.

²¹⁹ *Id.* at 553-57.

²²⁰ *Id.* at 557-561.

²²¹ See Garner, *supra* note ___, at 328-29 (asserting that the case method makes students self-sufficient and teaches about the law’s complexity).

asserted *inter alia*, that under the case method, students “do not study cases” truly as the method had claimed,²²² that [s]tudents trained under the Langdell system are like future horticulturists confining their studies to cut flowers,”²²³ and that the method’s most profound “fault is in its naïve assumption of the inviolability of the *stare decisis* doctrine and its corollaries.”²²⁴ Or one could forgo for now, Grant Gilmore’s later acerbic indictments in the 1970s, noting 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.”²²⁵ 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.²²⁶ 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 accomplish too much, and as a result, has assumed too much.²²⁷ 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.”²²⁸ The teaching of principles and doctrines under common law through the case

²²² Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, 910 (1933).

²²³ *Id.* at 912

²²⁴ *Id.* It could be worse: “They resemble prospective dog breeders who never see anything but stuffed dogs.” *Id.*

²²⁵ Gilmore, *DEATH OF CONTRACT*, *supra* note __, at 14-15.

²²⁶ 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).

²²⁷ W. Burlette Carter, *Reconstructing Langdell*, 32 Ga. L. Rev. 1, 84 (1997).

²²⁸ Redlich, *supra* note __, at 41.

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.²²⁹ 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-Law, our Utopia.²³⁰

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.²³¹ In his memorable crit-laden fashion, Kennedy claimed how law school itself as 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

²²⁹ *Id.* at 43.

²³⁰ Gilmore, AGES OF AMERICAN LAW, *supra* note __, at 48.

²³¹ See generally Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 54-75 (3rd ed. David Kairys) (1998).

nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense.²³²

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.²³³

Kennedy's reflections on the distortion of law were just as scathing as Gilmore's; for instance, the Socratic dialogue was characterized as "pseudoparticipation."²³⁴ 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."²³⁵ That striation, undemocratic at its core in Kennedy's 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.

Simultaneously, Kennedy criticized the case method for falsifying both the intellectualism of the law and the practice of lawyering. 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—

²³² *Id.* at 54.

²³³ *Id.*

²³⁴ *Id.* at 56.

²³⁵ *Id.*

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.”²³⁶ 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 regards 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”²³⁷—one which is “unintelligible to the layperson but somehow both explains and validates the great majority of the rules in force in our system.”²³⁸ 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 “a tub on its own bottom” 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).”²³⁹ 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 distinguished from law practice, and one learns nothing about practice.”²⁴⁰ The consequence ultimately “disables” students from the profession.²⁴¹

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,

²³⁶ *Id.* at 57.

²³⁷ *Id.* at 59.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 60.

²⁴¹ *Id.*

intentional set of separations²⁴² that distorted the reality of law.²⁴³ 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.”²⁴⁴ 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.”²⁴⁵ 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.

Kennedy lamented for an alternative: “A more rational system would emphasize to 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.”²⁴⁶ 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.”²⁴⁷ 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 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,

²⁴² *Id.* at 61.

²⁴³ *Id.* (“Entering students just don’t know enough to figure out where the teacher is fudging, misrepresenting, or otherwise distorting legal thinking and legal reality.”)

²⁴⁴ *Id.* at 60.

²⁴⁵ *Id.* at 61.

²⁴⁶ *Id.* at 65.

²⁴⁷ *Id.* at 69.

“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. 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.²⁴⁸ 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.”²⁴⁹ The minority law student learned that the skill of assimilation was the oar of survival.²⁵⁰ 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.²⁵¹ 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 was that it fostered dispassion, detachment, disengagement, and disenchantment with the law.²⁵²

Kennedy is not alone in being political and socially critical of the case method as well. Commentators have also attacked the case method’s blindness toward a plurality of learning styles and capacities in students.²⁵³ Accordingly, in this vein, some have also emphasized how the case method fetishizes abstract reasoning over a more inclusive set of critical lawyering skills.²⁵⁴ Others have examined the psychological aspects of the case method and even unflatteringly portrayed aspects of it as “infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving,

²⁴⁸ *Id.* at 70.

²⁴⁹ *Id.*

²⁵⁰ *See, e.g., id.*

²⁵¹ *Id.* at 72.

²⁵² *Id.* at 73.

²⁵³ Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 *J. Legal Educ.* 167, 185 (1986).

²⁵⁴ *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).

and destructive of positive ideological values.”²⁵⁵ Scholars have also observed that the way law schools teach the law exhorts cold, hard doctrine over the “human aspects of lawyering—variously called empathetic, affective, feeling, altruistic, and service aspects of lawyering.”²⁵⁶ 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 doctrine.²⁵⁷

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.²⁵⁸ Instead, she finds that contemporary American legal education produces in 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.²⁵⁹ 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 that bodes terribly for instilling a normative sense of jurisprudence in law students.²⁶⁰

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

²⁵⁵ Alan A. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 407 (1971)

²⁵⁶ 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) (citations omitted).

²⁵⁷ 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).

²⁵⁸ West, *supra* note __, at 51.

²⁵⁹ *Id.* at 51, 56.

²⁶⁰ *Id.* at 88.

Langdellian nineteenth-century formalism to objectify law, according to its late nineteenth-century virtues. To see larger, more damaging implications in that objectification of law, postmodernist critiques of Langdellian formalism offers such implications for contemporary legal education that are even more basic and fundamental than the disconnect between teaching law and justice that West had indicated.

As a tradition or condition of thought accentuated and effected by questions of instability, postmodern experiences of the law have challenged modernist conceptions of law for embedding assumptions and establishments of objective and complete unity in the law as part of a goal of legal modernists to find objective truth in reality.²⁶¹ In this way, to juxtapose Langdellian formalism next to 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.”²⁶² 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. 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.

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.²⁶³ 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.²⁶⁴ As Pierre Schlag has observed, much of this

²⁶¹ Minda, *supra* note __, at 354.

²⁶² *Id.*

²⁶³ See generally Pierre Schlag, *The Problem of the Subject*, 69 Tex. L. Rev. 1627 (1991).

²⁶⁴ *Id.* at 1646.

veiling or “effacement” of the author was effectuated through ritualized rhetoric of the law as well as the act of inductive legal reasoning.²⁶⁵ 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:

Whenever 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 . . .

.²⁶⁶

Ritualized and repeated in this way, the law as voiced and written by Langdellian formalists loses its authors and instead the impression is that “Contract 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.”²⁶⁷ 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”²⁶⁸—which have resulted experiences of the law by modern legal scholars that have been “somehow ‘constrained’ and ‘bounded’ by law’s professional method of analysis and orientation.”²⁶⁹ What is worse is the lie of disengagement: “And, yet, in removing their subjective presence from their discussion of the law, modern legal scholars have also

²⁶⁵ *Id.* at 1648-56.

²⁶⁶ *Id.* at 1633-34 (referencing K. Burke, A GRAMMAR OF MOTIVES 355 (1945) (quoting Langdell, CONTRACTS, *supra* note __, at vi (1871))).

²⁶⁷ Minda, *supra* note __, at 380.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

assumed that they are capable of excluding their own personal subjective identities from their work.” They “assume, in other words, that they are becoming relatively empty, abstract, and universal subjects-in-control of the law.”²⁷⁰ The problem with this ritualized uniformity and passivity that tries to embody a mimicry of 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.”²⁷¹

The established ritual of rhetoric of 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 minimizing the subject: “Legal rules are explained, analyzed, and criticized as if they were transcendental objects unaffected by analyzing subjects.”²⁷² These attributes of rhetoric and reasoning under Langdell is the crux of a popularized formalist style.²⁷³ In this way, the law achieves objectification because “the law is a transcendental object unaffected by social and economic context”²⁷⁴ and the result is prevention “from confronting the hidden assumption of the autonomous legal subject.”²⁷⁵

But postmodernism has uncovered the subject in law as anything but an autonomous being. When the reveal is made that “the subject is a problem,” the thought leads to a “serious predicament” for legal scholars because the reality is that “[t]here are many different subjects who interpret the law.”²⁷⁶ So how does one talk about the law or justify the law as transcendental, neutral, complete, and autonomous when “the meaning of law

²⁷⁰ *Id.* at 380-81.

²⁷¹ *Id.* at 381.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Schlag, *Problem of the Subject*, *supra* note __, at 1632-33.

²⁷⁵ Minda, *supra* note __, at 381.

²⁷⁶ *Id.* at 382.

depends on the various constructions of different subjects”²⁷⁷ The identities of the “subjects-in-control of the law” matter.²⁷⁸ What we are left with is the reality that law is “man-made,” not its own living scientific entity that reflects universal truths of the world, but something that reflects humanity—and undoubtedly has reflected a certain kind of humanity, even under Langdell’s order.²⁷⁹ Meanwhile, we do not have a language for articulating the law in this way, nor a reference point 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 about the subject in law to their students.²⁸⁰

According to postmodernism, this dispassionate, disengaged version of law and its 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 lie 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.”²⁸¹ If that is the case, then American legal education is floating on an ineffectual life raft 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. Since even the realists, the academy has

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 381.

²⁷⁹ *Id.*

²⁸⁰ See generally Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. Rev. 1681 (1996).

²⁸¹ Schlag, *Problem with the Subject*, *supra* note __, at 1637.

long-recognized Langdellian conception of law as science as having some virtues but altogether unencompassing as a way to study and develop law, but 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 Langdell case method, hypothesized reasons why the case method still persisted in law schools, despite its outdatedness.²⁸² He had listed that the case method's "very obsolescence" had engendered an appearance of its "immutability" so hard that "it seems less a tradition than a fact of nature."²⁸³ 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.²⁸⁴ 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.²⁸⁵ 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. "Our 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."²⁸⁶

Ten years has passed since Rubin's observations. 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. They are, borrowing another of Duncan Kennedy's phrases, quite the fiscal "tubs on their own bottoms" as they might have been.²⁸⁷ With that prong no longer true, justification for keeping the case method afloat in

²⁸² Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 Vand. L. Rev. 609, 613-14 (2007).

²⁸³ *Id.* at 613.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 614.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

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.²⁸⁸ First is the rise of a knowledge-based economy, in which “the increasing complexity of society in general” and “legal expertise, as knowledge, . . . 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.²⁸⁹ Currently, because law schools still “retain[] an approach to pedagogy developed before Dewey, Piaget, Montessori, and all the other founders of twentieth-century education theory,” they “teach at the same level of specificity in all three years. In effect, they are teaching three years of second-year courses.”²⁹⁰ 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.”²⁹¹ The result is more subjectivity, empowering, 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.”²⁹²

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.”²⁹³ 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

²⁸⁸ Edward Rubin, *The Future and Legal Education: Are Law Schools Failing and, If So, How?*, 39 *Law & Soc. Inquiry* 499, 507 (2014).

²⁸⁹ *Id.* at 510.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 513.

economy is producing.”²⁹⁴ Technology’s drive to complexity in life will translate to protection and enforcement of individual rights whether in private commercial law or criminal law.²⁹⁵ Secondly, such advancements and corresponding legal services will need to be equally distributed and accessible to avoid social injustice.²⁹⁶ 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.”²⁹⁷ Rubin’s fault with the Langdellian method here, in the realm of teaching justice, is similar to Robin West’s dissatisfaction. Others in the academic have similarly observed justice teaching as a goal of contemporary law schools.²⁹⁸

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 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. THE 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 solution in this Part IV charts more fundamentally toward creating a contemporary conceptualization of law rather than transplanting

²⁹⁴ *Id.* at 514.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ 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 *Hamline L. Rev.* 513 (2007); Anthony D’Amato, *Rethinking Legal Education*, 74 *Marq. L. Rev.* 1 (1990).

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.²⁹⁹ 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, *supra*, 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 necessary 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. Thusly, the idea of “law as instrumentality” seeks to do so in this manner.

Previous portions 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 undesirable results. 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 unity and autonomy.³⁰⁰ Each movement, in its own thought, has identified gaps to the law that defy unity.³⁰¹ Such observations could indicate either that these gaps exist in a present state of modernism or that the modernist moment has been entirely superseded by post-modernity.³⁰² Both possible observations suggest that achieving unity in law is ultimately impossible.³⁰³ To know this truth of the matter, but to continue preoccupying over unity and autonomy is debilitating after a

²⁹⁹ See Gilmore, *supra* note __, at 15 (referring to the case method “indoctrination through brainwashing”).

³⁰⁰ See generally Minda, *supra* note __.

³⁰¹ See generally *id.*

³⁰² *Id.* at 388.

³⁰³ *Id.* at 389.

while—especially if that *while* has lasted for more than a century. Why then, other than intellectual and academic complacency,³⁰⁴ do we still justify teaching only a limited set of ways to treat 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 out students 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” 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.³⁰⁵ 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 established by the case method that is no longer justified by Langdellian formalism.

A. *Etymology and Ontology*

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 as primarily “[a] thing used to achieve an end or purpose”³⁰⁶ and then secondarily “a means or agency through which a function of another entity is accomplished, such as a branch of a governing body.”³⁰⁷ The word

³⁰⁴ Rubin, *What’s Wrong with Langdell’s Method*, *supra* note ____, at 505.

³⁰⁵ Jennifer L. Culbert, *Shattering Law: Encounters with Love in Billy Budd*, 28 *Quinnipiac L. Rev.* 765 (2010).

³⁰⁶ BLACK’S LAW DICTIONARY 919 (Bryan A. Garner ed., 10th ed. 2014).

³⁰⁷ *Id.*

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 loquitor* 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.³⁰⁸ 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.³⁰⁹ In the criminal context, the Earl Warren majority opinion in *Terry v. Ohio*³¹⁰ penned the phrase, “instrumentalities of the crime,” in part, to describe items directed in the act of police stop and frisk.³¹¹ Of course, more seemingly benign uses of “instrumentality” exist, for instance, in federal statutory guidelines where “instrumentality” could be a state or private agency³¹² and, of course, in employment law in the realm of entrustment and agency.³¹³ 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* (1883) or the 8th edition of Bouvier’s *Law Dictionary* (1914). However, in English law, “instrumentality” is listed in F. Stroud’s *Judicial Dictionary* (1903): “[A] Solicitor is entitled to a charge for his costs on property recovered or preserved through his ‘instrumentality.’”³¹⁴ Stroud’s 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.³¹⁵ From the examples above

³⁰⁸ See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 458, 150 P.2d 436 (1944); *E. I. Du Pont De Nemours & Co. v. Cudd*, 176 F.2d 855, 858 (10th Cir. 1949).

³⁰⁹ *In re Hoffmann*, 475 B.R. 692, 699 (Bankr. D. Minn. 2012) (discussing the corporate as “the alter ego or mere instrumentality of the shareholder” in the test for corporate veil).

³¹⁰ *Terry v. Ohio*, 392 U.S. 1 (1968).

³¹¹ *Id.* at 25.

³¹² E.g., ¶ 1357.45 SERVICE FOR PUBLIC INSTITUTION OR INSTRUMENTALITY, Unempl.Ins.Rep. (CCH) P 7536423.

³¹³ See Restatement (Second) of Agency § 239 (1958).

³¹⁴ THE JUDICIAL DICTIONARY, OF WORDS AND PHRASES JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS 988-89 (F. Stroud ed. 1909).

³¹⁵ *Id.* (quoting *In re Wadsworth v. Sugden*, 29 Ch. D. 517 (1885)).

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; 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 purpose³¹⁶ and ultimately connects “instrumentality” to its meaning in legal usage: agency.³¹⁷ 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. 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.³¹⁸ This Article relies on the suffix, “ity,” in “instrumentality” however, to sustain its ambivalence from direct associations 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” share some overlapping characteristics to its usage in law, as non-legal dictionaries continue to denote the word’s agency function; however, some dictionaries recognize the word’s function more explicitly as a quality and not the thing itself. As an example, Merriam-Webster defines “instrumentality” as “[t]he fact or quality of serving as an instrument or means to an end; agency.”³¹⁹ 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

³¹⁶ BLACK’S LAW DICTIONARY, *supra* note ___, at 919.

³¹⁷ *Id.*

³¹⁸ See R. Summers, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 23 (1982).

³¹⁹ See Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/instrumentality>.

used for the accomplishment of some purpose or end; agency.”³²⁰ Secondly, the OED defines the word as “[t]hat which serves or is employed for some purpose or end; a means, an agency.” 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.³²¹ A comparative word, “instrumentalness,” has a usage around the same time, also in the religious context—also pejoratively describing the failings of human nature.³²² Its root words—“instrument” and “instrumental”—both have varied extensions in history. The OED lists “instrument” being used later, though in a law context to describe “a legal document.”³²³ The word, “instrumental,” had its “subservient” use and meanings in the fourteenth century.³²⁴ 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 connotations was borne out of the intervening uses of “instrument” that referred to legal documents bearing some agency to accomplish legal effects.

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.³²⁵ 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. 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 (“Physicall instrumentality”), civil government (“instrumentality

³²⁰ OXFORD ENGLISH DICTIONARY 1052 (J.A. Simpson & E.S.C. Weiner eds., 1989).

³²¹ *Id.*

³²² *See id.* (quoting reference to Satan’s instrumentality).

³²³ *Id.* at 1051.

³²⁴ *Id.*

³²⁵ *Id.*

of men”), and even the handiwork of a particular person (“instrumentality of Churchill”).³²⁶ 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”), a type of philosophical agent of faith (“[t]he moral and intelligent instrumentality”), illicit human corruption in governance (“human instrumentality”), and an active force in transforming civilization (“powerful instrumentalities”).³²⁷ 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 (that of men) that is not as useful compared to something else (God or the Divine). Henceforth, as discussed *infra*, 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 an instrument of adjustment to the environment.”³²⁸ Again, the “instrumental” word-root is the culprit. But likewise here, as in law, the use of “instrumentality” rather than “instrumental” here seeks to advocate for a similar ambivalence rather than a wholesale import of that theory here. Also, the possible allusion to both legal and non-legal philosophies ought to point to the word’s slippage. 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.³²⁹ It offers an extensive and versatile use—though it is ultimately not completely comprehensive or, at least, so comprehensive that it swallows its meaning.³³⁰ Also what has

³²⁶ *Id.* at 1052.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Feldman, *supra* note ____, at 38.

³³⁰ In this way, the postmodern resonance or slippage in reading the word “instrumentality” for the purposes of establishing a conception of law in this

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 functions to describe agency or goals—which postmodernism tends to reject.³³¹ Facetiously, the metaphysical conceit would be “instrumentality”’s inherent “instrumentalism” or “instrumentality.” Later parts of this section will try to reconcile both teleological and postmodern perspectives in the instrumentality conception. 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

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) (citing Andrea Dworkin, *LIFE & DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN* 118 (1997)) (quoting Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 *Harv. Women’s L.J.* 25, 37). Because of its implicit normative nature, as we will see *infra*, the “law as instrumentality” here resembles feminist theory in comparison to Gilreath’s narrowly described gestures toward reality.

³³¹ Anthony E. Cook, *Foreword: Towards A Postmodern Ethics of Service*, 81 *Geo. L.J.* 2457, 2466 (1993).

law as instrumentality. Of course, this quick etymology is not exhaustive. But in this brief explication, the study reveals that “instrumentality” is certainly a noun with an inherent strawman quality that prompts further inquiry. 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 a pluralism of 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 embody law; what theories and histories have shaped its perpetuation in form and content; and so on.³³² Instrumentality is 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.

In examining the instrumentalities, 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?* We can critique philosophically and normatively: *Are such goals just or moral? Are they socially or politically efficacious? Are they political goals? Are any bigger goals? Should there be other goals that the instrumentalities do not fulfill?* Or we can ask questions about the actors (or the

³³² Rubin, *What's Wrong with Langdell's Method*, *supra* note ___, at 640-41.

Subject(s) within that instrumentality: *Who accomplishes those goals through law as instrumentality? Whose goals are they? Who benefits, directly or indirectly? Who can access that instrumentality?* Correspondingly we can ask and study what skills are involved in that 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?* An instrumentality conception, in this way, serves as a broad reference point of critique and understanding and learning about law; 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, an instrumentality conception in law ought to use instrumentality to discuss the success and failings of such agency and the degrees of accomplishments of such goals veiled behind law.

Though its fixation is partly teleological, this approach to law through study of its instrumentality and critique of law's subservience rather than endorsing its teleology offers a postmodern alignment with the instrumentality conception. The same questioning from above can and ought to be applied to critique and study not merely of 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 regards 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 need to be wholly abandoned. They should just be options, among others, at the 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 asserts 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.

B. 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 thusly how one studies it. 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 preoccupations lead 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; (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.³³³ 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.³³⁴ Agreements are helpful to facilitate the cooperative exchange of resources within a society.³³⁵ 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 need to recognize trust, good faith, fairness, honesty, and clarity as important values in agreement-making.³³⁶ 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.³³⁷ Or perhaps

³³³ See, e.g., Thomas Hobbes, *LEVIATHAN* 132-33 (Michael Oakeshott ed., MacMillan 1977) (1651); John Locke, *An Essay Concerning the True, Original, Extent and End of Civil Government: Second Treatise on Government*, in *SOCIAL CONTRACT* 3, 10-11 (Oxford Univ. Press 1962) (1690); Jean-Jacques Rousseau, *On the Social Contract*, in *THE BASIC POLITICAL WRITINGS* 141 (Donald A. Cress ed. & trans., Hackett Publ'g 1987) (1762).

³³⁴ 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.”).

³³⁵ See generally John Rawls, *A THEORY OF JUSTICE* (1971).

³³⁶ 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.”).

³³⁷ 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—

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”).³³⁸ It could also mean encountering the content of instrumentality in the rules of contract law and seeing for instance, that the rules of contract

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.”).

³³⁸ *E.g.*, UNIFORM COMMERCIAL CODE.

formation in American jurisprudence requires, in part, an externalized offer and acceptance process, in which a meeting of the minds is approximated.³³⁹ 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. *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.³⁴⁰

Here, students can continue their evaluation of the law by tying their inquiries here to previous inquiries in step one regarding 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 and/or contractual documents; 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

³³⁹ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note ___, at § 18.

³⁴⁰ 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 (2013) (“China only requires offer and acceptance whereas the United States requires mutual assent and consideration[.]”).

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 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 transaction 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 law courses can be taught with 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 to order to achieve desired goals of justice or redress. 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.³⁴¹ Or perhaps it is a declaration of some sort that a claimant requires, rather than money.³⁴² 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

³⁴¹ Dan B. Dobbs, *THE LAW OF REMEDIES: DAMAGES--EQUITY--RESTITUTION* 86 (2d ed. 1993) (discussing the adequacy rule for equity); *see also id.* at 90 (discussing “constitutional rights” as a category subject to equitable relief).

³⁴² *See id.* at 53.

case law and statutes demonstrate to students an alternative route to redress by governing conduct or allowing a judicial proclamation. 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 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.

C. 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 divisions 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 lawyer³⁴³ 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

³⁴³ Kennedy, *supra* note ___, at 61.

words, the 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 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) and/or skills courses (such as contracts drafting) 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 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.³⁴⁴ Relevance

³⁴⁴ Timothy W. Floyd, Oren R. Griffin, & Karen J. Sneddon, *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 Ohio N.U. L. Rev. 257, 264-65 (2011) (discussing goal-oriented learning).

facilitates learning.³⁴⁵ Law as instrumentality is a more relevant pedagogical concept because it responds to reasons why people attend law schools: to become lawyers.³⁴⁶ 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. Thus, as seen in the examples above, teaching through this instrumentality conception can lead to more immediate engagement. 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. 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 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

³⁴⁵ *Id.* (discussing relevance in learning).

³⁴⁶ 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”).

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 the 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, the 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.³⁴⁷ 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

³⁴⁷ 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.").

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 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.