ARTICLES

THE LEGITIMACY TRAP

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ABSTRACT

Students entering law school today will have an educational experience strikingly similar to that of those who entered in the late 1800s. What will be their required courses? Torts, contracts, civil procedure, property, and criminal law. What will they read? Appellate opinions. How will their professors teach? By deploying the Socratic method. How will they be tested? With a hypo exam.

This Article argues that the belief that these practices are the legitimate means by which to teach students "how to think like a lawyer" is based on a fundamental misunderstanding of their origins. The casebook, the 1L curriculum, the Socratic method, and the hypo exam are all entailments of Christopher Langdell's nineteenth-century strategy to elevate the status of law schools by reimagining them as institutions where students would learn to think not like lawyers, but like scientists. Aiming to cash in on the acclaim of Charles Darwin's theory of natural selection, Langdell modeled the study of law after Darwin's study of organisms. Like Darwin, law students would study with an evolutionary eye. The judicial opinion would be their specimen; the classroom, their workshop; and the library, their laboratory.

Although initially lambasted by the legal community, the model spread because it was preferred by corporate law firms. White-shoe partners commonly observed that students trained under Langdell's methods did not possess much useful knowledge about the law. However, they believed that the social Darwinism embedded in his model could be exploited to the firms' financial benefit. High failure rates, stressful classroom environments, and a do-it-yourself method of study mirrored the "up-or-out" Darwinian culture at corporate law firms. Receipt of a Langdellian education indicated that a young lawyer would be able to endure the grueling life of a junior associate. Partners' preference for students trained under the model transformed Harvard Law from

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a middling institution to a financial powerhouse whose educational practices would be mimicked by law schools nationwide.

Today, law schools aim to be welcoming and inclusive, yet they default to an educational model that was designed to intimidate and exclude. By clinging to centuries-old educational precedent, law schools miseducate future lawyers and maintain stubborn cultures of alienation and anxiety within their halls. This Article identifies key shortcomings of the dominant model of legal education and recommends actions that will allow new models to flourish.

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> *In essence what we have created is the educational equivalent of a McDonald's hamburger stand. . . . [W]e have found a formula that apparently works and with rigid "quality control" characteristic of good franchises, in this instance guaranteed through the auspices of the American Bar Association and the Association of American Law Schools, we put out a fairly decent hamburger. Yet, not unlike McDonald's, the product of legal education is uniform, unimaginative, and mass-produced. This sameness in the monolithic infrastructure of American legal education has afforded only a limited possibility for experimentation and modification freely undertaken. It is this failure to respond creatively, and with flexibility, that most certainly must be identified as the Achilles' heel of legal education.*
>
> —E. Gordon Gee, 1981[1]

INTRODUCTION

In 1935, Karl Llewellyn, Columbia Law professor and famed drafter of the Uniform Commercial Code, gave a speech before the Harvard Law School faculty entitled *On What Is Wrong with So-Called Legal Education*.[2] The *Harvard Law Review* deemed his remarks so inflammatory that it refused to print them, defying the tradition of publishing the lectures of its invited scholars.[3] Llewellyn used his time at the podium to castigate the "incompetent" law professors who continued to "cling[] inertly and incuriously to" the antiquated educational practices developed by nineteenth-century Harvard Law Dean Christopher Langdell.[4] The audience members, to their audible dismay, were the prime targets of Llewellyn's reprimand.[5] They were among the "blind" and "quarter-baked" faculty members that Llewellyn prepared nearly thirty pages of notes to rebuke.[6]

Beyond just being incompetent, Llewellyn accused the professors of being professional "frauds" who swindled students out of their tuition dollars and "usurped [faculty] status, under the pretense of training [students] for the law."[7] But in fact, Llewellyn argued, they were not training students to enter the legal

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[1] E. Gordon Gee, *The Strengths and Weaknesses of Contemporary Legal Education*, *in* CONFERENCE ON LEGAL EDUCATION IN THE 1980S 13, 17-18 (Carrie L. Hedges ed., 1982).

[2] K. N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

[3] Explaining the *Harvard Law Review*'s refusal to publish his remarks, Llewellyn noted ruefully, "[T]heir editor's canons of taste and policy did not jibe with mine." *Id.* at 651 n.*.

[4] *Id.* at 653.

[5] Llewellyn specifically named the law professors at Harvard, Yale, and Columbia as the intended recipients of his opprobrium. Each of those schools was among the early adopters of Langdell's pedagogical methods and had become recognized as the standard-bearers of the model. *Id.* at 652.

[6] *Id.* at 653.

[7] *Id.* at 657.

profession, or at least not the modern profession.[8] Rather, by genuflecting to "the Grand Tradition"[9] of forcing students to parse through centuries' worth of appellate opinions each semester, law professors were teaching them to navigate the vanishing professional path of a "country-plus-city lawyer" who aimed for a career on the bench.[10] Given the lack of an inspiring and meaningful legal education, the professor opined, it was no wonder that so many of the brightest students graduated from law school rudderless, only to become "prostitutes" for corporate law firms.[11]

Llewellyn argued that Langdell's "Ancient Learning" techniques did little more than train students in the art of "legally artificial, dehumanized thinking."[12] He characterized the dominant educational model of American law schools as "blind, inept, factory-ridden, wasteful, defective, and empty."[13] "If you prefer verbs," he remixed, "it blinds, it stumbles, it conveyor-belts, it wastes, it mutilates, and it empties."[14]

But, Llewellyn emphasized, "[t]he grosser evil" of Langdell's model "lay in the over-simplification—as if there were a single kind of lawyer, with a single kind of practice, for which a single kind of training would suffice—and as if case-method were that single kind of training."[15] He believed that analysis of judicial opinions should be viewed as "one available tool" to learn the law, "useful here, wasteful or futile there."[16] Yet, law professors allowed their "aims to be dictated and limited by the existing tool, instead of seeking better or further aims."[17] The singular reliance on the case method produced a singularly silly means of testing students' knowledge of the law—asking them to respond to hypothetical scenarios that were often so outlandish that they pushed the relevant legal principles to the "borderlines of application" and thereby reduced those principles "to a partial absurdity."[18]

It was no coincidence, Llewellyn believed, that faculty trained to revere stare decisis were so doggedly devoted to pedagogical precedent when designing their courses.[19] Law professors, he noted, focused "not on what *can* be done in a school in three years, but purblindly on what our predecessors, or ourselves,

[8] *Id.* at 659.

[9] *Id.* at 662.

[10] *Id.* at 653.

[11] *Id.* at 662.

[12] *Id.* at 662-63.

[13] *Id.* at 653.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 212-13 (1948).

[19] Carl J. Friedrich, *Remarks on Llewellyn's View of Law, Official Behavior, and Political Science*, 50 POL. SCI. Q. 419, 423 (1935).

happen to *have been* doing."[20] Observing that students commonly "look around them, and rebel," demanding to know why they are being taught in this way, Llewellyn suggested the disillusioned students were unlikely to get coherent answers from their professors.[21] Aside from their adherence to tradition, most law professors were themselves unsure why they were teaching that way: "[N]o faculty," he speculated, "and, I believe, not one per cent of instructors, knows what it or they are really trying to educate for."[22] But, he bemoaned, because most law professors had never practiced the law they were teaching, "[t]hey do not know what they miss" in preparing students to enter the profession, "nor [do they] greatly care."[23]

Llewellyn argued that what had become regarded as best practices in American legal education was merely "a product of historical conditioning and chance."[24] Yet, law professors continued to reenact nineteenth-century pedagogical rituals as though they were divinely ordained.[25] Giving Langdell credit for being the pioneer who transformed legal education, Llewellyn believed that, by 1935, it was high time to revolutionize how students learned the law.[26] The "once succulent steak" that Langdell plated for law schools had become rotten with time, but law faculty were still using its putrid flesh to "make a hamburger that reeks its age."[27] "In [s]um," he concluded, "[l]aw [s]chool education, even in the best schools is, then, so inadequate, wasteful, blind and foul that it will take twenty years of unremitting effort to make it half-way equal to its job."[28]

Today, nearly a century after Llewellyn's polemic, the Langdellian model remains the bedrock of every American law school.[29] While there have been significant changes to the second and third years of law school, first-year law students continue to have an educational experience strikingly similar to that of

[20] Llewellyn, *supra* note 2, at 657.

[21] *Id.* at 662.

[22] *Id.* at 653.

[23] *Id.*; *see also* Bruce A. Kimball, *The Principle, Politics, and Finances of Introducing Academic Merit as the Standard of Hiring for "The Teaching of Law as a Career," 1870-1900*, 31 L. & SOC. INQUIRY 617, 644 (2006) (noting by early twentieth century, because of hiring qualifications Dean Langdell put in place, Harvard Law professors were not expected to have practiced law).

[24] Llewellyn, *supra* note 2, at 653.

[25] *See id.* (criticizing professors for allowing their "aims to be dictated and limited by the existing tool").

[26] *Id.* at 661.

[27] *Id.*

[28] *Id.* at 678.

[29] Gregory J. Marsden & Soledad Atienza, *Doing Law School Wrong: Case Teaching and an Integrated Legal Practice Method*, 66 ST. LOUIS U. L.J. 543, 543 (2022).

those who entered law school in the late 1800s.[30] What will be their required courses? Some version of torts, contracts, civil procedure, property, and criminal law. How will they learn? By reading appellate-level judicial opinions. How will their professors teach? By deploying the Socratic method. How will they be tested? By being given a single, cumulative "hypo exam" for which they will never receive individualized feedback. Despite the drastic changes in the legal profession and the advancements in pedagogical research, today's law students are trained using a model that was invented, in the words of two law professors, "not just before the Internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole; not just before Foucault, but before Freud; not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*."[31]

What makes the resilience of Langdellian legal education even more remarkable is that it has remained intact for over 150 years despite being plagued by an onslaught of criticism since its inception. It has been lambasted for being divorced from the actual work of modern lawyers,[32] for perpetuating a naive and overly formalistic notion of how judges arrive at decisions,[33] for treating appellate judicial opinions as the only relevant source of law,[34] for better preparing students to become law professors than to become legal practitioners,[35] for modeling its primary mode of pedagogical engagement on courtroom colloquies in an era when most legal jobs will never require a lawyer to set foot in court,[36] for engendering learning conditions hostile to women[37] and

[30] Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 543 (1991); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007).

[31] Rakoff & Minow, *supra* note 30, at 597 (lamenting legal education's failure to respond to professional and pedagogical advances).

[32] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

[33] *See, e.g.*, Oliver Wendell Holmes, *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (arguing Langdell's approach may lead to "misapprehension of the nature of" judicial decision making).

[34] *See, e.g.*, Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 916 (1933) (proposing reading and analysis of "complete records of cases").

[35] *See, e.g.*, *id.* at 915 ("[Langdellian institutions] are not lawyer-schools (as they should be primarily) but law-teacher schools.").

[36] *See, e.g.*, Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 529 (2007).

[37] *See, e.g.*, Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (1994) (highlighting gender-based performance and participation disparities linked to alienation experienced by women in law school); *see also* Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 508-12 (2007) (finding lower participation by women in law school).

students of color,[38] for creating a toxically competitive educational environment[39] shown to trigger mental illness and substance abuse in students,[40] for underpreparing those who want to go into public interest careers,[41] and for disillusioning those students who aim to bring about transformative legal change.[42]

Particularly interesting is that the criticism does not come only from those with seemingly low institutional power—i.e., the occasional disgruntled student. Instead, it has come from a surround-sound chorus of voices, including those of the American Bar Association ("ABA"),[43] the deans of the nation's premier law schools,[44] law professors,[45] judges,[46] legal employers,[47] and students of all backgrounds. Yet, for as much dissatisfaction as this educative model has generated, and despite the many barrels of ink that have been dedicated to identifying its flaws, the Langdellian model remains the primary model of education at every American law school.[48]

Blending historical analysis and institutional theory, this Article seeks to answer three primary questions: (1) How did American law schools come to uniformly adopt Christopher Langdell's peculiar approach to legal education, an

[38] *See, e.g.*, Asad Rahim, *Race as Unintellectual*, 68 UCLA L. REV. 632, 661 (2021) (finding that although law schools purport to value perspectives of underrepresented racial communities, Black law students commonly report feeling that their racial perspectives are devalued by both law professors and students).

[39] Sturm & Guinier, *supra* note 36, at 539-40.

[40] The results of an empirical study of students at fifteen law schools "indicate that roughly one-quarter to one-third of respondents [engage in] frequent binge drinking or misuse of drugs, and/or reported mental health challenges." Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students To Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 116 (2016).

[41] *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 601 (1982).

[42] *Id.* ("[T]eachers convey to students that, although morally exalted, [public interest] work is hopelessly dull and unchallenging . . . .").

[43] *See, e.g.*, AM. BAR ASS'N: COMM'N ON THE FUTURE OF LEGAL EDUC., PRINCIPLES FOR LEGAL EDUCATION AND LICENSURE IN THE 21ST CENTURY 4 (2020) ("Law schools use a relatively invariant model that remains wedded to 20th-century curriculum and pedagogy, while shortchanging development of the competencies needed today and in the future.").

[44] A former dean of Vanderbilt Law School characterized law schools as offering an education that is both "obsolete" and "discontinuous with the profession that it allegedly prepares its students to enter." Edward Rubin, *What's Wrong with Langdell's Method, and What To Do About It*, 60 VAND. L. REV. 609, 613 (2007).

[45] *See, e.g.*, *id.* at 611 ("The great irony of modern legal education is that it is not only out of date, but that it was out of date one hundred years ago.").

[46] *See, e.g.*, Edwards, *supra* note 32, at 34 (critiquing model from perspective of circuit judge).

[47] *See infra* Section II.C (discussing corporate law firms' dissatisfaction with entry-level associates' lack of practical legal knowledge).

[48] *See* Marsden & Atienza, *supra* note 29, at 543.

approach that his contemporaries widely dismissed as an "absurd" way to teach the law?[49] (2) What are some of the shortcomings of using this nineteenth-century model to educate twenty-first-century law students? (3) What conditions might loosen the grip that these practices have on American law schools so that new models of legal education can flourish?

The concept of legitimacy is key to understanding the "stickiness" of Langdellian education.[50] Law schools have claimed an amorphous function in the training of future attorneys: they claim to teach students how to "think like a lawyer."[51] While that phrase is ubiquitous, its meaning is ambiguous, and therefore it is difficult to assess how well or poorly a law school has fulfilled its educational mission. When organizations assume goals that defy measurement, institutional theory suggests they signal their legitimacy not by adopting the most successful methods to achieve those goals but by adopting the most *accepted* methods.[52] The standard first-year ("1L") courses, the casebook, the Socratic method, and the hypo exam constitute the socially accepted protocols in American legal education. The protocols appear necessary because their widespread adoption seems to indicate in a "rulelike" manner what law schools must do to effectively educate students.[53] However, their merit is questionable because the practices are substantiated based on the fact that they are widely shared rather than inherently correct.[54] Nevertheless, once practices have the veneer of legitimacy, they can sustain their status through the power of circular reasoning: the practices are deemed legitimate because most organizations have adopted them, but most organizations have adopted them because they have been deemed legitimate.[55]

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[49] *See* WILLIAM G. HAMMOND, GEORGE O. SHATTUCK, GEORGE M. SHARP, HENRY WADE ROGERS & J. HUBLEY ASHTON, REPORT OF THE COMMITTEE ON LEGAL EDUCATION 350 (1892) (criticizing case method as unduly difficult and misleading method for teaching law).

[50] For a discussion on how institutions are inherently "sticky," see Elisabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANN. REV. SOCIO. 441 (1999).

[51] Mertz, *supra* note 37, at 491.

[52] Organizational theorists use the concept of mimetic isomorphism to describe one means by which organizational practices come to resemble each other. Summarizing the concept, one team of sociologists noted, "Mimetic pressures arise primarily from uncertainty. Under conditions of uncertainty, organizations often imitate peers that are perceived to be successful or influential." Eva Boxenbaum & Stefan Jonsson, *Isomorphism, Diffusion and Decoupling: Concept Evolution and Theoretical Challenges*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 77, 79 (Royston Greenwood, Christine Oliver, Thomas B. Lawrence & Renate E. Meyer eds., 2d ed. 2017).

[53] John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOCIO. 340, 341 (1977) ("[T]he formal structures of many organizations in postindustrial society . . . dramatically reflect the myths of their institutional environments instead of the demands of their work activities." (citations omitted)).

[54] *Id.* at 349, 352.

[55] *See id.* at 359-60.

Herein lies the trap. Through an iterative social process, the cast of legitimacy becomes concretized around certain practices, even as those practices become ill-equipped to address the evolving needs of a particular industry.[56] Legitimacy becomes the protective coating insulating a tradition from attack, thereby ensuring its longterm survival.[57] The longer an industry holds on to a set of practices, the harder it is to relinquish.[58] Maintained for generations, the status quo can seem so natural that, as one sociologist famously observed, "alternatives may be literally unthinkable."[59]

Lulled by the comfort of tradition, organizations might find it difficult to recognize that what they have accepted as the legitimate means to achieve a desired result were not designed to achieve that result. Sometimes, the practices were created to resolve concerns that dissipated long ago.[60] Yet, to salvage the familiar, an industry will create new logics to justify antiquated procedures.[61] Organizations might refuse to deviate from tradition even when clinging to the status quo prevents them from realizing their stated goals.[62]

This Article applies the legitimacy framework to understand the birth, stubborn life, and possible death of the Langdellian model of legal education. Part I traces the process through which Langdell's educative practices came to define American legal education. While these methods have become legitimized as the proper way to teach law students how to "think like a lawyer," the irony is that they were specifically created to distinguish law schools as sites where students would learn to think not as lawyers, but as scientists.[63]

Against the backdrop of the rapid scientific advancements of the mid-nineteenth century, American scientists began a concerted effort to usurp control of the country's universities from the Christian church.[64] Once in power, new administrators not only made universities welcoming of scientific ideas but also ushered in an age of scientific supremacy, pushing for all disciplines to be

[56] *See* Cathryn Johnson, Timothy J. Dowd & Cecilia L. Ridgeway, *Legitimacy as a Social Process*, 32 ANN. REV. SOCIO. 53, 66 (2006) ("Once these new social objects . . . become generally valid in society, they imply certain practices and actions . . . . These practices and actions tend to be adopted in organizations and remain relatively stable, even when they are inefficient or unfair.").

[57] *See id.* at 67.

[58] *See* W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS, INTERESTS, AND IDENTITIES 10 (4th ed. 2013) (noting "institutions are 'cressive'—evolving slowly through instinctive efforts over long periods of time," and the longer they are in existence, the more resistant they are to change).

[59] Lynne G. Zucker, *Organizations as Institutions*, 2 RSCH. SOCIO. ORGS. 1, 5 (1983).

[60] *See* Johnson et al., *supra* note 56, at 60-61.

[61] *Id.*

[62] *See id.* at 61 ("[W]hereas the initially created innovation often does address immediate goals, purposes, or problems in the original local context, it may eventually become less useful in later adopter contexts yet still be perceived as the acceptable practice.").

[63] *See infra* Part I (tracking integration of Darwinian scientific principles into Langdell's case method).

[64] *See infra* Section I.A.

remade in the image of the natural sciences.[65] Key to the development of legal education was Charles Eliot, who assumed Harvard's presidency in 1869.[66] The trained chemist and former MIT professor was enthralled by Charles Darwin's groundbreaking book *On the Origin of Species*.[67] Eliot believed natural selection held insight into how nonscientific fields should be studied and how universities should be run.[68] Immediately upon taking office, he began to hire Darwin-inspired faculty across campus.[69] These professors were unified in their beliefs that (1) political and social life, like animal and plant life, evolved along discoverable evolutionary patterns; and (2) by using inductive methods, students could unearth the patterns that would allow them to predict future developments.[70]

Among this cohort of new faculty, Eliot hired Christopher Langdell, who relied on Darwinist theory to argue legal doctrines developed along evolutionary paths, and if students studied the genealogy of judicial opinions, they would be able to predict "with constant facility and certainty" how judges would settle future legal disputes.[71] Under Langdell's deanship, what students read, how they were engaged in the classroom, how they were tested, and even where they studied were all modeled after the natural sciences.[72] The judicial opinion became their specimen. The classroom was their workshop. The library, their laboratory—or, as Langdell once announced, the law library was to law students "all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoölogists, all that the botanical garden is to the botanists."[73]

During Eliot's presidency and Langdell's deanship, law school education would become deliberately Darwinist in another way: it would embody a survival-of-the-fittest ethos. Inspired by theories of social Darwinism, Eliot sought to bring to life his theory that "[i]n education, as elsewhere, it is the fittest that survives."[74] Under his president's watchful eye, Langdell designed an educational system that was intentionally meant to intimidate and overwhelm students. He established what his colleagues would refer to as the "Elimination

[65] *Id.*

[66] *See* ERIC ADLER, THE BATTLE OF THE CLASSICS: HOW A NINETEENTH-CENTURY DEBATE CAN SAVE THE HUMANITIES TODAY 143 (2020).

[67] CHARLES DARWIN, ON THE ORIGIN OF SPECIES (Gillian Beer ed., Oxford Univ. Press 2008) (1859).

[68] ADLER, *supra* note 66, at 144.

[69] *See infra* Section I.A.

[70] *See id.*

[71] C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (1879).

[72] *See infra* Section I.A (analyzing dissection of judicial opinions to extract scientific rules).

[73] Christopher Langdell, Teaching Law as a Science, Speech Before Harvard Law School Association (1886), *reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 514, 515 (Steve Sheppard ed., 1999).

[74] ADLER, *supra* note 66, at 144.

Tournament," whereby faculty were encouraged to devise means to fail as many students as possible under the theory that high failure rates would confer high status onto the Law School.[75] Casebooks with little editorial explanation supplanted more user-friendly legal treatises in part *because of* the casebook's difficulty.[76] The Socratic method became the default mode of pedagogical engagement partly *because of* the anxiety it triggered in students.[77] Similarly, a testing regime whereby a single exam would determine a student's institutional worth and career prospects was attractive to university administrators *because of* the distress it engendered and the competition it stoked.[78]

Langdell's model was initially met with contempt by students, faculty, and the broader legal community—all of whom dismissed it as a ridiculous way to teach law.[79] What saved the model was the rise of the corporate law firm. The rapid industrialization of the Gilded Age triggered an increased demand for lawyers which, in turn, birthed white-shoe law firms.[80] Wall Street firms expressed a strong preference for young lawyers trained under the Langdellian model.[81] This was not because firms believed the model was a superior way to teach the law. On the contrary, partners constantly observed that lawyers trained under Langdell's methods seemed to have only the foggiest understanding of how the law worked in real life.[82] Rather, law firm leadership believed that the social Darwinism embedded in the Langdellian model could be exploited to the firms' advantage.[83] If a young man was able to survive the ruthlessly Darwinian culture of Harvard Law School, partners speculated, he likely had the grit and determination to withstand the grueling work life of a young associate.[84]

As "Big Law" hopefuls realized that a Langdellian education was the price of admission to Wall Street's premier white-shoe firms, they began clamoring for spots on the Cambridge campus.[85] Harvard Law's enrollment skyrocketed, as

[75] For a fuller discussion of the "Tournament," see BRUCE A. KIMBALL & DANIEL R. COQUILLETTE, THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND CENTURY 33-37 (2020) (characterizing introduction of final exams, published grades, honors rankings, and journals as means of eliminating low achievers and fomenting competition between successful students).

[76] *See infra* Section I.B.1.

[77] *See infra* Section I.B.3.

[78] *See generally infra* Part I.

[79] *See infra* Section I.C (noting Langdell's plummeting class enrollment, scathing casebook reviews, and condemnation by campus administration).

[80] *See infra* Section I.D.

[81] *See id.*

[82] *See id.*

[83] *See* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 72 (Gerald L. Geison ed., 1983).

[84] *See* JOHN OLLER, WHITE SHOE: HOW A NEW BREED OF WALL STREET LAWYERS CHANGED BIG BUSINESS AND THE AMERICAN CENTURY 49 (2019).

[85] *See infra* Section I.D.

did its tuition.[86] By implementing a survival-of-the-fittest model of legal education, the school was able to elevate itself from a struggling institution to a financial powerhouse envied by law schools nationwide.

Between 1860 and 1911, the number of American law schools increased tenfold.[87] Wanting to experience the financial windfall enjoyed by their Cambridge competitor, law schools began to mimic Langdell's model to such a degree that by the mid-twentieth century, Langdellian legal education would become American legal education.[88] Harvard's first-year courses, its casebook, its Socratic method, and its hypo exams would quickly become adopted by every American law school.[89]

The primary driver behind the proliferation of Langdell's model was not its educational value but its sorting efficiency. It distinguished for corporate law firms those students who were able to withstand stressful working conditions from those who might buckle under pressure.[90] Yet today, in a great twist of irony, the Langdellian method—a method that was never designed to prepare students for legal practice and has been consistently derided by employers for producing graduates ill-equipped to practice law—has become legitimized as the proper means by which to teach students how to "think like a lawyer."[91]

Over the last 150 years, the theories about law and pedagogy that informed the Langdellian model have been thoroughly discredited. In their place are new understandings, many of which are diametrically opposed to Langdell's nineteenth-century views.[92] Yet, although legal educators have evolved in our thinking about the nature of both law and education, our core pedagogical practices remain tethered to their nineteenth-century roots. Part II of the Article examines how relying on nineteenth-century pedagogies frustrates twenty-first-century educational interests. It specifically explores the problems with

[86] See BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-1906, at 222 (2009) (noting between 1870, when Langdell became dean, and 1887 Harvard Law tuition increased 350%).

[87] As future Supreme Court Justice Harlan Stone wrote in 1911, "In 1860 there were 12 law schools in the United States, and of these not more than two or three, and certainly less than half, could fairly be characterized as professional schools . . . . At the present time there are 114 schools of law in the United States awarding to their graduates the degree of bachelor of laws or equivalent degrees, all avowedly existing for the purpose of fitting their students to take up the practice of law." Harlan F. Stone, *The Function of the American University Law School*, 34 ANN. REP. A.B.A. 768, 768 (1911).

[88] *See infra* Section I.D.

[89] *See id.*

[90] *See id.*

[91] *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER," at vii-viii (2007) ("During the first year of law school, students are reputed to undergo a transformation in thought patterns—a transformation often referred to as 'learning to think like a lawyer.' Professors and students accomplish this purported transformation, and professors assess it, through classroom exchanges and examinations, through spoken and written language.").

[92] *See infra* Part II.

maintaining the standard casebook, Socratic method, and traditional 1L curriculum as the bedrocks of modern legal education.[93]

First, the casebook was a product of Langdell's theory that law was a self-contained science whose development could be understood solely by analyzing the appellate judicial opinion.[94] In his view, bias, social and political factors, and even judges' personal views on fairness were all "irrelevant" to understanding the science of judicial decision making.[95] It was, therefore, a waste of time for law students to read about identity, power, and politics to understand legal outcomes. All they needed was the judicial opinion, which they were to take at face value.[96] Today, even though this formalistic legal view has been debunked, law students' primary learning tools are still compilations of opinions with scant exploration of the sociopolitical currents that motivate judicial decisions.[97] By continuing to limit students' analytic frame to the cautiously edited judicial opinion, doctrinal classes often miseducate future lawyers by perpetuating an incomplete, and perhaps naive, understanding of legal development.

Relatedly, in an era when law schools argue that it is crucial to expose students to the viewpoints of the historically marginalized, they default to a set of course materials that almost ensures that students will not receive that exposure from their assigned texts.[98] Given the historical lack of diversity on the nation's appellate courts, when law professors rely exclusively on the appellate judicial opinion to teach the law and its implications, they create an academic environment where students will rarely engage with the written word of women, people of color, sexual minorities, or other groups the law has historically oppressed.[99] This lack of exposure is a disservice not only to law students and the legal profession but also to the broader society, as law schools disproportionately train the nation's leaders.[100]

Second, although the widespread use of the Socratic method is commonly justified as a necessary means to teach students how to think like lawyers,

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[93] *See id.*

[94] *See infra* Section I.B.1.

[95] DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 324 (2015) (analyzing impact of Langdell's legal formalism on his contracts pedagogy).

[96] *See infra* Section I.B.1.

[97] *See infra* Section II.A.

[98] For a summary of the arguments that law schools have put forth over the last half century on the importance of exposing students to the viewpoints of the historically marginalized, see Rahim, *supra* note 38, at 641-52.

[99] *See infra* Section II.A.

[100] *See, e.g.*, DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 3 (3d ed. 2020) [hereinafter RHODE, LEADERSHIP FOR LAWYERS] ("[I]n the United States, no occupation is more responsible for producing leaders than law."); Deborah Rhode, *Why Lawyers Become Bad Leaders*, CHRON. HIGHER EDUC. (Sept. 16, 2013) [hereinafter Rhode, *Why Lawyers Become Bad Leaders*], https://www.chronicle.com/article/why-lawyers-become-bad-leaders/ ("Americans place lawyers in leadership roles in much higher percentages than other countries do.").

Langdell was decidedly uninterested in preparing students for legal practice when he implemented the Socratic method in the law school classroom. Instead, the method was part of a broader institutional effort to instill "manliness" in the student body via a gladiator model of legal education.[101] In the Socratic engagement, young men would be called upon to prove their intellectual virility by sparring with their professors before an audience of peers.[102]

Even though modern law professors tend not to understand themselves as constructing a more masculine student when they deploy the Socratic method, the method still produces gendered effects.[103] This is especially concerning given that the demographics of American law schools have drastically shifted since Langdell's day. No longer the exclusive domain of postpubescent young men, law schools now have a majority-female student population.[104] Yet, in teaching students, professors continue to rely on a mode of engagement that, generations of studies indicate, women are more likely to experience as alienating.[105] Female students commonly complain that the Socratic method requires that they perform masculinity for their intellect to be respected.[106] This gendered demand can alienate them from the classroom, from the profession, and sometimes from themselves.[107]

Beyond its gendered implications, the Socratic method also produces disparate racial impacts. In Langdell's day, the law school student body was virtually all white. Today, however, many law schools boast of having majority-

[101] CHARLES WILLIAM ELIOT, EDUCATIONAL REFORM: ESSAYS AND ADDRESSES 18 (1901).

[102] Both nineteenth- and twentieth-century law professors commonly understood the Socratic method to be an inherently masculine form of engagement. *See, e.g.*, EDWARD H. WARREN, SPARTAN EDUCATION (1943), *as reprinted in* 2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 712, 714 (Steve Sheppard ed., 1999) ("To carry on [Socratic] discussions effectively . . . The instructor must be a full man.").

[103] *See infra* Section II.B.

[104] *See Women in the Legal Profession: Chapter Outline*, *infra* note 398.

[105] *See, e.g.*, WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 20 (2008) (discussing empirical investigation of law schools' racial dynamics and power hierarchies); Anne M. Coughlin & Molly Bishop Shadel, *The Gender Participation Gap and the Politics of Pedagogy*, 108 VA. L. REV. ONLINE 55, 63 (2022) (describing Socratic classroom as requiring students to adopt stances denying their own identities); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 J. GENDER, SOC. POL'Y & L. 511, 536 (2005) ("[P]edagogical methods such as the Socratic Method may amplify the effect of differences in confidence levels."); YALE L. WOMEN, YALE LAW SCHOOL FACULTY AND STUDENTS SPEAK UP ABOUT GENDER: TEN YEARS LATER 13-17 (2012) (reviewing systematic attempts by Yale Law School to study women's participation and success in classroom); Mallika Balachandran, Roisin Duffy-Gideon & Hannah Gelbort, *Speak Now: Results of a One-Year Study of Women's Experiences at the University of Chicago Law School*, 2019 U. CHI. LEGAL F. 647, 661-62 (noting disproportionately lower voluntary participation by women in class sessions which utilize "cold calls"); Guinier et al., *supra* note 37, at 13.

[106] *See* Guinier et al., *supra* note 37, at 63.

[107] *See infra* Section II.B.

minority student bodies.[108] For Black and Latine students, whose intellectual merit is regularly debated in the courts, in the media, and sometimes within their own law schools, the act of being quizzed on newly acquired information before an audience of racial outsiders comes with both personal and political stakes.[109] The fear of publicly confirming negative racial stereotypes about their presumed intellectual inferiority can be paralyzing for many of these students, making the Socratic method a tool that interferes with their ability to learn the law.[110]

Finally, law schools routinely praise their students' commitment to public service, but they continue to require students to take a series of mostly private law courses that has been charged with taking students off the public interest track and rerouting them into corporate America.[111] Unlike their nineteenth-century predecessors, today's students most often enter law school with the expressed intention of serving the public good.[112] The required 1L curriculum not only fails to adequately speak to the aims that brought most students to law school, but its lopsided focus also implicitly prepares students to devote their professional energies to defending monied interests, often to the detriment of the very communities they entered law school pledging to protect.[113]

In Part III of this Article, I identify conditions that might allow educators to be more intentional when curating students' educational experiences so that American legal education might not be forever shackled to the ruminations of nineteenth-century science enthusiasts. Specifically, I suggest addressing three key barriers to pedagogical innovation. First, law schools should continue to refuse to participate in the *U.S. News & World Report*'s "Best Law School" rankings and any other ranking system that threatens to punish deviation from a centuries-old pedagogical precedent as though it were a form of educational malpractice. Second, to encourage faculty to modernize their pedagogical approaches, law schools should incentivize innovative teaching the same way they incentivize innovative research—with substantive, rather than symbolic, rewards. Finally, the ABA should cap the student-faculty ratio within 1L courses so that professors can be more concerned with efficacy than efficiency when determining their teaching and assessment techniques.

I. HOW DARWINISM, STATUS ANXIETY, AND PROFIT MOTIVES BIRTHED A

[108] *See* sources cited *infra* note 388.

[109] *See infra* Section II.B.

[110] *See id.*

[111] *See, e.g.*, Kennedy, *supra* note 41, at 601 (claiming course content and professors' comments dissuade students from pursuing public interest work for poor and local communities).

[112] *See* Bliss, *infra* note 418, at 1975 ("A long line of survey findings at a range of law schools have suggested that roughly half or more of the incoming law students who state a preference for working in the public-interest sector will take positions in private law firms upon graduation.").

[113] *See infra* Section II.C.

LEGAL EDUCATION MEANT TO EXCLUDE

Institutional theorists have conceptualized legitimacy as a staggered social process that is often driven by contingent circumstances.[114] First, individuals within an organization create practices to resolve concerns at the local level.[115] Second, the majority of the organization begins to replicate those practices.[116] Third, the practices are then diffused to other organizations within the industry.[117] Finally, after a set of practices has become sufficiently saturated across organizations, it becomes regarded as legitimate.[118] Once the practices become widely accepted, entrants to the field are compelled to adopt them to signal their own legitimacy.[119] Over time, as the concerns that inspired the initial creators become less relevant, their practices can continue to define an industry's understanding of what constitutes legitimate procedure, even as those practices become ill-suited to meet the evolving needs of the field.[120]

This Part of the Article uses this social process framework to explain how Langdell's innovations, originally created to turn Harvard Law School into a site where students would learn to think like scientists, have become widely regarded as the legitimate means by which to teach students how to "think like a lawyer."[121]

A. *The Concerns That Birthed the Langdellian Model of Education*

To contextualize Langdell's educational model, it is important to note the epistemological currents of the late nineteenth century that gave rise to his pedagogical innovations. A rapid succession of scientific advancements during the mid-1800s triggered a crisis in intellectual authority.[122] Before then, Americans widely recognized Christian doctrine as providing the most respected explanations of both nature and mankind.[123] Still closely tied to their Protestant

[114] *See, e.g.*, Johnson et al., *supra* note 56, at 72-73.

[115] *Id.* at 60.

[116] *Id.*

[117] *Id.* at 60-61.

[118] *Id.* at 61.

[119] *Id.*

[120] *Id.*

[121] Mertz, *supra* note 37, at 491.

[122] The crisis came to be known as "the conflict thesis." Scientists of the day argued that there was irreconcilable intellectual tension between religion and science. Moreover, they argued that scientific discovery discredited many Christian beliefs. John Draper is most associated with the conflict thesis. He believed "[t]he history of Science is not a mere record of isolated discoveries; it is a narrative of the conflict of two contending powers, the expansive force of the human intellect on one side, and the compression arising from traditionary faith and human interests on the other." JOHN WILLIAM DRAPER, HISTORY OF THE CONFLICT BETWEEN RELIGION AND SCIENCE, at vi (1875).

[123] DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 54 (1991) ("The problem of intellectual authority developed during the 1860s and 1870s, as the harmony between

origins, both the educated and uneducated tended to turn to biblical scripture and clergymen to help them make sense of natural events.[124] However, during the 1860s and '70s, credible scientific theories emerged that directly contradicted scripture.[125] Midcentury theories of thermodynamics, matter conservation, and evolution all suggested that science, rather than the Bible, had the power to provide a complete explanation of the world.[126]

A particularly potent force of intellectual destabilization was Charles Darwin's groundbreaking 1859 book, *On the Origin of Species*.[127] Darwin posited that populations evolve through a process of natural selection. His theory called into question the widely accepted story of creation presented in the Book of Genesis by suggesting humans share a common ancestor with other members of the animal kingdom.[128] The publication of Darwin's book, according to one historian, "effected an immediate and cataclysmic shift in outlook, casting into doubt ideas that had seemed basic to man's conception of the entire universe."[129] Fundamental understandings of how humans regarded themselves, their origins, and their future were suddenly and irreversibly disturbed.

Instead of being engines of production for scientific knowledge, American universities, at the helm of the Christian church, were often hostile to theories that contradicted biblical teachings.[130] Under clergymen's watch, institutions of higher education had dual, and sometimes competing, functions: education and evangelism.[131] When late-nineteenth-century scientific theories emerged that conflicted with biblical teachings, the common response of university leadership was to ban the teaching of heretical ideas.[132] In response to this collegiate censorship, in the late nineteenth century, thousands of young Americans

science and religion declared by virtually all segments of Protestant Christianity proved increasingly difficult to maintain.").

[124] *Id.* at 53-54.

[125] *Id.* at 54.

[126] *Id.*

[127] DARWIN, *supra* note 67.

[128] *See id.* at 122-23.

[129] MICHAEL T. GHISELIN, THE TRIUMPH OF THE DARWINIAN METHOD 1 (1969).

[130] *See* Mitchell L. Stevens & Ben Gebre-Medhin, *Association, Service, Market: Higher Education in American Political Development*, 42 ANN. REV. SOCIO. 121, 125-26 (2016) ("[E]arly US colleges became associational . . . by knitting themselves together in a wide variety of interorganizational associations. Religion was an early mechanism. Methodist, Baptist, Presbyterian, and other Protestant denominations linked regionally distributed schools into national webs, as did various orders of the Catholic Church." (internal citation omitted)).

[131] *Id.* at 125 ("Since their earliest settlements, Americans have used higher education as a vehicle for the aggrandizement of particular ethnoreligious groups and geographic regions. In building a new republic in which religious freedom was a founding tenet, pious citizens pursued Christian improvement and evangelism by founding colleges to train clergy, teachers, and missionaries.").

[132] ROSS, *supra* note 123, at 54-55.

flocked to European universities so they could learn the newest scientific theories that were, according to one historian, "literally remaking the world."[133]

During this exodus of college students, American scientists began to fight clergymen for control of the nation's universities.[134] They aimed to make American universities not merely safe for the sciences, but also institutions where science and, importantly, scientific reasoning would reign supreme. Over the course of a few decades, scientists backed by educated northeastern elites began to remake American universities in their image. In 1861, geologist William Barton Rogers founded the Massachusetts Institute for Technology, a university, he noted, "whose true and only practicable object" was "the inculcation of all the scientific principles which form the basis and explanation of (the arts)."[135] In 1866, science historian Andrew Dickson White cofounded Cornell University, which, he announced, would be "an asylum for *Science*—where truth shall be sought for truth's sake, not stretched or cut exactly to fit Revealed Religion."[136] In 1876, geographer Daniel Coit Gilman established Johns Hopkins University and became its first president.[137] In his inaugural address, he explained the purpose of the university was "[t]he encouragement of research . . . and the advancement of individual scholars, who by their excellence will advance the sciences they pursue, and the society where they dwell."[138] In 1891, ichthyologist and racial eugenicist David Starr Jordan became Stanford's founding president.[139] Jordan was widely recognized as "one of the leading scientific men of the country."[140]

It is important to unpack what the term "science" meant during this era. It was both a field of knowledge and a method of knowledge acquisition. By mimicking the methods employed by natural scientists, any field could become a science. As a Yale social science professor noted in 1873, every area of study could

[133] *Id.* ("German universities attracted some nine thousand Americans during the century after 1815, the great bulk of them between 1870 and 1900.").

[134] *Id.* at 56 (noting during late eighteenth century, "[northeast] gentry grew increasingly militant over control of the [American] colleges").

[135] 2 NAT'L RES. COUNCIL, RESEARCH—A NATIONAL RESOURCE 22 (1940).

[136] GOD AND NATURE: HISTORICAL ESSAYS ON THE ENCOUNTER BETWEEN CHRISTIANITY AND SCIENCE 2-3 (David C. Lindberg & Ronald L. Numbers eds., 1986); *see also* ROSS, *supra* note 123, at 56 (discussing White's founding of Cornell University).

[137] Maryann Feldman, Pierre Desrochers & Janet Bercovitz, *Knowledge for the World: A Brief History of Commercialization at Johns Hopkins University*, *in* BUILDING TECHNOLOGY TRANSFER WITHIN RESEARCH UNIVERSITIES: AN ENTREPRENEURIAL APPROACH 156, 156 (Thomas J. Allen & Rory P. O'Shea eds., 2014).

[138] *Id.* (quoting Daniel Coit Gilman, Inauguration Address at John Hopkins University (Feb. 22, 1876)).

[139] *See* David H. Dickason, *David Starr Jordan as a Literary Man*, 37 IND. MAG. HIST. 345, 345 (1941).

[140] *Id.* (quoting ORRIN L. ELLIOTT, STANFORD UNIVERSITY – THE FIRST TWENTY FIVE YEARS 1891-1925, at 40 (1937)); 2 ANDREW DICKSON WHITE, AUTOBIOGRAPHY OF ANDREW DICKSON WHITE 447 (1905).

become a science simply "by virtue of the methods it used."[141] Echoing this sentiment, nineteenth-century mathematician and racial eugenicist Karl Pearson noted the boundless potential of science:

> The field of science is unlimited; its solid contents are endless, every group of natural phenomena, every phase of social life, every stage of past or present development is material for science. *The unity of all science consists alone in its method, not in its material.* The man who classifies facts of any kind whatever, who sees their mutual relation and describes their sequence, is applying the scientific method and is a man of science.[142]

During this time, there was a widespread belief among scholars that not only could every field become a science by mimicking the natural sciences, but that every field *should* become a science. This sentiment reflects what historian Dorothy Ross has characterized as the prevailing nineteenth-century "belief that the objective methods of the natural sciences should be used in the study of human affairs; and that such methods are the only fruitful ones in the pursuit of knowledge."[143] In this era of scientific supremacy, disciplines—from languages, to history, to political science—began adopting the inductive methods relied upon by the hard scientists.[144]

In 1869, riding the wave of scientism that overtook American universities, Charles Eliot became President of Harvard University.[145] A trained chemist and founding professor of MIT, Eliot assumed the presidency at the tender age of thirty-five.[146] In his inaugural address, he announced three related aims of his presidency: to make higher education more rigorous, more competitive, and more masculine.[147] A key means to achieve all three, according to Eliot, was to make teaching across all departments more scientific.[148]

Social Darwinism informed Eliot's view of higher education. He was deeply influenced by the work of philosopher Herbert Spencer, who coined the phrase

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[141] ROBERT ADCOCK, LIBERALISM AND THE EMERGENCE OF AMERICAN POLITICAL SCIENCE: A TRANSATLANTIC TALE 113 (2014).

[142] KARL PEARSON, THE GRAMMAR OF SCIENCE 15 (Cambridge Univ. Press 2015) (1892).

[143] Dorothy Ross, *The Development of the Social Sciences*, *in* THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920, at 131 n.7 (Alexandra Oleson & John Voss eds., 1979).

[144] *See, e.g.*, WILLIAM R. HARPER & WILLIAM E. WATERS, AN INDUCTIVE GREEK METHOD 13 (Kessinger Publishing, LLC 2010) (1888) (exploring University of Chicago President William Rainey Harper's argument that Greek language should be learned by inductive methods).

[145] ADLER, *supra* note 66, at 143.

[146] *Id.* at 140-41, 143.

[147] *See id.* at 143; *see also* Bruce A. Kimball & Brian S. Shull, *The Ironical Exclusion of Women from Harvard Law School, 1870-1900*, 58 J. LEGAL EDUC. 3, 28-29 (2008) (noting during 1860s at Harvard, notion of ideal manhood shifted from softer "religious and beneficent ideal of manhood" to "manliness," which entailed "stronger, tougher, more physical man").

[148] ADLER, *supra* note 66, at 143.

"survival of the fittest" in his 1864 tome *Principles of Biology*.[149] Spencer relied on evolutionary theory to explain why certain people, societies, and social classes were more successful than others.[150] In his view, inequality could be attributed to an unavoidable truth: some groups had evolved to become superior to others. Therefore, Spencer argued, society need not guard against inequality but rather understand it as the natural outcome of the race among mankind, where intelligence, work ethic, and perseverance would distinguish the strong from the weak.[151]

As one early twentieth-century scholar noted, "Eliot indeed was Spencer's greatest disciple, almost, one might say, Spencer's only disciple."[152] In Eliot's view, colleges should become sites of sorting, intentionally aiming to distinguish the strongest young men from their weaker counterparts.[153] The best way to separate the wheat from the chaff, the scientist believed, was to design higher education to be Darwinian in nature. "In education, as elsewhere," Eliot noted, "it is the fittest that survives."[154]

Almost unrecognizable from the engines of competition that they are today, American universities of the 1800s often had lax admissions standards and few, if any, hurdles to graduation. Entrance examinations were rare, and students often passed classes by attendance alone, without any formal assessments.[155] It was not uncommon for students to graduate from university unable to read or write.[156] If one had the tuition, the time, and the right identity, it was fairly easy to earn a degree on both the college and professional levels.

Eliot was disturbed by the laissez-faire nature of American higher education, especially as it pertained to professional schooling. Writing in an 1875 Harvard Annual Report, he complained, "The schools of Law . . . which have sprung up all over the country during the last forty years have held no examinations for admission, and have required of candidates for admission no particular course of previous study."[157] As a result of these negligible standards, Eliot noted,

[149] HERBERT SPENCER, THE PRINCIPLES OF BIOLOGY 444 (1864).

[150] As Spencer would note, "This survival of the fittest . . . is that which Mr Darwin has called 'natural selection, or the preservation of favoured races in the struggle for life.'" *Id.* at 444-45.

[151] This idea would be essential to undergirding the imperial project as well as the eugenics movement and modern conservatism more broadly. *See id.* at 445 (stating those organisms that do not survive act as "purification of [the] species").

[152] ADLER, *supra* note 66, at 141 (internal quotation omitted).

[153] *Id.* at 144.

[154] *Id.* (quoting Eliot).

[155] Charles W. Eliot, *President's Report for 1874-75*, *in* ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 3, 23-24 (1876).

[156] Once Harvard implemented exams, faculty learned that many of their students were illiterate. Eliot wrote in his annual report, "[t]he large use of examinations in writing also brought into plain sight the shocking illiteracy of a part of the students, and made the Faculties quite ashamed of some of their pupils." *Id.* at 25.

[157] *Id.* at 24.

"[t]housands of ignorant, undisciplined men" entered the legal profession "with the scantiest technical preparation, to their own lasting injury and that of the community."[158]

Universities often kept barriers to entry and graduation as low as possible as a financial strategy.[159] In the 1800s, it was usually unnecessary to attend university to have a successful professional career. Therefore, to entice a critical mass of students to enroll and remain in college, university administrators were reluctant to erect hurdles to admission and graduation.

However, Eliot made a bold financial move at the beginning of his tenure. Upending the prevailing financial logic, Eliot hypothesized that if professors made higher education more difficult, the University would make more money.[160] He argued, "all reasonable measures of strictness, which it might be feared would reduce the amount of tuition-fees, will actually increase them."[161] Outlining the University's new financial strategy, Eliot wrote, "[a]n institution which has any real prestige and power will make a money profit by raising its standard . . . ."[162] As the theory went, once the University raised its standards, it would attract more elite students.[163] The President believed that "this improved class of students will in a marvellously short time so increase the reputation and influence of the institution as to make its privileges and its rewards more valued and more valuable."[164]

Rejecting the lax admission policies dominating American higher education, Eliot announced in his inaugural address that Harvard "does not owe superior education to all children [of the nation], but only to the élite—to those who, having the capacity, prove by hard work that they have also the necessary perseverance and endurance."[165] In the President's new system, the University would become a site of fierce and ongoing competition. It would be difficult for all but the brightest young men to gain admission and, once in, they would be able to make it out in only one of two ways: by flunking out, or by proving they had the stamina, intellectual fortitude, and determination to graduate.

In an age when science connoted the highest form of intellectual rigor, Eliot's preferred means to make university education more rigorous was to make it more scientific. Teaching reform became the central mission of his presidency. "The only conceivable aim of a college government in our day is to broaden, deepen, and invigorate American teaching in all branches of learning," he told the

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[158] *Id.*

[159] *See id.* at 26 (describing fear that heightened entrance requirements would reduce schools' incomes).

[160] *Id.*

[161] *Id.* at 27.

[162] *Id.* at 26.

[163] *Id.*

[164] *Id.*

[165] ELIOT, *supra* note 101, at 20.

Harvard community.[166] In a time when there was "endless controvers[y]" over which subjects were most important for students to learn, Eliot advised, "The actual problem to be solved is not what to teach, but how to teach."[167] He argued students across disciplines learned best through "the powers of observation,"[168] "inductive faculty,"[169] and scientific reasoning.[170]

Scientific methods were valued not merely because they were seen as more rigorous; they were also valued because they were regarded as more masculine. Subjectivity and intuition were deemed feminine, and thus less valued, ways of knowing.[171] Objectivity and logic, on the other hand, were constructed as inherently masculine, and thus superior. Nineteenth-century educators commonly believed that studying matters objectively and with empirical methods would lead to "[t]he transformation of [the] mind from female to male," or in their view, from undeveloped to evolved.[172] Taking this approach, Eliot advocated for rugged, do-it-yourself empiricism as a tool to construct masculinity and purge from young men the soft and feminine ways associated with boyhood. As he told the Harvard faculty, "The best way to put boyishness to shame is to foster scholarship and manliness."[173]

To achieve his science-based teaching reform, Eliot instructed "every department of learning [in] the University [to] search out by trial and reflection the best methods of instruction."[174] Yet, he was skeptical that existing faculty—particularly senior faculty—would be willing to embrace change. "To have been a schoolmaster or college professor thirty years," he once wrote, "only too often makes a man an unsafe witness in matters of education: there are flanges on his mental wheels which will only fit one gauge."[175]

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[166] *Id.* at 2.

[167] *Id.* at 1, 3.

[168] *Id.* at 6.

[169] *Id.*

[170] *Id.* at 3.

[171] Eliot said, "[t]he world knows next to nothing about the mental capacities of the female sex. Only after generations of civil freedom and social equality will it be possible to obtain the data necessary for an adequate discussion of woman's natural tendencies, tastes, and capabilities." *Id.* at 23. Forty years later, Eliot remained skeptical about the proper function of higher education for women. In 1908, he wrote in *Harper's Bazar* that to the extent that women were admitted into universities, their aim in being educated should be to improve the domestic sphere rather than enter the workforce. "[T]he prime motive of the higher education of women," Eliot wrote, should be developing "the capacities and powers which will fit them to make family life and social life more intelligent, more enjoyable, happier, and more productive." Charles William Eliot, *The Higher Education for Women*, 42 HARPER'S BAZAR 519, 522 (1908).

[172] EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE 39 (1996).

[173] ELIOT, *supra* note 101, at 18.

[174] *Id.* at 5.

[175] Charles W. Eliot, *The New Education*, ATL. MONTHLY, Feb. 1869, at 203, 204-05 (1869), https://www.theatlantic.com/magazine/archive/1869/02/the-new-education/309049/.

To Eliot's dismay, he was unable to fire recalcitrant senior faculty, nor did he believe that he would be able to compel them to modernize their teaching approaches.[176] Therefore, rather than focus on converting existing instructors, Eliot went in search of new professors who were already evangelists for scientific teaching. Immediately upon assuming office, he went on a hiring spree. Across departments, Eliot hired novice professors who lacked strong reputations in their fields but who passionately believed that their disciplines should be properly studied and taught with the methods relied upon by the hard sciences.[177]

In his faculty recruitment efforts, the President was partial to devotees of Darwinian methods. Penning the forward to an edition of *The Origin of Species*, Eliot commended Darwin for putting forth a method of study that could improve disciplines as disparate as anthropology, sociology, psychology, religion, language, and history.[178] Eliot looked for instructors who would take Darwin's methods and apply them to better their respective fields. The year he became President, he hired philosopher John Fiske, who argued that societies evolved like organisms and that by relying on Darwin's theory of evolution, one could identify the scientific principles governing social progress.[179] He also hired historian Henry Adams, who relied on Darwinism to argue that history evolved along a predetermined path and that scientific principles, once discovered, could predict the fall of an empire.[180]

Most importantly for our purposes, Eliot hired Christopher Langdell, who believed law was an evolutionary science, and with rigorous inductive analysis, law students could extract from judicial opinions the scientific principles that would allow them to predict "with constant facility and certainty" how a judge would settle a future legal dispute.[181] Explaining why he hired someone with no teaching or scholarly experience and with an unfavorable reputation among the

[176] Throughout his career, Eliot pondered what to do with older educators who he believed stood in the way of progress. He wrote in 1909, "One of the difficulties which beset American school committees or boards is the difficulty of disposing humanely of old teachers whose efficiency is impaired." Charles W. Eliot, *Educational Reform and the Social Order*, 17 SCH. REV. 217, 221 (1909), https://www.journals.uchicago.edu/doi/pdf/10.1086/435325.

[177] *See, e.g.*, sources cited *infra* notes 181-85.

[178] Charles W. Eliot, *Introductory Note*, *in* CHARLES DARWIN, THE ORIGIN OF SPECIES (1859), *reprinted in* 11 THE HARVARD CLASSICS 5-8 (Charles W. Eliot ed., 1909), https://babel.hathitrust.org/cgi/pt?id=nyp.33433082496005&view=1up&seq=34&size=175 [https://perma.cc/D5MK-FEEK].

[179] For an elaboration of Fiske's argument, see 1 JOHN FISKE, OUTLINES OF COSMIC PHILOSOPHY, at vii (5th ed. 1874).

[180] In much the same way that Langdell argued law helped to organize the "ever-tangled skein of human affairs," LANGDELL, *supra* note 71, at vi, Adams argued, "[h]istory is a tangled skein," but by unearthing the laws governing its trajectory, America could avoid some of the tragedies that led to the fall of other nations. HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 302, 474-88 (1905).

[181] LANGDELL, *supra* note 71, at vi.

bench and Bar,[182] Eliot recalled that, in his interview, Langdell said he "wished to teach law . . . in a new way."[183] Recounting the conversation, the President noted:

> He told me that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.[184]

So impressed with Langdell's vision of teaching law as a science, Eliot not only hired him to join the faculty over the objections of existing professors, but he also appointed him Dean of the Law School even though Langdell was the least experienced member of the faculty.[185] In doing so, Eliot aimed to empower the junior upstart to break through the conservative teaching approaches of his more senior colleagues.

Langdell had his own reasons for teaching law as a science, many of which concerned financial gain for the Law School. In 1870, when he accepted the deanship, Harvard Law struggled financially.[186] Most lawyers did not attend law school, opting instead to apprentice for a practicing attorney.[187] The apprenticeship model, with its ability to offer hands-on training, client interaction, and intimate mentorship, had an undeniable competitive edge over law schools, which taught students primarily through a series of lectures.[188] It was difficult for the Law School to entice enough students to turn a profit, so tuition had to be intentionally depressed so as to not provide yet another reason for aspiring lawyers to turn to apprenticeships.[189]

Langdell recognized that law schools were playing a losing game. To defeat the competition, he needed to carve out an educational offering that could not be

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[182] According to Jerome Frank, Langdell was a "cloistered, retiring bookish man" of "strange character." Frank, *supra* note 34, at 908. He practiced law for sixteen years, but his legal work was atypical. His clients were other lawyers and his legal work, done largely in isolation, consisted of helping to prepare documents so other lawyers could engage in litigation. *Id.*

[183] Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 518 (1920).

[184] 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 361 (1908).

[185] For a more in-depth discussion of Langdell's appointment to the deanship after being on the faculty for less than a year, see WILLIAM P. LAPIANA, LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 7-14 (1994).

[186] COQUILLETTE & KIMBALL, *supra* note 95, at 282 (noting in period immediately after Civil War, "[f]inancial missteps" by Harvard Law School leadership "left the school in poor financial condition").

[187] *Id.* at 1-2.

[188] *Id.* at 2-4.

[189] To compete with apprenticeships, law schools most often pegged their tuition to the going rate that students paid to train as an apprentice at a law firm. *Id.* at 51.

easily attained via an apprenticeship. A scientific approach to legal study represented an ideal competitive advantage. Without it, Langdell feared the Law School would soon face its demise. As he told his colleagues, in an era when apprenticeships offered superior legal training, "[a] Law School which does not profess and endeavor to teach law as a science has no reason for existence."[190] He warned that "[i]f it be not a science," then law was a trade, and as a trade it was best "learned by serving an apprenticeship to one who practices it."[191] Taking this argument to its logical end, law schools were superfluous institutions and, more concerning to the new Dean, they were financially unsustainable.

Teaching law as a science had the added potential of elevating the status of law professors. In 1870, when Langdell joined the faculty, law professors were often viewed as misfits on the university campus. Compared to their colleagues in other departments, who were renowned for their scholarly achievements, law professors were regarded primarily as tradesmen who were hired because they held a favorable reputation at the Bar.[192] Once on the faculty, rather than devoting themselves to the life of the mind, law professors often maintained their legal practice, giving the impression that law teaching was little more than a side gig to bring in extra income.[193] This all furthered the perception that law professors were intellectually unserious and that law school was a second-rate institution.[194] Langdell recognized that if Harvard's faculty taught law as a science, law professors and the Law School could command respect from other departments. Reflecting upon his motives, he said that in teaching law as a science, "I have tried to do my part towards making the teaching and the study of law [within Harvard] worthy of a university" and make the "Law School not the least creditable of its departments."[195]

B. *Turning Law into a "Most Difficult Science"*

Under Langdell's deanship, the purpose of law school would no longer be preparation for legal practice, which was admittedly best achieved via apprenticeship. Instead, its *raison d'être* would become teaching students the science of law. Distinguishing the goals of the competing models of legal training, Langdell conceded that the "art of the attorney, being in its nature local,

[190] WARREN, *supra* note 184, at 361.

[191] *Id.* at 374.

[192] *See* Kimball, *supra* note 23, at 640 (noting Langdell and Eliot faced stiff opposition to hiring faculty based on academic merit).

[193] *Id.* at 620 (explaining Langdell, in joining Harvard's faculty at forty-four, took first steps in developing teaching of law as career itself).

[194] The unflattering perception of American law faculty stood in distinction to the reputation of law professors in many European countries, who were recognized as intellectual leaders. Thus, Langdell noted, teaching law as a science, rather than as a trade, had the potential to place Harvard Law professors "in the position occupied by the Law Faculties in the universities of continental Europe." Langdell, *supra* note 73, at 514.

[195] *Id.*

should be acquired in the place where it is to be practiced."[196] However, "the science of the advocate," he distinguished, "may be best acquired . . . in the place where that system of thought is studied and taught most exclusively as a science."[197] That place, according to Langdell, was in the scholarly halls of a law school.[198]

Yet, it was not enough for legal study to be scientific. To aid in President Eliot's quest to make Harvard a site of social Darwinism and to rebut the unscholarly reputation of law schools, legal study had to be inherently difficult. Langdell explained that he aimed to design a model of legal education such that it "will scarcely be disputed" that law is "one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it."[199] In crafting his model, he hoped to create the perception that only a first-rate scholar of the highest intellect was capable of teaching law, and that even the sharpest students were incapable of understanding it without significant mental exertion, stamina, and expert assistance. In this way, Harvard Law could be transformed in the public consciousness from a middling institution into a home for intellectual warriors where only the strongest students survived.

1. The Casebook

For the Law School to be a formidable competitor of apprenticeships, law books had to displace practicing attorneys as the most respected source of legal knowledge. Langdell told his faculty that to lure aspiring attorneys away from apprenticeships, "it was indispensable to establish at least two things: first that law is a science; secondly, that all the available materials of that science are contained in printed books."[200] However, the books could not be the treatises and textbooks that law professors and seasoned attorneys traditionally relied upon to teach young attorneys. Authors of legal textbooks and treatises went to great lengths to summarize and synthesize the law for ease of understanding.[201] The user-friendly nature of these texts was a problem for Langdell, because it allowed students to learn the law through independent study, rendering law professors unnecessary.

For law schools to prevail, the most trusted legal texts needed to be sufficiently opaque that students would be unable to understand them without significant assistance—an amount of assistance that busy attorneys would be incapable of offering. This would make the law professor, rather than the seasoned attorney, the most important guide in one's legal education. Explaining

[196] Gordon, *supra* note 83, at 73 (internal quotes omitted).

[197] *Id.*

[198] *Id.*

[199] Langdell, *supra* note 73, at 515.

[200] *Id.* at 514-15.

[201] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 313-14.

the strategy behind creating the casebook to supplant legal treatises and textbooks as students' primary reading material, Langdell said:

> If . . . there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means—for instance, the work of a lawyer's office, or attendance upon the proceedings of courts of justice—it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him, then a university, and a university alone, can furnish every possible facility for teaching and learning law.[202]

To ensure that aspiring attorneys would need professors to understand their legal texts, Langdell created the first casebook as simply a compilation of judicial opinions with no headnotes or editorial explanations.[203] Denigrating the user-friendly nature of treatises and textbooks, Langdell wrote on the first page of his contracts casebook, "shortcuts are a waste of time . . . it is better to seek the sources than to follow the tributaries."[204] His casebook, he wrote, was meant "to compel the mind to work out the principles from the cases" without editorial assistance.[205]

In organizing the casebook, Langdell turned to Darwin's evolutionary taxonomy for inspiration. Legal treatises were traditionally organized by subject matter or by parties to the disputes.[206] For instance, in a nineteenth-century contracts treatise, one might find the table of contents organized as such: 'Contracts about Coal,' 'Contracts of Drunkards,' 'Contracts of Married Women,' 'Contracts of Seamen,' 'Contracts of Slaves,' and so on.[207] Darwin was not so haphazard in his classifications. To observe the process of natural selection, the scientist first placed species into their appropriate categories. *Homo sapiens* as a species, for example, belonged to the *Homo* genus, the primate order, the mammal class, and the animal kingdom.[208] Applying this logic to contract law, Langdell treated judicial opinions as a kind of legal species that

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[202] Eliot Norton, *The Harvard Law School*, 2 AM. U. MAG. 187, 188-91 (1985) (quoting Professor Christopher C. Langdell, Harv. L. Sch., Dinner of the Harvard Law School Association (Nov. 5, 1886)).

[203] COQUILLETTE & KIMBALL, *supra* note 95, at 313.

[204] LANGDELL, *supra* note 71, at iii; COQUILLETTE & KIMBALL, *supra* note 95, at 314 (translating this text, originally in Latin).

[205] COQUILLETTE & KIMBALL, *supra* note 95, at 314 (internal quotations omitted).

[206] *Id.* (contrasting Langdell's method of organization to traditional arrangement of cases in treaties "by their subject matter or holdings").

[207] *Id.* at 315.

[208] *See Homo Sapiens*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Homo%20sapiens [https://perma.cc/E3ZG-X87N] (last visited Jan. 15, 2024).

belonged to a specific doctrinal genus. Rather than organize his contracts casebook by subject matter or parties, Langdell reclassified contract cases into their doctrinal genera, namely mutual consent and consideration.[209]

Darwin believed that once properly classified, organisms had to be studied over an extended period. In *On the Origin of Species*, he wrote that "natural selection [had] by slow degrees" produced the current state of organisms.[210] Langdell parroted Darwin's language to explain why it was important for law students to trace the genealogy of common law doctrines: "doctrines," he wrote, "arrived at [their] present state by slow degrees."[211] "[I]n other words," he continued, "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 . . . the only way of mastering the doctrine effectually is by studying the cases in which it is embodied."[212] Following this logic, rather than just learning the current state of the law—which would be sufficient if the goal were preparation for legal practice—law students would have to read centuries-old judicial opinions in chronological order within their doctrinal subcategories. To behold the process of natural selection at work, they would also be required to analyze both living and extinct specimens, or in legal translation, both good and overturned case law.

Modeling legal study after Darwin's evolutionary biology would place significant limitations on the study of law. Because judicial opinions were in conversation with each other across time, they could readily be studied as evolutionary species. However, statutes were often self-contained legal instruments which did not refer to each other, so they could not as easily be analyzed from an evolutionary approach. As a result, unless a statute was analyzed within a judicial opinion, it was not to be given serious consideration in the Law School.[213]

Second, Langdell wrote that legal science should be "exclusive[] of everything local."[214] This meant that even though contract law varied by state, his casebook would not cover in any depth the laws of a particular locale. The Dean argued this was because state-specific laws were part of the provincial art that was taught in apprenticeships, but to understand the more "noble" science of law, students could not be confined to a single region.[215] Instead, they would

[209] COQUILLETTE & KIMBALL, *supra* note 95, at 315-16 (noting Langdell's casebook was first of its kind in United States and England).

[210] DARWIN, *supra* note 67, at 175.

[211] LANGDELL, *supra* note 71, at v.

[212] *Id.* at vi.

[213] *See* Robert W. Gordon, *The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1243-44 (1995) ("From the perspective of legal science, statutes cannot be understood scientifically. They are as 'preferences' are to the economist, random exogenous events.").

[214] Gordon, *supra* note 83, at 73.

[215] WARREN, *supra* note 184, at 361.

have to search across the jurisdictions of England and the United States—or, in evolutionary parlance, the common ancestor and its descendant.[216]

Though cloaked in scientific reasoning, his refusal to cover state law was likely due to financial rather than pedagogical concerns. Harvard needed to maximize its tuition revenue by appealing to students who would practice in various states across the country. For the cash-strapped institution, it was impossible to hire enough professors to teach the laws of each state. However, apprenticeships, being local in nature, taught apprentices the laws of the state where they aimed to practice. Rather than concede that apprenticeships had yet another leg up on their competition, Langdell presented the Law School's educational shortcoming as evidence of its scientific greatness.[217]

Finally, for law to be a science, judicial outcomes could not be dependent on the subjective feelings of judges. Judges, according to the Dean, were not influenced by politics, personal preferences, or even notions of fairness—all of which he dismissed as "irrelevant" to understanding legal opinions.[218] In his view, judges were purely motivated by their logical adherence to precedent. Therefore, in analyzing legal development, students would be required to remain within the four walls of the judicial opinion because only there could they find the scientific principles that explained legal outcomes.

Privately, Langdell was aware that judges often allowed their personal views and feelings to drive their decisionmaking.[219] However, if he acknowledged that inconvenient truth, he risked discrediting not just his pedagogical enterprise but also the reputation of the Law School. In an era when subjectivity was tied to femininity, and femininity to a lack of intellectual rigor, conceding that legal interpretation was motivated by emotions threatened to emasculate legal study.[220]

Acknowledging the subjectivity inherent in judicial decision making would also open the door to the notion that women were just as capable of studying law as their male peers—a door which Langdell wanted bolted shut.[221] In the nineteenth-century political climate, if women could understand the law, that

[216] Langdell noted the "science of the advocate" was "confined within no narrower limits than the system of English and American law." Gordon, *supra* note 83, at 73.

[217] Legal educators would eventually critique the casebook for failing to prepare students to practice law precisely because lawyers generally needed to know local laws and the casebook offered little to no guidance there. *See, e.g.*, Eugene Wambaugh, *The Next Step in the Evolution of the Case-Book*, 21 HARV. L. REV. 92, 95 (1907) (arguing future law students would need jurisdiction-based casebooks).

[218] COQUILLETTE & KIMBALL, *supra* note 95, at 324-27 (discussing Langdell's legal formalism school of thought).

[219] *See id.* at 333-34 (arguing Langdell did not sincerely believe in legal formalism but worried that acknowledging subjectivity in law would further undermine an already denigrated legal profession and legal education).

[220] *Id.* at 496 (noting "Victorian Era" fear that women were extinguishing American masculinity).

[221] *See* Kimball & Shull, *supra* note 147, at 26 (discussing Langdell's views on gender).

meant that, by definition, legal study was not rigorous. Langdell argued that "the law is entirely unfit for the feminine mind—more so than any other subject."[222] Given the rugged masculinity inherent to legal study, he warned that women risked personal "injury" if they attempted to understand the inner workings of judicial decision making.[223]

Therefore, to protect the idea that law was an objective science in the face of conflicting cases which suggested otherwise, Langdell made the circular argument that while law was in fact a science, most judges did not properly adhere to the science and therefore students should not study their opinions. "[T]he cases which are useful and necessary for" the purpose of studying law as a science, Langdell wrote, "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."[224] In creating his casebook, he chose to include those cases that would uphold his thesis that common law was internally consistent, linear, and rooted foremost in judges' faithful adherence to precedent. In doing so, he gave students the false impression that law was, in fact, an objective science.

2. The 1L Courses

Langdell's choice to make the casebook the core legal text at Harvard Law had ramifications for which courses students could take. Early in his tenure, Langdell pushed for a standardized curriculum for all law students. In doing so, he uprooted the existing model, under which students had the freedom to take whichever courses suited their interests.[225] Under the new curricular plan, all students would have to take the same classes during their first year. After that, they would have more latitude to determine their educational paths. The core question, however, was which courses should be part of the required curriculum.

Across the nation, there were competing ideas about what courses law students should have to take. Understanding law school to be a pathway to public service, nineteenth-century administrators at Columbia Law School planned for its students to take Political Economy, Modern History, and International Law.[226] Similarly, when Woodrow Wilson was asked to design a law school for Princeton University, he included courses on General Jurisprudence, History of

[222] *Id.*

[223] *Id.*

[224] LANGDELL, *supra* note 71, at vi.

[225] COQUILLETTE & KIMBALL, *supra* note 95, at 344 (quoting HENRY JAMES, 1 CHARLES W. ELIOT: PRESIDENT OF HARVARD UNIVERSITY, 1869-1909, at 268 (1930)) ("[T]he curriculum 'worked like a merry-go-round. . . . When a student enrolled he got aboard at whatever point was passing at the moment, and sat down between men who had perhaps been reading and attending lectures for a whole year.'").

[226] Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 343 n.6 (2007) (discussing rival curricular models and evolution of law school curriculum).

Law, Legal Philosophy, and Administrative Law.[227] Taking a different approach, educators at the University of Chicago's law school created a curriculum designed to prepare their young lawyers to handle the new transactional matters deriving from the industrialization of the Gilded Age.[228] Core coursework included Railroad Regulation, Relation of State to Industry, Labor and Capital, Administrative Law, and Legislation.[229]

These competing curricular models posed two problems for Langdell. First, they threatened to displace the case method as the crown jewel of Harvard Law. For Langdell's scientific model to cohere, legal study had to be centered around his designated legal specimen: the judicial opinion. Courses like Legislation and Administrative Law would require students to read statutes.[230] Jurisprudence, Legal History, and Legal Philosophy would require students to study works of history and philosophy.[231] Assigning students these texts in foundational courses would undermine Langdell's argument that law was an independent science by implying that it could not be fully understood simply by analyzing judicial opinions.

Second, an interdisciplinary approach to the study of law would also invite what was likely, for Langdell, an even more threatening proposition: that law professors were not wholly unique in their ability to teach law students. Recall that one of his core aims was to elevate the status of law professors within the academy by proving that only the most "enlightened" minds could explain legal development.[232] Law school courses that could be credibly taught by philosophers or political scientists would muddy the disciplinary distinctions between law and other fields. In so doing, they would suggest that law professors were not as unique in their scholarly ability as Langdell claimed.

To protect the case method as the sine qua non of Harvard Law School, and to police the boundaries of who could appropriately teach law, in 1873, Langdell helped establish Harvard's first-year curriculum as Property, Contracts, Torts, Criminal Law, and Civil Procedure.[233] Importantly, these courses were not chosen because they were considered foundational to legal practice. To the contrary, in the 1870s, subjects like Civil Procedure and Torts were only just beginning to emerge as conceptual fields of law.[234] Rather, the "Big Five" courses were foundational to the case method because they could easily be taught through judicial opinions and from an evolutionary perspective. As a

[227] *Id.* at 344 (noting Princeton Law never materialized).

[228] *Id.* at 346.

[229] *Id.* (describing how new intellectual approaches created new bodies of law beyond Harvard's traditional subjects).

[230] *See id.* at 346-47.

[231] *See id.*

[232] Langdell, *supra* note 73, at 515.

[233] KIMBALL, *supra* note 86, at 208-09 (listing required first-year curriculum Langdell started in 1873).

[234] *Id.* at 207 (describing how Harvard Law School's curriculum emphasized emerging fields over practical topics).

bonus, compared to some of the public law courses, these subjects were not as susceptible to encroachment by social scientists, philosophers, and other academics across campus.

3. The Socratic Method

In modern times, the Socratic method in law schools is often justified as a means to prepare students for the kinds of colloquies they might be required to engage in as courtroom litigators.[235] However, Langdell was decidedly uninterested in preparing students for legal practice. When he introduced the Socratic method into law school courses, to the extent he aimed to simulate a professional working environment, it was more likely the operating room than the courtroom.

President Eliot had a particular vision for how classrooms should be run. He believed young men learned best by doing, rather than by listening. He argued the lecture was a wasteful method of instruction, noting "[t]he lecturer pumps laboriously into sieves. The water may be wholesome, but it runs through. A mind must work to grow."[236] As a professor at MIT, Eliot coauthored the first chemistry laboratory manual used in an American classroom so that students could conduct laboratory experiements instead of merely listening to chemistry lectures.[237] He believed interactive learning would help them to better understand otherwise abstract concepts. To this end, when he took over as Harvard's President, Eliot set out to do away with the lecture method as the default teaching method across campus and instead reimagine classrooms as laboratories where students would learn by doing.[238]

Medical school teaching offered a particularly attractive template for Eliot's pedagogical vision. For medical students, the classroom simulated the operating room where students were required to dissect, analyze, and rehabilitate their specimen.[239] "The training of a medical student," he argued, "offers the best

[235] *See, e.g.*, Elizabeth Garrett, Review, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2d 199, 202 (1998) (arguing in defense of Socratic method, "[s]peaking in public, whether in the courtroom, before a group of clients or opposing counsel . . . is part of every lawyer's job, so developing the ability to present ideas forcefully and effectively in such contexts is integral to becoming a lawyer").

[236] ELIOT, *supra* note 101, at 15.

[237] The point of the laboratory method was to have students "grasp the idea of making their own observations without imitating or copying, then describing accurately what they saw, and lastly, drawing the right inference from what they had themselves done and seen." Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334-35 (1979).

[238] ELIOT, *supra* note 101, at 318-19 ("The old-fashioned method of teaching science by means of . . . demonstrative lectures has been superseded . . . by the laboratory method, in which each pupil . . . is taught to use his own senses.").

[239] Eliot was instrumental in transforming the way medical school classes were taught. As one historian noted, "of singular importance to the history of American medical education was Eliot's initiation of clinical and laboratory instruction in [Harvard's] Medical School at the expense of the predominant lecture method of teaching medical subjects." Chase, *supra*

example we have of the methods and fruits of an education mainly scientific. The transformation which the average student of a good medical school undergoes in three years is strong testimony to the efficiency of the training he receives."[240]

However, Eliot had to be cautious when arguing that law students learn best by doing. That claim, when taken to its logical conclusion, would suggest that the apprenticeship offered a superior means of legal education. Therefore, he trod lightly, insisting that the law school, rather than the lawyer's office, provided the ideal facilities to learn the law. In the University's 1873-1874 annual report, Eliot wrote,

> Medicine and surgery must be learned, partly, it is true, from books, but largely from the bodies of the sick and wounded; whereas law is to be learned almost exclusively from the books in which its principles and precedents are recorded, digested, and explained. The medical student must spend a large part of his time in hospitals; but a law student who should habitually attend courts, except during the short period when he is acquainting himself with office work and practice, would waste his time. The law library, and not the court or the law office, is the real analogue of the hospital.[241]

However, Eliot still believed the law classroom should be a site of interactive learning to the extent feasible. Bringing to life his President's vision, Langdell began to teach via the Socratic method, and in so doing he replicated medical school training.[242] In medical school classrooms, students analyzed, dissected, and rehabilitated human bodies. In law school classrooms, students would be asked to do the same with their chosen specimen, the judicial opinion.[243] The professor would "cold call" his students and require that they perform surgery on their assigned case.[244] Reciting the facts was akin to conducting patient intake. Identifying the core legal issue was diagnosing the ailment. And in the series of questions to follow, students were tasked with dissecting the opinion to unearth the legal principles embedded within.[245]

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note 237, at 340. In 1874, Eliot introduced clinical and laboratory study to Harvard Medical School, and that model was soon imitated by medical schools nationwide. *Id.* at 341.

[240] ELIOT, *supra* note 101, at 16.

[241] Charles W. Eliot, *President's Report for 1873-74*, *in* ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 3, 27 (1875).

[242] Note, *The Case System of Teaching Law*, 1 VA. L. REG. 298, 299 (1895) (quoting Letter from Christopher Columbus Langdell, Dean of Harvard L. Sch. (1878)).

[243] Sydney G. Fisher, *The Teaching of Law by the Case System*, 36 AM. L. REG. 416, 418-19 (1888) (analogizing how, with new "case method" of study, law students dissected judicial opinions).

[244] *See* Note, *supra* note 242, at 299.

[245] Langdell would go on to explain the mechanics of the Socratic method:

> The instructor begins by calling upon some member of the class to state the first case in the lesson, *i. e.*, to state the facts, the questions which arose upon them, how they were decided by the court, and the reasons for the decision. Then the instructor proceeds to

Beyond furthering Eliot's pedagogical aims, there were two other institutional benefits of implementing the Socratic method. First, it helped to plaster over another competitive weakness of the Law School compared to an apprenticeship. While the point of the Socratic method was not to simulate the courtroom, the format bore some resemblance to the hard-hitting interrogations that a layperson might imagine consumed a lawyer's day-to-day life. To the uninitiated law student, therefore, the apprenticeship no longer seemed unique in its ability to expose aspiring lawyers to a practical component of their chosen field.

However, as many students would discover upon graduation, the Socratic method was not particularly useful in developing the core competencies that their evolving profession required. The industrialization of the late 1800s prompted a change in the legal profession. Lawyers' jobs shifted from the courtroom to the office as their work became increasingly transactional in nature.[246] Few attorneys were involved in courtroom battles in which they would have to respond extemporaneously to a series of complex questions before a crowd of onlookers. Instead, most would have careers where "a day in the life" would be replete with far more mundane tasks, such as drafting charters, leases, mortgages, and bond indentures.[247] Consequently, to the extent that students believed that the Socratic method gave them a glimpse into the typical life of a lawyer, most would soon find that they had been operating under an illusion.

As a second, more important, institutional benefit, the Socratic method helped to further a culture of social Darwinism in the Law School. Under Eliot's nineteenth-century theory that Harvard was to be a site of masculine construction, the Socratic method became a core element of "the gladiator model of legal education."[248] While most forms of combat involved students being pitted against one another, the Socratic method required that a young man spar directly with his professor.[249] Social humiliation came with giving incorrect or stumbling responses.[250] Acclaim was reserved for the few men who were able to surefootedly navigate an uncertain and often hostile terrain. This Darwinist mode of engagement helped to further a larger institutional aim of purging from

> question him upon the case. If his answer to a question is not satisfactory (and sometimes when it is), the question is put round the class; and if the question is important or doubtful, or if a difference of opinion is manifested, as many views and opinions as possible are elicited.

Id.

[246] Gordon, *supra* note 83, at 73 (describing this fundamental shift in legal practice).

[247] *Id.*

[248] Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 126-27 (1997).

[249] *See, e.g.*, Kennedy, *supra* note 41, at 593 (describing Socratic method, from student's perspective, as form of "pseudo-participation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you").

[250] *See id.*

young men the soft qualities associated with boyhood and constructing a tougher, more "manly" specimen.[251]

When Langdell first implemented the method, his students were aghast.[252] They were intimidated by the specter of being publicly interrogated about complex concepts to which they had only recently been introduced and therefore barely understood.[253] In response, the overwhelming majority dropped the Dean's class, leaving him with fewer than ten pupils.[254]

Student pushback against the Socratic method became so fierce that even President Eliot grew concerned.[255] However, after hearing favorable testimony from the handful of students who chose not to drop Langdell's class, Eliot "never questioned Langdell's teaching again."[256] From the President's perspective, Langdell's high course attrition rates were evidence that the process of natural selection was unfolding as planned: students who dropped were simply incapable of withstanding the rigors of a Darwinian education, and the few who remained were "the ablest men of the class," those most deserving of carrying the Harvard name.[257]

4. The Hypo Exam

For President Eliot, the European system of education represented a model to which American universities should aspire. Not only did universities across the pond embrace science, but they also demanded rigor from their students. Before assuming Harvard's presidency, Eliot traveled throughout Europe studying its educational systems in hopes of incorporating some of their best elements into American institutions of higher education.[258]

Particularly attractive to Eliot were the testing regimes at Oxford and Cambridge. While the exams at American universities were often unsystematic and unserious, at Oxbridge, formal examinations were considered a defining rite of passage into manhood.[259] As one historian noted, at these universities,

[251] *Id.*

[252] *See, e.g.*, Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 440 (1906) ("His attempts were met with the open hostility, if not of the other instructors, certainly of the bulk of the students.").

[253] *Id.* ("Most of the class could see nothing in [Langdell's] system but mental confusion and social humiliation.").

[254] *See id.* at 439; KIMBALL, *supra* note 86, at 145.

[255] *See* KIMBALL, *supra* note 86, at 146 (noting opposition to Langdell's methods became so strong President Eliot grew concerned and solicited views from Langdell's student supporters, who affirmed uniqueness of Langdell's teaching methods).

[256] *Id.*

[257] Batchelder, *supra* note 252, at 440-41.

[258] For a discussion of Eliot's exploration of European education systems, see HUGH HAWKINS, BETWEEN HARVARD AND AMERICA: THE EDUCATIONAL LEADERSHIP OF CHARLES W. ELIOT 20-61 (1972).

[259] PAUL R. DESLANDES, OXBRIDGE MEN: BRITISH MASCULINITY AND THE UNDERGRADUATE EXPERIENCE, 1850–1920, at 126 (2005) (noting at Cambridge University,

students viewed exam taking as "a specific act of masculine 'consecration and recognition.'"[260] Tests were not merely measures of proficiency but also "gauges of professional masculinity" that were used to assess students' "competitive spirit, endurance, stamina, strength, diligence, [and] ability to overcome adversity."[261] As a result, students often pushed themselves to their extremes to ace their exams and thereby define their position in the hierarchy of manhood.[262]

Oxbridge administrators used the specters of public acclaim and humiliation to fan the flames of competition. Professors posted exam results in public forums where scores of students scoured the lists to see how they performed in relation to their peers.[263] To make exam results even more of a spectacle, university administrators then published students' grades in city newspapers.[264] Absent individualized feedback, students were often unaware of the strengths and weaknesses of their exams. But they knew two critical data points: whether they had passed the class, and whether they could rightfully command respect from their peers and employers. Coveted professional opportunities, heightened social standing, and even better romantic prospects awaited those who performed laudably.[265] On the other hand, low performance could lead to social, professional, and perhaps actual, suicide.[266]

Eliot sought to introduce the Oxbridge testing regime to Harvard. He proposed requiring students to take public examinations and using exam results to rank students against each other.[267] Hearing of his plan, however, many in the Harvard community pushed back, believing that ranking students was inimical to the learning process.[268] Eliot argued that a rankings system would not only further students' learning but also help to build their character.[269] The fear of being at the bottom of the rankings and the hope of being atop would force young

"[b]y the 1840s and 1850s, written competitive examinations, now a firmly entrenched feature of undergraduate education, had achieved unparalleled importance").

[260] *Id.* at 124 (quoting PIERRE BOURDIEU, THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER 104 (Lauretta C. Clough trans., 1996)).

[261] *Id.* at 132-33.

[262] *Id.* at 138, 146-47.

[263] *Id.* at 133 (describing eager crowds that gathered to see posted grades).

[264] *Id.* at 128, 130-31.

[265] *Id.* at 144 ("Examinations for male undergraduates acquired significance in the world beyond the university as training exercises for a range of possible careers.").

[266] *Id.* at 139 ("Undergraduates also pointed to the ways in which their worries and fears could follow them to bed or even, in one intentionally amusing and provocative 1888 example from the Oxford paper *Undergraduate*, prompt students to commit suicide by throwing themselves into the River Cherwell . . . .").

[267] *See* KIMBALL, *supra* note 86, at 160-61, 265 ("The term 'public examination' was drawn from the English precedent of requiring students to pass highly competitive examinations written in common, rather than in private, in order to earn honors at Oxford and Cambridge universities.").

[268] ELIOT, *supra* note 101, at 17.

[269] *See id.* at 18.

men to push themselves. Explaining his rationale, he told the Harvard community:

> Many excellent persons see great offense in any system of college rank; but why should we expect more of young men than we do of their elders? How many men and women perform their daily tasks from the highest motives alone—for the glory of God and the relief of man's estate? Most people work for bare bread, a few for cake. The college rank-list reinforces higher motives. In the campaign for character, no auxiliaries are to be refused.[270]

Eliot was especially eager to implement this system in the University's professional schools. The year after he assumed the presidency, he drafted new university bylaws that stipulated that "no candidate for [a law degree would] be recommended except after thorough public examination."[271] The exams would be used to stoke competition among students. However, to be effective, the exams had to be difficult enough to stretch even the most agile mind.

Initially, most law professors failed to create questions difficult enough to fulfill the president's aim. Typically, examinations asked students to state a given legal rule. For example, an 1873 evidence exam asked students to "Give the rule as to a modification of a written contract by oral evidence."[272] A criminal law examination asked, "What is the criminal liability of infants?"[273] A key problem with these kinds of straightforward questions, from Eliot's perspective, was that too many students got them right.[274]

Langdell aimed to create a more onerous exam, one that would also uphold his theory of legal science. The hypo exam reflected his belief that law was a science consisting of certain legal principles, and once those principles were mastered, students could "apply them with constant facility and certainty to the ever-tangled skein of human affairs."[275] In his exams, students had to do just that: they were given a hypothetical, tangled skein of human affairs and asked to demonstrate their mastery of legal science by predicting how a judge would resolve the dispute.[276]

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[270] *Id.* at 17-18.

[271] WARREN, *supra* note 184, at 364.

[272] KIMBALL, *supra* note 86, at 162.

[273] *Id.*

[274] *See id.* at 213 (showing in early years of exam administration in the law school, with exception of Langdell and his protégé Ames, most professors passed most of their students; a passing grade was 70%, and with exception of those two professors, faculty tended to assign average grades in mid-seventies to low eighties).

[275] LANGDELL, *supra* note 71, at vi.

[276] As an example of an early prototype of the hypo exam, Langdell's 1873 Contracts exam read:

> A, of Bordeaux, having a quantity of brandy in New York, wrote to B, in New York, to whom the brandy had been consigned, offering to sell it to him on specified terms. B accepted the offer by letter, and immediately resold the brandy on his own account at a considerable profit. After the sale of the brandy by B, and before his letter of acceptance

Most students failed Langdell's hypo exam, and that was by design.[277] Bringing to life Eliot's vision that educational institutions should be sites of survival, Langdell presided over what came to be known as "an elimination tournament," whereby between one-fourth and one-third of the first-year class failed out of the school each year.[278] In this Darwinian academic culture, a high failure rate became an indication that a professor was protecting the Harvard brand. Eliot's public support of Langdell for flunking most of his pupils led to a competition among professors to see who could fail the most students.[279] Harvard Law Professor John Chipman Grey wrote defensively to President Eliot, "[i]t has been assumed that Mr. Langdell marks lower than any one else. . . . You will see that I mark at least as low as any one," he assured.[280] "If it is deemed for the advantage of the school that I slash more severely, I shall be very glad to do so."[281] One tried-and-true way to fail more students was to scrap straightforward test questions in lieu of the hypo exam.

Like Oxbridge faculty, Harvard law professors posted students' exam results in public forums. The release of grades functioned like the announcement of a race. Students would gather around to see how they performed in relation to their peers. In much the same way an announcer of a marathon would not bother giving contestants tips on their stride while calling the race, professors did not deem it necessary to give students specific feedback on their exam performance. The exam's purpose was not to correct any misunderstandings to improve students' legal knowledge. The primary purpose was not education, but stratification. From the law faculty's perspective, all the students needed to know was where they placed in the "tournament" and if they were eligible to participate in the next round.

C. *Langdell's Educational Model Becomes the Harvard Model*

Within Harvard Law School, Langdell's educational model was initially met with contempt from students, faculty, and administrators alike.[282] As word of his

reached A, the latter died. Was there, or not, a contract of sale between A and B, and why? If there was, was it unilateral or bilateral and why?

COQUILLETTE & KIMBALL, *supra* note 95, at 350.

[277] In the words of two historians, "Langdell believed that most [of his students] deserved to fail." *Id.* at 408. A passing grade was 70%, and Langdell's students' grades typically hovered in the low sixties. KIMBALL, *supra* note 86, at 213.

[278] *See* KIMBALL & COQUILLETTE, *supra* note 75, at 33-37.

[279] *See* KIMBALL, *supra* note 86, at 211-12.

[280] COQUILLETTE & KIMBALL, *supra* note 95, at 408.

[281] *Id.*

[282] KIMBALL, *supra* note 86, at 145 ("[C]ase method 'was seldom mentioned except to be criticized' by faculty, alumni, and members of the bench and bar, and the number of students attending Langdell's courses dwindled to seven or eight.").

innovations spread, his course enrollment plummeted.[283] His colleagues wrote scathing reviews of his casebook.[284] Campus administrators condemned his pedagogical approaches in university audit reports.[285] Yet within a couple of decades, the Langdellian model of legal education would become widely regarded as the Harvard model. How did his innovations go from being widely despised to being adopted by every professor in the Law School? A good deal of the answer lies in the interplay of power and personnel.

On the power front, while most actors at Harvard were hostile to Langdell's methods, the two people who believed in them most fervently also happened to be two of the most powerful figures in the institution, and they held on to their power for decades. Langdell would remain Dean of the Law School for twenty-five years.[286] Eliot would also have an unusually long tenure, serving as President of the University for forty years.[287] Together, they used their power to ensure Langdell's teaching methods would be replicated by incoming law faculty.

When Langdell first joined, the Law School only had three professors.[288] The faculty needed to expand for Harvard Law to become a financially viable institution that could enroll a large number of students.[289] In hiring decisions, the Dean made willingness to replicate his teaching model the core criterion for determining whether a candidate was eligible for serious consideration.[290]

However, in the 1870s, few outside of Harvard Law were familiar with Langdell's pedagogical methods. Those most acquainted with them were recent graduates, many of whom Langdell had personally taught.[291] Thus, to ensure his model of legal education would be replicated, Langdell aimed to pack the faculty with his former students.[292] The problem, however, was that most of his students were fresh out of law school and had little-to-no experience practicing law.[293]

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[283] *See id.* at 140 ("One reason for these low enrollments was that case method rendered the courses notoriously difficult for the students, and Langdell was least compromising in the inductive approach.").

[284] *See, e.g.*, Holmes, *supra* note 33, at 234.

[285] COQUILLETTE & KIMBALL, *supra* note 95, at 387 (discussing 1883 HARV. UNIV. BD. OF OVERSEERS, REPORT OF THE COMMITTEE FOR VISITING THE LAW SCHOOL).

[286] *Id.* at 217.

[287] *Id.*

[288] The three professors were Theophilus Parsons, Emory Washburn, and Nathaniel Holmes. *Id.* at 624-25.

[289] *See id.* at 305-11 (discussing Eliot's larger strategy for Harvard's finances and his alliance with Langdell).

[290] *See id.* at 386.

[291] *See id.* at 398.

[292] *See id.* at 385 ("Though elected dean and encouraged by the president, Langdell still needed colleagues to support his academic vision for legal education."); Kimball, *supra* note 23, at 637.

[293] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 385-87.

Under the traditional model of law faculty hiring, their inexperience in the field would have made them ineligible for consideration.[294]

To get his freshly minted acolytes on the faculty, Langdell used his institutional muscle to reconstruct the criteria for who was eligible to become a professor at Harvard Law.[295] No longer did experience practicing the law make one capable of teaching it. Instead, it was experience *studying* the law. Speaking to the Harvard community in 1886, Langdell said, "[w]hat qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law."[296]

The problem with hiring seasoned attorneys was not simply that they were unfamiliar with Langdell's teaching methods. The bigger problem, from the Dean's perspective, was that their experience in the field might have made them especially critical of his pedagogical approach.[297] Recent graduates did not know any better: having worked neither as apprentices nor as attorneys post law school, their primary exposure to the legal field came from learning the Dean's legal science. Unable to contrast legal theory with legal practice, they were prone to teach law the way Langdell had taught them.

However, it was unlikely that prominent attorneys who had successful careers in practice based on traditional modes of legal training would believe those modes to be so defective that they needed to master Langdell's newfangled legal science to effectively educate students. To make matters worse, within the legal community Langdell had been regarded as a mediocre lawyer, so prominent attorneys would be especially reluctant to accept law teaching tips from their professional underling.[298] Therefore, to protect his educational model, Langdell did not stop at arguing that scholarly experience was more important than practice experience in faculty hiring decisions. He took it one step further and argued that being an experienced lawyer was, in fact, a disqualification from joining the law faculty.[299]

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[294] *See* Kimball, *supra* note 23, at 618 (noting in 1873, when Harvard Law hired James Barr Ames, he was "first law professor in the United States who had never practiced or been a member of the bar").

[295] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 385-86 (describing Langdell's efforts to convince Eliot).

[296] *Id.* at 385 (quoting Christopher Colombus Langdell, Dean, Harvard L. Sch., Address to the Harvard Law School Association (Nov. 5, 1886), *in* REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING 48, 50 (1887)).

[297] *See id.* at 391.

[298] *See id.* at 309. As Jerome Frank noted, "[p]racticing law to Langdell meant the writing of briefs, examination of printed authorities. The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries . . . was virtually unknown (and was therefore meaningless) to Langdell." Frank, *supra* note 34, at 908.

[299] As Eliot would later recall, for Langdell,

Eliot backed the Dean in this shaky proposition. Writing in a University annual report, the President tried to explain why it was necessary for medical school professors to have practical experience, yet when lawyers had practice experience, it made them less capable of teaching the law:

> [T]he medical teacher must be a practitioner in order to have cases to teach with. It is far otherwise in law. The successful practitioner may or may not have the knowledge, tastes, and mental powers which go to make a good teacher of law, and the chances are against his having them. A good teacher of law in any high sense must be a thorough student by nature and habit; but it is well understood that a practitioner engrossed in business can hardly study any large subject with thoroughness, so manifold are the questions brought in quick succession to his attention. On the other hand, there are personal qualities of great importance to success at the bar, which are of little value in a teacher.[300]

It was a flimsy argument, and many within the Harvard community saw through it.[301] Even the University's own Board of Overseers pushed back, arguing if the Law School was preparing students to have successful careers within the profession, then certainly those doing the preparation should have, at some point, worked in the profession.[302] "[I]f you would teach baseball," the Board wrote, "you would select not merely a teacher who knew the laws of projectiles, but one who had played the game himself."[303]

Eliot was not obtuse. He understood his position was not entirely reasonable. Yet, he had financial motives for giving priority to inexperienced candidates in faculty appointments decisions. Put plainly, Harvard could not afford to hire a slate of prominent attorneys to teach in the Law School.[304] In the early years of Eliot's presidency, Harvard Law struggled to stay afloat financially, and faculty

> [T]he fact that a man had become a distinguished lawyer or a respected judge did not prove that he knew how to teach law, or indeed that he could learn to teach law. He was inclined to believe that success at the Bar or on the Bench was, in all probability, a disqualification for the functions of a professor of law.

Eliot, *supra* note 183, at 520. Faculty would also come to argue that being a lawyer made someone less likely to be a capable professor. *See, e.g.*, Warren, *supra* note 102, at 714 ("Some instructors who are sound lawyers seem to be unable to acquire the suppleness and adroitness of mind which will enable them to carry on *stimulating* classroom discussions.").

[300] Eliot, *supra* note 241, at 27.

[301] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 387.

[302] *Id.*

[303] *Id.*

[304] *See id.* at 388-89 ("This financial constraint influenced faculty hiring no less than did the principled debate over whether professional experience or academic merit should determine faculty appointments. Further complicating events was the fact that the president veiled the financial considerations. If forced by limited resources to hire an inexperienced professor at a lower salary, Eliot cited instead the dean's principle of hiring according to academic merit.").

salaries reflected that.[305] While Harvard Law professors made more than the general population, they earned between one-third and one-half of the salaries of successful metropolitan lawyers.[306] The comparatively low salaries made it difficult to entice top attorneys to join the faculty.[307] Fresh law school graduates, on the other hand, were more than willing to accept a Harvard Law salary.

Of course, Eliot could not publicly admit the Law School could not afford to hire the best talent; doing so would only further the notion that it was a second-rate institution. So instead, he doubled down on Langdell's argument that being a seasoned attorney made one less capable of being a successful professor: "It has but seldom happened that the same man achieved eminence both in practice and as a teacher," he noted.[308] "[T]he teaching of law is a difficult and honorable profession in itself, and cannot often be combined with, or late in life taken up in exchange for, the practice of law, another absorbing profession which appeals to different motives, develops different qualities, and holds out different rewards."[309] Instead, Eliot argued, it was necessary to "breed professors of law by the same gradual process by which competent teachers are trained up in other departments of the University."[310] By "other departments," he meant those that were not professional schools.[311]

As senior faculty who opposed Langdell's methods retired, they were replaced by fresh graduates, many of whom the Dean had personally trained.[312] At the turn of the twentieth century, President Eliot boasted that the faculty consisted of a "body of men learned in the law, who have never been on the bench or at the bar" because a law school comprised of experienced practitioners would lack scientific rigor.[313] Instead of hiring experienced lawyers, Harvard became a law professor factory, aiming to "breed" professors to teach at the Law School.[314] Demonstrated mastery of Langdell's teaching methods, as evidenced by an applicant's law school grades, became a key criterion to determine which

[305] *See id.* at 391, 413.

[306] *See id.* at 388 ("During the 1870s a successful lawyer in Boston made two to three times the salary of the Law School's professors. In 1890, when the Corporation raised the salary of full professors with ten years of tenure to $5,000, a successful lawyer in Boston or New York made at least three or four times that amount.").

[307] *See id.* at 389.

[308] Charles W. Eliot, *President's Report for 1881–82*, *in* ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1881–82, at 3, 31 (1883).

[309] *Id.*

[310] Eliot, *supra* note 241, at 27.

[311] *See id.* (contrasting importance of clinical instructors for medical school with law school).

[312] COQUILLETTE & KIMBALL, *supra* note 95, at 386.

[313] Charles W. Eliot, *President Charles W. Eliot's Address*, *in* REPORT OF THE NINTH ANNUAL MEETING AT CAMBRIDGE, JUNE 25, 1895, at 69, 71 (1895).

[314] Eliot, *supra* note 241, at 27.

former students were eligible to join the faculty.[315] Over time, as the faculty filled up with his disciples, the Langdellian model became the Harvard model.

D. *Diffusion to Other Law Schools*

As word of Langdell's teaching methods spread, the broader legal community became highly critical. The ABA, for instance, condemned the casebook as "rubbish" and an "absurd" way to teach students the law. In its 1892 report on the state of legal education, the ABA wrote:

> So long as the books used in our schools are mere collections . . . of the cases in which each point is sustained, without a word to show how one rule is connected with another, how the points owe their genesis to principles, the evil will remain. It is absurd to expect that a class of beginners will strike out a scientific method for themselves in a mass of such "practical" rubbish, merely because we deafen them with praises of the logical consistency and scientific character of the law. All this talk of scientific law, of principles, might be mere glittering generalities, if in truth the words of one judge . . . had any magic power to compel future judges and courts to decide in the same way—if a precedent were as sure to produce the same ruling for which it is quoted as a chemical formula to give a certain result.[316]

The criticism became even more intense as classes of Harvard Law graduates entered the profession with seemingly no understanding of how the law worked in real life. An early-twentieth-century New York appellate judge spoke of graduates trained under Langdell's model: "With the practical working of the law he has little or no familiarity. He may come to the bar almost ignorant of how the law should be applied and is applied in daily life," the judge observed.[317] "It is, therefore, not unusual to find the brightest student the most helpless practitioner, and the most learned surpassed in the profession by one who does not know half as much."[318]

Prominent members of the bar also joined in on the criticism. New Deal official Jerome Frank dismissed Langdell's model for being an overly theoretical approach to legal study. He noted that the law schools that relied on the model were "best equipped not to train lawyers but to graduate men able to become book-law teachers who can educate still other students to become book-law teachers—and so on ad infinitum. They are not lawyer-schools (as they should be primarily) but law-teacher schools."[319]

What saved the Langdellian model from being swept into the dustbin of history was the rise of the corporate law firm. The industrialization of the Gilded

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[315] COQUILLETTE & KIMBALL, *supra* note 95, at 386.

[316] HAMMOND ET AL., *supra* note 49, at 350.

[317] Frank, *supra* note 34, at 919 (quoting Judge Crane of the New York Court of Appeals).

[318] *Id.*

[319] *Id.* at 915 (emphasis omitted).

Age created a need for lawyers to handle the ballooning volume of new legal issues.[320] The traditional boutique law firms were insufficiently staffed to be formidable players in the changing legal landscape. Corporations required factories full of lawyers to represent their interests. The Wall Street law firm grew out of this newfound need.[321]

White-shoe partners were reluctant to hire experienced lawyers. Given the disrepute of the profession during the era, they believed that seasoned attorneys had likely picked up bad habits that could leave their firms vulnerable to undue liabilities.[322] To ensure anyone working on their behalf had been properly trained, partners wanted to be solely responsible for teaching their associates how to practice law. Thus, under the first principle of what would become known as the "Cravath System"—a model of employment first implemented at Cravath but quickly adopted by most of the white-shoe law firms—having experience as an attorney was a disqualification from joining the firm.[323]

While firm partners were confident in their ability to teach young lawyers how to practice law, they needed to know that the novice attorneys had the grit and determination to survive the Darwinian culture of their firms. Under their "up or out" system, "[a]ssociates were given five to six years . . . to prove themselves, at which point they were either promoted to partner or were expected to leave the firm."[324] Firms wanted associates who had the psychological and physical stamina to endure their grueling probationary period.[325] Young lawyers were expected to work intensely, toiling away at their desks until the wee hours of the morning on weekdays and until at least mid-afternoon on Saturdays.[326] It was a gladiator model of employment under which only the strongest associates would survive.

Harvard Law, as a site of social Darwinism, emerged as an attractive feeder institution for Wall Street law firms. Given partners' unique set of hiring needs, Langdell's model of legal education proved to be the perfect sorting device: the model did not teach students much about the practical workings of the law, so partners did not have to worry that entering associates had picked up bad habits

[320] For an exploration of the origins of Wall Street firms, see JEREMIAH D. LAMBERT & GEOFFREY S. STEWART, THE ANOINTED: NEW YORK'S WHITE-SHOE LAW FIRMS—HOW THEY STARTED, HOW THEY GREW, AND HOW THEY RAN THE COUNTRY 1-5 (2021).

[321] *See id.* at 1 ("It is no accident that these firms are found in New York, the largest city in the world's largest economy and also the nation's largest port, principal banking center, and epicenter of industry.").

[322] *See* OLLER, *supra* note 84, at 48-49 ("Cravath's first principle was that all new legal hires were to come straight out of law school . . . . [Cravath] wanted men (and they were all men in those years) who had not acquired bad habits picked up from practicing elsewhere. He could teach new recruits the nuts and bolts of lawyering once they came to his firm . . . .").

[323] *See id.*

[324] *Id.* at 50-51.

[325] *See id.* at 49-50 ("[Cravath] sought out those who . . . had strong personalities and physical stamina.").

[326] *See id.*

that could put their firms at risk.[327] However, because the model was ruthlessly Darwinian, hiring partners could rest assured that if a young lawyer earned a law degree from a school that relied on the model, he would be able to hold his own once at the firm.[328] As a result, white-shoe firms began to hire exclusively from Harvard, Columbia, and Yale, all early adopters of Langdell's methods.[329] For hiring partners, being trained under Langdell's methods became a proxy not so much for a young lawyer's legal acumen but rather for his ability to withstand stressful conditions.

As word spread that corporate law firms preferred those trained under Langdell's model, Harvard Law's enrollment skyrocketed. Between 1882 and 1897, the student body increased by 400%.[330] Whereas in the beginning of Langdell's tenure the administration was desperate to lure students into the Law School, after a couple of decades, they were frantically trying to keep students out.[331] "The recent growth of the School," Langdell explained, "has been in spite of the constant efforts of the Faculty to reduce its numbers."[332] The University's central administration began to warn that overcrowding in the School had reached a critical point.[333]

While accommodating so many students was a logistical nightmare, it was a financial fantasy come true. The overflowing classrooms were full of students who had paid top dollar to attend the Law School. Commenting on what a cash cow the Law School had become under Langdell's deanship, President Eliot said, "The College stands for philosophy, for literature, for humanities, for the progress of mankind; as to the Law School, the Medical School, they are bread and butter."[334]

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[327] *Id.* at 49. Corporate lawyers mostly served as advisers to large Wall Street companies. *See* LAMBERT & STEWART, *supra* note 320, at 1-3. Around the turn of the twentieth century, big law firms shifted their focus from litigation to work consisting primarily of drafting legal documents. *See* Gordon, *supra* note 83, at 73-74. Harvard's insistence that students focus on common law doctrinal evolution did not train many of Harvard's graduates in the day-to-day skills needed to enter the new legal world. As Robert Gordon wrote, the effect of Harvard Law's "self-imposed limits to the province of 'pure' law was that [it] deliberately kept [its] distance from a large and growing component of the work of [its] most successful graduates." Gordon, *supra* note 213, at 1244.

[328] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 415 (discussing market demand for young lawyers trained under Langdellian system).

[329] *See* OLLER, *supra* note 84, at 49.

[330] Kimball & Shull, *supra* note 147, at 5-7 (noting enrollment of 138 students in 1882 and "surpass[ing] 550 in 1897").

[331] *See generally* COQUILLETTE & KIMBALL, *supra* note 95.

[332] Kimball & Shull, *supra* note 147, at 6 (quoting Christopher C. Langdell, *Reports of Departments: The Law School*, *in* ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1893-94, at 121, 131 (1895)).

[333] *Id.* at 7.

[334] WARREN, *supra* note 184, at 362 (quoting Charles Eliot, President, Harvard Univ., Speech at the Harvard Law School Association Dinner (June 23, 1891)).

With the growth of Wall Street law firms, more young Americans aimed to enter the profession with hopes of partaking in the lucrative salaries that the firms offered to their employees. To gain access, they turned to law schools. As historian Robert Gordon has noted, "the modern law school and the corporate law firm grew up together and achieved a symbiotic relationship to one another."[335] With the spike of young men aiming to become lawyers, the small office apprenticeship became unsustainable as the primary mode of legal education. In 1890, upending the traditional professional norms whereby the apprenticeship was regarded as the superior source of legal training, the ABA wrote that "in view of the advantages offered by the law schools," aspiring lawyers "should be advised to spend as large a part of this period [of legal training] in a good law school as they may find practicable."[336] To accommodate the influx of students seeking a legal education, between 1860 and 1911, the number of law schools in the country exploded, increasing by almost tenfold.[337]

Amid this boom, the American Association of Law Schools was created to provide guidance to the country's rapidly expanding community of legal educators.[338] Its founding president was James Bradley Thayer, Langdell's colleague at Harvard Law and a staunch supporter of his methods.[339] In 1895, speaking to the burgeoning community of law school administrators hungry to replicate Harvard's financial success, Thayer advised that by teaching law as a science, their universities could also rise in prominence: "[O]ur law must be studied and taught as other great sciences are studied and taught at the universities, as deeply, by like methods, and with as thorough a concentration . . . ."[340]

As for who could appropriately teach the law, Thayer parroted Langdell's view that it was decidedly not someone who had achieved success at the bar. Instead, it was only someone who had logged many hours in the library, studying law as a science:

> It is the simple truth that you cannot have thorough and first rate training in law, any more than in physical science, unless you have a body of

[335] Gordon, *supra* note 83, at 72.

[336] REPORT OF THE COMMITTEE ON LEGAL EDUCATION 328-29 (1890).

[337] *See* Stone, *supra* note 87, at 768 ("In 1860 there were 12 law schools in the United States . . . . At the present time there are 114 schools of law . . . .").

[338] *See History*, ASS'N OF AM. L. SCHS., https://www.aals.org/about/history/ [https://perma.cc/DJ8J-8CNA] (last visited Jan. 15, 2024).

[339] *See id.* (noting Thayer's role in association); COQUILLETTE & KIMBALL, *supra* note 95, at 401 (noting Thayer's connection to Langdell).

[340] James Bradley Thayer, *Address of James Bradley Thayer*, 18 ANN. REP. A.B.A. 409, 414 (1895). Quoting Langdell, Thayer told the community of legal educators the importance of teaching law as a science: "If our law be not a science . . . as a distinguished lawyer has remarked, '[a] university will best consult its own dignity in declining to teach it.'" *Id.* (quoting Christopher Colombus Langdell, Dean, Harvard L. Sch., Address to the Harvard Law School Association (Nov. 5, 1886), *in* REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING 48, 50 (1887)).

> learned teachers; and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work. The main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject; and that requires . . . an enormous and absorbing amount of labor.[341]

In announcing this qualification, Thayer helped remake the law professoriate nationwide. The requirement that one possess scientific training to teach the law created a competitive advantage for HLS graduates on the law teaching market. Harvard alumni quickly began to assume positions at new and existing law schools across the country.[342] Often with no practice experience, these new professors taught students law the way they learned it—the Langdellian way.

Once in power at their new law schools, HLS-trained administrators set out to "Harvardize" their institutions.[343] In rapid succession, law schools across the country began to adopt Harvard's first-year curriculum, its casebooks, its Socratic method, its hypo exams, and its Darwinian culture.[344] In doing so, the law schools signaled that they were legitimate players in the new world of legal education.

E. *Langdellian Education Becomes Legitimized as American Legal Education*

Over time, disconnected from the contingent circumstances that gave rise to the Langdellian model, the legal community began to believe the model was widely adopted because it offered the best legal training to future lawyers.[345] According to this view, one needed only to look at the success of those taught using Langdell's model for evidence of its educational efficacy.[346] However, as early as 1933, Jerome Frank cautioned against making such a causal link. While

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[341] *Id.* at 416.

[342] *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 57, 60-64 (G. Edward White ed., 1987) (1983) (describing spread of Langdellian system across country).

[343] For instance, when Howard Law School faced losing its accreditation in the early 1920s, Charles Hamilton Houston, himself a graduate of Harvard Law School, stepped in as vice dean of Howard Law. *See* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 63-65 (1983) ("[W]hile the timing of Charles Houston's application was determined by entirely separate factors, his addition to the Howard [L]aw faculty in 1924 proved to be auspicious."). To resuscitate the school by "Harvardizing" it, he stiffened admission requirements, implemented the case method, and, importantly, made Howard Law a site of social Darwinism. *See id.* at 73. "Look to your left and look to your right," Hamilton would tell first-year students. *Id.* at 82. "Next year, one of you won't be here." *Id.* To make good on his promise, one of his pupils reflected, Houston famously "worked the students without mercy." *Id.*

[344] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 471-73.

[345] *See* STEVENS, *supra* note 342, at 63 ("By the beginning of the twentieth century, then, the case method, although far from unanimously approved, was recognized as *the* innovation in legal education.").

[346] *See* COQUILLETTE & KIMBALL, *supra* note 95, at 471.

it was true that the nation's most skilled lawyers were trained under the Langdellian model, Frank's point was that the most *unskilled* lawyers in the nation were trained under that same system. As he observed by the turn of the twentieth century, "it was almost impossible for a man to obtain a legal education in a law school that was not Langdellian."[347] Consequently, "most lawyers, dull or stupid, successful or unsuccessful, necessarily were products of that method."[348] An attorney's success, he noted, "may well be in spite of and not because of their method of instruction."[349]

Nevertheless, by 1950, every American law school would come to rely on the Langdellian model.[350] The methods became divorced from the scientific theory that gave birth to them. Langdell's innovations were originally created to support the notion that the noble "science of the advocate" was distinct from the lowly "art of the attorney."[351] Yet today, his methods have become legitimized as the best means by which to teach an aspiring attorney "how to 'think like a lawyer.'"[352]

II. THE FOLLY OF RELYING ON EXCLUSIONARY PEDAGOGICAL PRACTICES TO CREATE AN INCLUSIVE LEGAL EDUCATION

Over the past century, the theoretical foundations undergirding Langdell's model have collapsed. Legal realism, critical legal studies, critical race theory, and libraries of empirical studies have thoroughly discredited the idea that law is a science whose development is best understood by looking solely at the explicit justifications proffered within judicial opinions. In the contemporary era, arguing that law is unperturbed by bias, politics, or historical developments would be a surefire way to raise the eyebrows of even the most uncritical observers of the American legal system.

The strategic interests that inspired the Langdellian education system have also fallen away. The apprenticeship model has been summarily defeated as a viable competitor to law schools. Disciplines no longer need to mimic the natural sciences to signal their rigor. Law schools are no longer viewed as the home of the incompetent student, and law professors, for their part, have ceased being haunted by a perception that they pale in comparison to other university

[347] Frank, *supra* note 34, at 921.

[348] *Id.*

[349] *Id.* (emphasis omitted).

[350] *See* Gordon, *supra* note 226, at 340 ("[B]etween 1925 and 1950 virtually every full-time university-based law school in the country had adopted the Harvard model's basic elements.").

[351] Gordon, *supra* note 83, at 73 (quoting Christopher C. Langdell, *To the President of the University*, *in* FIFTY-SECOND ANNUAL REPORT OF THE PRESIDENT OF HARVARD COLLEGE 1876-77, at 82, 92 (1878)).

[352] *See* Gordon, *supra* note 226, at 342 (noting one reason case method has survived despite its foundational principles eroding is the method can be used to achieve different aims).

scholars.[353] In short, Langdell succeeded in curing the ails that afflicted nineteenth-century law schools.

Yet, modernity has created new educational goals that are exceedingly difficult to achieve when relying on Langdell's 150-year-old teaching model. His methods were core elements of a broader project whose aim was to intimidate and exclude as many students as possible with the hope that in doing so, Harvard Law would rise in status. Those objectives are decidedly at odds with the stated goals of modern legal education. Today, law schools consistently express a desire to be welcoming and inclusive.[354] However, to create this culture of inclusion, they rely on a pedagogical model that was specifically designed to exclude. This Part of the Article explores how defaulting to the Langdellian model frustrates modern efforts to create an inclusive education that is responsive to students' educational needs.

A. *The Prohibitive Nature of the Casebook*

In 1880, future Supreme Court Justice Oliver Wendell Holmes wrote a biting review of Langdell's casebook.[355] The core criticism was about neither the opinions Langdell chose to include nor their evolutionary organization. Rather, the crux of the criticism was aimed at the fundamental theory that lay at the heart of the casebook: that students could understand legal outcomes purely by analyzing judicial opinions. For Holmes, what judges wrote were often merely attempts to give their personal preferences a veneer of neutrality.[356] He argued his Harvard Law colleague was miseducating future lawyers by limiting their analytic frame to the carefully crafted judicial opinion.[357]

To the extent that law should be studied as a science, Holmes believed it should be studied as a social science, and more specifically, as anthropology.[358] This approach would require that students study history, culture, power, politics, and identity alongside judicial opinions to fully understand legal

[353] Indeed, given the growing expectation that entry-level law professors have two terminal degrees, both a JD and a PhD, law professors are often among the most educated faculty on university campuses. *See* Sarah Lawksy, *Lawsky Entry Level Hiring Report 2022*, PRAWFSBLAWG (Oct. 8, 2022), https://prawfsblawg.blogs.com/prawfsblawg/2022/09/lawsky-entry-level-hiring-report-2022.html (noting in recent years, close to 50% of successful candidates have received doctorate in addition to JD).

[354] *Diversity in Law School*, L. SCH. ADMISSIONS COUNCIL, https://www.lsac.org/discover-law/diversity-law-school [https://perma.cc/W8LZ-2CUR] (last visited Jan. 15, 2024) ("Law school diversity enables individuals from a wide range of backgrounds and identities to add their perspectives and talents to the greater legal community. . . . A diverse learning environment that represents communities across social and personal identities . . . strengthens our justice system and expands legal access.").

[355] *See* Holmes, *supra* note 33, at 234.

[356] Holmes argued judicial opinion "is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements." *Id.*

[357] *See id.*

[358] *Id.*

development.[359] As he cautioned, "[n]o one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is."[360]

The Justice's nineteenth-century criticism mirrors a recurring complaint of modern law students: that doctrinal courses do not sufficiently attend to issues of race, class, gender, culture, and politics.[361] Many students realize these factors drive judicial outcomes, sometimes even more so than stare decisis.[362] Yet when power, politics, and identity are mentioned in doctrinal courses, they are often treated as ancillary considerations.[363] For the law student who has a developed critical consciousness, the doctrinal classroom can feel like a world of make-believe where academic success is contingent upon one's ability to pretend, as Langdell did 150 years ago, that issues of bias and politics are largely "irrelevant" to understanding judicial outcomes.[364]

Unlike their prototype, modern casebooks sometimes mention sociopolitical issues when introducing opinions. The problem is that this critical information is usually relegated to a few paragraphs sandwiched between cases, further giving students the impression that these factors are minor in comparison to judges' proffered logics. However, the short shrift given to context does not necessarily reflect the educational priorities of casebook authors. Instead, it is an inevitable outcome of the prohibitive nature of the casebook itself.

To create a competitive advantage against legal apprenticeships, Langdell intentionally designed the casebook to be time-consuming so it would be impossible to adhere to the method while also pursuing other educational goals. Today, that strategy has backfired by placing significant limitations on legal study within law schools. Because judicial opinions are still studied from an evolutionary approach and new opinions are regularly published, the potential scope of required cases for a given course is ever-expanding.[365] This makes it nearly impossible for editors to provide sufficient context for the hundreds of

[359] Holmes noted law students "must remember that as [law] embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs." *Id.*

[360] *Id.*

[361] For interview accounts of modern law students detailing their complaints with the omission of race, gender, and class from law school discussions, see generally Rahim, *supra* note 38.

[362] *See, e.g.*, *id.* at 638 (noting "[a]lthough Black students commonly reported both a desire to talk about race and a belief that discussing race and racism is essential to understanding course materials, they are reluctant to bring up either topic in class discussions" out of fear that they will be seen as distracting from course materials).

[363] *See id.*

[364] COQUILLETTE & KIMBALL, *supra* note 95, at 328.

[365] *See id.* (explaining "[o]ne of the most novel features of Langdell's casebook[s]" was that cases were organized chronologically to show growth and development of doctrines because "[l]aw is not static, but evolving").

opinions included within a casebook without turning what is already a weighty tome into a multivolume series.

Law professors are similarly restricted. Limiting legal study to judicial opinions was supposed to protect law faculty from interdisciplinary encroachment, but in the modern era when law professors are increasingly interdisciplinary themselves, the confines of the case method can prevent professors from sharing with students critical perspectives that might broaden their legal understanding.[366] Given the amount of time the method demands, professors face tough trade-offs: either fully walk students through the complex doctrinal dimensions of scores of judicial opinions, or regularly carve out time to discuss the unnamed issues of power and inequality that lurk in the background of the cases.[367] In the race to make it to the end of the syllabus, critical context often takes a back seat.

The casebook further underserves students by presenting them with a relatively homogenous perspective of the law. Because Langdell viewed law as a science, students did not need a diversity of viewpoints to understand its development.[368] Identity was inconsequential. The science held true irrespective of who was in front of the bench or behind it. If students mastered the scientific principles embedded in legal doctrines, according to Langdell, they would be able to predict "with constant facility and certainty" how a judge would resolve a dispute.[369] Today, that view has been fully discredited. It is widely accepted, and empirically proven, that how one interprets and experiences the law is significantly influenced by identity.[370] This is one of the reasons that law schools have consistently argued to courts that if students are to properly understand the law and its implications, it is vital they be exposed to a diversity of viewpoints.[371]

Despite the ubiquity of diversity talk, law schools default to a set of course materials that make it exceedingly difficult for students to be systematically exposed to any perspectives other than those of the nation's most powerful and privileged. Under the case method, students read appellate-level federal and state judicial opinions.[372] The federal and state appellate courts are among the least

366 *See* Rakoff & Minow, *supra* note 30, at 600 ("[L]awyers increasingly need to think in and across more settings, with more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them.").

367 *See* Rahim, *supra* note 38, at 673 (discussing student perceptions that conversations on race are disfavored during 1L curriculum as "taking away class time").

368 LANGDELL, *supra* note 71, at vi (expanding on Langdell's beliefs).

369 *Id.*

370 *See, e.g.*, Rahim, *supra* note 38, at 652.

371 *See id.* at 642-49 (reviewing some appellate briefs that law schools have submitted to courts); *see also, e.g.*, *Diversity, Equity & Inclusion in Action at SLS*, STAN. L. SCH., https://law.stanford.edu/community/diversity-equity-and-inclusion/diversity-equity-inclusion-in-action-at-sls/ [https://perma.cc/XJ5Y-7B2M] (last visited Jan. 15, 2024) ("Legal education must prepare students to work effectively in a highly diverse society still grappling with racism and other forms of inequality.").

372 *See* Rakoff & Minow, *supra* note 30, at 600.

representative professional bodies in the nation. Each has historically been, and continues to be, overwhelmingly dominated by upper-class, white men.[373] Following the confines of the casebook, students will rarely be required to read the legal perspectives of women, people of color, or sexual minorities.

The homogeneity of assigned authors can affect law students' sense of belonging. Through their legal education, students are socialized into the profession. They pick up subtle impressions about whose perspectives are valued.[374] When nearly all the required legal texts are authored by white men, it teaches students that white men's legal views are the most worthy of studied

[373] Consider the demographics of each of these decision-making bodies. Since the U.S. Supreme Court was founded in 1789, 115 Justices have served on the bench. Jessica Campisi & Brandon Griggs, *Of the 115 Supreme Court Justices in US History, All But 7 Have Been White Men*, CNN POL. (Mar. 24, 2022, 8:23 AM), https://edition.cnn.com/2022/03/24/politics/supreme-court-justices-minorities-cec/index.html; *see also Justices 1789 to Present*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/T8XW-ZPXF] (last visited Jan. 15, 2024). Of those, 108 have been white men. Campisi & Griggs, *supra*. 107 have been Christian. *Id.* (noting most Justices have been Protestant and only "eight Jewish justices have sat on the bench"). Four have been white women. *Id.* Four have been people of color. *Id.* All have identified as heterosexual. *Id.* Eight of the nine current Supreme Court Justices attended either Harvard or Yale for law school. *See Biographies of the Justices*, SCOTUSBLOG, https://www.scotusblog.com/biographies-of-the-justices/ [https://perma.cc/3PWS-A78Z] (last visited Jan. 15, 2024).

The demographics of the U.S. Court of Appeals are also strikingly unrepresentative of the American public and the legal profession. As of January 2024, about 68% of circuit court judges were white, almost 14% were Black, 8% were Latine, and 8% were Asian American. *Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/ [https://perma.cc/6L85-MLNK] (last visited Jan. 15, 2024); *see also* Maggie Jo Buchanan & Stephanie Wylie, *It Is past Time for Congress To Expand the Lower Courts*, CTR. FOR AM. PROGRESS (July 27, 2021), https://www.americanprogress.org/article/past-time-congress-expand-lower-courts/ [https://perma.cc/RKJ7-SFCA] (arguing judiciary is unrepresentative of America).

The state supreme courts tell a similar story. As of May 2022, there were no Black justices in twenty-eight states, no Latine justices in thirty-nine states, no Asian American justices in forty-three states, and no Native American justices in forty-seven states. Amanda Powers & Alicia Bannon, State Supreme Court Diversity—May 2022 Update, Brennan Ctr. for Just., https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update [https://perma.cc/Z3W6-FG4T] (May 25, 2022) ("In 20 states, no justices identify as a person of color, including in 12 states where people of color make up at least 20 percent of the population.").

Keep in mind that these numbers come from recent years. In many ways, they represent a high point of diversity on both the state and federal judiciaries. Because doctrinal courses continue to be taught from an evolutionary perspective, most opinions students read will not come from this century. Instead, they will spend the bulk of their law school careers parsing through opinions written during a time when the judiciary was even whiter and more male. For many students, it will be a special occasion to read anything other than the perspectives of upper-class white men for the entirety of their law school careers.

[374] For a discussion of how professors unintentionally pass on to their students racialized and gendered understandings about what and who is valued, see generally THE HIDDEN CURRICULUM IN HIGHER EDUCATION (Eric Margolis ed., 2001).

consideration not just in the classroom but also in the profession. Moreover, it sends an implicit message that women and people of color are outsiders to the legal community—more appropriately considered topics of legal discussion than respected interlocutors.[375] Rarely seeing themselves reflected in their assigned texts, female students and students of color can internalize a sense that they are peripheral figures both in the law school and within the broader profession.[376]

To be clear, the problem is not that students learn the legal views of the most powerful segments of society. Given the demographics of the American judiciary, to effectively represent clients, lawyers will have to be intimately familiar with those views. Rather, the problem is that under the case method, students are usually only assigned these perspectives on the law. Limited to the appellate opinion, an aspiring attorney can easily come to internalize the perspectives of the most powerful as neutral ways of understanding what the law can and should accomplish.[377]

The lack of exposure has an especially deleterious impact when considering the broad function that law schools have come to serve since Langdell's day. Law schools are not merely schools for lawyers; they are also the training grounds for the nation's leaders.[378] They have educated the majority of U.S.

[375] It also sends a dangerous message to the student who finds his identity constantly reflected in the authors of the assigned opinion. To the straight, white male student who can have a successful law school career without having to substantively consider the perspectives of those who are unlike himself, it can subconsciously send the message that one need not consider the perspectives of women or people of color to be successful in the profession.

[376] Speaking of her experience of being relegated to the margins when she was in law school, Patricia Williams stated,

> My abiding recollection of being a student at Harvard Law School is the sense of being invisible. I spent three years wandering in a murk of unreality. I observed large, mostly male bodies assert themselves against one another like football players caught in the gauzy mist of intellectual slow motion. I stood my ground amid them, watching them deflect from me, unconsciously, politely, as if I were a pillar in a crowded corridor . . . . The school created a dense atmosphere that muted my voice to inaudibility. All I could do to communicate my existence was to posit carefully worded messages into hermetically sealed, vacuum-packed blue books, place them on the waves of that foreign sea, and pray that they would be plucked up by some curious seeker and understood.

PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 55 (1991).

[377] Kimberlé Williams Crenshaw, Foreword, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1988) (noting in typical law school classroom "what is understood as objective or neutral is often the embodiment of a white middle-class world view").

[378] *See, e.g.*, RHODE, LEADERSHIP FOR LAWYERS, *supra* note 100, at 3 ("[N]o occupation is more responsible for producing leaders than law."); Rhode, *Why Lawyers Become Bad Leaders*, *supra* note 100 ("Americans place lawyers in leadership roles in much higher percentages than other countries do. . . . The legal profession has supplied a majority of U.S. presidents, and in recent decades, almost half of the members of Congress. Although they account for just 0.4 percent of the population, lawyers are well represented as governors, state legislators . . . and heads of corporate, government, and nonprofit organizations."); Albert P.

presidents,[379] most members of Congress,[380] and more elected officials than any other professional discipline.[381] Thus, in relying primarily on judicial opinions to teach the law and its implications, not only are law schools conditioning lawyers to not fully consider a diversity of views, they are also training the nation's leaders to do the same.

B. *An Alienating Mode of Pedagogical Engagement*

The Socratic method makes the 1L classroom a notoriously stressful site for students. While modern law professors tend to deploy the method less aggressively than their nineteenth- and twentieth-century predecessors,[382] a professor need not intend for the exchange to be intimidating for students to experience it as such. The intimidation is embedded in the structure of the format.[383]

Students' anxiety comes largely from professors questioning them on materials that were intentionally created to confound legal novices. Langdell designed the casebook to offer little-to-no editorial guidance to prevent students from understanding the law without significant assistance.[384] This helped ensure that professors would be central actors in legal education. It also elevated the intellectual status of law professors, who in the Socratic exchange seemed to be omniscient legal figures if only by virtue of having access to information that

Blaustein, *Lawyers in the Senate: They Predominate in 81st Congress*, 35 A.B.A. J. 108, 108 (1949) (noting one-third of ninety-six members of 81st Congress were lawyers).

[379] Rhode, *Why Lawyers Become Bad Leaders*, *supra* note 100.

[380] This has historically been true. *See* Andrew Hacker, *Are There Too Many Lawyers in Congress?*, N.Y. TIMES (Jan. 5, 1964), https://www.nytimes.com/1964/01/05/are-there-too-many-lawyers-in-congress.html. In 1964, "[o]f the 535 members of the 88th Congress, no less than 315 [were] lawyers. Sixty-six of the 100 Senators [had] had legal training, as [had] 57 per cent, or 249, of those in the House. The second most popular profession in the Congress [was] that broad category called 'businessman,' and it [was] less than half the size of the legal contingent." *Id.*

[381] *See, e.g.*, *Fast Facts About America's Governors*, RUTGERS UNIV., https://governors.rutgers.edu/fast-facts-about-americas-governors/ [https://perma.cc/ZYQ8-ZTNU] (last visited Jan. 15, 2024) (showing of U.S. governors in 2022, one has doctorate, one is doctor of veterinary medicine, eleven have masters degrees, five have business degrees, but sixteen have law degrees).

[382] *But see* MOORE, *supra* note 105, at 49 (explaining, in 2007 ethnographic study of elite law schools, "[t]he Socratic method, as it is used in modern law schools, often becomes adversarial and even hostile, and the professors (because they presumably know the answers to their own questions) maintain the power in this adversarial exchange").

[383] *See id.* ("Professors have the power, and the relatively less powerful students must respond to the will of the professor.").

[384] Holmes criticized the casebook for being unduly difficult for student learning. In reviewing the casebook, he noted, "We do not agree with . . . [Langdell's] seemingly exclusive belief in the study of cases. . . . We think [a beginning student] would find the present work a pretty tough pièce de résistance without a text-book or the assistance of an instructor." KIMBALL, *supra* note 86, at 92. However, that was exactly Langdell's aim in creating the casebook: to make law professors necessary to one's ability to learn the law.

had been omitted from students' assigned texts.[385] Today, unaware this method of legal study was designed to elude attempts at independent mastery, law students often internalize their inability to deftly respond to their professors' questions as a personal failing. The public nature of the Socratic method only intensifies feelings of inadequacy as students' presumed intellectual deficiencies are put on display for their peers and professors to judge.[386]

While the Socratic engagement can be intimidating for students of all backgrounds, the weight of the burden is not equally carried. In Langdell's era, nearly everyone in the law school classroom was a white man.[387] However, over the past 150 years, student demographics have drastically shifted. Today, law schools increasingly boast of having majority-minority student bodies.[388] For those who hail from minority groups that have been racialized as unintelligent by broader society, a Socratic stumble can have both personal and political ramifications.

Whether Black and Brown students deserve to be members of the law school community is regularly debated in the courts, in the media, and often within law schools themselves.[389] Against this cultural backdrop, the act of publicly quizzing marginalized students of color before an audience of racial outsiders has far-reaching implications. For white students who fumble an answer in front of their peers, the consequences are more localized: they have simply embarrassed themselves as individuals. Students of color, on the other hand, may credibly believe they have humiliated not only themselves, but their entire race. An incorrect response threatens to give credence to longstanding beliefs that those who resemble them lack mental acuity and are undeserving of their seats in the classroom.[390] The fear of confirming negative racial stereotypes can have a paralyzing impact. Anxiety about underperforming in front of racial outsiders can overwhelm students' cognitive faculties, impairing their ability to focus, let alone adeptly respond to a series of unpredictable questions before an audience

[385] *See* MOORE, *supra* note 105, at 49.

[386] *See id.* (discussing getting "slammed" by professors in Socratic questioning).

[387] *See* Kimball & Shull, *supra* note 147, at 8 (noting during Langdell's era, there were but few African American and East Asian students at Harvard Law School).

[388] *See, e.g.*, Emmy M. Cho, *Harvard Law Class of 2024 Marks School's Most Diverse in History*, HARV. CRIMSON (Sept. 2, 2021, 10:40 PM), https://www.thecrimson.com/article/2021/9/2/hls-2024-most-diverse-class/ [https://perma.cc/YD73-SZV2] (noting 56% of Harvard Law's class of 2024 identified as people of color). Nationwide, the rate of minority enrollment is less, but it is growing. *See* Susan L. Krinsky, *Incoming Class of 2022: A Major Advance in Diversity, More Work To Do*, LSAC (Dec. 20, 2022), https://www.lsac.org/blog/incoming-class-2022-major-advance-diversity-more-work-to-do [https://perma.cc/9CNX-7U7D] ("36.6% of the incoming class of 2022 identify as students of color, a nearly 2% jump over last year's record-setting level of 34.7% students of color.").

[389] *See, e.g.*, Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71, 89 (2010).

[390] *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 797 (1995).

of their peers.[391] In this sociopolitical context, though the Socratic method is intended to facilitate students' learning, for many, it may make learning more difficult.

Beyond its racial implications, it is also important to note the well-documented gendered effects of the Socratic method. When the method was implemented in law schools, it was never intended to be a gender-neutral form of pedagogical engagement. Instead, it was part of a broader institutional effort to construct a more masculine student via a gladiator model of legal education.[392] The Socratic method showcased the intellectual sparring ability of the most masculine students while humiliating their supposedly more impotent counterparts.[393]

Still today, in the Socratic colloquy, traditional displays of masculinity are often conflated with legal mastery. Assuming that the method simulates the work of the profession, students can come to believe that those who exhibit a surplus of confidence, certainty, and aggression are the most likely to be effective advocates.[394] Conversely, those students who are more contemplative, measured, and nuanced in their thinking may leave Socratic engagements feeling defeated and falsely conclude that they lack the qualities necessary to become successful attorneys.[395] The mistake is in assuming Socratic success is an accurate proxy for professional success. While acknowledging uncertainty and taking time to think before committing to a position can be fatal flaws in the Socratic exchange, they are often the very qualities that make a lawyer a great advocate.[396]

Although students of any gender might feel uncomfortable with the Socratic engagement, the discomfort tends not to be equally experienced. Decimating Langdell's argument that "the law is entirely unfit for the feminine mind,"[397] women now constitute the majority of American law students.[398] Yet law

[391] Social psychologists have long found that when stereotype threat is activated, it overwhelms Black students' cognitive function and impairs their ability to perform intellectual tasks at their usual level. *See id.*

[392] *See* Kimball & Shull, *supra* note 147, at 29.

[393] One of the justifications for excluding women from Harvard Law School was the belief that "women would inhibit Socratic teaching." *Id.*

[394] *See, e.g.*, YALE L. WOMEN, *supra* note 105, at 23 (discussing law professor's belief male students "talk more regardless of how much they have to say" and "have a higher perception of their ability").

[395] *See, e.g.*, Dev A. Patel, *In HLS Classes, Women Fall Behind*, HARV. CRIMSON (May 8, 2013), https://www.thecrimson.com/article/2013/5/8/law-school-gender-classroom/ [https://perma.cc/75TP-2JXT] (describing law student's experience with Socratic method, including how it made her "feel really uncomfortable and incompetent").

[396] *See, e.g.*, YALE L. WOMEN, *supra* note 105, at 23 (finding although women law students tend to be more cautious and take more time to reflect on their comments, their comments are substantive and of "higher quality").

[397] Kimball & Shull, *supra* note 147, at 26 (emphasis omitted).

[398] *Women*, ABA PROFILE OF THE LEGAL PRO. 2023, https://www.abalegalprofile.com/women.html [https://perma.cc/26L9-XTKS] (last visited Jan. 15, 2024).

schools continue to default to a mode of engagement that is consistently appraised more negatively by female law students than by their male peers.[399] Women regularly report that the Socratic engagement requires them to perform an aggressive mode of masculinity for their intellect to be respected.[400] This gendered demand can alienate them from the academic culture of the law school, from the profession and, at times, from themselves. More than merely being a source of discomfort, however, the widespread use of the Socratic method has been cited as one of the reasons for the commonly observed gender disparity in law students' academic performance: although women and men enter law school with similar undergraduate grades and LSAT scores, by the end of the three years, men are significantly more likely to find themselves at the top of the class.[401]

Ironically, a contemporary justification for the Socratic method is its ability to create an inclusive classroom. In high-enrollment courses, when law professors rely on a volunteer system, white men tend to dominate the discussions.[402] The Socratic method allows professors to intentionally create gender and racial parity by controlling who speaks.[403] However, it is doubtful that the best means to create an inclusive classroom is by deploying a pedagogic tool that women and students of color disproportionately experience as

> Women make up a majority of law school students in the United States: 55.7% in 2022. That's up from 48.4% in 2000. . . . The first time first-year female students outnumbered first-year male students was in 2014. Two years later, in 2016, women made up a majority of all students in law schools for the first time. Here's another way of looking at the gender trend in law schools: In 2022, nearly five times as many law schools had female majorities (162 law schools) versus those with male majorities (33 law schools). And at five law schools in 2022 (Northeastern, North Carolina Central, Howard, Florida A&M and American), women outnumbered men by a 2-to-1 ratio. The change came slowly over several decades. In 1963, only 4% of first-year law students were female, rising to 20% in 1973, 39% in 1983 and 44% by 1993.

Id.

[399] *See* sources cited *supra* note 105.

[400] One female HLS student noted of the Socratic method in 2013, "[i]t's the worst thing in the world . . . [i]t forces you to talk like a man." Patel, *supra* note 395.

[401] *See, e.g.*, Guinier et al., *supra* note 37, at 3 (noting in empirical study of students at University of Pennsylvania Law School, researchers found that although women law students enter with identical academic credentials, "[b]y the end of their first year in law school, men are *three times more likely* than women to be in the top 10% of their law school class"); *see also* Patel, *supra* note 395 ("Among the top students in their graduating classes, men and women entering Harvard Law School earn similar undergraduate grades and LSAT scores. But as soon as students step into Wasserstein Hall, a dramatic gender disparity emerges. Indicators suggest that female students participate less and perform worse than their male counterparts over the course of their three years at the Law School.").

[402] *See, e.g.*, Molly Bishop Shadel, Sophie Trawalter & J.H. Verkerke, *Gender Differences in Law School Classroom Participation: The Key Role of Social Context*, 108 VA. L. REV. ONLINE 30, 40 (2022).

[403] *See id.* at 31 (providing empirical evidence that gender gap in speaking closes "when professors call on students systematically").

alienating. Instead, a foundational question might be: what is it about the existing academic culture that makes certain groups of students feel less comfortable volunteering, even when they constitute the classroom majority? In this way, rather than forcing twenty-first-century students to adhere to nineteenth-century educational norms, professors might begin to reimagine an academic structure whose architects never fathomed the students' presence, let alone their needs.

One might accept that there are undesirable effects of the Socratic method and still feel that the juice is worth the squeeze. Although Langdell did not intend for the Socratic method to equip students for legal practice, in the modern era it has become commonly regarded as necessary preparation to enter the profession.[404] That justification, however, tends to implicitly rely on an outdated view of lawyers as primarily courtroom advocates whose professional success depends on their ability to extemporaneously respond to a judge's inquiries and to an opposing counsel's objections.[405] While that is certainly the career path that some law students will take, in the modern era most will not.[406] That being so, it is unclear that the ability to confidently respond to a series of unanticipated questions before a crowd of onlookers is the appropriate measure of a successful legal education. It is similarly unclear that every 1L course needs to be taught via the Socratic method for students to gain the intellectual and communicative skills that the modern profession requires.[407]

More broadly, though, the assertion that the Socratic method is necessary to train competent lawyers is just that—an assertion. The claim cannot be falsified because there is no control group: nearly every living attorney educated in an American law school was trained via the Socratic method.[408] Like Jerome Frank argued almost a century ago, because every American law school uses the same mode of instruction, it is difficult to isolate the effects that a particular form of training has on one's professional success or lack thereof.[409] Absent the ability to contrast the professional success of those taught via the Socratic method against those who were not, the educational status quo has become regarded as

[404] *See, e.g.*, Sturm & Guinier, *supra* note 36, at 523 ("It is this litigation-centric aspect of 'getting it' that many people associate with the Socratic classroom and the standard first-year curriculum.").

[405] *See id.* at 527 (explaining professors deploying Socratic method in law school classroom create "court-centered focus" that "encourages law students to identify good lawyering primarily with skillful and quick-witted verbal combat").

[406] *See, e.g.*, *id.* ("Although most lawyers never go to court, the culture of the law school classroom reinforces the iconic status enjoyed by litigators in the legal imagination.").

[407] *See id.* at 516 (arguing Socratic method is "ill-suited to fostering 'legal imagination,' which is what lawyers need most to become effective advocates, institutional designers, transaction engineers, and leaders" (citation omitted)).

[408] *See id.* at 515-16.

[409] *See* Frank, *supra* note 34, at 921 ("It will doubtless be urged in answer to the foregoing that the Langdell-patterned law schools have turned out our most successful lawyers. But that may well be *in spite of and not because of their method of instruction*. The experiment has not been a controlled experiment.").

necessary largely because a chorus of actors, over the course of generations, have asserted its necessity.[410]

C. *The Misfit Between the 1L Curriculum and Students' Interests*

Nearly every law school requires students to take some version of Torts, Property, Contracts, Civil Procedure, and Criminal Law in their first year.[411] During Langdell's era, students flocked to Harvard Law with the specific intention of working for one of the emerging white-shoe firms.[412] In that climate, the private law focus of the required curriculum, even if lacking in practicality, was consistent with the private law ambitions of the student body.

Today, however, students typically come to law school with the goal of serving the public interest. A 2018 survey from the American Association of Law Schools revealed students are interested in pursuing legal education primarily because they believe it will give them a foundation for a career in public service, endow them with the necessary training to advocate for social change, and better equip them to fight for those in need.[413] However, once they arrive in law school, public-minded students often find that the intellectual interests that drove them to pursue a legal education are largely absent from their required coursework. There is little pedagogically sound justification for this omission. Instead, the primary explanation for the disjuncture between the required courses and the legal issues that most plague twenty-first-century America is that the 1L curriculum, in the words of a former Vanderbilt Law dean, "treats the entire twentieth century as little more than a passing annoyance."[414] Many of today's most active legal fields were not yet distinct areas of law in the 1870s when Langdell and his colleagues created the first-year lineup. Civil rights law, immigration law, environmental law, reproductive justice, human rights law, and poverty law were by and large twentieth-century inventions.[415] Because the 1L curriculum remains largely preserved in amber,

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[410] One HLS student noted in 2013, "[i]f you can show that the Socratic method makes us better lawyers, then fine, but we need to see that data." Patel, *supra* note 395.

[411] Samantha Weller, *First Year Law School Curriculum: What To Expect*, BARBRI, https://lawpreview.barbri.com/law-school-curriculum/ [https://perma.cc/TVQ9-KMGB] (Mar. 29, 2021). Although every law school generally follows the 1L curriculum, there are slight variations. Berkeley Law, for instance, recently made Property an elective. *First-Year Curriculum*, BERKELEY L., https://www.law.berkeley.edu/academics/jd/first-year-curriculum/ [https://perma.cc/XLY7-KJAS] (last visited Jan. 15, 2023).

[412] *See supra* Section I.D.

[413] ASS'N OF AM. L. SCHS., HIGHLIGHTS FROM BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL 17 (2018), https://www.aals.org/app/uploads/2023/08/AALS_BeforetheJD_Final_Report_083118.pdf [https://perma.cc/Y8PJ-FSJC].

[414] Rubin, *supra* note 44, at 610 (explaining although law schools have "introduced courses reflecting new developments in law" these classes "rarely have penetrated the sacrosanct first year").

[415] On the origins of civil rights law, see G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 755 (2014) ("The category only came into being with the passage of the Civil Rights Act of 1866 and received its first judicial interpretations

students curious about these subjects will generally have to wait until their second year to fully explore them.

While it may seem like a small obstacle to hold off on exploring one's professional interests for a year, the minor delay can have major implications. Because corporate law firms begin recruiting associates immediately after students complete their first year of law school (if not sooner), students are often forced to decide if they want to pursue public law or private law careers before they have had significant exposure to public law subjects.[416] The choice to remain steadfast in their public-interest pursuits is made even more difficult by the lucrative salaries attached to corporate law jobs.[417] Students are asked to take a potentially life-changing leap while blindfolded: to forego significant wealth to pursue professional interests that may be largely unfamiliar to them. This conundrum has been cited as contributing to the commonly observed "public interest drift," whereby students enter law school committed to fighting for social justice, but by the end of their first year find themselves drifting off into corporate law careers.[418]

Of course, many students come to law school with the clear intention of pursuing private law.[419] The traditional 1L curriculum also underserves them, albeit in different ways. In her 2015 study of hiring at Big Law firms, sociologist

in the context of the Reconstruction-era constitutional amendments. In the decades of the 1870s and 1880s, the category was refined, but there was never a clear consensus about the content or scope of civil rights, or the extent to which they could be enforced by the federal government." (citation omitted)). On human rights law, see Frans Viljoen, *International Human Rights Law: A Short History*, UNITED NATIONS: U.N. CHRON., https://www.un.org/en/chronicle/article/international-human-rights-law-short-history [https://perma.cc/2RE6-Y8E5] (last visited Jan. 15, 2024) ("For many centuries, there was no international human rights law regime in place. . . . The first international legal standards were adopted under the auspices of the International Labour Organization (ILO), which was founded in 1919 as part of the Peace Treaty of Versailles."). On poverty law, see THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES—CASE SUPPLEMENT 2017, at 4-5 (Marie A. Failinger & Ezra Rosser eds., 2017) (noting first major poverty law case, *Edwards v. California*, 314 U.S. 160 (1941), came in mid-twentieth century).

[416] *See* Mary Kate Sheridan, *Navigating the First Year of Law School: 1L Timeline*, VAULT (Aug. 18, 2021), https://legacy.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/navigating-the-first-year-of-law-school-1l-timeline [https://perma.cc/8ELU-2JTT] (explaining "[a]t most [law] schools bidding for summer associate recruiting will open in June or July" of summer following students' 1L year).

[417] *See, e.g.*, Staci Zaretsky, *The Biglaw Salary Wars Increased First-Year Associate Salaries Across the Legal Profession*, ABOVE THE L. (May 10, 2023, 11:44 AM), https://abovethelaw.com/2023/05/the-biglaw-salary-wars-increased-first-year-associate-salaries-across-the-legal-profession/ [https://perma.cc/4HJ2-KJ54] (stating in Big Law, "$215K may now be the most common starting salary").

[418] *See, e.g.*, John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2028 (2018) (arguing one way for law schools to mitigate public-interest drift is to allow students to take seminars and public interest electives before firm recruitment).

[419] *See, e.g.*, ASS'N OF AM. L. SCHS., *supra* note 413, at 29 (showing among students considering career in law, 31% cite "[p]otential to earn a lot of money" as very important).

Lauren Rivera found partners constantly complained that the 1L curriculum was "overly abstract and taught students about legal theory rather than about how to practice law."[420] Much like their nineteenth-century predecessors, firm leadership commonly reported using students' 1L grades not as a proxy for their legal knowledge, but instead as a gauge for how they might fair in stressful working conditions.[421] Given the lack of practicality in the core law curriculum, law firms generally do not expect entering junior associates, even those with the top grades, to possess practical legal knowledge.[422] Instead, they take it upon themselves to teach students the foundational knowledge that perhaps should have been acquired in law school.[423]

III. EDUCATION DETERMINED BY INTENTION RATHER THAN PRECEDENT

When legal educators allow nineteenth-century norms to dictate how they teach twenty-first-century students, not only do those students suffer, but so does the profession. In a 2020 report on the future of legal education, an ABA commission criticized law schools for their "deep-rooted" conservatism.[424] By "encourag[ing] students to focus on historical rites of passage," the commission noted, modern law schools "prepar[e] the next generation of legal professionals for yesterday rather than for tomorrow."[425] Rather than fighting to rationalize the educational status quo, law schools were called to "tak[e] bold collective risks to meet the challenge of a transforming world."[426]

The solution lies not in creating a new one-size-fits-all model for every law school to adopt.[427] That would only lead to an updated version of the current quagmire. Nor is the solution to reflexively discard all vestiges of the Langdellian model, as some elements of it may, at times, be useful in serving

[420] LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 186 (revised ed. 2015) ("As such, a demonstration of substantive knowledge of the law was neither expected nor (usually) tested during job interviews.").

[421] *Id.* at 102. Explaining why his firm looked to hire first-year law students with the highest grades despite a widespread belief among firm leadership that the 1L curriculum was largely irrelevant to the needs of their firm, one partner in Rivera's study said, "I think we hire the top of the class because more often than not it signifies that they're meticulous . . . I think that's what class rank tells you. For lack of a better word, how *anal* they are." *Id.* Agreeing that 1L courses lacked relevance to practice, another attorney said her firm used performance in those courses primarily as a proxy for "how [an applicant] can handle stress, if they'd had their feet to the flames before. If they've gotten good grades at a very competitive school . . . [they] can take care of themselves." *Id.*

[422] *Id.* at 186.

[423] *Id.* at 185.

[424] AM. BAR ASS'N, *supra* note 43, at 4 (criticizing change-resistant institutional cultures for stymying efforts to promote inclusivity).

[425] *Id.* at 3-4.

[426] *Id.* at 4, 7 (exhorting law schools to adapt JD education through embracing diverse pedagogies, de-emphasizing appellate cases, and increasing team-based work and grading).

[427] *Id.* at 4.

particular educational ends.[428] Instead, the solution lies in a commitment to intentionality. Rather than letting their aims be predetermined by nineteenth-century education reformers, law schools should decide for themselves what knowledge and skills are most critical for modern students' success.[429] Then, based on that assessment, educators should design the core courses, course materials, and teaching strategies that are most useful in helping them achieve their desired learning outcomes. This strategy would allow law schools to chart their own educational paths while taking into account the professional aims of their student bodies and the changing nature of the legal profession.[430]

To create conditions that might allow legal educators to be more intentional in their curriculum and course design, key impediments must be removed. In this section of the Article, I suggest addressing three barriers. First, law schools should continue to abandon the *U.S. News & World Report*'s ("USNWR") "Best Law Schools" rankings system. Second, schools should implement incentive structures that substantively reward teaching innovation. Third, the ABA should cap the student-faculty ratio in 1L courses.

A. *Continue To Divest from Law School Rankings Systems*

Law schools regularly discuss the need to overhaul legal education.[431] Tempering the push for change, however, is the credible fear that significant deviation from the status quo could lead to reputational damage. Rankings systems have helped to maintain a follow-the-leader industry structure whereby law schools are incentivized to mimic the practices of the designated "top law schools" to preserve and elevate their own institutional prestige.[432] In recent

[428] As the report noted, "[r]ather than continuing predominantly to protect the *status quo* . . . [legal educators] must have a defensible rationale for what we retain in our current education." *Id.* at 3.

[429] Given that most law schools are composed of faculty who have more academic experience than practice experience, law schools might benefit from consulting with successful practitioners when determining their educational goals and strategies.

[430] As the ABA report notes, "follow distinct missions serving their students and communities, while reflecting the variation of roles needed for the widespread provision of legal services." *Id.* at 6.

[431] *See, e.g.*, William Michael Treanor, Exec. Vice President and Dean, Georgetown Univ. L. Ctr., Remarks at the American Academy of Arts and Science's 2028th Stated Meeting (Dec. 4, 2015) (transcript available in *The Crisis in Legal Education*, BULL. AM. ACAD. ARTS & SCIS., Spring 2016, at 9) (questioning whether Langdellian model adequately prepares students for professional life).

[432] The ABA Commission on the Future of Legal Education specifically called out rankings as a driver of industry-wide stagnation among law schools:

> We regulate law schools in ways that are myopic, outdated, and excessively one-size-fits-all. Ordinally ranking the multitude of law schools exacerbates those characteristics. All of this affects how schools prioritize their resources. It diverts their focus from . . . experimenting with new educational models; and adapting to changing professional requirements.

AM. BAR ASS'N, *supra* note 43, at 4.

decades, the USNWR "Best Law Schools" list has been a primary driver of industry-wide homogeneity.[433] As sociologists have noted, by using one algorithm to evaluate every law school, regardless of their unique educational goals or the particular needs of the students they serve, USNWR rankings "promote a single, idiosyncratic definition of what it means to be a 'good school' and punish schools that do not conform to the image of excellence embedded and embodied in the rankings."[434] Under this system, adherence to the status quo is often a prerequisite to being christened a good law school, and steering too far from tradition can come with severe sanctions.[435]

Although the USNWR "Best Law Schools" rankings have been primarily configured by a person who never attended law school and does not have a background in education, the legal community has historically attached extraordinary significance to its educational assessments.[436] Law school applicants, students, alumni, faculty, and employers have anxiously awaited the release of the annual rankings, as the ordinal number attached to an institution's name has become a widely trusted indicator of a school's value.[437] A drop in the rankings can lead to a drop in applications, a loss of revenue, fewer job opportunities for current students, complaints from alumni, faculty departures, and administrative turnover.[438]

Anticipating the calamity that can befall a deviant institution, administrators learn to be conservative when structuring their educational offerings.[439] The annual surveillance of USNWR has compelled many law schools to hew tightly

[433] *See, e.g.*, *2023-2024 Best Law Schools*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Jan. 15, 2024) (ranking 196 law schools by academic quality and graduates' success).

[434] WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 6 (2016) (describing ways rankings engender fear and conformity among law schools).

[435] *See infra* note 440, at 73 (noting nonconforming missions, such as promoting public service or serving disadvantaged students, can result in exclusion from this category).

[436] The longtime head of the USNWR Best Law Schools rankings is Robert Morse, nicknamed "Mr. Rankings." ESPELAND & SAUDER, *supra* note 434, at 10-11; *Robert Morse: Chief Data Strategist*, U.S. NEWS & WORLD REP., https://www.usnews.com/topics/author/robert-morse (last visited Jan. 15, 2024).

[437] ESPELAND & SAUDER, *supra* note 434, at 4.

[438] *See* Ben Taylor, *Why Law School Rankings Matter More Than Any Other Education Rankings*, FORBES (Apr. 14, 2014, 12:19 PM), https://www.forbes.com/sites/bentaylor/2014/08/14/why-law-school-rankings-matter-more-than-any-other-education-rankings/ [https://perma.cc/LF3E-ETAX] (reporting better job outcomes for graduates of top fourteen schools).

[439] In their interviews with law school deans, a pair of sociologists noted:

> [T]he fear of falling in rank . . . dominates the consciousness of those subject to them. Nearly everyone we spoke with lived in dread of the inevitable day that new rankings would come out showing that their school had dropped to a worse number or tier, and many of the changes caused by the rankings can be directly traced to this fear.

ESPELAND & SAUDER, *supra* note 434, at 4.

to tradition, even when they believe charting a new educational course might lead to improved learning outcomes.[440] Rankings have had a chilling effect on pedagogical innovation and have helped to maintain virtual homogeneity across law schools.[441]

In the fall of 2022, citing the USNWR ranking methodology's punishing effect on efforts to create an economically diverse student body, law schools began to pull out of its rankings system in rapid succession.[442] At the time of this writing, one-third of all U.S. law schools and nearly the entire top fourteen ("T-14") have refused to participate.[443] Now, with its industry leaders gone, USNWR has considerably less disciplinary power. Not as inhibited by Big Brother's annual surveillance, law schools have room to break free from tradition and experiment with their educational offerings with less fear that doing so will result in automatic reputational damage.

This moment in history is a rare opportunity to take up important questions that have henceforth been relegated to legal education articles: Should there be a required curriculum for all students irrespective of career ambitions? If so, should it be the same core curriculum that Langdell designed 150 years ago? Alternatively, should there be multiple curricular tracks for students to choose from depending on their career aspirations? Now, there is significantly more latitude to act on these questions in ways that could better both students' experiences and the overall profession. To ensure that this newfound freedom is preserved, however, law schools should continue to refuse to participate in the rankings system, even if USNWR adjusts its algorithm to account for administrators' most recent concerns.

B. *Incentivize Teaching Innovation*

Because professors have relative autonomy when structuring their courses, if there is going to be fundamental change in legal education, law professors will be responsible for executing it. However, under the typical institutional logics that govern law faculty employment, professors have little incentive to devote their energy to reimagining what happens inside their classrooms. Indeed, they

[440] For a specific conversation of the disciplinary effect of USNWR rankings on law school administrations, see Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOCIO. REV. 63, 69 (2009).

[441] *Id.* at 73.

[442] Debra Cassens Weiss, *Which Law Schools Are Now Boycotting US News Rankings? Some Say They're Staying in*, ABA J. (Nov. 28, 2022, 12:24 PM), https://www.abajournal.com/news/article/law-school-outside-t14-boycotts-rankings-others-say-they-are-staying-in [https://perma.cc/Q2EJ-KAMQ]; *see* Karen Sloan, *U.S. News & World Report Indefinitely Postpones Law and Medical School Rankings amid Backlash*, REUTERS (Apr. 20, 2023, 11:41 AM), https://www.reuters.com/legal/legalindustry/us-news-world-report-indefinitely-postpones-law-medical-school-rankings-amid-2023-04-20/.

[443] Sloan, *supra* note 442 (noting as of April 23, 2023, "[n]early a third of U.S. law schools this year declined to provide U.S. News with any internal data for its rankings, including 12 of the top 14 schools").

have compelling reasons to maintain the status quo, even if they believe it to be fundamentally flawed.

A commonly cited theory for the relative stagnation of the core model of legal education is that because law professors are conservative by training, so too is their approach to teaching.[444] Existing in a field where precedent rules, law professors are thought to be preternaturally reluctant to deviate from tradition. If that were the case, however, what accounts for the rapid evolution of legal scholarship in the same period when the core teaching model remained relatively stagnant?

Whereas legal scholarship was once mostly doctrinal in nature, modern legal scholarship is multitudinous in form. It is heavily influenced by insights from other disciplines, including economics, political science, moral philosophy, gender studies, African American studies, cultural studies, and anthropology.[445] It is structuralist and poststructuralist.[446] For analytic tools, it relies on statistical analysis, narratives, archival records, field interviews, and so on.[447] As one law professor has suggested, in recent decades "legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution."[448]

A key reason for such expansive growth in the nature and form of legal scholarship is that faculty employment tends to be governed by an incentive structure that encourages law professors to push boundaries in their published work. Innovative research confers lifetime job security, lucrative salaries, endowed chairs, and heightened standing among one's professional peers.[449] By comparison, innovative teaching, even when successfully executed, tends to produce more symbolic institutional rewards, such as certificates of appreciation

[444] *See e.g.*, Llewellyn, *supra* note 2, at 657 (describing law professors trained to worship precedent: "[their] eyes and efforts have been fixed, and still are fixed, not on what *can* be done . . . but purblindly on what [their] predecessors . . . happen to *have been* doing").

[445] Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002).

[446] *Id.* (noting application of structuralist and poststructuralist perspectives in legal scholarship beginning in 1960s).

[447] *Id.*

[448] Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 192 (1991).

[449] *See, e.g.*, Deborah J. Merritt, *Salaries and Scholarship*, L. SCH. CAFE (Jan. 13, 2018), https://www.lawschoolcafe.org/2018/01/13/salaries-and-scholarship/ [https://perma.cc/78Q4-N4S5] (finding $97,322 difference in annual salary between senior scholarship-focused faculty and senior clinical faculty); Melissa Nyman, *Faculty Research and Teaching: Why Endowed Chairs Matter*, AM. UNIV. MAG. (Nov. 2021), https://www.american.edu/magazine/article/faculty-research-and-teaching-why-endowed-chairs-matter.cfm [https://perma.cc/TQ2Z-CZ8Y] (explaining how endowed chairs contribute to faculty members' distinction among peers and long-term career trajectory); *Law Teaching 101*, COLUM. L. SCH., https://www.law.columbia.edu/careers/academic-careers/careers-law-teaching/law-teaching-101 [https://perma.cc/283M-SX4E] (last visited Jan. 15, 2024) (describing scholarly achievement as "required" for tenure-track hopefuls).

or, occasionally, a plaque presented at an awards ceremony.[450] Given the drastic asymmetry in rewards, faculty are implicitly incentivized to maximize the amount of time they spend on research and minimize the amount of time devoted to teaching.[451] One way to prevent teaching from consuming one's professional energy is to follow the template that has been passed down for generations.

To cultivate a fertile environment for pedagogical innovations, law schools should take many of the strategies they use to incentivize faculty research and apply them to teaching. This might include making teaching performance a more central consideration in faculty promotion and compensation decisions.[452] In much the same way law schools fund research sabbaticals, they might also fund teaching sabbaticals, during which faculty can design new teaching materials, pilot creative teaching strategies, and create new kinds of assessments.[453] Finally, in hiring decisions, law schools might more intentionally focus on recruiting professors with evidence of innovative teaching, rather than making innovative research the sole criterion for determining who is worthy of joining the faculty.[454]

C. *Limit the Student-Faculty Ratio in 1L Courses*

One of the biggest barriers to educational change is the high student-faculty ratio in law school service courses. Across second- and third-year electives, there tends to be variation in the modes of engagement, the kinds of assigned texts, and the assessment techniques. These differences partly reflect variation in course enrollment sizes.[455] A manageable number of students allows

[450] As one law professor advised junior faculty,

> You will be astounded at how little the rest of the law school community knows or cares what you are doing or saying in your classroom. The dean and faculty will start paying attention only if you cause massive student dissatisfaction, and then typically not until it reaches the point where committees of students are meeting with the dean or are burning effigies of you on the law school lawn.

Douglas J. Whaley, Essay, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125, 136 (1982).

[451] A pearl of wisdom commonly offered to junior faculty at research universities: Don't fall into "the teaching trap" by devoting significant energy to an aspect of the job that is regarded as much less important by senior colleagues and thereby jeopardize your chances of professional success. Kerry Ann Rockquemore, *The Teaching Trap*, INSIDE HIGHER ED (Mar. 14, 2010), https://www.insidehighered.com/advice/2010/03/15/teaching-trap [https://perma.cc/R2WA-EGEK].

[452] Gerald F. Hess, Michael Hunter Schwartz & Nancy Levit, *Fifty Ways To Promote Teaching and Learning*, 67 J. LEGAL EDUC. 696, 699 (2018) ("Law schools interested in improving teaching and learning must give significant weight to teaching in annual evaluations and compensation decisions.").

[453] *Id.* at 700 (noting use of teaching sabbaticals in Sweden).

[454] *Id.* at 697 (recommending law schools, "[i]n hiring, focus on a track record or indicia of good teaching").

[455] *See, e.g.*, *Course Reference Guide*, HARV. L. SCH., https://hls.harvard.edu/academics/curriculum/registration-information/course-reference-guide/ [https://perma.cc/F6VY-T3MQ]

professors to be more intentional about their pedagogical approaches. However, in high-enrollment classes, the number of students often dictates the course design. Large courses are the most loyal to Langdell's nineteenth-century pedagogical formula: the casebook plus the Socratic method, finished off with a hypo exam sans feedback. Part of the staying power of Langdell's methods resides not in their educational efficacy but in their scalability. They provide a workable means by which one professor can single-handedly educate a number of students that would typically require a team of instructors.

In most law schools, the group of students that most needs intensive academic support is the least likely to receive it. 1Ls tend to be placed in their law school's largest courses, where the number of students can make it difficult for even the most attentive instructors to provide individualized attention.[456] Instead, for these students, academic success is often contingent upon their ability to access the underground economy of outline banks, hornbooks, and old exams from upperclassmen.[457]

Even in some of the nation's most well-resourced law schools, one can find upward of one hundred students enrolled in a single 1L course.[458] That, in itself, is not a unique phenomenon on a university campus: lecture halls are often overflowing with students. A key difference in law schools, however, is that there is generally a sole instructor responsible for teaching, grading, and holding office hours for the entire lecture hall of students.[459] In most other departments, a class of that size would be automatically team-taught: staffed with a primary professor and teaching assistants who help grade assignments, reinforce key ideas in smaller discussion groups, and hold supplemental office hours.[460] With a team of support, faculty have significantly more latitude when designing the course. Professors can create group exercises for students to complete in their discussion sections. They can offer low-stakes assessments throughout the semester to identify which concepts students misunderstand so that those

(last visited Jan. 15, 2024) ("In general, total course capacities vary by course type: reading groups are 12; seminars are 22; most multi-section courses are 75-125; and many courses range from 30-125.").

[456] *See* Daniel Waldman, *What To Know About Law School Class Sizes*, U.S. NEWS & WORLD REP. (Sept. 2, 2019), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/2019-09-02/what-to-know-about-law-school-class-sizes ("[W]ith 500-plus students in a class and often more than 100 in a course, a [law] professor can only dedicate so much time to walk students through something that has eluded them during class.").

[457] Sharon A. Kahn, *Law School Survival Guide*, 80 U. DET. MERCY L. REV. 497, 497-98 (2003) (encouraging first-year law students to befriend upperclassmen for access to outlines and intel on professors).

[458] *See Course Reference Guide*, *supra* note 455.

[459] *Cf. Teaching*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/research-faculty/policies-recruitment/policies/teaching/ [https://perma.cc/KR9K-929V] (last visited Jan. 15, 2024) (noting only one teaching assistant for large 1L courses).

[460] *See, e.g.*, *Assistantships*, CORNELL UNIV. GRADUATE SCH., https://gradschool.cornell.edu/financial-support/assistantships/ [https://perma.cc/Y8E6-JQ92] (last visited Jan. 15, 2024) (describing responsibilities of graduate school teaching assistants).

concepts can be revisited in class. They can offer individualized, written feedback to students. They can intervene early when students' submitted work suggests that they are at risk of underperforming. In short, the support allows professors to be educationally attentive.

However, in law schools, where the typical duties of a team become the responsibility of a single instructor, professors must find ways to streamline the educational process to make their workload manageable. As Karl Llewellyn observed in the diatribe that opened this Article, the Langdellian method provides a tried-and-true way of "conveyor-belt[ing]" students through the law school assembly line.[461] A professor might recognize the shortcomings in the current model but still use it for efficiency's sake. The Socratic method, for instance, often doubles as a classroom management technique.[462] Unable to check whether a lecture hall full of students are keeping up with the readings, professors sometimes resort to cold calling as a form of pop quiz, hoping that the threat of public embarrassment will compel students to do their assigned work.[463] Similarly, professors often realize the gendered and racialized impacts of the Socratic method yet still rely on it, because in a high-enrollment course, the means to sustain interactive learning are severely limited.[464]

High student-faculty ratios are also a key reason why most 1Ls continue to have a single, cumulative exam with no feedback, despite the growing empirical data indicating that summative assessment alone is a suboptimal testing format.[465] In Langdell's era, this assessment regime worked because the purpose was merely to sort students in clearly delineated hierarchies of achievement. Today, however, educators have a more evolved understanding of the purpose of assessments. Formative evaluations with individualized feedback can be critical to improving students' understanding.[466] When first-year law students

[461] Llewellyn, *supra* note 2, at 653.

[462] *See* Heather K. Gerken, *How To Teach the Socratic Method with a Heart*, 21 L. TCHR. 24, 25 (2014) (suggesting Socratic method "helps solve the problem of big classrooms").

[463] *See id.* at 26 (describing benefit of Socratic cold-calling: "Everybody reads").

[464] In her review of Lani Guinier's work on how the Socratic method disproportionally creates unproductive learning environments for women law students, professor Elizabeth Garrett acknowledged the gender disparities the method produces but defended it on practical grounds, stating:

> One challenge of law teaching is to provide an environment of active learning for 100 or more students at one time. A teaching strategy which includes calling on students without giving them prior notice is one of the best ways to foster critical thinking for all members of such a large group.

Garrett, *supra* note 235, at 201-02.

[465] *See, e.g.*, Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence That Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 395 (2012) (finding formative assessment substantially improved final exam grades for 70% of test group students).

[466] As education scholars have noted, "[f]eedback is one of the most powerful influences on learning and achievement." John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RSCH. 81, 81 (2007); *see also* Ruth Jones, *Assessment and Legal Education: What*

receive feedback, their performance often increases dramatically.[467] This is partly because exam performance is not necessarily a reflection of students' intelligence or even of their legal knowledge: sometimes it is simply a matter of whether they have been taught how to take a law school exam.[468] However, the number of students enrolled in many 1L courses makes it impractical for their professors to provide the individualized feedback that could shift students' academic trajectories.

To create conditions that allow for more attentive teaching, the ABA should limit the student-faculty ratio in 1L courses. A maximum ratio of 40:1 would give professors significantly more latitude to be intentional in their teaching and substantive in their feedback.[469] Some law schools might already meet that ratio. Others could attain it by restaffing current tenure-track faculty. For law schools that lack sufficient faculty or space, this ratio would not necessarily require that they admit fewer students or hire more full-time faculty. Instead, adopting the team-teaching model that normally accompanies high-enrollment courses elsewhere on a university campus, they could have visiting assistant professors ("VAPs," the law school equivalent of postdoctoral fellows) work as teaching fellows in high-enrollment 1L courses.

Serving as a VAP has increasingly become a prerequisite for being hired as an entry-level faculty member.[470] Under the current system, VAPs often teach low-enrollment elective courses on their own while they make progress on their scholarship.[471] However, under the suggested model, they would assist tenure-track professors in high-enrollment 1L courses. VAPs would help grade

*Is Assessment, and What the *# Does It Have To Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 89, 107 (2013) ("[F]ormative assessment is a critical element of educational achievement.").

[467] Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139, 142 (2017) (showing 1L students who received individualized feedback in only one course outperformed students who did not in all courses, with strongest impacts for students whose LSAT scores and undergraduate GPAs were below school's median).

[468] *See* Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723, 733 (1986).

[469] Educators do not universally agree upon a specific number that constitutes the ideal student-faculty ratio for a given classroom. *See generally*, PETER BLATCHFORD & ANTHONY RUSSELL, RETHINKING CLASS SIZE: THE COMPLEX STORY OF IMPACT ON TEACHING AND LEARNING (2020). However, empirical studies of 1L law school classrooms indicate that a ratio of 30:1 can significantly improve students' educational results. *See, e.g.*, Daniel E. Ho & Mark G. Kelman, *Does Class Size Affect the Gender Gap? A Natural Experiment in Law*, 43 J. LEGAL STUD. 291, 305 (2014) (finding improved performance among women law students in thirty-seat courses). Relying on these studies, I identify 30:1 as a target ratio, with 40:1 as a maximum.

[470] *See* Lawsky, *supra* note 353 (noting in 2019-2021, between 78-85% of successful entry-level candidates had previously served as visiting assistant professors).

[471] *See, e.g.*, *Visiting Assistant Professor Program*, CHICAGO-KENT COLL. OF L., https://kentlaw.iit.edu/law/practical-experience/legal-research-and-writing/visiting-assistant-professor-program [https://perma.cc/NM2M-L8KH] (last visited Jan. 15, 2024) (stating VAPs may only teach nonrequired courses).

assignments, lead smaller discussion groups to reinforce key ideas, and offer supplementary office hours.

This model of team-teaching could be mutually beneficial. VAPs would get a head-start on what can be one of the most challenging parts of being an assistant law professor: prepping and teaching a large-enrollment course for the first time. Because they would not be the lead instructors, they could still make progress on their research while getting valuable teaching experience in a relatively low-stakes environment. The lead instructors, no longer solely responsible for managing a lecture hall full of students, can become more intentional when determining their assignments, modes of engagement, and learning goals. Most importantly, 1Ls might have more growth-centered classroom experiences that better support their intellectual and professional development.

CONCLUSION

It is well past time to reimagine our conception of legitimate law teaching. In many respects, the Langdellian model has outlived its useful life. Holding on to tradition prevents law schools from capitalizing on their intellectual resources, from implementing decades of research on effective pedagogy, and from meeting the needs of an increasingly diverse student body. Over the past 150 years, radical changes have occurred both inside and outside the law school walls. It is time for the core model of legal education to reflect these changes.