

THE CASE FOR (AND AGAINST) HARVARD

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LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION. By *William P. LaPiana*. New York: Oxford University Press. 1994. Pp. viii, 254. \$39.95.

William LaPiana¹ has for years been one of the most learned and acute scholars of nineteenth-century American legal thought. In his most recent book, he is both scholar and advocate. He has a client and a cause to defend. LaPiana's client is Christopher Columbus Langdell, who, as Dean of Harvard Law School in the 1870s, developed what would become the prototype for modern legal education in the United States: the three-year, postgraduate sequenced curriculum of private-law courses staffed by a faculty of full-time academics teaching by the "case method" — the interrogation of students primed with the reading of appellate cases. LaPiana's cause is Langdell and his faculty's larger vision that underlay their reforms: their ideals of legal science, their theory and practice of the case method, and their projects of professional improvement. LaPiana believes that we tend to view Langdell's ideas and practices through the distorting lens of the legal-realist generation that followed. The realists liked to quote Oliver Wendell Holmes's description of Langdell as "the greatest living legal theologian,"² without realizing how much Holmes actually shared and furthered Langdell's vision of law as science. They scoffed at legal science as empty scholasticism and lumped it — under the derogatory label of "formalism" — with the conservative constitutional doctrines of the "Lochner era" judiciary. They criticized the case method as an unduly narrow means of skills training and as an obstructed window into the legal system.

LaPiana wants to revive the power and plausibility of Langdell's system by placing it in the context in which it arose — the intellectual and social world of the 1870s. After this task is completed, one would realize

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1. Rita and Joseph Solomon Professor of Wills, Trusts, and Estates, New York Law School.

2. Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879) and SIR WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS (Oxford, Clarendon 1879)).

that Langdell was no fool; indeed, he was an accomplished practitioner whose ideas about law and how to study it not only were well grounded in contemporary jurisprudence but also strongly reflected the experience of practice under the great changes wrought by code pleading.

[LaPiana] also suggest[s] that the appeal of “Langdellianism” — of the case method and the careful creation of a structure of rules of law — was based on its practical effects. To be sure, the skills of case parsing that it taught were truly useful; moreover, the rigorous academic legal education it fostered helped assure the social position of the bar in a rapidly changing world. The construct Langdell and his contemporaries worked to create was a melding of logic and experience: the use of science to better understand and practice. [pp. vii-viii]

LaPiana tells a rich and complex story illustrated with a wealth of detail. He has dug up more material from contemporary sources, both published and unpublished, on Harvard, American legal science, and American legal education than any other scholar who has published in this area. The book contains many fascinating small discoveries and iconoclastic insights. We learn, for example, that James Coolidge Carter, the famous practitioner-jurisprude, recommended Langdell to Harvard’s President Eliot (p. 12); that Langdell had not succeeded as he deserved in practice because he had developed a “heartily disgust for the means & methods by which business, place & reputation are . . . gained [in New York City practice]” (p. 12); that Eliot — not Langdell — appointed the Harvard law school’s faculty (p. 15); that Langdell was a dreadful administrator (p. 19); that in the first years of his experiment, his school actually lost students (p. 19); and that in the early 1880s, when a successful practitioner earned approximately \$20,000 a year, a Harvard law professor earned a mere \$4500 (p. 20).

LaPiana’s thesis rises above all of this detail. Although LaPiana does not put it quite this way, his thesis is: Langdell’s Harvard experiment succeeded and spread, while so many previous experiments in American legal education had failed, because it was able to develop a better professional product — a more rigorous and practical legal science and teaching method³ — than its predecessors and rivals. Harvard also succeeded in creating the right niche market for its product: an elite postbellum bar anxious to upgrade

3. In his more general passages, LaPiana tends to commingle Langdell’s two projects — his ideal of legal science and the case method. In Langdell’s own practice, of course, the two *were* the same: the science was a science of principles extracted from the study of cases; the method taught the principles by teaching the cases, the original materials — lab specimens — of the science. As LaPiana elsewhere makes clear, the two projects rapidly separated: the case system took on a life of its own as a teaching method, divorced from Langdell’s legal theory, and remarried to completely different approaches to law. P. 135.

its prestige and supply certifiably smart talent to the new corporate law firms.

In contrast to Langdell's Harvard, antebellum legal education aimed both too high and too low. Like Langdell and his colleagues, the leading early nineteenth-century lawyers aspired to construct, and to teach in law schools, a legal "science of principles" derived by induction from reported cases. They believed a scientific — or as we would now call it, a theoretical — approach was required to lift the lawyer above the "mere case-lawyer" who can reason only by analogy and to distinguish him from the journeymen and "pettifogging" elements of the profession (pp. 29-38). LaPiana suggests that the antebellum brand of legal science failed to take hold in the routine training of lawyers because it was too abstract, composed of "great universal principles which, once understood, will reveal to the scientist the nature of the world and, indeed, the very mind of its Creator" (p. 58). Such natural-law principles had little connection with the "practical science of procedure," the pleading rules derived from the common law forms of action, that made up the day-to-day, bread-and-butter materials of practice (pp. 38-44). Law school curricula based on the grand principles were therefore shunned as impractical, while curricula based on the pleading rules — such as the one at New York University — duplicated what was better taught through apprenticeships and failed to deliver the social cachet and general culture of law-as-science. The antebellum Harvard Law School did attract students with the prestige of its faculty — which included Justice Joseph Story, Joel Parker, Theophilus Parsons, and Emory Washburn — and with the enticement that it equipped its graduates with the ability to practice anywhere by teaching them truly national law in the form of general principles. Nonetheless, Harvard teaching, though based on interactive discussion and lectures, had by mid-century become desultory and undemanding. As a first-year student, Joseph H. Choate, later famous as an advocate and diplomat, stopped taking notes in October, remarking in his notebook, "at this point *Parsons* became *Pathetic!*" (p. 51).

By the time Langdell became Dean of Harvard in the 1870s, conditions had become more favorable for a more rigorous and practical version of legal science and for university-based legal education in general. Procedural reforms, pioneered by David Dudley Field's 1848 Code in New York,⁴ shifted the basis of pleading and therefore of practical knowledge from formulas to facts, from skill in the technicalities of the pleading game to the search for cases "on point" — cases with similar facts (pp. 70-73). These reforms, which

4. An Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of this State, 1848 N.Y. Laws 379 § 118.

Langdell witnessed firsthand as a New York practitioner, furthered his project in several respects. First, Harvard's claim that its case method was a clinical-training method became more plausible, as it taught the skills of parsing, analogizing, and distinguishing cases (pp. 102-09, 148-52). Second, it facilitated the development of a more genuinely empirical legal theory — a theory that would organize thinking about law into broad substantive categories based on the facts of cases.⁵ Finally, the production of such a theory to organize the chaotic new case-filled world of the judges and practitioners demanded a new cadre of academic specialists. LaPiana summarizes the new Harvard thinking:

Only full-time scientists can properly pursue legal science. Their task is to find principles in the original sources of the law, which are the cases. Understanding the opinions of the courts will reveal the true basis of the law. That basis is not grand principles related to the ultimate ordering of society, but the narrow, technical principles that make up the real work of the lawyer, which courts use to decide real cases. [pp. 57-58]

LaPiana argues that, aside perhaps from James Barr Ames, Langdell's Harvard colleagues — such as Oliver Wendell Holmes, John Chipman Gray, and James Bradley Thayer — created scholarship that echoed their Dean's view of a secular, positivist, case and fact-based legal science based on John Austin's jurisprudence. In Austin's model, law derives its authority from the "commands" of a legal sovereign rather than from moral principles or universal truths, and legal science describes "law as it is and not as it should be." The positivists aimed to create an autonomous field of knowledge: "The creation of a modern science of law was their common goal, and the separation of that science from every other science was their common method" (p. 169).

Harvard's gamble, after a slow start, finally paid off. An active group of alumni — including James Coolidge Carter and Louis Brandeis — propagandized the virtues of the case method to the practicing bar. The intellectual demands of the method, as well as tighter entrance requirements, sequenced courses, and regular examinations, certified the Harvard Law School graduate as educated and rigorously trained. The invention of the law review — and its membership based on class rank — also helped to sort and certify a legal elite whose members were in sudden demand as associates in the new metropolitan corporate firms. The notion of a legal science appealed to the elite bar's aspirations to raise its status by associating itself with the prestige of new models of professionalism

5. "Langdell's legal science exemplifies the shift from the idea of legal order based on principles inherent in the constitution of a divinely created universe to one based on proper understanding and arrangement of technical principles inherent in the historically produced legal system." P. 70.

founded on the mastery of apolitical, secular, objective, university-based bodies of learning (p. 161). Law schools like Columbia and Yale at first tried to hold out against the pull of the Harvard model in order to preserve an older conception of the law school as designed to train generalist lawyer-statesmen. They were nonetheless converted to Harvardism — which by 1900 meant primarily the case method taught by a full-time law faculty — when they saw Cambridge taking their best potential applicants, a situation exacerbated after amendments to the New York bar rules equalized the status of Harvard and the New York state law schools.⁶ Other alternatives to the legal science, case-method model, such as Roscoe Pound's call for "sociological jurisprudence," went nowhere (pp. 152-58), but the Harvard model spread to law schools everywhere. The ideal of an autonomous private-law science based on the extraction of principles from cases became the legal profession's intellectual orthodoxy institutionalized in the compact between the bench, bar, and academy — the American Law Institute's Restatement projects, which, like the Harvard curriculum, supposed that disinterested legal minds could identify a core of national common law principles that rose above both variations in state law and mere politics (pp. 158-64).

LaPiana forcefully and effectively conveys the central points in his thesis. His claim that the Harvard pioneers were indeed important innovators in both the distinct realms of scholarship and teaching is convincing. Langdell, Holmes, and their colleagues severed the connections between legal theory and moral science and natural law, and began to refound legal theory on generalizations — principles and categories of classification — from the data of reported cases. The case method — especially in the hands of teachers more gifted than Langdell, such as James Barr Ames and William Keener — turned out to be not only an effective tool for engaging and sharpening the minds of students but a brilliant marketing device. It could be sold to President Eliot, a chemist, as a technique of working with laboratory specimens, the raw data of legal science; to the practicing bar as a method of clinical instruction in the new techniques of fact-based code pleading; and to an upper bar scornful of "mere case-lawyers," and aspiring to theoretically-based learning, as a method both for teaching principles and the practical arts of the "counsellor," the appellate litigator.⁷

6. See P. 88; see also *Amendment to Rules Regulating the Admission of Attorneys*, March 19, 1878, 17 ALBANY L.J. 235 (1878).

7. So flexible was the case method that it had no difficulty surviving the legal realist revolution. By 1900, the case method had drifted far away from its original Langdellian moorings to become nothing more than a method for asking questions about case after case. For the realists, the casebooks were rich storehouses both of stories about the kinds of social experience that produce disputes and of wrongheaded formalist judicial reasoning about

In several respects, however, LaPiana's history — though certainly among the best histories we now have of American legal education — is misleading and incomplete. In the rest of this review, I will focus on three topics in particular: (i) LaPiana's account of late nineteenth-century legal science; (ii) his claim that the Harvard system flourished because it met the "practical" needs of the new profession; and (iii) his depreciation of rival approaches to training lawyers, especially those approaches calling for a broad education in the policy sciences.

I. A FACT-BASED SCIENCE

Whenever LaPiana gives a capsule summary of Harvard's brand of legal science, he stresses its positivism: that it is based on an empirical bedrock of "facts," "cases," "what the courts do," and "the law as it is" (pp. 77, 100-03). Law is a fact, not a norm, the result of the exercise of state power. This positivist view unites all the legal scientists from Langdell to Holmes to Nicholas St. John Green (pp. 110-31), even including Arthur Corbin (pp. 146-47).

Although such a summary is true as far as it goes, it is incomplete and overbroad. It is incomplete because the legal scientists themselves, if asked what they were doing, would surely have emphasized their *generalizing* ambitions to produce what Holmes called a "philosophically arranged" body of law,⁸ a rational scheme or system of abstract categories for organizing legal knowledge to replace the old forms of action. Oddly enough, LaPiana recognizes this ambition perfectly well in his more specific passages.⁹ Con-

those disputes. The realist teacher could sharpen students' minds by encouraging them to criticize the formal reasons given for the decisions and foster their creative policymaking talents by getting them to suggest alternative functional reasons.

8. Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of Law*, 5 AM. L. REV. 1, 2 (1870).

9. Even in these passages, LaPiana's treatment is unduly parochial in its decision to treat — save for a few glancing references — only the American side of a legal-intellectual culture that in the late nineteenth century had reached its high point of cosmopolitan collaboration. Classical legal science was a genuinely transatlantic endeavor. Harvard scholars like Holmes, Ames, Thayer, and Gray were learned in civil and Roman law history and theory, and corresponded with English and German scholars such as William Anson, A.V. Dicey, Frederick Pollock, Fitzjames Stephen, James Bryce, F.W. Maitland, Heinrich Brunner, and Otto von Gierke, who shared their historical and theoretical enthusiasms. See RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930* (1987) (detailing correspondence with English scholars). Langdell's ambitions for legal theory and education obviously borrowed from the German ideal of the conceptualist jurist and the English model of the barrister's role as expert counsellor to the judiciary; Holmes's intellectual debt — though he downplayed it, as he did all such debts — to Sir Henry Maine, Fitzjames Stephen, and Rudolf von Jhering is evidently enormous. James Gordley's recent study shows the extent to which the questions that the Harvard scientists like Parsons, Langdell, Holmes, Ames, and Williston framed about contract law were the same questions, framed in much the same way, as those of the civil law writers. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 161-213 (1991).

trasting Langdell on contracts with predecessors like Bishop and Hilliard, LaPiana says that the "clearest difference" is that the earlier works overflow with citations to cases and to "fact patterns and recurring situations in life" (p. 60), whereas Langdell cites practically no cases, preferring to spin "theory from a small number of leading opinions" (p. 69) and to derive doctrinal rules from "fundamental legal" concepts such as the definition of a contract.¹⁰ In Langdell's system, cases are carefully selected to serve as the building blocks of concepts that will thereafter operate as axioms; after the concepts are in place, any mere case or fact that fails to conform to the axiom is squashed under the juggernaut. Holmes, as Thomas Grey has pointed out in a pair of brilliant articles,¹¹ fully shared the legal scientists' generalizing and system-building ambition. For Holmes, however, the concepts were only pragmatic

10. Pp. 63-64. As a research assistant to Theophilus Parsons, Langdell read and digested over 6,000 contracts cases. LaPiana — momentarily back in the grip of his *idée maitresse* that all legal scientists loved cases and facts — infers from this that "[u]nder the direction of a respected teacher [Langdell] learned to look for the law in a rigorous dissection of the original records of judges' reasoning." Pp. 70-71. Actually, Langdell's experience under Parsons seems to have cured him of case collecting forever; as he later said, "The vast majority are useless, and worse than useless, for any purpose of systematic study." Pp. 55-56 (quoting 1 C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vii, viii (Boston, Little, Brown 2d ed. 1879)). As his contracts casebook makes clear, the only cases Langdell thought truly useful for teaching principles were 20 to 300 years old and almost exclusively English. Although Langdell may simply have been arguing here for the need to be highly selective in choosing cases for teaching purposes, his scholarship is also highly selective.

11. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) [hereinafter Grey, *Legal Pragmatism*]; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). LaPiana makes surprisingly little use of the large body of remarkable secondary work on nineteenth-century private-law thought that has appeared in recent years. See, e.g., P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 660-715 (1979); COSGROVE, *supra* note 9; WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); GORDLEY, *supra* note 9; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE, 1760-1850 (1991); EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986); Grey, *Langdell's Orthodoxy*, *supra*; Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989); Mathias W. Reimann, *Holmes's Common Law and German Legal Science, in THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 72 (Robert W. Gordon ed., 1992); A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247 (1975); Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431; Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975; David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26 (William Twining ed., 1986). Some of this work he cites in passing; much of it does not appear in his Bibliography.

guidelines and useful organizing tools; they could not be deployed operationally to determine every legal outcome because the actual legal system was the product of "experience" rather than "logic," crammed with historical "survivals" of past power struggles and policy choices.¹²

LaPiana's stress on the factual basis of legal science is also overbroad because — as his own account reveals — "facts" carried different meanings among the legal thinkers he discusses. For Langdell himself, among the primary facts of the legal order were the old remedial forms whose distinctions he built into the structure of his general principles.¹³ Holmes and Green, on the other hand, aspired to arrangements that would transcend the forms entirely (pp. 110-12), so for them the remedial categories were not scientifically *useful* facts. Nor did they find significance in the merely "dramatic" fact groupings such as "Railroads" or "Telegraphs" favored by practitioners' manuals (pp. 113-14). "Real" facts for Holmes and Green were facts they believed relevant to the construction of general legal theory. Sometimes these were observable facts about nature and society, "what actually happens in the world when men and women act" (p. 114), *as opposed to* the fictions and constructs found in legal language,¹⁴ and sometimes they included anything accorded the status of fact by reported case law, *including* the purely fictional constructs of legal language.¹⁵

For the Harvard scientists' English counterpart, Frederick Pollock, the facts were the entire statistical universe of reported cases, from which lawyer-scientists could make probabilistic predictions.¹⁶

12. Grey, *Legal Pragmatism*, *supra* note 11, at 806-07.

13. See, e.g., pp. 63-64. Although LaPiana generally wants to present Langdell as a fully up-to-date modernizer, who as a New York practitioner had witnessed and participated in the procedural revolution wrought by the Field Code fact-based pleading, he recognizes that in this respect his hero is a relatively conservative, transitional figure in the development of legal science, "seeing the principles of the forms of action as still alive and finding them best expressed in a small number of older English cases dating from a time of procedural purity." P. 74.

14. See, e.g., p. 114 (discussing Green's theory of actual foreseeability as the basis of negligence); p. 116 (discussing Holmes's view that negligence is based not on individual moral fault but on community judgments about the consequences of average behavior).

15. See, e.g., p. 115 (discussing Holmes's view that A may succeed to B's rights because the law constructs a notional identity between A and B).

16. Frederick Pollock, *The Science of Case Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* (1874). No one in Pollock's generation actually ever attempted to try to run this kind of analysis on a case data set. Pollock's article was intended only to suggest how one might think about case law science as if it were like other sciences, not to propose an actual experiment along these lines. I have been told by English lawyers that, when he was a law reporter, Pollock stuck unpublished decisions of which he disapproved in a drawer and left them there, calling them "bad law." This does not seem very scientific, unless perhaps Pollock thought the cases statistical outliers that would only confuse later analysts. An article could be written about the contrast between the classical jurists' rhetoric of rigorous scientific inquiry and the casualness of their empiricism — their ruthlessness in squeezing and suppressing data that did not fit. As I suggest above, their justification was surely that the generalizing feature

"Real" facts for John Chipman Gray, on the other hand, were often the very phenomena that his scientifically minded colleagues preferred to disregard as surface disturbances on the deeper waters of the law: the conventional wisdom of the bench and bar. "[T]he opinions of judges and lawyers as to what the law is *are* the law,"¹⁷ said Gray in a famous polemic against his own dean — Langdell — in 1883, adding that "a school where the majority of the professors shuns and despises the contact with [such] actual facts, has got the seeds of ruin in it and will go to the devil."¹⁸ To the legal realists, of course, the stated grounds of decisions, the official rules and doctrines, were almost entirely useless for understanding the real bases of decisions, which were rather to be found in latent facts — subtexts of custom and context-specific function. Arthur Corbin also thought the case reports were a "mighty storehouse of *facts*."¹⁹ What Corbin meant by the phrase was not a data set for prediction in any ordinary sense but rather a great anthropological record, rich in the diversity of social situations described and in the wonderful variety of "arguments of learned and experienced men on both sides of vast numbers of questions."²⁰ Louis Brandeis — a prominent Harvard alumnus and proponent of the case method who occasionally taught at the School but declined an offer to join the faculty — concluded by 1890 that the School was not teaching enough of the kind of "facts" he thought important. For Brandeis, as for other progressives, these were the "social facts" of industrial society — facts about working conditions, corporate finance, and public utility rate bases.²¹ A later generation of realists would argue that the facts that were the key to understanding the legal system in actual operation were not to be found in the cases at all but

of their project was far more important and urgent business than the empirical or factual side. To give them credit, the classical generation *did* do far more rigorous work on one part of the empirical project — namely, legal history — than any of their predecessors.

17. P. 19 (quoting Letter from J.C. Gray to C.W. Eliot (Jan. 3, 1883) (on file with Harvard University Archives)).

18. *Id.*

19. Pp. 146-47 (quoting Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. 234, 246 (1914)).

20. *Id.*

21. LaPiana, normally very thorough about any matter concerning Harvard, generally neglects Brandeis's substantive views on the Law School and legal education. Brandeis was an important influence on the School's curriculum, inducing Harvard to offer a course on the "peculiarities of Massachusetts law" that, besides teaching students something about local practice, would show them how law was adapted to local conditions and ideals. See Letter from Louis D. Brandeis to Christopher C. Langdell (Dec. 30, 1889), in 1 LETTERS OF LOUIS D. BRANDEIS 84-88 (Melvin I. Urofsky & David W. Levy eds., 1971). When asked to give a course of lectures on law at M.I.T. in 1890, Brandeis — persuaded of the traditional private-law curriculum's excessive remoteness from social issues by the great Homestead Strike going on at the time — delivered a set of lectures on law focusing on the problems of industrial society. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 87 (1946). Brandeis's notes for these lectures are in the collection of his papers at Brandeis University.

instead through research into the social conditions that generated disputes — or the psychological conditions or class positions that influenced decisions — and the social consequences of legal rules.²² Finally, Jerome Frank would wash the facts in the cases in the same skeptical acid that his fellow realists poured over doctrinal rules and doctrinal reasoning and conclude that these supposed bedrock data of the legal system were nothing but artifacts of a capricious and irrational trial process.²³

Through the generations, advocates of a scientific approach to law agreed that the science should be a positive science based on discoverable, observable facts — facts of nature and society, facts of history, and facts of prior decisions. In part this commitment to facts expressed an attitude — a “masculine” readiness to look brute reality unblinkingly in the face, to throw off the crutches of religion, moral sentiment, and the stale formulae of conventional professional wisdom, and to embark upon the strenuous, tough-minded, intellectual path.²⁴ It was a lot more than an attitude, obviously; it generated a serious program of doctrinal, historical, and — eventually — social-empirical research, and a profound rethinking of basic jurisprudence. For an intellectual historian, however, I think the interesting story is not the broadly shared consensus about the factual basis of true legal science but the fierce contests over what the relevant facts actually were and where to look for them. The long search for the “facts” that will predict legal results in the positivist tradition is a fascinating sort of striptease, in which one veil of illusion after another is ripped off to reveal, in the end, only more veils.

II. A PRACTICAL PROGRAM

I suspect that the reason LaPiana plays down the generalizing and system-building theoretical ambitions of his legal scientists, and plays up their empiricism, is to further another of his main revisionist arguments: that the Harvard scientists were not — *pace* J.C. Gray’s accusation²⁵ — impractical dreamers but practical men who had developed a practical method of training lawyers for practical tasks. This is a more complex claim than it first appears. It is best broken down into claims of (i) indirect and (ii) direct practical effects. The distinction matters. For example, the English universities since the nineteenth century have prepared candidates for the

22. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

23. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14-27 (1949).

24. One can detect a similar affect, a sort of hard-boiled defiance of lazy and effete doctrinal conventionality and a willingness to face hard truths — the harder the better — in our modern-day counterpart to classical legal science, the Chicago law and economics school.

25. See *supra* text accompanying notes 17-18.

upper civil service by teaching them Latin and Greek. That curriculum was eminently "practical" in the indirect sense that it was rigorous and exclusive; it sorted the candidates by general intelligence and class background. But only its most generous admirers ever claimed that it taught them much of immediate utility about the governance of a nation and empire.

A. Indirect Practicality

LaPiana's stronger case for the practicality of the Harvard curriculum focuses upon its *indirect* role as a sorting mechanism and as a provider of rigorous training in general legal thinking. A useful way of putting this argument, following pioneer work by Anthony Chase,²⁶ is that Harvard certified its high-ranking graduates as having survived a disciplinary regime of hard work in preparing for classes and exams. Then, as now, the lawyers who hired such graduates cared less about their specific skills, which could be picked up on the job, than about their general "smartness," willingness to work, and ability to focus on matters of minute detail — hence the marketability of veterans of the law review citechecking ordeal.

LaPiana also stresses — rightly in my view — the importance of the social cachet of university-trained lawyers for the newly organized profession. With the founding of the Association of the Bar of the City of New York in 1870 and the American Bar Association in 1878, the elite of the profession sought to purify the bar of corruption and incompetence through stiffened entrance, ethical, and disciplinary requirements (pp. 84-85). They hoped in part to redeem themselves from complicity in the piratical practices of some of their business clients and in part to distinguish themselves as a meritocratic caste from both new-wealth businessmen and from what they perceived to be the — increasingly immigrant — riffraff of the profession. For such purposes, the revitalized law schools, with their own stiff admissions requirements and certification of science-based professional expertise, were a godsend: they became among the most important of the institutions that signaled membership in the new professional and social elites.²⁷

26. Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979); Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived As Clinical Instruction In Law*, 5 NOVA L.J. 323 (1981) [hereinafter Chase, *Origins*]. LaPiana generously acknowledges Chase's contribution.

27. Pp. 91-92. Here, LaPiana's argument resembles those made by JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 74-101 (1976) and MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 13, 183-84 (1988), except that he does not stress as forcefully as Auerbach and Powell the ethnic and class distinctions fostered by the professionalization project. Harvard Law School's role with respect to those distinctions is interestingly complex. The requirements of an undergraduate degree and an ability to forego work for another three postgraduate years effectively closed elite legal edu-

B. *Direct Practicality*

The case for the *direct* utility of Harvard's education to practitioners is much trickier, partly because LaPiana does not begin to supply the kind of evidence one would need to confirm it — evidence of the kinds of jobs the Law School's graduates entered and how they did them.²⁸ The Harvard faculty's strongest argument for the practical value of their training was, of course, that it taught students how to work with cases — how to digest them, state their holdings, use them as authority, and distinguish them — in a legal world in which the West Publishing Company was producing reports and in which lawyers were increasingly citing them as precedent (pp. 99-109). Langdell himself conceived of the case method as a sort of clinical training in appellate practice. Harvard's mission in his view was to train "counsellors," a super-elite of the bar whose specialty — like Langdell's own during his brief stint in practice — would lie in arguing fine points of law to upper courts and who would eventually fill the ranks of the higher judiciary.²⁹

Even as to this very modest claim of practicality, I do not feel quite satisfied. One would like to know much more specifically how alike and how different were the ways in which the Law School faculty taught case analysis and how lawyers ordinarily performed it. My own suspicion is that, then as now, there was a substantial gulf between the two: that the school encouraged the students to find a core of principle in lines of cases but that most practitioners

cation to all but a small fraction of the population. Jews, however, and even occasional blacks, though not women until the 1950s, who met the requirements seem to have been admitted without discrimination and often reported that their law school experiences — in contrast to the many social humiliations at colleges — were ones of genuine meritocracy. When they looked for employment, of course, it was another story. Until the late 1960s elite law firm practice was mostly closed to Jews — except in Jewish firms — and virtually entirely closed to blacks.

Besides neglecting the Auerbach-Powell thesis about professionalization as a means of firming social and ethnic distinctions, LaPiana rather surprisingly ignores some of the most powerful works on late nineteenth-century professionalization — namely, RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) and MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977). These works argue that professional standard setting is largely a project of market control — the effort to create and define a distinctive product, market that product, and protect that market against competitors. Langdell's project to construct an autonomous legal science unconnected to any other competing sciences would seem to fit nicely into the Larson-Abel framework.

28. Some evidence on the social backgrounds and jobs of Boston lawyers of the period can be found in ROBERT A. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900*, at 30-33 (1981) and Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA* 97 (Gerard W. Gawalt ed., 1984).

29. See Chase, *Origins*, *supra* note 26. Langdell's model evidently focused on the appellate side of an English barrister's practice. Indeed, to judge by his scholarly work and dean's reports suffused with English cases and English examples, Langdell almost seemed to have believed himself to be living in an English intellectual and professional world. P. 60.

used the cases simply as precedents, as fiat authority for rules, or as sources of analogy from past decisions on similar facts.³⁰

How important was appellate case practice among the emerging tasks of the bar? Apparently without sensing the problems it raises for his argument, LaPiana quotes Lawrence Friedman's description of emerging corporate practice:

Between 1880 and 1900, the career of the [Cravath] firm was intimately bound up with Wall Street finance; it drew up papers merging businesses, it advised railroads on their legal affairs, handled stockholders' suits, floated bond issues It was a servant and advisor to big business, an architect of financial structures; it did not feed on lawsuits, rather it avoided them.³¹

Langdell's vision of a school devoted to training a barrister elite was thus exquisitely timed to coincide with the shift of elite practice from the courtroom to the boardroom, from appellate argument to corporate reorganization practice, and from litigation to counselling and dealmaking. About this emerging world of corporate practice, one can safely say that Langdell's school taught absolutely nothing. William D. Guthrie, a Cravath partner, complained in 1897:

Most of our work is in the management of large corporate enterprise which requires capacity for detail and also great accuracy and much business judgment. We find little difficulty in obtaining assistance in litigated work, but we have found it almost impossible to secure men who can attend to the details of these corporate matters capably and accurately.³²

Lawyers entering this elite corporate practice needed technical knowledge of such matters as corporate financial structures and the valuation of public utility rate bases. The legal materials they needed to master were, increasingly, statutes and administrative records. Harvard did not even consider statutes and administrative decisions to be "law" until or unless they were interpreted by a court³³ and made no attempt to teach them until Bruce Wyman and Felix Frankfurter joined the faculty. Why? Because neither the

30. Such a discrepancy, if it existed, did not mean the Harvard teachers were wrong to teach cases the way they did. They might well have believed that the lawyer trained to see the principles — and, we would now add, the policies, purposes, and social visions — behind the rules will be a better practitioner than the "mere case lawyer" who sees cases as nothing more than precedents. They might also have believed that, over time, an entire profession trained in principles and policies would elevate its standards of practice. Such a reformist or dynamic justification for the Harvard-style case method is, however, quite different from the claim that LaPiana makes — and that the Harvard faculty and alumni defending it felt compelled to make — that the method taught *current* practice skills in *immediate* demand.

31. P. 92 (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 637 (2d ed. 1985)).

32. 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1948*, at 657 (1946).

33. See, e.g., Christopher C. Langdell, *Dominant Opinions in England during the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of it, during that Period*, 19 HARV. L. REV. 151 (1906) (reviewing A.V. DICEY, *LAW AND*

technical nor the statutory-administrative materials could be accommodated by the methods of private-law science. From the perspective of legal science, statutes cannot be understood scientifically. They are as “preferences” are to the economist, random exogenous events. There were, of course, social sciences that did purport to study legislative and administrative output — as well as corporate finance and public utility rate regulation — “scientifically”: political science, political economy, and economics. Because, however, these were not *legal* sciences, the law schools had to exclude them entirely. The consequence of these self-imposed limits to the province of “pure” law was that the schools deliberately kept their distance from a large and growing component of the work of their most successful graduates. Therefore, any argument about the new model of law school’s “practicality” must be severely qualified to reflect this huge disjunction between curricular and corporate practices.

In contrast to its effect on practice, the Harvard model had a direct and immense influence on legal *education*. After some initial resistance, the model spread to schools all over the country, including those preparing students for local-practice jobs entirely different from those of Harvard graduates.³⁴ On legal *practice*, my guess is that the main practical effects of the Harvard system were long-term, diffuse, and indirect; perhaps the most important of these effects is one that LaPiana hardly mentions at all, the influence of classical legal theory. Practicing lawyers almost never appreciate new theories when they are proposed, dismissing them scornfully as airhead speculation. All the same, the new theories soak gradually into the marrow of lawyers’ bones, and, in time, lawyers come to rely on them without being aware of it. Lawyers bought the new treatises — *Williston on Contracts*,³⁵ *Thayer and Wigmore on Evidence*,³⁶ *Scott on Trusts*,³⁷ and the like — for their encyclopedic collections of cases; but, with the cases, they absorbed the categories and principles as well. As Thomas Grey has said, the spread of classical-legal modes of thought into commonsense legal language is “Langdell’s secret triumph”:³⁸ his generation’s legacy is found in

OPINION IN ENGLAND (1905)). Langdell said Dicey’s title was misleading because the book was not about *law* at all, but legislation. See Langdell, *supra*, at 151.

34. By far the best account of this imperial spread remains ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983), which contains a more critical account of the Harvard model than LaPiana’s.

35. SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1927).

36. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (Boston, Little, Brown 1898); JOHN H. WIGMORE, *A STUDENT’S TEXTBOOK OF THE LAW OF EVIDENCE* (1935).

37. AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* (1939).

38. Grey, *Langdell’s Orthodoxy*, *supra* note 11, at 50.

the distinctions we take for granted between private and public law; voluntary and involuntary obligation (contract, quasi-contract, and tort); intentional, negligence-based, and strict liability in tort; and many more.

III. LAW AS AN AUTONOMOUS "TECHNICAL" SCIENCE

In 1871, Langdell was invited to chair a "committee on jurisprudence," possibly of the newly formed American Social Science Association. LaPiana has unearthed Langdell's remarkable response:

[I]t [the study of jurisprudence] does not specially concern lawyers or those intending to become lawyers, but other portions of the community as well; some perhaps more, e.g., those aiming at public life or a high order of journalism.³⁹ The chief business of a lawyer is and must be to learn and administer the law *as it is*; while I suppose the great object in studying jurisprudence should be to ascertain what the law *ought to be*; and although these two pursuits may seem to be of a very kindred nature, I think experience shows that devotion to one is apt to give more or less distaste for the other.⁴⁰

"Jurisprudence" in this context evidently means not just legal philosophy but any endeavor to connect law with its ethical, economic, social, or political foundations or consequences — what in the nineteenth century were called the sciences of morals and legislation. As LaPiana says, Langdell almost certainly borrowed this "law-as-it-is" versus "law-as-it-ought-to-be" formula from John Austin (p. 77). The formula was actually very misleading. In practice, it stood for much more than a distinction between positive and normative approaches to law. It stood for the attempt to construct what Max Weber called a "formally rational" legal science,⁴¹ that is, an approach to studying law that was autonomous from all other sciences, *including* other *descriptive* sciences such as sociology, non-strictly-legal history like social-legal history, anthropology, "positive" economics, and political science. Above all, it stood for an approach that, besides eschewing nonlegal disciplines, would produce an account of *law itself* as a domain of professional activity autonomous from all other social action and norms. Recall LaPiana's summary of the credo of Harvard legal science:

Only full-time scientists can properly pursue legal science. Their task is to find principles in the original sources of the law, which are the cases. Understanding the opinions of the courts will reveal the true

39. The reference to "journalism" is not as catty as it sounds. Langdell had in mind the intellectual quarterlies of the time, such as the *Quarterly Review*, the *Westminster Review*, or (in the United States) the *North American Review*. John Stuart Mill wrote several of his essays for such reviews.

40. P. 77 (quoting Letter from C.C. Langdell to T.D. Woolsey (Feb. 6, 1871) (on file at Yale University Library)).

41. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63-64 (Max Rheinstein ed., 1954).

basis of the law. *That basis is not grand principles related to the ultimate ordering of society, but the narrow, technical principles that make up the real work of the lawyer*, which courts use to decide real cases. (pp. 57-58; emphasis added).

Harvard and the other schools that adopted the Harvard model were rigorous in their pursuit of the study of law as both an autonomous discipline and an autonomous element in society. The Harvard faculty resisted President Eliot's efforts to add courses that would help train graduates for public-service and political careers. Even Roscoe Pound, the apostle of "sociological jurisprudence" and Dean at Harvard, taught his "jurisprudence" course only to graduate students outside the Law School lest it corrupt the law students' private-law curriculum (p. 157). Most famously, Harvard's Dean Ames refused to allow Professor Joseph Beale to become Dean at Chicago Law School unless Chicago renounced the plan of its leading light, the émigré scholar Ernst Freund, that the school offer courses in

criminology, "relation of the state to industry," finance, railroad transportation, accounting, banking, experimental psychology, history of political ethics, comparative politics, diplomatic history of the United States and Europe, government of colonies, European political theory, and administrative law. "We have no such subjects in our Curriculum," Ames wrote [President William Rainey Harper of Chicago], "and are unanimously opposed to the teaching of anything but pure law in our department."⁴²

The claim that law is best studied as an autonomous phenomenon by the methods of an autonomous discipline has — like neo-classical economics — two faces, one modest and self-limiting, the other arrogant, insular, and imperialist.⁴³ In their modest mode, the classical lawyers conceded that their work dealt with only a small patch of the social universe, the realm of private law. Furthermore, their little patch could be and frequently was further reduced by legislation; on the wisdom or folly of such legislation, legal science could not comment, as the whole subject was outside its field.⁴⁴ But that self-limiting stance founded on a division of intellectual labor concealed — as it so often does — much more ambitious arguments: that the patch was hardly so little after all, because it contained the whole field of knowledge relevant to the actual work of the legal profession and that legal science provided the only valid

42. P. 130 (footnote omitted) (quoting Enclosure of Ernst Freund to W.R. Harper (Mar. 2, 1902) (on file in University of Chicago Archives), and Letter from J.B. Ames to W.R. Harper (Mar. 31, 1902) (on file in University of Chicago Archives)).

43. A nice modern example of the modest argument for legal autonomy is Charles Fried, *The Artificial Reason of the Law Or: What Lawyers Know*, 60 TEXAS L. REV. 35 (1981).

44. Compare the economist's disclaimer that his science is unequipped to deal with issues of distribution.

methods for lawyers to master, all other types of knowledge being extraneous to the practical tasks of cultivating the law-patch.

LaPiana has worked himself into such historical sympathy with his Harvard legal-science heroes that he seems to have adopted all their main assumptions. These assumptions pervade his book and are manifest in two ways: First, he accepts the basic proposition of classical legal science that law, especially private law or "lawyer's law," is in fact an exclusively "technical" subject without political, social, or moral content. Second, partly as a result of adopting this view, he persistently disparages all the alternatives to the classical-positivist model of legal autonomy, from the antebellum versions of legal science to modern "sociological jurisprudence."

A. *An Exclusively Technical Subject*

What could it plausibly mean to say that law is a "technical" subject unconnected with "grand principles related to the ultimate ordering of society?" (pp. 57-59). LaPiana wants to defend this claim against several contrary views.

One view is that of progressive and legal-realist critics of late nineteenth-century legal thought, who tended indiscriminately to lump both private-law and public-law — constitutional — theory into a single bogeyman called "formalism," which, they asserted, masked a bias in favor of big business and against social legislation under abstract conceptions and purportedly logical deductions. LaPiana has no trouble protecting his Harvard scholars against this charge. As Thomas Grey has also pointed out, their own politics — except for those of J.C. Gray, a real reactionary — were mostly Mugwump and moderate progressive, and they had no objections to statutory reforms *per se*, only to treating them as proper subjects of legal science.⁴⁵ Two of the Harvard scholars, Thayer and Holmes, were, after all, the great advocates of the presumption of legislative validity and judicial restraint in constitutional cases.

LaPiana deals more obscurely with a second view that he apparently wants to rebut: "Recent writing on American legal history commonly asserts that Langdell's work on contracts inaugurated a body of thought that would become the 'classic' or 'orthodox' view of law in America in the last third of the nineteenth century" (p. 59). The footnote to this sentence cites Grant Gilmore, Duncan Kennedy, and Morton Horwitz, and the reader eagerly looks forward to an engagement with their work.⁴⁶ It never comes: we learn neither what these writers think "classical" legal thought is about nor how LaPiana disagrees with them. From small clues in LaPi-

45. Pp. 122-25; see also Grey, *Langdell's Orthodoxy*, *supra* note 11, at 35.

46. P. 187 n.11 (citing GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); HORWITZ, *supra* note 11; Kennedy, *supra* note 11).

ana's text and footnotes, I infer that he wishes to question the view of this "recent writing" that classical legal thought is ideological and that it expresses a substantive political and social vision.

To demonstrate the nonideological nature of classical thought, LaPiana challenges, though very obliquely, Gregory Alexander's "attempt to place [J.C.] Gray squarely among the classical formalists."⁴⁷ LaPiana concedes that Gray's motivation to write his book on restraints on alienation was overtly political — outrage at the U.S. Supreme Court's express validation of spendthrift trusts,⁴⁸ which allow trust settlors to tie up assets in the hands of beneficiaries and protect them from creditors. Gray thought such trusts fostered a privileged "aristocracy" and exemplified the same sort of loathsome "paternalism" as socialism (pp. 127-28). At the same time, LaPiana goes on to argue that Gray's attack on the doctrine had *nothing to do* with his political views; he contends that it was based "not on a notion of the proper social order but on a critique of the formalistic reasoning of those cases" (p. 128) and their inconsistency with the principles of the law-as-it-is, which happened to favor alienation of property. Gray was just "attempting to be a modern scientific jurist" (p. 128). But LaPiana is not at all responsive to Alexander's thesis. Alexander argues as follows: the principle favoring free alienation is inherently contradictory. The law always has to choose between favoring the freedom of the donor to dispose of his property as he wishes, including his freedom to create restraints on donees, and the donee's freedom of alienation. In other words, the law must choose between policies favoring the donor's autonomy and those favoring the marketability of assets. Preclassical American law mediated this contradiction by the doctrinal ruse of "repugnancy," which said that restrictions on alienation were "repugnant" to interests in legal but not equitable estates. Gray, in his role as scientific jurist, had no trouble exposing repugnancy as a fiction, as a label glossing over a difficulty. But with the ruse out of the way, the contradiction in the doctrine was there for all to see. The Supreme Court chose one view of what individual liberty required and upheld spendthrift trusts. Gray argued strenuously for the other view. Nevertheless — Alexander concludes — what legal science itself did was to show that "technical" principles could not resolve this conflict between opposing ways of implementing the free-alienation principle.⁴⁹

The main point of the recent writing is that Gray's work is part of the "classical" legal thinkers' general effort to construct a cate-

47. P. 207 n.83; see also Alexander, *supra* note 11. Alexander is clearly one of the "recent writers": he expressly adopts the framework of Kennedy's work on classical legal thought.

48. *Nichols v. Eaton*, 91 U.S. 716 (1876).

49. Alexander, *supra* note 11 *passim*.

gorical scheme that would create and isolate a purified sphere of voluntary legal relations — relations created by the exercise of freely acting individuals — among formally equal persons. All other legal relations, such as those involving state “regulation” of free action, and all persons with special status, special privileges, or special disabilities — such as corporations, married women, children, the insane, felons, lunatics, sailors, and so on — were to be extruded from this zone and placed in separate categories.⁵⁰ Some of the classical theorists — like Gray — had laissez-faire sympathies and wanted many regulatory and paternalistic doctrines abolished entirely. Most, as mentioned above, were perfectly happy to see the regulatory-protective sphere expand, so long as its actions were properly classified on the public side of the public-private ledger. The isolation of a private sphere of freely willed legal relations was the common aim of legal-conceptualist enterprises on both sides of the Atlantic, and this commonality explains their mutual sympathy with classical liberalism in moral philosophy and political economy.⁵¹

As Alexander’s spendthrift-trust example illustrates, it is difficult for any postrealist lawyer to imagine what can be plausibly meant by the claim that private-law principles — the real tools of courts and lawyers — do not implicate principles related to the ultimate ordering of society. Private law defines property rights and dictates how they may be acquired and transferred and the extent to which they may be protected against diminution by trespass, nuisance, and competition. By defining property, private law also determines which social actors have the power to coerce others, and who must serve or bribe them to gain access to their assets. Through family, partnership, corporation, and labor law, private law defines the structures, powers, and authority relations of the organic associations of civil society.⁵² In LaPiana’s period, many of the major social controversies implicated conflicting interpretations of private-law principles. One was the spendthrift-trust issue itself, as the trust developed into the main legal device for assuring the

50. LaPiana briefly recognizes this aim in his summary of Roscoe Pound’s thought at p. 155.

51. See, e.g., ATTYAH, *supra* note 11, at 660-715; Sugarman, *supra* note 11. James Gordley has interestingly — though to me rather implausibly — challenged the thesis that nineteenth-century legal thought has any but adventitious connections to classical liberalism. GORDLEY, *supra* note 9, at 214-29.

52. As one of the German social jurists, Heinrich von Dernburg, put it in 1889, during the great dispute over the German Civil Code, in which the “conceptual jurists” took the Langdell-LaPiana position that private-law science was an apolitical and socially and ethically neutral restatement of the norms of existing law: “What is private law except the organization of society? . . . it is precisely private law which regulates the relationship between the different classes, estates, and corporations that exist in society. The social element is what matters.” MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE* 108 (1989).

continuity of the dynastic family holdings of the new industrial wealth.⁵³ Others included the issue of the liability of industrial enterprises for damage to neighboring landowners, workers, passengers, competitors, and bystanders; the legality of combinations of capital under common law restraint-of-trade principles; the right of combinations of labor to strike, boycott, picket, and organize; the "property" that employers could protect against such actions; and the powers of equity courts to help out such employers by injunction.

The most ambitious claim for legal science, of course, was that even though these issues might be socially important — perhaps even the subject of epic social struggles — common law principles, the ordinary tools of lawyers and judges, offered techniques for resolving such issues in the courts that did not require taking positions on any of the political, economic, and moral questions implicated in them. In view of the issues' importance, legislators and social scientists — who unlike lawyers and legal scientists *may* properly take economic, political, and moral factors into account — may wish to regulate these activities, but that is entirely their business. The legal scientist must ignore all those considerations. He just calls the law the way it is.

This claim of the autonomy and neutrality of the private-law principles met opposition from the moment of its articulation. One of its sharpest challengers was Holmes, the most famous of all the legal scientists.* Holmes devoted a large part of his intellectual and judicial career to arguing that private law was saturated with policy judgments about ultimate ordering, that in great ongoing social controversies the policies were bound to conflict and that the abstract concepts and principles of legal science, though useful for organizing legal thought, could not possibly dictate how to resolve such conflicts.⁵⁴ Moreover, as some of the "recent writers" have pointed out, the claim of autonomy and neutrality itself served a vital ideological function.⁵⁵ Even if the legal scientists were perfectly happy to allow legislatures to alter private-law principles, the very act of defining them as the basic principles of law helped to naturalize them, to establish them as the default framework governing the private sphere of market or voluntary relations, and thus to shift the burden of justification to anyone who proposed varying them. This naturalization of baseline rules — not the political conservatism that progressives wrongly ascribed to the classical jurists — is what

53. See Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

54. See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920); OLIVER WENDELL HOLMES, *Privilege, Malice and Intent*, in COLLECTED LEGAL PAPERS 117 (1920).

55. I rely here chiefly on HORWITZ, *supra* note 11.

links private-law and constitutional formalism in the classical period. Conservative courts constitutionalized certain of the private-law baseline rules — for example, by making nuisance doctrine the boundary marker for the limits on the police power — and very restrictively construed statutes trying to vary many others. To this very day — “Langdell’s secret triumph” again — the public-private distinction continues to spread a mystifying fog through political rhetoric, positing a voluntary sphere of free market relations that liberals want to “regulate” and conservatives want to “leave alone.” What is that sphere but the zone defined by the principles of nineteenth-century common law science?

B. *The Poverty of Alternatives*

The other method LaPiana uses to increase the attractiveness and plausibility of Harvard’s model of private-law science is to tear down its competitors — the traditions of antebellum thought and the emerging schools of sociological jurisprudence. By the time he finishes, he convinces the reader that, for all its flaws, Langdell’s game was the only substantial game in town, the only one that could combine academic rigor with practical payoffs to the bar.

LaPiana’s main shorthand characterization of antebellum legal thought is as “[a] science of ordered principles based ultimately on the truths of revelation” (p. 55), “those great universal principles, which, once understood, will reveal to the scientist the nature of the world and, indeed, the very mind of its Creator” (p. 58). The author continues: “[T]he Baconian scientists of the first part of the nineteenth century believed that their research revealed truth. Indeed, their work was revelation. The principles they adumbrated were real and true because, in the end, they were expressions of the Creator” (p. 32; footnote omitted). The only evidence he cites for this, however, is Theodore Bozeman’s general account of early American science and its connections to religious thought.⁵⁶ I do not mean to deny that LaPiana could also have found quotations from specifically legal sources illustrating their devotion to revealed truth and natural law. But if one actually looks at any of the respected works of legal science of the time — *Jones on Bailments*,⁵⁷ *Story on Equity*,⁵⁸ or *Sedgwick on Damages*⁵⁹ — one finds that the part played by natural law is relatively small, precisely be-

56. P. 32 (citing THEODORE DWIGHT BOZEMAN, *PROTESTANTS IN AN AGE OF SCIENCE: THE BACONIAN IDEAL AND ANTEBELLUM AMERICAN RELIGIOUS THOUGHT* 64-70 (1977)).

57. WILLIAM JONES, *AN ESSAY ON THE LAW OF BAILMENTS* (London, J. Nichols 1781).

58. JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA* (Boston, Hilliard, Gray 1836).

59. ARTHUR G. SEDGWICK, *ELEMENTS OF DAMAGES: A HANDBOOK FOR THE USE OF STUDENTS AND PRACTITIONERS* (Boston, Little, Brown 1896).

cause it does not generate many operational principles. The principles are synthesized instead from the case law, only at a lower level of abstraction than that of late nineteenth-century science, or borrowed from foreign sources such as the civil law or law of nations.

Among the most pervasive and important principles of antebellum law are those derived from considerations of policy or "convenience," the functional needs of a commercial society. This was a vital tradition of legal thought that LaPiana — despite a brief reference on pages 33-34 — ignores: it was the science of legislation, the study and practice of law as a policy science, founded on the study of comparative historical sociology and the emerging sciences of utilitarian morals and political economy. Adam Smith's *Wealth of Nations* originated in a section of Smith's *Lectures on Jurisprudence* devoted to the police power.⁶⁰ Policy science was not just for legislators, either; it was also for lawyers and judges. Partly inspired by Lord Mansfield's example, the Scottish lawyers — lacking a Parliament of their own after their union with England — hoped to implement their project of modernizing the law to suit the needs of commercial society by influencing judicial reform of the case law.⁶¹ Lord Kames's treatise on equity, for example, is an ambitious effort to reformulate judge-made private-law principles along utilitarian lines.⁶² This utilitarian law reform project was picked up and greatly elaborated in the nineteenth century. Its most intellectually impressive offshoot was the increasingly specialized new science of classical political economy. The legal side developed as well, especially through the work of Jeremy Bentham.⁶³ Policy science was anything but an academic's dream; it had immense consequences for the legal system and practical affairs. In England, legal policy scientists trained an entire cadre of administrative lawyers who staffed and wrote the rules for the early bureaucratic state.⁶⁴ Some of them — James Mill, Fitzjames Stephen, and Henry Maine — also wrote codes creating bodies of property and criminal law to administer England's empire in India.⁶⁵

60. ADAM SMITH, *LECTURES ON JURISPRUDENCE* (R.L. Meek et al. eds., 1978).

61. The best accounts of the science of legislation are in DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* (1989) and KNUD HAAKONSEN, *THE SCIENCE OF A LEGISLATOR* (1981).

62. HENRY HOME, LORD KAMES, *PRINCIPLES OF EQUITY* (Edinburgh, Alexander Kincaid 1760).

63. Bentham's *Rationale of Judicial Evidence* is a far more intellectually powerful work of legal theory than anything produced by the Harvard legal scientists, with the exception of Holmes's theory of torts. See JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (London, Hunt & Clark 1827); Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873).

64. See H.W. ARTHURS, *WITHOUT THE LAW* (1985).

65. See generally ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA* (1959).

As previously mentioned, the science of legislation was never confined to statutory and administrative ghettos. Rather, it intruded pervasively in the Anglo-American common law courts in the form of arguments about "convenience" or "policy," which usually trumped the considerations of morality that LaPiana emphasizes.⁶⁶ In the United States, the grand field of operation for public law was constitutional law, which engaged the best legal talent of the early republic as constitutional draftsmen, judges, advocates, and treatise writers. Indeed, it was their connection to legal nation-building through constitutional lawmaking and discourse that elevated American lawyers to their extraordinary position as Tocqueville's "aristocracy" of political and civic leadership.⁶⁷

Again, I think that LaPiana's disposition to see the legal world from the perspective of his subjects leads him to downplay the policy and public-law sides of legal thought. He writes:

Throughout the 1890s the [American Bar Association] committee . . . asserted that law schools should teach a broad array of subjects that today might be considered cultural [sic!]. The argument usually was based on the idea that lawyers were the natural leaders of American society and government. Law schools, therefore, should teach the "science of government" or "political and social science," and even moral and political philosophy. In 1895 the committee declared that all schools gave instruction that was "too technical" and devoted to training attorneys rather than jurists. . . .

. . . .
 . . . [T]he broad legal education promoted by those who criticized Harvard, was not science; it was amateur moralizing. [pp. 136-37; footnotes omitted]

Now — even though I must admit I am in total sympathy with the general spirit of the ABA's critique and see nothing inherently ridiculous about its proposals for enriching the curriculum — I should at once concede that LaPiana's disdain for these particular critics is not unfounded. As he relates it, most of the previous experiments in trying to give a "broad" general schooling for lawyer-statesmen had come to grief for overambition and lack of rigor. In addition, many of the existing spokesmen for this tradition, like the ABA committees, were stuffed with pomp and wind. These deficiencies, however, do not excuse the narrowness of the Harvard vi-

66. For secondary treatments with many examples, see for example ATTYAH, *supra* note 11, at 660-715; HORWITZ, *supra* note 11; HOVENKAMP, *supra* note 11 (arguments drawn from classical political economy); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960) (on the "Grand Style" of antebellum judging); and LOBBAN, *supra* note 11. Oddly, LaPiana, who in most of his discussion of Langdell and the Harvard scientists adopts their view that their legal science was a "strictly legal science," in one surprising passage unexpectedly admits to an entire menagerie of nonlegal influences on classical thought — namely, liberalism, Jacksonian democracy, and classical political economy. P. 76.

67. See generally ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984).

sion. The public-law tradition that had been one of the glories of American legal culture was by no means played out between 1870 and 1900. Thomas Cooley, John Dillon, John Norton Pomeroy, and Christopher Tiedeman and Ernst Freund, among others, were writing substantial treatises.⁶⁸ Constitutional argument, thanks in no small part to the Fourteenth Amendment, was still one of the important occupations of the upper bar.

Meanwhile, the old Enlightenment enterprises of comparative legal-sociological history and the science of legislation were both undergoing a brilliant revival. LaPiana — who certainly knows better — represents the historical enterprise with James Coolidge Carter's amateur and reactionary pseudo-Savignyan ruminations on law-as-evolving-custom⁶⁹ and policy-science by Roscoe Pound's "sociological jurisprudence" (pp. 139-40, 155-56). If these really had been the only alternatives to the Harvard model, it is not surprising that he should find Harvard's approach intellectually superior.

But they were not the only alternatives. Legal scholars interested in social-legal history had no need to read Carter when they had access to Maitland, Brunner, Gierke, Maurer, Jhering, Mommsen, Holmes, and soon Vinogradoff and Max Weber.⁷⁰ When Holmes told the Harvard alumni in 1886 that "science is gradually

68. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (New York, Da Capo 1972) (1868); JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (Chicago, James Cockcroft 1872); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS (Boston, Little, Brown 1876); JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (San Francisco, A.L. Bancroft 1881); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (New York, Da Capo 1971) (1886).

69. LaPiana presents Carter as the most famous proponent of the main intellectual alternative to Harvard's positivism. P. 139. This intellectual alternative was a version of historical jurisprudence asserting that history reveals law as not contingent and changing but rather as a body of unchanging and uniform principles. Pp. 138-42. "[F]or the advocates of legal truth the case method law school was the enemy." P. 142. LaPiana does not explain why, if Carter best represents the chief intellectual opponent of Harvard's legal science and case method, Carter should have promoted Langdell and his Law School so aggressively.

70. FREDERIC WILLIAM MAITLAND, TOWNSHIP AND BOROUGH (Cambridge, Cambridge University Press 1898); HEINRICH BRUNNER, DIE ENTSTEHUNG DER SCHWURGERICHTE (Berlin, Neudruck der Ausg. 1872); OTTO FRIEDRICH VON GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Berlin, Weidmann 1968-1913); GEORG LUDWIG VON MAURER, EINLEITUNG ZUR GESCHICHTE DER MARK-, HOF-, DORF- UND STADTVERFASSUNG UND DER OFFENTLICHEN GEWALT (n.p., Neudruck der Ausg. von 1854 bzw. 1896); RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG (Leipzig, Breitkopf und Hartel, 1891-1906); THEODOR MOMMSEN, THE HISTORY OF ROME (Free Press 1957) (1864); OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Boston, Little, Brown 1881); PAUL VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE (1909); MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (2d ed. 1925).

drawing legal history into its sphere," it was this new legal history he had in mind.⁷¹

Of course, very few lawyers read or knew about such historical studies, and the studies would have been too remote from practical concerns to interest law students. Yet one could hardly say the same about the new policy sciences. On this subject, LaPiana's dismissiveness is simply staggering. He says that to the extent Pound's view — that social conditions influenced the law and the law needed to adapt to social needs — achieved any currency among lawyers, such impact owed only to the bland lawyer's cliché that the common law has always adapted to changing circumstances. Sociological jurisprudence, he notes, never went anywhere in the law schools and "was not much more effective outside of academia. Attempts to influence the highest courts with sociological argument, excepting Louis Brandeis's victory in *Muller v. Oregon* in 1908, never bore fruit"⁷² (p. 157). This remarkable conclusion can only be explained by LaPiana's momentary overidentification with the perpetually myopic Harvard world view, which always had trouble noticing anything that happened in the legal world outside the courts.⁷³

LaPiana does take brief notice of the progressive movement which found expression in

state statutes limiting the hours of work, improving working conditions, and requiring payment of wages in currency rather than in scrip and in the creation of workmen's compensation schemes. Such laws often fell afoul of the bar's fear of socialism and were frequently struck down by appellate courts in the name of freedom of contract. . . . The increasing divergence between popular political reform programs and the bar's position must have proved embarrassing.⁷⁴

LaPiana fails to note that bar leaders promoted a substantial part of the new legislation and regulatory commissions between 1870 and 1920 and that lawyers — including many corporate lawyers —

71. OLIVER WENDELL HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 35, 41 (1920). In this, as in many other respects, Holmes ventured far beyond the analytic-positivist program for legal science with which he himself had begun his intellectual career.

72. P. 157 (discussing *Muller v. Oregon*, 208 U.S. 412 (1908)).

73. Consider in contrast the *Harvard Law Review* of the period, which, unlike the school's curriculum, paid attention to a wide variety of public-law, political, and social issues. A general perusal of issues of the *Harvard Law Review* of the time will demonstrate the point. See, e.g., Joseph H. Beale, Jr., *The Recognition of Cuban Belligerency*, 9 HARV. L. REV. 406 (1896); E. Parmelee Prentice, *Congress, and the Regulation of Corporations*, 19 HARV. L. REV. 168 (1906); Samuel C. Wiel, *Theories of Water Law*, 27 HARV. L. REV. 530 (1914).

74. Pp. 152-53. The elided portion of this passage includes the mysterious comment: "As the reform impulses these statutes represented entered the mainstream of American politics, however, the statutes themselves seemed to be less and less the product of the sovereign Austinian legislature run amok." P. 153. I hazard the guess that LaPiana means "more and more."

stood at the vanguard of the progressive movement and served as the principal architects of the institutions of the modern regulatory state. Lawyers staffed antitrust enforcement agencies, ratemaking commissions, labor boards, workman's compensation boards, industrial commissions, factory inspectorates, and agencies regulating municipal franchises, banking, insurance, and securities. Other lawyers represented clients appearing before these bodies. Still others sat on commissions to study and propose personal and corporate income taxes and to consider the regulation of every conceivable aspect of social life — including schools, transport systems, prostitution, social welfare, child labor, immigration, liquor, gambling, sanitation and public health, accident compensation, vagrancy, and mine safety. Business lawyers in particular took an active part in the National Civic Federation (NCF), the informal planning group of vanguard-business and conservative-union leaders that helped draft workmen's compensation laws, amendments to the antitrust laws, and other basic regulatory schemes of the progressive period.⁷⁵ "Scientific" discourse saturated all of this activity, which was justified, analyzed, and debated in terms of a formidable apparatus of argument and analysis, less and less in the decaying traditions of the old-style public lawyers, and more and more in the methods of the fanciest new legal policy sciences — the administrative law branch of political science, marginalist and institutionalist economics, and industrial and urban sociology.

If one looks at the full array of early twentieth-century social and policy approaches to law — and not just at Pound's own peculiar and timidly executed project of "sociological jurisprudence" — their intellectual and practical influence adds up to a good bit more than one brief in one case!⁷⁶ A short list of pre-New Deal lawyers who, in their roles as scholars, reformers, advocates, administrators, judges, or some combination of these positions, seriously entertained, and in some part of their practices applied, approaches to law as a progressive policy science includes: Presidents Theodore Roosevelt and Woodrow Wilson; Judges Julian Mack, Learned Hand, Benjamin Cardozo, and — in some of his moods — Oliver Wendell Holmes; the corporate lawyers Louis Brandeis, Elihu Root, Charles Evans Hughes, Henry L. Stimson, C.C. Burlingham, Everett P. Wheeler, Louis Marshall, Victor Morawetz, Russell Lef-

75. The part played by progressive corporate lawyers in the work of the NCF is particularly well analyzed in MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* (1988) and JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968).

76. Incidentally, even the "Brandeis brief" itself was good for more than one case. The technique pioneered in *Muller v. Oregon* of saturating briefs with social-science data designed to show that legislatures might have acted from rational motives became the National Consumers League's standard strategy in cases testing the constitutionality of state social legislation. See PHILLIPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 59-64 (1993).

tingwell, Samuel Untermyer, and George Wickersham; the labor lawyers Clarence Darrow, David Lilienthal, and Donald Richberg; the administrative lawyers Ernst Freund, Frank Goodnow, John Dickinson, Gerard Henderson, and E.R.A. Seligman; a great many legal academics — most of whom later played an important part in the New Deal — such as Felix Frankfurter, James Landis, William O. Douglas, Jerome Frank, Herman Oliphant, Charles Clark, Walter Wheeler Cook, A.A. Berle, Jr., Robert L. Hale, Thurman Arnold, Walter Nelles, Karl Llewellyn, and Leon Green; and many other lawyers less well-known. Because they wrote so much about law, the leading economists who contributed to the policy science of progressive law and economics should also be added to this list: Henry Carter Adams, Richard T. Ely, John Commons, John Bates Clark, and John Maurice Clark.⁷⁷

Not surprisingly, many of the lawyers who observed and participated in the development of these law-reform initiatives, new institutions and regulations, and attendant policy sciences came to think that legal education should take some account of them. They proposed supplementing, and only occasionally replacing, the private-law curriculum with training in public-law and policy science in order to prepare graduates for jobs in and around the regulatory state and for the study of the legislative and administrative responses to the problems of industrial society. Ernst Freund, whose plans for the Chicago Law School so distressed Dean Ames, was a pioneer advocate of such a policy-enriched law school curriculum.⁷⁸ Brandeis, as has been noted, taught a progressive policy course on law at M.I.T. in the early 1890s.⁷⁹ Woodrow Wilson tried for years to start a law school at Princeton that would include a public and administrative law component.⁸⁰ Columbia Law School in the 1920s was briefly captured by a faction that tried to reorganize the curriculum around a “functional” — policy and social-science research-oriented — approach to law;⁸¹ when that failed, many of the reformers went off to Yale Law School and Johns Hopkins and tried again there.⁸² Everywhere orthodox law teachers schooled in the

77. See generally Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

78. OSCAR KRAINES, *THE WORLD AND IDEAS OF ERNST FREUND: THE SEARCH FOR GENERAL PRINCIPLES OF LEGISLATION AND ADMINISTRATIVE LAW* 76-87 (1974).

79. See *supra* note 21.

80. 7 PAPERS OF WOODROW WILSON 63-68 (Arthur S. Link ed., 1969). The new Stanford Law School, whose first instructor was the former President Benjamin Harrison, put into effect a version of Wilson's proposal. See Howard Bromberg, *Our Professor, the President Benjamin Harrison*, STAN. LAW., Fall 1991, at 10.

81. See STEVENS, *supra* note 34, at 137-140. See generally Brainerd Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. 1 (1955).

82. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

Harvard religion bitterly fought off — on the whole, successfully — the reformers. Still, the progressives gradually gained some footholds.⁸³ Yale for a while defined its mission in opposition to Harvard's "formalism." Even at Harvard, Felix Frankfurter came in to teach Administrative Law and Public Utilities, and the administrative lawyer James Landis eventually succeeded Pound as dean.

In short, there were plenty of vital alternatives to the Harvard model in public-law thought and in the social-legal sciences that were engaged in studying and rationalizing legal responses to industrial society. The alternatives were directly relevant to the practices of lawyers, especially elite lawyers, and thus found their way into well-articulated — and occasionally even realized! — proposals for reforming law schools. To maintain the purity of private-law science and the case method, Harvard and all the law schools that mimicked its methods turned their backs on a great tradition of legal thought and practice and on a brilliant future. It was like deciding to come in from a lush variety of tropical gardens to a bare monastic cell.⁸⁴

CONCLUSION

I have voiced a lot of criticisms about LaPiana's thesis, so I want to repeat what I said at the beginning: this is a very good book containing many interesting discoveries; it probably puts forth the best case possible for its client and cause, Langdell and the Harvard project. Perhaps Harvard's removal from the world at large was good strategy between 1870 and 1900 when the School was struggling to get its project off the ground. As the forms of action disappeared, the business of putting basic legal doctrine into theoretical order had some claim to priority. Moreover, as LaPiana rightly points out, the actual experience of trying to teach public law and the science of legislation in American law schools had mostly failed, both intellectually and commercially. The concentration on private-law doctrine taught through the case method may well have seemed the best way of breaking free of the windbag culture of the upper bar in order to achieve some degree of academic rigor while preserving the School's marketability through a plausible claim to practical relevance. Also, the alternative approaches were *danger-*

83. A book commissioned by the Russell Sage Foundation, ESTHER LUCILE BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* (1948), undertook to document the growing number of places where lawyers practiced a version of public-policy law, as well as that movement's growth, roots in, and implications for legal education.

84. English legal academics in the same period made the same decision, achieving an even greater degree of cultural isolation of legal studies from other disciplines and from the traditional involvement of lawyers in policy science and public moralizing. See STEFAN COLINI, *PUBLIC MORALISTS: POLITICAL THOUGHT AND INTELLECTUAL LIFE IN BRITAIN, 1850-1930*, at 251-307 (1991); Sugarman, *supra* note 11.

ous. Teaching law explicitly as what it inescapably is, a body of principles and procedures for ordering social life, is bound to land the teacher in the thick of greatly controverted issues. When one is running a school whose success must be underwritten by a powerful and often very conservative profession, that thicket is not necessarily where one wants one's teachers to be. Economics at the turn of the century was a dangerous field for this reason — the progressives Henry Carter Adams and Richard T. Ely came close to losing their jobs for flirting with ideas alumni considered "socialist," and economists finally learned as the lawyers had, to camouflage their political views in the discourse of a technical and value-neutral science.⁸⁵ Roscoe Pound's timidity about implementing his vision of "sociological jurisprudence" in the curriculum was surely reinforced when Harvard alumni called for the firings of Felix Frankfurter and Zechariah Chafee for defending the rights of radicals to a fair trial and free speech.

Ultimately, however, even LaPiana's able advocacy does little in my eyes to rehabilitate Harvard's intellectual world. Like Robert Stevens, I am willing to give at most "two cheers" for the Harvard crew.⁸⁶ One cheer is for the case method, a genuinely fruitful innovation in pedagogy that encouraged active rather than passive learning and that motivated the students to engage firsthand with at least some — if deplorably few — of the primary materials of their trade. The second cheer is for their ideal of legal science, for the courage to advocate and steadfastly pursue an avowedly theoretical enterprise based to some extent on cosmopolitan comparative learning, in the face of a ferociously anti-intellectual professional and national culture.

On the other hand, the decision of Harvard and schools like it to remain in their bare cell of "technical" appellate doctrine, while all around them leading lawyers were busily transforming law practice and legal institutions, was a decision to avoid teaching and writing about all the great issues of the time — labor-capital warfare, the administrative revolution in government, the regulation of common carriers and public utilities, the "trust" problem, the doomed attempt at Reconstruction of the defeated South, the populist agrarian revolts, and the progressive institution-building and regulatory responses to industrialization, urbanization, and immigration. For all of the noise about how practical the case method was, it was also a decision to refuse to train lawyers for — or even to acknowledge the existence of — all the new tasks that required an understanding

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

86. Robert Stevens, *Two Cheers for 1870: The American Law School*, in *5 PERSPECTIVES IN AMERICAN HISTORY* 405 (Donald Fleming & Bernard Bailyn eds., 1971).

of statutes, administrative records and procedures, financial structures of corporations, large-scale transactional work such as mergers and reorganizations, conducting trials, drafting documents, and arguing appeals. Intellectually, the decision was an act of self-mutilation, a deliberate cutting off of "pure" legal science from contemporary legal economics and the comparative history and sociology of law. The world of private-law science had been a fresh and vital one when Langdell and Holmes began their work in the 1870s. By the century's end, that world was a narrow cell from which all the air had gradually been withdrawn.