UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 85 ● Winter 2023

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ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1001
http://lawreview.law.pitt.edu

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Harold Anthony Lloyd*

INTRODUCTION

Thoroughly addressing problems with current legal education and its impact upon the world would be impossible without mention of that odd man Christopher Columbus Langdell. As I have discussed Mr. Langdell in more detail in other works,[1] I will focus here on what I call three of his "follies" and the damage that these three follies have done to legal education; to the character of lawyers, judges, law professors, law students, and others affected by Mr. Langdell's unfortunate influence; and to democracy itself.

Such three follies are: (1) Langdell's claim that law is a science of doctrines and principles known with certainty and primarily traced through case law;[2] (2) Langdell's claim that the study of redacted appellate cases is "much the shortest and best, if not the only way" of learning such law as geometry;[3] and (3) Langdell's

 Professor of Law, Wake Forest University School of Law. I want to thank Bernard Hibbitts and Richard Weisberg for inviting me to speak on this Article's topic at the "Disarmed, Distracted, Disconnected and Distressed: Modern Legal Education and the Unmaking of American Lawyers" conference in Pittsburgh. I am grateful to my research assistants, Summer Allen, Matthew Ledbetter, and John Payne (listed in alphabetical order) for their hard work and helpful comments on this Article. Without the help of these three excellent students, this Article would not have been possible. Any errors or other shortcomings in this Article are of course my own.

[1] *See* Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2013); Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231 (2016); Harold Anthony Lloyd, *Good Legal Thought: What Wordsworth Can Teach Langdell About Forms, Frames, Choices, and Aims*, 41 VT. L. REV. 1 (2016).

[2] *See* C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (2d ed. 1879) ("Law, considered as a science, consists of certain principles or doctrines.").

[3] It is hard not to hear echoes of Euclid here when Langdell not only claims, again, that "[l]aw, considered as a science, consists of certain principles or doctrines" but when he also claims that "[t]he number of fundamental legal doctrines is much less than is commonly supposed . . . [i]f these doctrines could be so

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1001
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claim that, despite his own approximately fifteen years of legal practice, the prior practice of law is not only unnecessary but harmful to the law professor.[4]

In this Article, I will, of course, lack space to address all of the vast character and other damage done by these three follies. Instead, I will explore the damage done to the development of several principal virtues[5] required of good judges, lawyers, law professors, law students, and others participating in rule of law and democracy. The canon of *expressio unius*[6] therefore most definitely does not apply to this Article. Instead, I encourage the reader to focus not only on the matters expressly addressed in this Article but also to reflect on the other ways Mr. Langdell has harmed both legal mind and character and broader society as well.

I. THE FOLLY OF CERTAINTY AND ITS DAMAGE TO CHARACTER

A. Integrity and the Pretense of Certainty

It should be obvious to even the most casual observers of the law that law is not a certain science like geometry. Although it would be foolish to litigate in Euclidean geometry whether a straight line is the shortest distance between two points[7] or whether the sum of the three angles of a triangle is 180 degrees,[8] the law involves matters where reasonable parties can disagree. Perhaps nothing underscores this point better than the role of dissents in even our highest courts.[9] Mr. Langdell's

classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable [in] their number." *Id.* at viii–ix.

[4] *See* BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906, at 169 (Daniel Ernst & Thomas A. Green eds., 2009).

[5] Since I have done so elsewhere, I will not go into deep dives into definitions of the various virtues explored. Instead, I will generally assume that the reader has basic understandings of the virtues explored and will generally refer such readers to my prior work. *See generally* Harold Anthony Lloyd, *Balancing Freedom and Restraint: The Role of Virtue in Legal Analysis*, 32 S. CAL. INTERDISC. L.J. 315 (2023).

[6] *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[H]olding that to express or include one thing implies the exclusion of the other, or of the alternative.").

[7] *See* ARCHIMEDES, THE WORKS OF ARCHIMEDES: VOLUME 1, THE TWO BOOKS ON THE SPHERE AND THE CYLINDER: TRANSLATION AND COMMENTARY 36 (Reviel Netz trans., 2009).

[8] *See* EUCLID, ELEMENTS, 316–17 (Thomas L. Heath trans., Dover 2d ed. 1956).

[9] *See, e.g.*, M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 307. *See also infra* Section I.C.1 for a discussion of Justice Harlan's dissent in *Plessy v. Ferguson*.

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claims of certainty thus either betray a basic misunderstanding of the nature of the law or a lack of integrity in claiming what he must know is not the case.

Interestingly, even if we were to concede that law is like geometry, we should still not always expect certain results. For example, imagine that Mr. Langdell enters into a contract with his protégé James Barr Ames.[10] The contract provides that "Mr. Langdell must pay Mr. Ames $10 for each line that Mr. Ames draws on a sheet of paper." Mr. Ames neatly draws the following on a sheet of paper:

He then presents Mr. Langdell with a bill for twenty dollars. Mr. Langdell objects with "certainty" that he only owes ten dollars, and he looks forward to litigating this case to show how certain answers can be drawn from cases.

However, even here, even with a case actually involving geometry, there is no one certain answer. One need only exercise a bit of imagination (a necessary legal virtue discussed below) to see that Mr. Ames can make a strong case. If we measure the drawing from the two end points, we have one line. Yet, if we measure the drawing from three points instead (first point, midpoint, last point), we end up with two lines. In fact, as this exercise shows, we could have any number of lines depending on the number of points considered. One could therefore say that Mr. Ames is actually being generous in only asking for a payment of twenty dollars!

As this example shows, even if law were geometry, it would not always generate certain results. Thus, to the extent we perpetuate the untruth of law as a general process of generating answers having absolute certainty, we lack integrity on this point *even if* law were somehow geometry.

Of course, the reader might immediately object that no one today considers law as geometry. However, that objection would ignore the extent to which legal formalism continues to infect the law.[11] One need only think, for example, of Chief

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[10] *See* KIMBALL, *supra* note 4, at 171.

[11] I refer here to formalist notions that the law is "a self-contained system of legal reasoning" permitting one to deduce apolitical and otherwise "neutral" conclusions from "general principles and analogies among cases and doctrines" (including formalist claims that the law is like an "objective" game of baseball where judges merely call "balls and strikes"). *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16–17 (1992) (defining formalism generally); Jim Evans, *Sorry, Judges, We Umpires Do More Than Call Balls and Strikes*, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/outlook/sorry-judges-we-umpires-do-more-than-call-balls-and-strikes/2018/09/07/bd6ba7a2-b227-11e8-a20b-5f4f84429666_story.html?utm_term=.6ed3461b9e07 (rejecting the notion that even baseball umpires merely call balls and strikes).

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Justice Roberts' claim that his role on the Supreme Court would be that of an umpire who simply calls balls and strikes (with the suggestion here being, presumably, that good umpires simply call the given).[12] Again, like Mr. Langdell, the Chief Justice is caught on the horns of an unacceptable dilemma. He either does not know how the law works (which of course is very likely not the case), or he lacks integrity here.

One must not lack such integrity here and must speak of and teach the law as it really works. One must expressly recognize and teach the applicable freedoms and restraints available in good legal analysis. In so doing, one must also help one's students and oneself develop the basic virtues required to perform such analysis. Among such basic virtues are imagination (as briefly hinted above), balance, and empathy which I shall further discuss in turn.

B. Imagination, Balance, and Framing Flexibilities

As the Langdell-Ames contract hypothetical shows, lawyers have much flexibility in how they frame matters at hand. We can also note how that hypothetical demonstrates the restraint that lawyers face in framing. This hypothetical helps us see how one such restraint is the social pushback that lawyers face. For example, if Mr. Ames were to claim that he had drawn one million lines and was thus entitled to ten million dollars, it is hard to imagine a jury that would accept such a claim. A good lawyer advising Mr. Ames must thus temper the virtue of imagination with the virtue of balance[13] in advising Mr. Ames.

In discussing the virtue of balance, social pushback is not the only pushback that lawyers must recognize. I have discussed this topic in detail elsewhere[14] and will not repeat those discussions in detail here. However, for purposes of this Article, I will note that such pushbacks include ever-flowing objective and subjective experience; morality; communities in which we nest; concepts; and language itself.[15]

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[12] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States); *see also* Evans, *supra* note 11 (exploring how baseball umpires do more than simply call balls and strikes).

[13] I have elsewhere called this the virtue of moderation and I still debate the best term for this virtue. *See* Lloyd, *supra* note 5, at 342. The downside of using the term "moderation," is that it might suggest one should not boldly challenge convention when convention should be challenged for moral or other reasons. I am indebted to comments from my colleagues at the Pittsburgh conference for this point.

[14] *See* Lloyd, *supra* note 5, at 326–32; Harold Anthony Lloyd, *Making Good Sense: Pragmatism's Mastery of Meaning, Truth, and Workable Rule of Law*, 9 WAKE FOREST J.L. & POL'Y 199, 222–44 (2019).

[15] *See* Lloyd, *supra* note 5, at 326–28; Lloyd, *Making Good Sense*, *supra* note 14, at 222–28.

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C. Modeling Imagination and Balance

All that said, how do we go about modeling both (1) imagination (which includes the ability to frame and react to analysis in multiple, including novel, ways) and (2) balance for our students? More broadly, how do we help students develop the character traits that will allow them to succeed in balancing applicable flexibilities and restraints?

1. Freedom and Imagination

We can begin by calling out how any formalist suggestion that there can be one "certain right" answer[16] downplays the need for imagination to the extent any such claim ignores reasonable alternative framing possibilities applicable to a given legal analysis. With Langdell's case method formalism,[17] one can also call out how the adversarial frame involved in constant case analysis can stifle imagination by suggesting a combative, two-sided norm for analysis. I discuss this in more detail in Section II below.

As we go down this road, we must be honest about, and make our students aware of, the human origins of our concepts.[18] Such awareness helps students cultivate imagination in at least two important ways. First, since our concepts are human constructs, they may be modified if applicable restraints permit.[19] For example, the human concept of a flat earth can and should be replaced by a concept that better accords with the totality of experience.

Second, we will also help students develop imagination when we explore how concepts as human constructs help us deal with experience. Concepts do this by helping us frame experience in ways that, among others, both highlight and downplay aspects of experience.[20] For example, if I conceptualize an atom as a "mini solar system," I emphasize a substantial center with other entities revolving around it.[21] However, at the same time, I ignore such differences as the atomic fusion going

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[16] HORWITZ, *supra* note 11; Evans, *supra* note 11.

[17] *Id.*; LANGDELL, *supra* note 2, at viii–ix.

[18] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 27 (2d prtg. 2002) ("[O]ur categories do not derive from the shape of the world but create it.").

[19] *Id.* at 27–28, 50 ("People have a great capacity for modifying received categories or constructing new ones . . . ."; "'[N]aturalness' itself is a creature of our conceptions and our circumstances . . . .").

[20] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 163 (2003).

[21] *See* Harold Anthony Lloyd, *Law as Trope: Framing and Evaluating Conceptual Metaphors*, 37 PACE L. REV. 89, 95 (2016).

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on at the center of our solar system and the fact that many of the entities revolving around our sun have moons.[22]

As this begins to show, understanding both positive creativity ("highlighting") and negative creativity ("downplaying") is critical to the development of good legal imagination.[23] On the positive or highlighting side, one can perhaps more easily see the role that imagination must play in crafting such concepts as the "mini solar system" just discussed.[24] However, grasping the negative (downplaying) aspect of creativity is no less important.

First, failure to grasp this aspect of creativity can lead to misunderstanding. For example, "Smith deliberately left her very hungry dog's food bowl empty for a whole day" and "Smith strictly followed the veterinarian's orders by not feeding her dog for one day prior to testing that required fasting" can both refer to the exact same event. The first frame leaves out critical information that would make it clear that she was not potentially abusing her dog by intentionally failing to feed it.

Second, failure to grasp the negative (downplaying) aspect of creativity can inadvertently lead one to embrace concepts that do unacceptable harm. For example, one might initially consider good the notion of freshly repainting a law school building with bargain price paint that allows substantial saved funds to be applied elsewhere. Yet, if the emphasis on the bargain price is allowed to downplay the cost of harmful chemicals in the paint that perhaps resulted in the bargain price, one might in fact make a terrible decision by choosing such paint. Similarly, those performing good legal analysis must consider all relevant aspects of the matter at hand and not simply those that may be highlighted in the current discourse.

When good lawyers imagine, that is, when good lawyers see and react to circumstances in multiple, including novel ways, such lawyers are thus careful to see both highlighted and downplayed matters involved. When modeling imagination for students, it is thus critical that law professors stress both the positive and negative aspects of imagination.

For example, if (as I so much hope) we show students substantial actual contract language in a first-year contracts course, we will want to explore not only the "obvious" ways words may act in such contract language but also explore other perhaps less obvious issues with the language. Additionally, we will want to explore not only the specific matters addressed by the contract but also ask ourselves whether

[22] *See id.*

[23] *See* LAKOFF & JOHNSON, *supra* note 20; *see* AMSTERDAM & BRUNER, *supra* note 18.

[24] *See* LAKOFF & JOHNSON, *supra* note 20, at 163 (discussing "highlighting" and "downplaying").

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the parties' interests require addressing additional or other matters. And, in any case, we will want to ask ourselves whether the positives highlighted by the contract language are not offset by negatives that were not emphasized. Imagination is thus critical to good legal analysis in reviewing such contract language, and we law professors must do our best to model such imagination.

Taking this further, we can and should model imagination in loftier and grander ways. When, for example, we speak of Justice Harlan's dissent in *Plessy v. Ferguson*,[25] we should stress the important role of imagination in such dissent. Justice Harlan could imagine a world without segregation and could do so in a way that generated such a powerful dissent. In even loftier and grander fashion, Thurgood Marshall and Dr. King could imagine such a better world in ways that actually achieved change.[26] This leads me to the next virtue we should expressly teach and model in law school: the virtue of balance.[27]

2. Restraint and Balance

Although we have much freedom in what we can imagine, there are restraints on what we can do in practice. First, objective and subjective experience push back in ways that we must recognize. For example, one simply cannot choose to fly from one roof to the next. If one attempts to do so without means that work, one will of course end a featherless Icarus. Second, without socially accepted change, concepts

[25] *See generally* 163 U.S. 537 (1896) (Harlan, J., dissenting).

[26] *See generally* REBECCA CAREY ROHAN, THURGOOD MARSHALL: THE FIRST AFRICAN-AMERICAN SUPREME COURT JUSTICE (2016); Jennifer M. Chacón, *Civil Rights, Immigrants' Rights, Human Rights: Lessons from the Life and Works of Dr. Martin Luther King, Jr.*, 32 N.Y.U. REV. L. & SOC. CHANGE 465 (2007).

[27] I lack space to continue further discussion in the body of this Article of ways to model and help develop the virtue of imagination in law students. However, I would also briefly note the following here: First, instead of merely reading about a contract or a pleading in a case, we should examine the actual matters involved in such cases. For example, having students read a contract case without looking at the actual language in dispute can miss much opportunity for learning. Not limiting ourselves to casebooks, we should also provide students with complex actual contracts and complex pleadings and other litigation documents that can deeply stimulate their imaginations. Switching gears, we should strongly encourage students to take humanities-type courses, which are often found in law schools such as jurisprudence and law and literature. Along this line, we should inject more humanities in law schools. For example, I teach a course in classical rhetoric for law students. Additionally, we should take where possible an interdisciplinary approach to the law. For example, when teaching interpretation and construction, I have found using interpretation of visual art to be particularly helpful in developing imagination in the way law students approach materials. Finally, again, we should expressly celebrate the virtue of proper imagination in the law.

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and language push back.[28] For example, we would no doubt encounter resistance if we simply claimed—without more—that multiplying two by two will give us five. Third, society and the various communities within which we live also push back.[29] For example, Justice Harlan's great dissent in *Plessy* presumably failed because of the general acceptance of segregation at the time.[30]

Good lawyers develop the virtue of balance which helps them successfully navigate such pushback. Such a virtue recognizes the restraints in play and acts and thinks accordingly to achieve proper results by knowing how to properly respond to and navigate such restraints.[31]

One excellent legal exemplar of this virtue is Thurgood Marshall whose victory in *Brown*[32] is a culmination of, among other virtues,[33] the brilliance of balance. He recognized that he could not simply wave a wand and eliminate segregation in public schools.[34] He recognized that he faced substantial pushback which was both social and legal including the Supreme Court precedent of *Plessy*.[35] Recognizing such pushback of the highest order, Marshall thought and acted accordingly in ultimately

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[28] ROBERT BENSON, THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW 74 (2008). Benson also reviews Stanley Fish and his notion "that we all live in 'interpretive communities' which are made up of a 'political, social and institutional . . . mix' of constraints on acceptable interpretations," *Id. See also* CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 513 (John Wilkinson & Purcell Weaver trans., 1969) ("All language is the language of a community, be this a community bound by biological ties, or by the practice of a common discipline or technique. The terms used, their meaning, their definition, can only be understood in the context of the habits, ways of thought, methods, external circumstances, and traditions known to the users of those terms.").

[29] BENSON, *supra* note 28; *see also* PERELMAN & OLBRECHTS-TYTECA, *supra* note 28.

[30] *See* Corinna B. Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1030–31 (2019).

[31] Again, I have discussed this virtue in more detail elsewhere under the title of the virtue of moderation. Lloyd, *supra* note 5, at 342.

[32] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[33] Such other virtues of course include the virtue of imagination. Marshall was able to imagine a pathway to a world where segregation of public schools was no longer lawful. Combining the virtues of imagination and balance, Marshall could successfully reframe segregation as evil and then successfully navigate societal and other pushback in winning *Brown*. *Id.*

[34] Sherrilyn Ifill, *The Road to* Brown v. Board of Education, *in* FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA, 1619–2019, at 319 (Ibram X. Kendi & Keisha N. Blain eds., 2021).

[35] *Id.*

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achieving the legal victory of *Brown*.[36] When teaching our students about *Brown*, we do them a great disservice if we do not also stress this critical aspect of Marshall's achievement.

We also do our students a grave injustice if we fail to teach and model how the virtue of balance applies to the restraints of both morality and civility. If one is lost in the illusion that law is a closed, deductive system, one of course risks blindness to the rules of morality and civility. For civility does not determine the validity of a syllogism. These restraints, however, do exist in our social institutions despite any such formalist myopia, and lawyers lacking the virtue of balance therefore risk both moral and social failure, if not disaster.[37]

Law schools must thus model and teach the virtue of balance in the face of the panoply of restraints (legitimate and otherwise) faced by lawyers in the real world. This includes teaching and showing how lack of balance risks moral compromise, risks failure for our clients when we try to go too far, and even risks well-deserved mockery or disgust if we wrongly challenge civility or other proper conventions that push back.

D. Modeling Empathy

Having now touched upon applicable freedom and restraint and the role of imagination in legal analysis, we can turn to a further casualty of Langdell's folly of certainty: failing to recognize the vital importance of empathy in real-world legal analysis. If one is lost with Langdell in the illusion that law is a closed, deductive system, one might well overlook this virtue since empathy plays no role in the validity of a syllogism.

However, blindness to the role of empathy in legal analysis raises great concern. Without empathy, which is the ability to see and feel as others do,[38] we impair both imagination and proper balance. If we cannot see and feel as others do, we miss much potential fodder for the imagination. If we cannot see and feel as others do, we may well miss restraints in their perspective that also affect what we seek to do.[39]

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[36] *Id.* at 320.

[37] *See* Lloyd, *supra* note 5, at 327–28, 342.

[38] *See* BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 23 (2010).

[39] *See* Sonia A. Krol & Jennifer A. Bartz, *The Self and Empathy: Lacking a Clear and Stable Sense of Self Undermines Empathy and Helping Behavior*, 22 EMOTION 1554, 1566, 1568 (2022).

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Once more, good legal education must therefore cast off any illusion that the law is a closed, deductive system. Along with applicable freedom and restraint and the necessary imagination required for good legal analysis, legal education must also highlight the importance of empathy by emphasizing the blinders we wear when we cannot see and feel as others do. This applies not only in transactional matters where it is obviously difficult, if not impossible, to reach the right deal if one does not have a good grasp of the interests and feelings of both sides. This also applies to matters of litigation since the parties' interests and feelings both drive the litigation and delineate the realms of possible proper settlement.

As legal educators teach and model this virtue, they should recognize that its cultivation requires a good dose of the humanities in legal education.[40] It is difficult to imagine, for example, a thorough legal education which does not include a reading of Dr. King's Letter from Birmingham Jail.[41] In conjunction with that letter, legal education would no doubt be further improved by a reading of, for example, Randall's magnificent "Ballad of Birmingham."[42] I do not have the space here to continue similar suggestions but hope that these examples suffice to underscore the vital importance of the humanities in a legal education.[43]

Additionally, as discussed in Section II below, good legal education must take care to address the potential damage that the case method does to the cultivation of this important virtue of empathy.

II. THE FOLLY OF THE CASE METHOD AND ITS DAMAGE TO CHARACTER

A. The Case Method, Pedagogy, and Integrity

We all hopefully know that statutes, for example, are higher authority than cases.[44] Presenting redacted appellate cases as "much the shortest and best if not the

[40] *Cf.* Jeremy Graham et al., *Medical Humanities Coursework is Associated with Greater Measured Empathy in Medical Students*, 129 AM. J. MED. 1334, 1334 (2016) (finding the study of medical humanities to increase empathy in medical students).

[41] *See generally* Martin Luther King, Letter from Birmingham Jail (Apr. 16, 1963), *in* A TESTAMENT OF HOPE 289 (James Melvin Washington ed., Harper & Row 1986).

[42] DUDLEY RANDALL, *Ballad of Birmingham*, *in* CITIES BURNING 11, 11–12 (1968).

[43] A colleague of mine, Professor Michael Kent Curtis, has often told me that a legal education should be the capstone of a liberal arts education. I would like to preserve that statement here.

[44] *See* CHRISTINE COUGHLIN, JOAN ROCKLIN & SANDY PATRICK, A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 24 (3d ed. 2018).

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only way" of learning law is therefore not only false on its face, but it can set up students to fail in actual practice.[45] For example, law schools' fixation upon redacted appellate cases can lead recent law school graduates to begin their first research assignment with an overemphasis on finding applicable cases.[46]

This leads to yet a further pedagogical problem with the case method. To the extent use of redacted appellate cases disproportionately consumes time needed for careful analysis of other sources of the law (such as statutes), we are not prioritizing either subject matter or time in appropriate ways.

In any case, we cannot with integrity claim that reading multiple or even one long redacted appellate case whose import could be summarized in a few or even one line is "much the shortest" way to teach such law.[47] To the extent we professors pretend otherwise, we not only harm the education of students by letting such cases crowd out other more useful materials, but again we impugn our own integrity on this point. And, as discussed below, the troubling pedagogical and integrity concerns with the case method do not end here.

B. The Case Method and Ritual Hazing

Additionally, the case method can turn into unvirtuous hazing[48] exercises which should simply not be tolerated. I endured such hazing as a law student. As a law professor, I have also seen it. For example, I have seen professors use redacted appellate cases to fill up or otherwise waste class time by turning the focus from the law itself to the student's reaction to unnecessarily disagreeable treatment by the professor.

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[45] LANGDELL, *supra* note 2.

[46] *See* Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 WHITTIER L. REV. 419, 434 (2014) ("Almost every new associate comes to the firm wanting to look for cases. But half the time cases aren't the answer[.]"); Jason Murray, *Practicing to be Practice Ready: Making Competent Legal Researchers Using the New Process and Practice Method*, 21 APPALACHIAN J.L. 1, 20 (2021) ("Because students in LRW [legal research and writing] research mostly case law, the first thought of many students entering ALR [advanced legal research] is to immediately want to search for case law. Students really do not consider that legal research includes a plethora of things besides finding cases[.]").

[47] LANGDELL, *supra* note 2.

[48] "To haze" can mean "to harass by exacting unnecessary or disagreeable work" or "to harass by banter, ridicule, or criticism." *See Haze*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (Sept. 28, 2023), https://www.merriam-webster.com/dictionary/haze. "To harass" can mean to "exhaust" or "fatigue." *See Harass*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (Sept. 29, 2023), https://www.merriam-webster.com/dictionary/harass.

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Students must be trained to perform in public. However, day after day of such incessant hazing on its face at best wastes time that could be used for deeper dives into the law. To the extent such behavior inflicts unnecessary pain on students, professors who engage in it should examine their own character. In my view at least, virtuous people do not wish to inflict unnecessary pain.

Such hazing professors no doubt have different motives for this behavior. Because they have told me so, I know that some do this because they know no way to fill up their mandated class time without playing hide the ball with such a process. Integrity requires that professors with this motivation think again and do the work required to have a fully productive class without resorting to hazing.

I suspect that others ritually haze because they confuse the angst of being hazed with difficulties endured in acquiring deep understanding. Put another way, they equivocate upon the notion of "tough" and confuse intellectual rigor with ritual ordeal. Based upon this confusion, I suspect they believe that they are intellectually rigorous when in fact, as their students well know, they can be quite the opposite.[49] Hazing students under the cover of Langdell is no easy shortcut to true excellence as a professor of law. Integrity requires that we call this out and demand more.

C. The Case Method and Its Other Detriments to Character Development

Finally, the redacted appellate case method should raise concerns for those wishing to model and foster the development of student imagination and empathy. Without limitation, such concerns include:

1. Detriments to Imagination

Given their typically combative and two-sided approach to the matters at hand, constant use of redacted appellate cases on its face stifles imagination by constantly presenting the law as combative and as two-sided. However, even a modicum of imagination would question this constant frame.[50] Why would we therefore wish to present the law over and over again in ways that might beat down such imagination?

[49] For what it is worth, I have seen "hazing professors" at graduation or alumni events take as praise "callouts" from former students who no doubt meant quite the opposite.

[50] Thus, as good transactional practice shows, (i) good legal analysis need not be combative, and (ii) it is critical for good deals to explore the various views and interests of the parties which need not be constrained to some form of duality. *See* Harold Anthony Lloyd, *Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism*, 24 S. CAL. INTERDISC. L.J. 657, 681–82 (2015); *see also* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 20–21 (Bruce Patton ed., 3d ed. 2011).

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Constant use of redacted appellate cases can also harm imagination in other ways. By redacting portions of cases, students miss the opportunities for imagination which might be stimulated by such missing portions. One might respond that such a loss is outweighed by the particular focus such redaction hopes to achieve. If so, however, one must still worry whether constant bombardment by parts of cases sufficiently prepares students to use their imagination with full, real-world cases which they themselves must successfully use.

Additionally, constant use of redacted appellate cases constantly hides from the imagination further critical material. Where is the record on appeal that could further stimulate imagination and prepare the student for the real-world records on appeal to be encountered? Where do the redacted cases in themselves remind students that such cases did not appear out of thin air but are only a portion of what made it from the record on appeal into the portion of the case presented? And what about the strategy and other decisions and interests that do not manifest themselves in the full case, not to mention the redacted one? And where do the redacted cases in themselves remind students that the portion of the cases presented are often the results of strategy and other decisions and interests that occurred or should have occurred yet receive no mention in the portion of the cases presented? And, once again, how much fodder for imagination is thereby lost?

2. Detriments to Empathy

Many of the problems with the case method discussed above under imagination also bleed over into a discussion of the case method and the development of empathy. Again, a redacted appellate case only captures the non-redacted parts of those portions of the case that the appellate court chose to commit to writing. This effectively gives us redaction upon redaction—the editor has given us only part of a written appellate opinion which itself does not capture the entirety of what went on below (such as the full record on appeal and what occurred but did not make it into the record on appeal). Thus, studying redacted appellate cases can remove on multiple levels much of the humanity involved in the actual controversy, including interests that drove or should have driven the case, as well as decisions made as the case progressed. This, unfortunately, can ignore much of the fodder needed for the development of empathy.

And, again, the typically two-sided adversarial lens of redacted appellate cases hardly invites an openness to questions about the various ways the parties may have seen and felt about the matter or matters at hand (and even the multiple ways the parties may have seen and felt about the possible ways of framing the matters at hand). It is therefore hard to see how constant use of the redacted appellate case method invites students to take the time and effort to make appropriate attempts at learning how the parties themselves saw and felt about the matters litigated. Recognizing the importance of such humanity is further limited when students are

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cold called in class under great pressure to simply give "objective" summaries of facts and "objective" recitations of appellate courts' analyses of those slices of disputes surviving for students to see. Where in such an approach is the fuller substance and opportunity needed for developing the critical virtue of empathy?

Instead, constantly requiring students to brief redacted appellate cases can devolve into treating the parties like chess pieces on a board. Such dehumanization hardly fosters the development of empathy. Constantly requiring students to recite and defend their briefs of such chess moves again leaves little room for modeling and developing the critical virtue of empathy.

To the extent we must use the case method, we should therefore expressly remind students that the redacted appellate cases are not mere problems presented for analysis. Instead, we must remind students that such cases involve actual human beings, much of whose humanity has not been presented to the students for the reasons discussed earlier. In doing so, we should stress how viewing the case through the eyes and feelings of the parties could suggest frames that the parties and courts might have missed, frames that could have changed the results of the case for the better.

III. THE FOLLY OF LANGDELL'S DISPARAGING PROFESSORIAL PRACTICE EXPERIENCE AND ITS DAMAGE TO CHARACTER

Although perhaps few in the academy today believe that practice experience taints the law professor, the fact remains that one can be a law professor without substantial law practice experience, and this continues to cause such laments as "law schools hire impractical scholars with little, if any, record of practicing law."[51] Since I have elsewhere discussed in detail both the inseparability of theory and practice and the importance of substantial practice experience for the law professor,[52] I will

[51] Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 139 (2010). Importantly on this point, ABA Standard 401 for law schools provides in part: "The faculty shall possess a high degree of competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship." STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. r. 401 (AM. BAR ASS'N 2022). This disjunctive phrase "experience in teaching or practice" on its face accepts teaching without any practice experience. *See id.* Necessary reform can begin with a rewrite of this standard in a way that better expressly addresses needed practice experience.

[52] Harold Anthony Lloyd, *Theory Without Practice Is Empty; Practice Without Theory Is Blind: The Inherent Inseparability of Doctrine and Skills*, *in* LINDA H. EDWARDS, THE DOCTRINE SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND 77–90 (2017).

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not repeat those discussions here. Instead, I will simply make a few points about the adverse effects on character that come from diminishing the importance of practice experience in the legal academy.

To begin, I pull a course title out of the air with no intent to refer to any particular actual course, law school, or professor: "Complex Cross-Border Commercial Litigation." Could we in true good conscience allow such a course to be taught by professors who have little or no practice experience whatsoever?[53] Although I do have substantial commercial practice experience, I do not have sufficient experience of the type that would let me in good conscience teach such a course. *A fortiori*, I must wonder how a law professor without any practice experience could in good conscience teach such a course. Furthermore, how could a law school in good conscience permit a professor lacking such experience to teach such a course? And turning to the real world, how would highly compensating a law professor with no practical experience whatsoever to teach such a complex course model the competency requirements ethically imposed upon lawyers?[54]

This practice experience problem can and should be fixed. It has a feasible remedy even with existing professors of law who lack such experience. Law schools could permit extended leaves for such faculty to engage in practice and thus obtain substantial practice experience.[55] This would be a win-win both for the students and for such faculty. In addition to the benefits to students that would come from better-rounded faculty, such faculty would be able to enjoy the deeper insights that practice provides, would be able to make the world outside of law school a better place, and might even be able to draw a larger salary while doing so.[56]

At least as long as issues with practice experience remain, another lingering character aspect of Langdell's third folly is the unvirtuous caste system that continues to exist at law schools. Unfortunately, we can still find hierarchies in law school where those with substantial practice experience (such as clinical and legal writing professors) are looked down upon by, and are paid substantially less than,

[53] *See* Newton, *supra* note 51, at 136; STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. r. 401 (AM. BAR ASS'N 2022).

[54] *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

[55] Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95, 97 (1995) (discussing how law schools could build upon current sabbatical practices to allow law professors to gain practice experience).

[56] *See id.* at 97–98.

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"higher caste" professors who lack the practice experience of those looked down upon.[57]

This adversely impacts the development of multiple virtues in both faculty *and* in students.[58] Virtues adversely impacted by professors who actively or tacitly embrace such caste systems include, without limitation, virtues such as integrity,[59] honesty, and intellectual humility.

Since a principal way virtues are learned is by imitation of role models,[60] the caste system also puts students at risk of impairment to the extent they see such impairment modeled in law professors. Additionally, to the extent students buy into the faculty caste system, they run the risk of not taking seriously such critical classes as legal writing and clinical classes.[61] This poses serious risk to their legal education.[62]

CONCLUSION

I will not conclude by calling Langdell a confidence man. I will, however, conclude with a few words from Melville's *The Confidence Man*.[63] As Melville reminds us: the false cannot plausibly overclaim perfection. For example, "[T]he best

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[57] I have seen and endured all this myself and painfully cite to my own experiences here. As to salary discrepancies, the Association of Legal Writing Directors and Legal Writing Institute 2020–21 survey reports that the mean base salary for full-time legal writing faculty was $106,641. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE 2020–2021 INDIVIDUAL SURVEY 137 (2021), https://alwd.org/images/resources/2020-2021-ALWD-and-LWI-Individual-Survey-report-FINAL.pdf. In comparison, the median base salary for the 2019–20 school year at the University of Alabama School of Law, as an example, was $124,866 for an assistant professor and $211,373 for a tenured professor. SOC'Y OF AM. L. TCHRS., 2019–20 SALT SALARY SURVEY 3 (2021), https://www.saltlaw.org/wp-content/uploads/2021/06/SALT-salary-survey-2021-final.pdf.

[58] *See, e.g.*, Newton, *supra* note 51, at 144–48 (noting that the bifurcation of academic and practical law professors prevents the former from being able to integrate real-world competencies into their curricula and disincentivizes the latter from engaging in scholarship); Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology": Diagnosis Confirmed*, 5 N.Y.C. L. REV. 115, 116–26 (2002) (finding that students statistically give more negative evaluations to legal writing classes than they do for other classes).

[59] Integrity concerns apply not only to the perpetuation of something wrong. One must also ask how one can with integrity disparage practice while taking money to send students off into practice.

[60] LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND 157–58 (1st ed. 1996).

[61] *See* Marlow-Shafer, *supra* note 58, at 116–26, 132–33.

[62] *See id.* at 97–98.

[63] HERMAN MELVILLE, THE CONFIDENCE MAN: HIS MASQUERADE (Herschel Parker ed., Norton 1971).

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false teeth are those made with at least two or three blemishes, the more to look like life."[64]

A legal formalism which claims mathematical certainty (and which further denies the importance of the slings and arrows of substantial law practice for the law professor) does not even pretend to look like life. Were Langdellianism a con, it could therefore not be a plausible one, and those duped by it should be all the more ashamed.[65]

In *The Confidence Man*, Melville also usefully reminds us that some "know not virtue only for the same reason they know not French; it was never taught them."[66] Leveraging Melville's wisdom here, law schools have a duty to teach and model character as one of their most basic charges. This includes the virtues of imagination, balance, and empathy discussed above.

As I have written in more detail elsewhere, other virtues that law schools should model and teach include, without limitation: (1) the motivational virtues of required fidelity to clients, law, and justice; curiosity; and openness to doubt where appropriate; (2) the perspective virtues of wholeheartedness and justified confidence; (3) the process virtues of sobriety, fairness, coherence, and thoroughness; (4) the strength virtues of courage and tenacity; (5) the great freedom virtue of creativity; and (6) the culminating virtue of phronesis or practical wisdom (which is the ability to do the right thing at the right time for the right reasons).[67] Although I regret the lack of space here to discuss these virtues in detail, I celebrate the chance to list them and hopefully spur the reader's further interest and reflection.

As we consider Langdell's damage (including that of his mutations)[68] to development of the virtues addressed, I would remind us that the stakes reach well beyond legal education.[69] If, in Langdell's wake, officers of the law lack such virtues,

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[64] *Id.* at 121.

[65] To use a bit more of Melville, one might say that if Melville's "butterfly" is the exalted veneer of modern legal education and his "caterpillar" is Langdell, then: "[T]he butterfly is the caterpillar in a gaudy cloak; stripped of which, there lies the imposter's long spindle of a body, pretty much worm-shaped as before." *Id.* at 108.

[66] *Id.* at 110.

[67] Lloyd, *supra* note 5, at 331–53.

[68] I would note again, for example, the mutated contagion of adhering to the caste system without the concomitant belief that practice taints the law professor and the mutated contagion of simply inflicting the over-consuming case method upon students without remembering the bizarre law as geometry notions that generated the practice.

[69] *See generally* Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1311 (1947) (critiquing Langdellian legal education for its detrimental effects to legal education and the practice of law).

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what hope can we have for democracy, what hope for rule of law? The stakes are high indeed.

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APPENDIX

Since the best argument is like a cable that is woven of multiple strands,[70] I weave in among my prose some strands of my verse as well:

Langdell Villanelle

Practitioners dumb down. A model school
Employs pure scholars. (Langdell, though, is rare;
Langdell is an exception to the rule.)[71]

Pure science keeps to theory and to rule
And leaves mere practice to the tradesman's care.
Practitioners dumb down a model school.

Though calling cases "useless"[72] as a rule,
Langdell could do case science. (Work by fair
Langdell is an exception to the rule.)

Truth wants a law school (not a lawyer school)
That teaches science, not mere craft. Beware:
Practitioners dumb down a model school.

In fifteen years of practice after school,[73]
Langdell saw practice taints beyond repair.
(Langdell is an exception to the rule.)

The best have never done. They teach at school
Because they know. And though they would declare
Practitioners dumb down a model school,
Langdell is an exception to the rule.[74]

[70] *See* CHARLES SANDERS PEIRCE, *CP 5.265*, *in* COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (Belknap Press 1963).

[71] *See* KIMBALL, *supra* note 4, at 42–43.

[72] *See* LANGDELL, *supra* note 2.

[73] *See* KIMBALL, *supra* note 4, at 42–43.

[74] For those wishing to see the continuing draft of "The Apology Box" from which this villanelle came as well as other collections of continuing verse drafts, *see* LAW & LANGUAGE BLOG, https://haroldanthonylloyd.blogspot.com/p/blog-page_4.html (last visited Aug. 4, 2023).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1001
http://lawreview.law.pitt.edu