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The Schlegelians v. the Langdellians on Legal Education

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In great dramas there's a moment when a character shows up who makes such an impression that, whatever else may be going on, you just wait for that character to reappear. Sir John Falstaff makes his entrance in the second scene of *Henry IV, Part I*, and from that point on has the audience wanting to skip over all the ponderous high statecraft of kings and nobles so we can all get back to Jack Falstaff. Jack Schlegel, in my recollection, made his entrance in my second year at Buffalo in the Fall of 1973. Once you hear that voice, with its almost-whispered, shockingly original and penetrating aperçus, followed by the cackling laugh that tells you that you and he, and anyone else who may be around, are just having the grandest possible time together, you want more. A year later Schlegel and I, along with Al Katz and Janet Lindgren, formed "Section 3," an experimental section of the first-year that combined Torts and Contracts, made Procedure auxiliary to both, and set the class to practical tasks like drafting pleadings, arguing motions, taking depositions, negotiating contracts. The enterprise took a good deal of planning, most of which took place in one another's homes, accompanied by many bottles of wine and,

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when we were lucky, Joanne playing the piano. Our students, surprisingly (for law students) open to unorthodox experiments, indulged us with amazing good humor. I think this may have been the most intense and exciting intellectual experience of my professional life; and Schlegel was essential to it.¹

It was in that period that he began the research for his seminal book on *American Legal Realism and Empirical Social Science* (1995).² Looking back, I see that he and I were animated by the same questions, which derived from the disappointments of our own legal educations, and could be boiled down to, "given the great ferment of 20th Century thought, why has so much American legal scholarship been so unadventurous and uninteresting?" We were motivated to look at some of the exceptions, the adventurous anomalies—in my case, socio-legal historians like Willard Hurst, in his, the Legal Realists—in part to try to explain why their work was treated as weird and eccentric and failed to catch on. Schlegel noticed that Legal Realism was conventionally treated as a school of jurisprudence, a theory about how courts decided cases, and an amateur and perhaps perniciously relativistic jurisprudence at that; and that this treatment bypassed a large body of work the Realists did trying to make good on their promise to integrate law and social science, to study the law "in action," in its "social context." In the process he rescued a whole tradition of empirical work from obscurity and some important scholars, like Underhill Moore, from undeserved neglect and ridicule. The enterprise was, he concluded, mostly abandoned for

1. I left Buffalo in 1977, but Schlegel has remained a loyal and devoted friend, not just to me, but to my entire family. We see each other at conferences, and correspond when the mood strikes. He has been an acute and generous reader and editor of my work over the years. When my daughter spent a summer in Buffalo a few years ago, Jack and Joanne looked out for her. Schlegel also corresponded regularly with my ex-wife Martha until her death last February; came to her memorial meeting; and wrote a moving tribute for the occasion.

2. JOHN HENRY SCHLEGEL, *AMERICAN REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

largely contingent reasons (the Depression killed off research funding, many of the principals went off to join the New Deal, others got bored with the inconclusiveness of empirical work, etc.). The book remains today a landmark, one of the most impressive works of intellectual history in law or any other field.

The question we started with (“Why . . . so uninteresting?”) has stayed with him. In the last few weeks I’ve been reading Schlegel’s output on the history and present condition of legal education. There is a lot of it—in addition to the book, some fifty-two essays and reviews in the HeinOnline database, which include delicious improvisational riffs alongside many richly footnoted articles. Among his many other concerns, Schlegel wants to explain how C.C. Langdell’s Harvard Law School experiment of the 1870s and 80s ultimately became the template for legal education in the entire country, adopted even by schools preparing students for very different practice jobs than those of the big-city law firms. There was nothing inevitable about its triumph. From the start the model ran into resistance, and had many rivals: the night schools that actually educated most lawyers until their demise in the Great Depression and World War II; Columbia’s blending of Law and Political Science;³ or Ernst Freund’s University of Chicago, which offered courses in Legislation, Administrative Law, Relation of State to Industry, Labor and Capital, and Railroad Regulation;⁴ John Norton Pomeroy’s Hastings curriculum combining legal theory with history and political science to supply a theoretical foundation in the first year, and using the third year for practical exercises such as trial preparation and drafting documents;⁵ Woodrow Wilson’s projected (but never built)

3. See JULIUS GOEBEL, JR. ET AL., *A HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY* 85–89, 95–97, 67–68 (1955).

4. See Paul Carrington, *The Missionary Diocese of Chicago*, 44 *J. LEGAL EDUC.* 467, 491–92 (1994).

5. See THOMAS GARDEN BARNES, *HASTINGS COLLEGE OF THE LAW: THE FIRST*

law school at Princeton, also combining private law with public law, history, and political science;⁶ Wesley Newcomb Hohfeld's fantastically ambitious proposal for a School of Jurisprudence;⁷ or John Henry Wigmore's construction of an ideal curriculum that would supplement case-method training with explicit attention to legal history, legislation, and comparative law.⁸

What then was the attraction of the Harvard model? Schlegel borrows some explanations from Robert Stevens's classic history of legal education⁹ and Jerold Auerbach's of the legal profession¹⁰: the drive to restrict entry to the profession to graduates of seven years of higher education was in part a class project to exclude lower orders and a nativist project to exclude Jews and the foreign-born generally from the profession. He borrows others from Magali Sarfatti Larson's theory of professionalization¹¹ as a market-control project dependent on "state sanction for exclusive possession of distinct knowledge based on university production of certified professionals."¹² The key move for professionalizers is to identify a field of operation distinct from anyone else's and to standardize its content and

CENTURY 103-06 (1978).

6. Letter from Woodrow Wilson to Albert Shaw (Nov. 3, 1890), in *THE PAPERS OF WOODROW WILSON, 1890-1892*, 63 (Arthur S. Link ed., 1969).

7. See Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 14 *HANDBOOK ASS'N AM. L. SCHS.* 76 (1914).

8. John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 *HARV. L. REV.* 812 (1916-1917).

9. ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980s* (1987).

10. JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1977).

11. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1979).

12. John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 *J. LEGAL EDUC.* 311, 320 (1985).

then control the market for purveyors of that content.¹³ Like other academic professions (studied by the intellectual historian Dorothy Ross)¹⁴:

[A] small group of scholars created an academic discipline where none had been before. Each group began by staking out part of the intellectual world as its “turf,” adopting a particular way of looking at that turf, a method as it were, and moving to cut out the “amateurs” who formerly had a claim to that turf.¹⁵

In Langdell’s case, the move was to identify the turf as “pure law,” the rules of private law doctrine to be found in appellate cases.¹⁶ Doctrinal analysis and argument is the thing we do that nobody else does. “Law = rules” as Schlegel sees it, is the gist of Langdell’s bequest, the “empty envelope” he left for future generations.

The clearest illustration of the depth of the cultural equation of law with rule is the reaction of individuals fresh from our culture; take any group of middle class, first-year law students and try any approach other than a doctrinal, rule-focused one. They hate the alternatives because the alternatives undercut the notion of law as specialized knowledge available only to, and for sale by, the professional lawyer. That is the identity that they bring with them to law school, for that is what the culture tells them law is about. Legal education supports the notion of law as rule in the classroom and in the journals, in our bones as it were, just as it supports the notion that the prevailing rules are on the whole justified, a comforting notion for the bar as well as for the neophytes whom we train.¹⁷

I recall learning the truth of this in a painful way when, as a still novice teacher I was invited to teach a large first-year class in Contracts at Harvard Law School. As a colleague, at the time, of Stewart Macaulay’s at Wisconsin, and imbued with the gospel of studying law in society, I began my course

13. *Id.* at 319–20.

14. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1990).

15. Schlegel, *supra* note 12, at 314.

16. *Id.* at 323.

17. John Henry Schlegel, *Langdell’s Legacy Or, the Case of the Empty Envelope*, 36 *STAN. L. REV.* 1517, 1532 (1984).

(as my own teacher Lon Fuller had done) with remedies, and led the students to see that the expectation measure of damages, reduced by mitigation, foreseeability, causation, and uncertainty limitations, and the unavailability of damages for non-economic harm or punitive sanctions unless one could prove an independent tort, all coupled with the American rule requiring parties to pay their own attorney's fees, meant that most breaches of contract were simply not worth suing on. A substantial fraction of the class informed me that all this was not Law but rather Sociology of Law, which they had not come to Law School to learn. A real lawyer, on this view, would instruct his or her clients in the nuances of contract doctrine, without tactlessly and irrelevantly informing them they had no chance of recovering any money. I would bet that almost every law teacher has had an experience like this.¹⁸ More systematically, Elizabeth Mertz's fascinating study of Contracts classes at eight different US law schools observes that law teachers keep any kind of non-doctrinal—e.g., social-contextual or explicitly policy-based or moral—matter safely at the margin, open to brief and casual impressionistic discussions rather than the subject of rigorous analysis.¹⁹ David Sandomierski of the University of Western Ontario Law School has just published a massive study of Canadian Contracts teachers.²⁰ He shows that most of them (largely under the influence of graduate training in US law schools) have absorbed and internalized the basic insights of legal realism—that law is a product of its social context, that it reflects plural and often contradictory purposes and is riven by latent ideological conflict, and that communicating these insights is

18. It would be remiss of me not to add that I came to love this class, which remains one of the happiest teaching experiences of my career.

19. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 211–12 (2007).

20. DAVID SANDOMIERSKI, *ASPIRATION AND REALITY IN LEGAL EDUCATION* 178–80 (2020).

indispensable to the practical training of future lawyers.²¹ But, his book concludes, most of them do very little to operationalize these insights in their teaching, which is overwhelmingly, like that in the American classes reported by Mertz, doctrinal.²² Orthodoxy in perceptions of what is “practical” education seems to be silently enforced by students, as well as by general expectations of the profession—*notwithstanding* the nearly universal experience of graduates, once out of school, that their law school actually did very little to prepare them for practice.

To sum up: Langdell’s legacy is impoverished because it gives a false idea of law. For Schlegel the legal realist, law is not a body of rules, but an array of practices. “It is institutions, actors of many kinds, and groups, a whole social manifold, and it is not just ideology, but actual resolution of conflicts, drama, and getting from yesterday to tomorrow in the bureaucratic state, as well.”²³ The legacy is impoverished because the study of law as rules cuts them off from their social context, their political origins and consequences, their actual functioning. And in addition to not being sufficiently theoretical, or sufficiently grounded in history, social theory, and economic context, the study of law-as-rules is not very practical either. Analysis and argument over legal doctrine is one set of lawyers’ practical tasks, but only one and far from the most frequent. Compare, for example: investigating and arguing about facts; tweaking forms to fit particular transactional purposes; devising a legal structure around a business plan; case selection for strategic reasons; managing multi-party negotiations toward a commonly accepted outcome; engaging in regulatory arbitrage; trying to get a client into a drug rehab program to keep him out of prison; valuing a torts case; and steering a greedy or angry client

21. *Id.* at 286–90.

22. *Id.*

23. John Henry Schlegel, *An Irrelevancy, Perhaps*, 6 L. & POL’Y 307, 308 (1984).

toward a realistic settlement, among a million others. If he had his way, clearly, Schlegel would aim for a curriculum somewhat closer to the Pomeroy model—a grounding in theory and history, followed by a series of exercises in practical tasks.

To recapitulate: If law was to be a profession, it had to be attached to a university; if attached to a university, it had to have plausible academic content. The content Harvard chose to settle on was “pure law,” that is, private-law “science” in the arid mode of Austin’s jurisprudence, the exercise of grouping legal doctrines into categories of principles, and showing how they could be derived from those principles. The dominant alternative in Anglo-American tradition was a view of law that, instead of setting it apart from all the other social sciences in its own narrow realm, established it as the Queen of Social Sciences, integrating history, political economy, and moral theory into the ultimate purpose and end product toward which the scientific study of the social world was directed, the Science of Legislation. This was the science prefigured in Adam Smith’s *Lectures on Jurisprudence* and *Wealth of Nations* and *Theory of Moral Sentiments*, taken up in Bentham’s codification projects and J.S. Mill’s tracts on Political Economy, and (not always with happy results!) applied to India through the codes of Macaulay, James Mill, and Fitzjames Stephen.²⁴ Similarly, draft model legislation was announced to be the ultimate by-product of studies conducted under the auspices of the American Social Science Association, the umbrella association for the new social sciences founded in 1865.²⁵

If these were the principal alternatives, you can see why the new universities springing up in the West and out of the land-grant colleges would pick the Langdell model. The Science of Legislation was political dynamite: heterodox

24. See ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA* (1989).

25. On the ASSA, see THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977).

professors like Henry Carter Adams, Edward Bemis, E.A. Ross, and Thorstein Veblen were fired at the instance of conservative trustees, and the president of the new American Economic Association, Richard T. Ely, nearly lost his job as well.²⁶ (Harvard's trustees actually did try to fire some Law School professors for their political opinions in the 1920s—Zechariah Chafee for criticizing Red Scare prosecutions, Felix Frankfurter for questioning the fairness of Sacco and Vanzetti's trial.)²⁷ The strictly private-law focus of Harvard was much less obviously political. Moreover, Harvard seemed to show that a law school could admit and teach hundreds of students at a time, could rake in tuition money for the central university rather than depending on its subsidies, could attract young faculty out of practice without paying them all that much, and still enjoy great prestige.²⁸ Once the West Publishing Company saw money in publishing casebooks (an important part of the story Schlegel tells),²⁹ Harvard's case method of teaching was easily transplanted to new venues. Bright young lawyers could be recruited out of practice, could keep a few cases ahead of the students in the class while interrogating them mock-Socratically, engaging them as equals before the same texts—and (also thanks to West) do research for their own

26. See MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905* (1975).

27. See BRUCE A. KIMBALL & DANIEL COQUILLETTE, *THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND CENTURY 132–48* (2020).

28. A new book just off the presses on the history of Harvard Law School in the 20th century shows that the School's financial model became the template, not just for other law schools, but for graduate professional education in the US generally. *Id.* at 195–218. Big differences opened up between the schools' financial fortunes because law schools were at a relative disadvantage (until late in the 20th century) to raise significant amounts of money from sources other than tuitions. *Id.* at 787. Medical schools benefited from huge philanthropic benefactors, business schools from wealthy business donors. Lawyers were thought neither to need charity nor to be worthy objects of philanthropy. Harvard Law School itself was unable to raise any outside money until the Erwin Griswold era (1946–68), and only really succeeded at fundraising beginning with the deanship of Robert Clark (1989–2003). *Id.* at 800–02.

29. See Schlegel, *supra* note 12, at 318.

articles, casebooks and treatises without leaving the library. Teaching the Science of Legislation, on the other hand, would have required a faculty of polymaths like Pomeroy or Wigmore and probably needed miracles to engage the students.

Now although change has been very slow and halting, I actually think there has been some movement in recent years away from the Langdellian model and somewhat more nearly approaching the Schlegelian in legal education. The improvement has mostly come on the academic side of contextual studies of law, rather than on the practical-training side (though there is some movement in that direction too). The ideological content of law, formerly concealed under a screen of superficial “policy argument” and “interest balancing,” is now out in the open.³⁰ Empirical studies in law-and-society and law-and-economics of the kind that Schlegel’s Realists tried out and mostly failed to follow through on, is also much more common and no longer such a despised and neglected poor relation in the law school faculties. Although it may once have been true that “law and” scholarship drawing on other disciplines imported only schlock versions of the other discipline, it is no longer true in every field, and certainly not in the field Schlegel and I both inhabit of legal history, where scholars appointed to law school faculties have won more than their share of history prizes in recent years.³¹

Yet the expansion of interdisciplinary academic connections has provoked the inevitable backlash. Law

30. For this unmasking, credit is due to Chicago 1970s-style Law and Economics, which pretended to be a neutral positive science but was plainly anything but; to Critical Legal Studies and Feminist and Critical Race Theory; and not least to the Federalist Society, Robert Bork, Antonin Scalia, and Mitch McConnell among others who have not even tried to pretend that adjudication is a politically neutral enterprise.

31. The Bancroft Prize for the best book in American history has been awarded to legal scholars in 2016 (Mary Bilder), 2013 (John Fabian Witt), 2012 (Tomiko Brown Nagin), 2011 (Christopher Tomlins), 2005 (Michael Klarman), and 1978 (Morton Horwitz).

offices want the schools to produce more “practice-ready” graduates to save them the cost of on-the-job training; and bar associations hope to make legal education more practical (sometimes by requiring more training in trial practice—trial practice, mind you, in the age of the vanishing trial!) and, more usefully, to partner with practitioners to teach something about document drafting and transactional practice.

Even more threatening: the appalling cost of seven years of higher education as a prerequisite to admission to the profession, now imposing student debt loads of half a million dollars or more, while even public law schools’ budgets are no longer subsidized, raises doubts about whether either the Langdellian model or the more academically and practically valuable—but also more labor-intensive—Schlegelian model can be sustained. All these problems will be made worse by the looming recession of the plague years.

And as we all know, as the academic side of law teaching has swollen, so has our distance from the profession and the interests of most of our students, not always all that close to begin with. Schlegel has a lot to say about the phenomenology of the law teacher and of the students he or she tries to teach, and his meditations on their alienated condition are the most brilliant and penetrating I have seen anywhere.

Schlegel isn’t just a grumpy old man complaining about “the youth of today” and their hippity-hop music and annoying habit of treading on his lawn. He understands and sympathizes with their alienation, up to a point. He knows the reasons for it are the insecurity of employment in the legal market and the terrible burden of debt and the fear that taking risks might mess up one’s resume or GPA.

They did not create the world in which they find themselves and it is highly doubtful that they would have chosen it had they been given a choice. It is ugly to find oneself in a world where social advance, or even maintenance of social position, requires twenty years of an education that is not intrinsically attractive leading to not very secure employment opportunities doing work that is not all

that interesting.³²

But he is grieved to observe the deadly effects of such conditions on the will to learn.

[A]t times, it seems that almost everything other than the thinnest, narrowest, most quickly comprehended material, delivered much as the classic heroin addict's plea, "straight in the arm," is an imposition on the life of the law student, a life conceived as moving on, getting this over with, as an endless series of occasions to hit the "page down" button on the computer program that is learning. Maybe even on the computer program that is life.³³

Thus the demand for the doctrinal curriculum, for law as rules. To give Langdell credit, what he promoted, and apparently himself brought to the classroom, was lively disputation about rules.³⁴ What many students prefer, however, is simple exposition of the rules, in the manner of the well-taught bar review cram course. This is perfectly good instruction for the purpose of passing the bar exam. But it has little or no value as preparation for the practice of law—for what Schlegel calls "keeping the job," rather than "getting the job." Good lawyering—unfortunately less and less common in an age where much practice is bureaucratic routine—is a craft skill, and one that calls for the exercise of judgment.

The subject of judgment can be various: a merger, a regulatory filing, a financing package, a property settlement, a plea agreement, a complaint, a brief, a trial strategy, the structure of a financial instrument, or a business plan. All require judgment, a matter of more or less, a matter of taking ownership of a problem and so accepting responsibility for the quality of the solution proffered, rather than merely deferring to "the law." More crudely put, it is the act of putting one's butt on the line. A lawyer who

32. John Henry Schlegel, *To Dress for Dinner: Teaching Law in a Bureaucratic Age*, 66 *BUFF. L. REV.* 435, 469 (2018).

33. *Id.* at 443.

34. 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 *L. & HIST. REV.* 57 (1999). Schlegel comments on this article in *Langdell's Auto-da-Fe*, 17 *L. & HIST. REV.* 149 (1999).

exercises judgment accepts the risk that the advice given will be less than optimum, even wrong, and so accepts the blame that follows from poor judgment. Thus, for the exercise of judgment—as distinguished from “just” filing routine papers—a lawyer is entitled to be paid well, even when no question of malpractice could possibly arise.³⁵

If anyone has said this better, I don’t know who it is.

How does Schlegel himself handle the challenge of teaching in an alienated and bureaucratic age? The model he offers is not one he expects anyone else to follow. Its exemplar is Don Fabrizio Corbèra, the eponymous aristocratic hero of Lampedusa’s *Leopard*, in his own eyes a walking anachronism.

I teach as if law were a species of handicraft, and for those who might possibly so understand it. The trick then—Don Fabrizio’s trick—is at the same time to harbor no illusions about what is being learned, as well as no regrets that other things are not being learned. Teach for the handcrafters, those who are willing, however hesitantly, to take the risk of exercising judgment, but grade for the credentialists, since the handcrafters will need the credential too.³⁶

I would bet that more students than Schlegel gives himself credit for, who have been exposed to his steadfast cranky integrity, have recognized that they have brushed against greatness.

35. Schlegel, *supra* note 32, at 463–64.

36. *Id.* at 477–78.

