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ROLL OVER LANGDELL,
TELL LLEWELLYN THE NEWS: A BRIEF HISTORY OF
AMERICAN LEGAL EDUCATION

Stephen R. Alton*

The origin of this essay is a presentation the author made at the Office of the Attorney General of the State of Texas on December 10, 2008. This essay is derived from the author's presentation, which originally was entitled "A Brief and Highly Selective History of American Legal Education and Jurisprudence." In this essay, the author provides an overview of the history and development of legal education in America, emphasizing the establishment and evolution of the case method of instruction in American law schools and focusing on the influence of American jurisprudence on the development of legal education in the late nineteenth and early twentieth centuries. Drawing on Christopher Columbus Langdell, Oliver Wendell Holmes, Jr., Benjamin N. Cardozo, and Karl N. Llewellyn (among others), the author discusses the impact that American legal education has had on American jurisprudence and the reciprocal impact that American jurisprudence has had on both the means and the ends of legal education in the United States. The author concludes with a brief exploration of the direction of American legal education in the early twenty-first century.

This essay had its origins in a presentation that I made at the Office of the Attorney General of the State of Texas; that presentation resulted from an introductory lecture on American legal history that I had been asked to make to brand-new law students during my law school's orientation week.

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When I was tapped to make that lecture on American legal history to entering law students, I was a bit perplexed as to how to begin my preparation. How should I approach the subject? After all, I periodically teach a two-hour seminar on American legal history, and that seminar is itself a condensation of a three-hour American Legal History course that I had taught previously at our law school. Since I found more than a little difficulty in paring down the materials for a course that met for a total of forty-two hours into one that meets for a total of twenty-eight hours, how, I wondered, would I be able to further condense those materials? An entire course squeezed into a one-hour lecture—what a nightmare for a law professor! While pondering this predicament, it dawned on me that, instead of trying to outline for new law students the entirety of American legal history in an hour's lecture, the time would be more fruitfully spent exploring the history of just how we, in the United States, have come to construct the path down which the new law students were about to travel—a legal education.

This essay represents an overview—a brief and highly selective history of legal education in America with a special emphasis on the establishment and evolution of the case method of instruction in American law schools. I will also focus on the influence of American jurisprudence on the development of legal education in the late nineteenth and early twentieth centuries. Introduced by Dean Christopher Columbus Langdell at Harvard Law School,¹ the case method has dominated American legal education for more than a century, though not without some controversy and a good deal of change in the method itself.² Not surprisingly, legal education has had a significant impact on American jurisprudence. In turn, American jurisprudence has greatly affected both the means and the ends of legal education in the United States. So, I would like to examine how we came to where we are as wayfarers on the road of legal education; I will conclude this essay with a brief look at the direction in which American legal education may be headed in the near future.

Before beginning this examination, I need to single out two of the many sources on which I have drawn freely in the course of this undertaking. The first is the book *Law School: Legal Education in America from the 1850s to the 1980s*, by Professor Robert Stevens.³ The

1. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 47 (1977).

2. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at xiv (1983).

3. *Id.*

second is the late Professor Grant Gilmore's book, *The Ages of American Law*.⁴

Legal education has never taken place in a vacuum. It is no more possible to divorce eighteenth-, nineteenth-, or twentieth-century American legal education from its social, intellectual, political, and professional settings than it is to divorce contemporary American legal education from such settings. Legal education is inextricably bound up with the social, intellectual, political, and professional currents of the contemporaneous American scene. Those currents have always moved and shaped legal education in this country, and they continue to do so.

Legal education has itself had a profound influence on American higher education in general, resulting largely from the innovative use of the case method of study—a method of study which law students confront on their very first day of class.⁵ The case method has made its way from the law into other fields of instruction, and it has had a significant impact on those other fields.⁶ Yet, for all its influence, the case method is a relatively recent innovation. In anything resembling its current form, it sprang whole cloth, Athena-like, from the head of Christopher Columbus Langdell, the dean of the Harvard Law School in the latter part of the nineteenth century.⁷ There is much more to say about Dean Langdell. But, at the outset, there should be no mistake about this point: it is no exaggeration to say that the case method of study, which he created, has fostered the system of legal education that has become predominant today in American law schools.⁸ Contemporary legal educators have perpetuated this system and the curriculum that is integral to it, though both the system and the curriculum have undergone significant modifications during the 140 years or so since the case method's birth.⁹

Before exploring the birth of the case method, an exploration of what came before it is in order—namely, the system of legal education in

4. GILMORE, *supra* note 1.

5. See STEVENS, *supra* note 2, at xiv.

6. See ROBERT F. BRUNER, *SOCRATES' MUSE: REFLECTIONS ON EFFECTIVE CASE DISCUSSION LEADERSHIP* (2003) (discussing the use of the case-method approach as an effective teaching tool in a variety of settings).

7. See GILMORE, *supra* note 1, at 42–47; STEVENS, *supra* note 2, at xv, 35–38. “The appointment of Christopher Columbus Langdell as Dane Professor at Harvard Law School on January 6, 1870, is widely acknowledged to mark the beginning of the modern American law school.” WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 3 (1994).

8. STEVENS, *supra* note 2, at 36–38.

9. See *infra* text accompanying notes 129–37.

America that the case method supplanted. Perhaps the word “system” is misleading when used to refer to legal education in the antebellum United States. Legal education in revolutionary and early federalist America largely—though not exactly—reflected English legal education.¹⁰ Leaving aside the issue of a bifurcated profession, one in which *barristers* engage in litigation and *solicitors* engage in an office practice (to oversimplify matters somewhat), those aspiring to enter the English legal profession, either as barristers or as solicitors, had to engage in a lengthy apprenticeship in a law office.¹¹ This was as true in eighteenth-century England as it remains today in that nation.¹²

In America circa 1800, a man (for all intents and purposes, an aspirant to the bar at this time was *male*—and a *white* male at that)¹³ who desired to prepare himself for a career in law had six options open to him.¹⁴ First, he could attend one of the few existing colleges in the newly formed United States and could select from the paucity of courses offered in law and related subjects such as politics, civil government, and international law.¹⁵ Second, the aspiring lawyer could attend one of the very few existing private law schools—that is, non-university-affiliated law schools—and pursue his courses there.¹⁶ Third, he could engage in the private, self-directed study of law.¹⁷ Fourth, he could clerk in the office of the clerk of a court of record in his jurisdiction.¹⁸ Fifth, if his resources afforded this luxury, he could pursue his legal studies in England at one of the Inns of Court, at which aspiring English barristers trained.¹⁹

Sixth—and, by far, most usually—the would-be American lawyer could serve an apprenticeship in the law office of a practicing lawyer.²⁰ This form of apprenticeship was known as “reading law” and had been

10. STEVENS, *supra* note 2, at 3.

11. *Id.*

12. Stephen R. Alton, *Mandatory Prelicensure Legal Internship: An Idea Whose Time Has Come Again?*, 41 U. KAN. L. REV. 137, 138 (1992). The following five paragraphs are largely taken from the author’s earlier work, with permission granted by the *Kansas Law Review*.

13. *Id.* at 139.

14. *Id.* (citing 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 173 (1965)) (noting five options available to an aspiring lawyer).

15. *Id.*

16. GILMORE, *supra* note 1, at 19; STEVENS, *supra* note 2, at 3.

17. Alton, *supra* note 12, at 139.

18. *Id.*

19. *Id.*

20. *Id.*

common since colonial days.²¹ In the early days of the American republic, “few would have considered offering themselves as full-time attorneys without [having had] some period of [law office] apprenticeship.”²² Even well into the nineteenth century, “the chief method of legal education [in the United States] was the apprenticeship served in the office” of an established practitioner of the law.²³

What were the character and the quality of the apprenticeship training received by the rising attorney in antebellum America?²⁴ Here, theory diverged greatly from practice. In theory:

[T]he legal clerkship system placed the student in [a law-centered environment,] where [his] education was a total and many faceted experience. [The apprentice] would learn by copying documents, transcribing contracts, and performing the other mundane but necessary duties of a law office. He would learn by listening to his fellow [apprentices], his [practitioner–]teacher and other members of the bar. He would learn by attending court and paying careful attention to all that transpired there. He would learn by reading the law books available to him and by taking copious notes In all aspects of his training [the apprentice w]ould be guided by his mentor, a lawyer versed in the law and concerned with the education of his charge[.].²⁵

Some lawyers even provided room and board to their apprentices.²⁶ Operating in this way, the apprenticeship method of training “assumed that the clerk would learn both the practical and theoretical aspects of the law, leaving his teacher’s office after the prescribed number of years a complete lawyer as well as a man steeped in the values of his profession.”²⁷

So much for the *theory* of a legal education gleaned from a law office apprenticeship. How did that theory translate into *practice*? The ideal of legal training and its reality often bore little resemblance to one another in

21. *Id.* (citing Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 125 (1976)).

22. *Id.* (quoting STEVENS, *supra* note 2, at 3).

23. *Id.* at 140 (quoting 2 CHROUST, *supra* note 14, at 173–74).

24. *Id.*

25. *Id.* (quoting McKirdy, *supra* note 21, at 127).

26. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 97 (2d ed. 1985).

27. Alton, *supra* note 12, at 140 (quoting McKirdy, *supra* note 21, at 127–28).

antebellum America.²⁸ In practice, the quality of the training that apprentices received in mentors' law offices varied greatly.²⁹

[The apprentice] commenced his studies whenever he wished [to do so], studied as much or as little as he pleased, and more often than not was wholly on his own as far as learning the law was concerned. . . . [H]e received little formal instruction: theory was hardly ever discussed There were no definite requirements or standards, nor was there a systematic program of study. The lawyer who [employed apprentices] might be a conscientious and efficient man who tried to educate [his charges] to the best of his ability [whatever that might have been], or he might be indifferent or lazy and let [his apprentices fend] for themselves[when it came to their legal education].³⁰

Moreover, the apprenticeship system served as a device to keep the practicing bar small and to keep senior lawyers in firm command of the bar.³¹ In sum, the theory behind law office apprenticeship as the primary means of imparting legal training may have been a good one, but the execution and the effects of apprenticeship left very much to be desired.³²

Largely in reaction to the practical inadequacies of the apprenticeship system as a means of training lawyers, the United States experienced an expansion in formal, university-provided legal education in the middle of the nineteenth century.³³ During the Jacksonian era, a number of institutions among the growing population of American universities opened either departments of law or separate schools of law.³⁴ Some of these law departments and law schools flourished, but many more failed to endure more than a few years.³⁵ Still, the trend toward university-based law schools had begun, however tentatively.³⁶

The antebellum era was one of political, social, and economic turbulence as the expanding nation lurched toward a war between the

28. *Id.* (citing McKirdy, *supra* note 21, at 128).

29. *Id.* (citing FRIEDMAN, *supra* note 26, at 97-98).

30. *Id.* (quoting 2 CHROUST, *supra* note 14, at 175).

31. *Id.* at 140 n.21 (citing FRIEDMAN, *supra* note 26, at 97).

32. STEVENS, *supra* note 2, at 24, 30 n.28.

33. *Id.* at 21-22.

34. *Id.* at 5.

35. *Id.* at 8, 22-23.

36. *Id.* at 21-22.

states. The legal profession was by no means immune to this turbulence, and lawyers came under attack from some democratic elements who accused the attorneys of creating a lawyer-centered aristocracy in America.³⁷ Alexis de Tocqueville, a nineteenth-century French aristocrat and observer, viewed America's lawyers as the nation's natural aristocracy.³⁸ "Without a monarch or a clearly defined aristocracy . . . [and] with little by way of competing professions, the new nation was almost inevitably bound to rely on lawyers Lawyers became the technicians of [nineteenth-century] change as the country expanded economically and geographically"³⁹

"The first half of the nineteenth century was [also] a period of great judicial creativity."⁴⁰ Some legal historians recall the epoch favorably.⁴¹ In *The Ages of American Law*, Professor Grant Gilmore called pre-Civil War America the "Age of Discovery"—the "Golden Age" of American law.⁴² It was an age in which judges used the law to foster the burgeoning new nation's economic vitality.⁴³

The era's surge in university-based law departments and law schools paralleled the heightened importance of the legal profession in an increasingly industrialized America.⁴⁴ The professionalization of the American bar as a group of highly trained and skilled individuals possessing much-needed expertise not commonly available to the general public dates from this antebellum Golden Age.⁴⁵ The American legal system was developing in sync with the industrializing and expanding American economic system.⁴⁶ "The owners of slaves, steamboat[s] . . . and banks found that they needed lawyers."⁴⁷ And the number of attorneys

37. *Id.* at 7.

38. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1963) (1835) ("[In America, lawyers] form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that . . . it occupies the judicial bench and the bar.")

39. STEVENS, *supra* note 2, at 7.

40. *Id.* at 9.

41. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 1 (1977).

42. GILMORE, *supra* note 1, at 12, 39-40.

43. *Id.* at 33-36. See generally HORWITZ, *supra* note 41, at xv, 109-39.

44. STEVENS, *supra* note 2, at 20-23.

45. *Id.*

46. GILMORE, *supra* note 1, at 34-36.

47. STEVENS, *supra* note 2, at 9.

in politics, which had never been notably small, was also growing.⁴⁸ In this period before the American Civil War, legislators all too often did little to solve the nation's legal and political problems.⁴⁹ Into this void stepped America's judges and, with them, America's lawyers.⁵⁰ The law, lawyers, and judges became instruments of American economic and geographic expansion.⁵¹

Then, abruptly, though hardly unexpectedly, the nation blew apart, ostensibly over the question of slavery. The compromise on the slavery issue—the compromise that had paved the way for the United States Constitution—made the federal union possible, but this compromise merely postponed the inevitable day of reckoning.⁵² That day of reckoning finally came in 1861, and it lasted four bloody, agonizing, tragic years. Ostensibly, the fight was about slavery; yet, the fight was really about the very nature of the union itself. Where did the boundary lie between the spheres of federal and state power? The answer to this question was provided at the time by the sheer force of arms, but the question—and the answer—continues to be explored and debated to this very day.

Professor Gilmore called the next period in American legal history—the years between the end of the Civil War and the end of the First World War—the “Age of Faith.”⁵³ It was an age of legal formalism, when Christopher Columbus Langdell, who was appointed the first dean of the Harvard Law School in 1870, introduced the case method at Harvard.⁵⁴ Legal education has not been the same since.

Langdell believed that law is a science.⁵⁵ In his words, “all the

48. *Id.*

49. GILMORE, *supra* note 1, at 15, 36.

50. *Id.*

51. *Id.* at 36–38.

52. *Id.* at 37.

53. *Id.* at 41–42, 64–67.

54. *Id.* at 42–47. According to Gilmore:

One of the hidden costs of the national agony which culminated in the Civil War may have been the crippling of our legal system. If judges like [Joseph] Story[, Associate Justice of the United States Supreme Court,] and [Lemuel] Shaw[, Chief Justice of the Massachusetts Supreme Judicial Court,] were driven into formalism [by having to wrestle with laws relating to slavery, such as the Fugitive Slave Act], so were many lesser judges. And once the tools of formalism have been used, even in a good cause, they are there, ready to hand, tempting. It is among other things extremely easy to decide cases according to the letter of a statute or of an established rule of law, without further inquiry.

Id. at 38–39.

55. *Id.* at 42.

available materials of that science are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history [is] to the zoologists, the botanical garden [is] to the botanists.”⁵⁶ From Langdell’s basic proposition that law is a science, two subsidiary propositions followed.⁵⁷ First, “legal truth is a species of scientific truth”; that is, once legal truth has been discovered and demonstrated, it endures, unchanging.⁵⁸ Second, there are in fact relatively few fundamental legal doctrines.⁵⁹ If one found one of these few legal truths and applied it scientifically to the case at hand, the legal result should be virtually automatic and invariable.⁶⁰ This was the accepted faith of Langdell and his acolytes.⁶¹

The Langdellians formulated legal theories that would cover broad areas of the law and “reduce an unruly diversity to a manageable unity.”⁶² The law library was the lawyer’s “laboratory,” and the reported appellate cases were the lawyer’s “experimental materials.”⁶³ But, according to Langdell, most cases were wrongly decided, and these cases were, therefore, “worse than useless”: they were positively harmful.⁶⁴ “The function of the legal scholar . . . is to winnow . . . from the chaff those very few cases which have . . . been correctly decided and which,” if followed, will lead to the Platonic ideal of enduring legal truth.⁶⁵

Langdell’s era was a time dominated by formalistic thinking about the law, which has come to be called “legal formalism.”⁶⁶ As already noted, the Langdellians viewed the law in terms of a relatively limited number of fundamental legal truths in certain well-defined areas of the law.⁶⁷ From the myriad of reported cases, the student would find the pertinent legal rule

56. Christopher C. Langdell, Dane Professor, Harvard Law Sch., Address to Harvard Law School Association at the “Quarter-Millennial” Celebration of Harvard University (Nov. 5, 1886), in *The Harvard Law School*, 3 L.Q. REV. 118, 124 (1887).

57. GILMORE, *supra* note 1, at 42.

58. *Id.* at 42–43.

59. *Id.* at 43.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 47.

64. *Id.* (quoting C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (The Lawbook Exch., Ltd. 1999) (1871)).

65. *Id.*

66. *Id.* at 38–39.

67. See *supra* text accompanying notes 53–65.

and mechanically apply it to the problem at hand.⁶⁸ The result would be foreordained (indeed, even easy) once the applicable legal rule had been discovered.⁶⁹

This was the thinking of the Legal Formalists—Langdell and his disciples—and this thinking was ascendant during the years roughly between 1865 and 1920.⁷⁰ Professor Gilmore believed that every legal system, sooner or later, must go through its “Age of Faith,” its age of formalism.⁷¹ After all, “[t]he idea of a body of law, fixed for all time and invested with an almost supernatural authority, is irresistibly attractive—[not only for the judges,] not only for the lawyers and their clients,” but also for the public at large.⁷² Most people prefer certainty over uncertainty, order over chaos.⁷³ After the terrible war between the states, Americans sought “peace, repose, and tranquility.”⁷⁴ The certainty of legal formalism furthered these ends, contributing to “the illusion that a stable body of law was not only a theoretical possibility but [was] an accomplished fact.”⁷⁵ The allure of legal formalism has had a revival throughout much of the American judiciary during the last few decades, but a discussion of contemporary legal formalism is the subject for another essay at another time.

The certainty of legal formalism also served the ends of laissez-faire economics, which came to predominate during this era.⁷⁶ Courts staffed by formalist judges became increasingly hostile to social legislation.⁷⁷ Social legislation not only sought to alter the status quo that legal formalism buttressed but also trespassed on the judges’ terrain—that of *making* law in the guise of merely appearing to *apply* it.⁷⁸ Laissez-faire economics and legal formalism went hand-in-hand in late-nineteenth- and early-twentieth-century America.⁷⁹

During this period, the movement toward professionalization of the bar intensified, mirroring Langdell’s push for a more intellectually

68. See *supra* text accompanying notes 53–65.

69. See *supra* text accompanying notes 53–65.

70. Gilmore, *supra* note 1, at 11–12.

71. *Id.* at 64.

72. *Id.*

73. *Id.* at 65.

74. *Id.*

75. *Id.*

76. *Id.* at 65–66.

77. *Id.* at 62–64.

78. See *id.* at 62.

79. *Id.* at 66.

rigorous legal education.⁸⁰ As corporations grew so did the law firms that served them.⁸¹ The legal profession, during the later nineteenth century, became a vehicle for upward social and economic mobility for many of its practitioners.⁸² Those who moved up the social and political ladder during this age were almost exclusively white, middle-class, protestant males of Western European ancestry.⁸³

The growth of formal legal education in this era sprang from the belief that the science of law was an ideal background for gentlemen of substance and the system of law-office apprenticeship—the informal practice of reading law—was simply inadequate as a means of educating such gentlemen.⁸⁴ It should be understood that law-office apprenticeship as the primary means of legal education died slowly. In 1900, it was still the only legal education that the majority of American lawyers received,⁸⁵ but the elite lawyers—those who were becoming leaders of the bar and powerful servants of the corporate giants—were increasingly being trained in university-based law schools that employed Langdell's case method.⁸⁶ Increasingly, those elite lawyers were calling for more rigorous standards in both legal education and bar admission.⁸⁷ These standards included written bar examinations.⁸⁸

The stated purpose of these rigorous standards was to increase the competence of the profession.⁸⁹ The American Bar Association was founded for this express purpose in 1878.⁹⁰ The result (intentional or otherwise) of the heightened standards in legal education and bar admission was greater exclusivity in bar admissions to the detriment of the rising tide of immigrants who began to flock to America's shores in the years after the Civil War.⁹¹

By 1920, the number of American law schools was growing rapidly,

80. STEVENS, *supra* note 2, at 73; LAPIANA, *supra* note 7, at 14.

81. STEVENS, *supra* note 2, at 22, 51.

82. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 21–23 (1976).

83. *Id.* at 25–26; STEVENS, *supra* note 2, at 100–02.

84. STEVENS, *supra* note 2, at 21–22, 73.

85. *Id.* at 24.

86. *Id.* at 38–39, 51–52, 60–63, 96.

87. *Id.* at 172–74.

88. *Id.* at 94–95, 98–99.

89. *Id.* at 92.

90. *Id.* at 27, 92.

91. *Id.* at 100–02; AUERBACH, *supra* note 82, at 62–64.

and most of those law schools were emulating Langdell's Harvard.⁹² Thus, there was general use of the case method of study; there also was general use of a three-year course of law school study (another Langdellian innovation).⁹³ Still in the post-World War I future was the time when those three-year law schools would become exclusively *graduate* schools—that is, when students would attend law school *after* receiving their undergraduate degrees.⁹⁴ Before the time of Langdell, the study of law at a college or university was an undergraduate pursuit; graduates in law received a bachelor of laws degree.⁹⁵ This conformed to the practice in England, a practice which is extant in contemporary Great Britain. Langdell sought to make the law school a graduate school.⁹⁶ He did so with limited success beyond Harvard in his own lifetime,⁹⁷ but that situation changed rapidly after the First World War and continued to accelerate after the Second World War.⁹⁸ Thus, by the 1960s, law school entrants were required to have a four-year undergraduate degree.⁹⁹ The American law school had finally become a *graduate* institution.

Langdell's legacy has been hotly controverted in recent years. Professor Gilmore, emphasizing the narrowness of Langdell's conception of the law as science, called him "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. . . . However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea shaped . . . legal thinking for [generations]."¹⁰⁰ A somewhat different and more positive view of Langdell and his followers was expressed more recently by Professor William LaPiana:

Whatever the shortcomings of the legal education Langdell and his colleagues created, present-day legal education is still shaped by the actions and beliefs of those teachers and scholars of the preceding century, and there is something appealing in the clear role for legal education [that] they envisioned. They knew

92. STEVENS, *supra* note 2, at 123.

93. *Id.* at 36–37.

94. *Id.* at 37.

95. *Id.* at 36–37.

96. *Id.*

97. *Id.*

98. *Id.* at 205.

99. *Id.* at 209.

100. GILMORE, *supra* note 1, at 42.

what they had to do and they went on to do it. In the process, they were confident that they were training their students to fulfill the most demanding tasks of a most demanding profession.¹⁰¹

History's judgment on Langdell's legacy may be mixed, but the man's significance in the history of American legal education is beyond dispute. Langdell's case method is still in use in today's American law schools, albeit in a modified form. Yet, the method's use and usefulness are vigorously debated by contemporary legal educators.

Just what were (and still are) the advantages of the case method of legal education? For Langdell and his followers, as previously discussed, the method was scientific and, thus, practical,¹⁰² the method's ultimate goal was to find the golden nugget of legal truth amid so much dross.¹⁰³ Most who came of age after the generation of Langdell and his followers questioned the Langdellians' certainty on this point.¹⁰⁴ Both Langdell and his critics, however, agreed on one important advantage of the case method—perhaps *the* most important aspect of the method and, certainly, the one responsible for its continued use and vitality in contemporary legal education. The main argument in favor of the case method of instruction has been its ability to teach the skill of thinking like a lawyer—the skill of critical thinking and analysis that forms the basis of legal problem-solving.¹⁰⁵ In the estimation of Professor Stevens, “the lasting influence of the case method [has been] to transfer the basis of American legal education from *substance* to [*process*].”¹⁰⁶ This shift from substance to process is particularly marked during the first year of legal education.¹⁰⁷ Methodology—critical thinking—more than substance has become the nub of legal education. This is the lasting legacy of Christopher Columbus Langdell.

In addition to the theoretical advantages of the case method, the method presents practical advantages—and some disadvantages—as well. As law students soon find out, the case method of instruction is intellectually stimulating, as professor and student interact in the

101. LAPIANA, *supra* note 7, at 170.

102. See *supra* text accompanying notes 53–65.

103. LAPIANA, *supra* note 7, at 103, 108.

104. STEVENS, *supra* note 2, at 269.

105. *Id.* at 268–69.

106. *Id.* at 56 (emphasis added).

107. *Id.* at 270–71.

discussion of important legal issues, rules, and policies.¹⁰⁸ Indeed, we professors often gain insight from the class discussion that the case method fosters. This insight makes us better teachers. On the other hand, the case method is a time-consuming way to impart information, and it is not the best way to teach certain important legal skills (statutory analysis and legal drafting being but two important examples). Therefore, the case method has been modified and supplemented in today's law school—so much so that Dean Langdell, were he resurrected, would hardly recognize much of what goes on in our classrooms. While the future direction of American legal education continues to be a topic of debate, there is general agreement that modern American legal education represents a synthesis of legal *theory* (in the form of predominantly case method courses), on the one hand, and legal *practice* (in the form of predominantly clinical and practice skills courses), on the other hand.¹⁰⁹

How did we arrive at this synthesis, this modification of Langdell's original system? The road to this synthesis wound through the America of the 1920s and 1930s, the period of boom and bust between the two world wars.¹¹⁰ During these years, there arose an important movement in American jurisprudence that has come to be called "Legal Realism."¹¹¹ The Legal Realists were skeptical of the old, formalist, Langdellian order.¹¹² Law, an exact science?¹¹³ Nonsense, they scoffed!¹¹⁴ The law was *not* a value-free system of objective, black-letter rules—not a brooding omnipresence in the sky.¹¹⁵ Legal rules—and the decisions made by the courts when applying those rules—were hardly neutral.¹¹⁶ In the opinion of the Realists, the Formalists of the Langdellian era had used the law to bolster the laissez-faire economic system,¹¹⁷ yet this was despite the

108. *Id.* at 269.

109. For a survey of current trends and practices in—as well as some prescriptions for—legal education, see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); DAVID I.C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE (2009); Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 QUINNIPIAC L. REV. 227 (2009).

110. GILMORE, *supra* note 1, at 79.

111. *Id.* at 78.

112. *Id.* at 79.

113. STEVENS, *supra* note 2, at 156.

114. *Id.*

115. *Id.*

116. *Id.*

117. GILMORE, *supra* note 1, at 65–66.

Formalists' claim that they merely were applying timeless legal principles that had been "scientifically" discovered.¹¹⁸

In contrast to the Langdellian Formalists, the Legal Realists took a functional or instrumental view of the law.¹¹⁹ Legal principles are not carved in stone but are malleable in accordance with the tenor of the times, and the law can and should be used to effect positive social change. In the words of the proto-realist Justice Oliver Wendell Holmes, Jr.:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹²⁰

In writing these words during the late-nineteenth-century heyday of legal formalism, Holmes was anticipating the legal realist movement by at least a generation.

At the dawn of the age of legal realism, Benjamin Cardozo, the man who would become Holmes's successor on the United States Supreme Court, concurred in Holmes's assessment of the law. In an influential

118. *Id.* at 62.

119. *See generally id.* at 68–69 (discussing the divergence between the two schools of thought).

120. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW AND OTHER WRITINGS* 1 (The Legal Classics Library 1982) (1881). Professor Gilmore, among others, might take issue with my characterization of Holmes as a proto-realist. Contrary to the popular view of Holmes as the "Yankee from Olympus," Gilmore thought that: "[t]he real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak." GILMORE, *supra* note 1, at 48–49. Holmes did not reject the idea that law was a science, but his view of legal science was more pragmatic and more sociological than the view of the law held by the Langdellians. *Id.* at 50. However, "Holmes never shared the prevalent hostility toward social legislation," even though "he thought that most of it was silly and useless." *Id.* at 67. It is Holmes's acceptance of the inherent legitimacy of social legislation in a democracy—an acceptance that ran counter to the prevailing view of the contemporary legal establishment—that prompts me to label Holmes a proto-realist, even though Gilmore probably would say that I have gone too far in my characterization. *See id.* at 48, 66–67.

series of lectures entitled *The Nature of the Judicial Process*,¹²¹ which were given at Yale Law School in 1921, Cardozo asserted:

[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.¹²²

Cardozo went on to reveal a judicial secret that was central to the philosophy of the Legal Realists: Judges legislate from the bench, and there is nothing new or nefarious about such judicial legislation.¹²³ This is a central insight into the nature of judging in a common-law system—a feature of the Anglo-American legal system that was (and still is) too often ignored:

One of the most fundamental social interests is that law shall be uniform and impartial. . . . Therefore in the main there shall be adherence to precedent. There shall be symmetrical development [of the law] But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest[s] served by equity and fairness or other elements of social welfare. . . .

If you ask how he [i.e., the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. . . . Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for

121. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

122. *Id.* at 112.

123. *Id.* at 113, 116.

himself None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.¹²⁴

One should notice that Cardozo said that frequently the law “is not found, but made,”¹²⁵ thus rejecting the Formalists’ assertion to the contrary—i.e., that the law is not made but found by judges and lawyers.¹²⁶

No doubt in response to half a century of formalist jurisprudence, Cardozo opined that judicial “legislation” in a common-law system is neither new nor threatening: “There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law. . . . Much of the process has been unconscious or nearly so.”¹²⁷ Quoting his predecessor Holmes, Cardozo noted that:

“We do not realize . . . how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. . . . I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage [i.e., consideration of public policy].”¹²⁸

Thus, as Holmes recognized a generation before Cardozo delivered his famous lectures on the nature of the judicial process, the life of the law *is* experience (social experience), and not mere, cold logic.

The views of the Legal Realists, supported by their judicial forebears such as Holmes and Cardozo, shattered Langdellian certainty in the law, but the Realists themselves did not substitute any *systemic* pedagogical approach of their own in formalism’s stead.¹²⁹ In fact, in the period

124. *Id.* at 112–15.

125. *Id.* at 115.

126. Modern-day legal formalists who decry “judicial activism” should take note of Cardozo’s point. At the very least, it should be recognized that this debate between formalists and instrumentalists was joined more than a century ago (in the days of Langdell, Holmes, and Cardozo) and has continued more or less unabated ever since.

127. CARDOZO, *supra* note 121, at 116–17 (footnote omitted).

128. *Id.* at 117–19 (quoting Justice Oliver Wendell Holmes Jr., Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in *The Path of the Law*, 10 HARV. L. REV. 457, 466–67 (1897)).

129. STEVENS, *supra* note 2, at 155–56; GILMORE, *supra* note 1, at 77–79.

between the two world wars (the high watermark of legal realism), American law schools continued to use the case method of teaching.¹³⁰ Now, however, law professors began to question the previously accepted tenets of the law and legal education, tenets to which the Langdellian Formalists had clung with such tenacity.¹³¹ The most prominent of these tenets, of course, was the notion that law was an exact science, much like a natural science.¹³² The Realists generally admitted that the law was a science, but it was a *social* science—an *inexact* science.¹³³ Moreover, the law was heavily influenced by such other social sciences as economics, sociology, political science, and even psychology.¹³⁴

During legal realism's salad days, numerous changes were made at the nation's elite law schools. New casebooks appeared, and these casebooks included materials other than cases—materials such as statutes and explanatory text.¹³⁵ New courses appeared—courses in the area of public law, courses which took interdisciplinary approaches, and courses, such as seminars and clinical programs, that deviated from the standard question-and-answer, case-method routine.¹³⁶ More and more, law professors were calling their students' attention to the world beyond the law school walls (that is, to *experience*) and to the fact that this extramural world had as profound an impact on the law as the law had on that world.¹³⁷

Many of the realist law professors practiced what they preached by taking leaves of absence from academia to serve in government, particularly in Franklin Roosevelt's New Deal.¹³⁸ Perhaps the most prominent among them was the late Justice William O. Douglas, who left his teaching position at Yale Law School to serve on the Securities and Exchange Commission before his 1939 elevation to the United States Supreme Court.¹³⁹ To professors like Douglas, public service provided the forum in which the law could be employed in the public interest.

In the years following the Second World War, the reforms of the Realists spread from the elite law schools and reached the regional and

130. GILMORE, *supra* note 1, at 79.

131. *Id.* at 79, 87.

132. *Id.* at 87.

133. *Id.*

134. *Id.* at 87–88.

135. STEVENS, *supra* note 2, at 158.

136. *Id.* at 158–60.

137. *Id.* at 160.

138. *Id.*; GILMORE, *supra* note 1, at 91.

139. STEVENS, *supra* note 2, at 140.

local schools.¹⁴⁰ The result is that legal education today represents a synthesis of the Langdellian, formalist thesis and the realist, functionalist antithesis. In a very real sense, we in the academy are all legal realists, particularly during the first year of law school.

The late Professor Karl Llewellyn, one of the leaders of the legal realist movement, captured the potential of the functional or instrumental approach to law in his book, *The Bramble Bush*.¹⁴¹ According to Llewellyn, every case lays down a rule of law on which the case is decided.¹⁴² In a subsequent case, that earlier rule—the precedent—is merely a starting point for the contestants and their attorneys.¹⁴³ The attorney who seeks to convince the court *not* to apply the precedent to the present controversy will endeavor to narrow and distinguish the earlier rule—to confine the rule of the earlier case to its particular facts.¹⁴⁴ Llewellyn called this process “the dogma which is applied to *unwelcome precedents*.”¹⁴⁵ Conversely, opposing counsel, who seeks to convince the court to apply the precedent to the controversy at hand, will endeavor to expand the application of the earlier rule.¹⁴⁶ Llewellyn dubbed this process the “device for *capitalizing welcome precedents*.”¹⁴⁷

This duality of the nature of precedent was—and is—a fundamental concept within the law:

[T]he doctrine of precedent . . . is . . . two-headed. . . . [I]t is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same precedent, are contradictory of each other*. . . . [T]here is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. . . . [T]hese two doctrines exist side by side. . . . Until you realize this you do not see how it is possible for law to change and to develop, and yet to stand on the past. You do not see how it is possible to avoid the past mistakes of courts, and yet to make use of every happy insight for which a judge in writing may have found

140. *See id.* at 209, 213–14.

141. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930).

142. *Id.* at 72.

143. *Id.*

144. *Id.*

145. *Id.* at 73.

146. *Id.* at 74.

147. *Id.*

expression. . . . For look again at this matter of the *difficulty* of the doctrine. The strict view [of precedent]—that view that cuts the past away—is *hard* to use. An ignorant, an unskilful judge will find it hard to use: the past will bind him. But the skilful judge—he whom we would make free—is thus made free. He has the knife in hand; and he can free himself.¹⁴⁸

And, in a parting shot fired across the Langdellians' bow, Llewellyn concluded:

People . . . who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts or departure from the court-ways of some golden age—such people simply do not know our system of precedent in which they live.¹⁴⁹

Where, then, does all of this leave us today in legal education? It is an inescapable truth that contemporary American legal education is a product of its past. From the Langdellians, we have inherited the case method of instruction and the three-year course of graduate study that is law school.¹⁵⁰ Thanks to the Legal Realists, we no longer view the law as an exact science; instead, we see it as an art—a profession—to be employed in the public interest.¹⁵¹ Thanks also go to the Realists for transforming the nature of the case method and for at least significantly expanding (if not entirely revolutionizing) what form and substance are acceptable in a law school classroom. As we have seen, the Langdellians pulled American legal education from its roots, emphasizing the primacy of legal theory over legal practice, at least in the classroom. The Legal Realists fought the Langdellians on the latter's home field—the legal academy—with the Realists trying to shake their predecessors' seemingly unshakeable certainty. One legal realist who might have led a revolution in American legal education, had he found a sufficient number of followers, was Jerome Frank. Over several decades in the first half of the twentieth century, Frank repeatedly campaigned for a more skills-

148. *Id.* at 74–75.

149. *Id.* at 76. Once again, present-day legal formalists should take note of Llewellyn's admonition, although they are unlikely to do so.

150. *See supra* text accompanying notes 84–99.

151. *See supra* text accompanying notes 129–40.

oriented system of education in the law schools.¹⁵²

Jerome Frank's call was sounded anew when the "MacCrate Report" was issued two generations later.¹⁵³ This thoughtful document examined the professional skills and values that every lawyer should possess.¹⁵⁴ The report recommended that law schools not simply leave the teaching of these skills and values to the profession but endeavor to instill these skills and values in their students during their years in law school.¹⁵⁵ Among the conclusions of the MacCrate Report was the following: "Law schools and the practicing bar should look upon the development of lawyers as a common enterprise, recognizing that legal educators and practicing lawyers have different capacities and opportunities to impart to future lawyers the skills and values required for the competent and responsible practice of law."¹⁵⁶ The report proposed a law school pedagogy that included professional skills and values in addition to—but not in substitution for—the traditional Socratic give-and-take of the case method, which so successfully taught generations of American law students the fundamental, practical, professional skill of thinking like a lawyer (i.e., critical analysis).¹⁵⁷ The MacCrate Report advocated a reweaving of the two main strands of legal training—the analytical and the practical—into one tapestry; ideally, American law schools would offer their students more training in professional skills and values, in addition to training their students in the skill of legal analysis.¹⁵⁸ This process had already been initiated with the advent of law school clinics and externship programs, but the MacCrate Report called for more of such opportunities and for additional classroom settings in which law students would learn these other professional skills and values.¹⁵⁹

Recently, the "Carnegie Report"¹⁶⁰ has reexamined the familiar

152. See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20 (1951).

153. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

154. See *id.* at 135–221.

155. See *id.* at 233–36, 330–34.

156. *Id.* at 330.

157. *Id.* at 233–36.

158. See *id.* at 330–34.

159. See *id.*

160. SULLIVAN ET AL., *supra* note 109. This is commonly referred to as the Carnegie Report; unfortunately, a detailed examination and analysis of this fascinating report is beyond the scope of this essay.

territory of legal education and has made suggestions that transcend those set out a generation earlier in the MacCrate Report. The Carnegie Report urges not merely reweaving the strands of legal education but fully integrating them at the law school level, using what the report terms an “integrative” strategy of legal education; this integrative strategy would draw upon the best aspects of inculcating professional skills and values in aspiring attorneys seen during the days of law-office apprenticeships.¹⁶¹

The core insight behind the integrative strategy is that effective educational efforts must be understood in holistic rather than atomistic terms. For law schools, this means that, far from remaining uncontaminated by each other, each aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social—takes on part of its character from the kind of relationship it has with the others. . . .

. . . [I]n virtually no law schools do these experiences systematically reach all of the students.¹⁶²

The introduction to the Carnegie Report is itself an essay on the history of American legal education.¹⁶³ While acknowledging Langdell’s innovations in legal education and their general acceptance by American law schools, the report notes the hostility with which many Langdellians viewed their students’ acquisition of practical, professional skills (at least during their years of formal legal education).¹⁶⁴ As did the MacCrate Report before it, the Carnegie Report acknowledges the value of the case method of instruction, with its Socratic dialogue, for what this method does well (particularly during the first year of law school), which is to impart not merely substantive law but an analytical process: “Recognizing the priority of analytical thinking in preparing lawyers, we

161. *Id.* at 191.

162. *Id.*

163. *Id.* at 1–20.

164. *Id.* at 4–12. The report states:

[O]ne of the less happy legacies of the inherited academic ideology [i.e., inherited by the legal academy from Langdell and his followers] has been a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.

Id. at 8.

place formal knowledge as the first element within the integrative framework we propose for legal education.”¹⁶⁵ Indeed, the authors note: “[L]egal education has refined important lessons of value to other professional fields. The chief of these is the extraordinary power of the first-year experience as a way of beginning the formation of future professionals.”¹⁶⁶

The Carnegie Report in no way calls for the abolition of the case method of instruction, but the priority and the importance of teaching analytical thinking “should not be misconstrued as sufficiency.”¹⁶⁷ The report concludes that law schools should use other methods of instruction beyond the case method, especially—though not exclusively—after the first year of law school.¹⁶⁸ Echoing the MacCrate Report’s recommendations, the Carnegie Report urges the legal academy to adopt modes of pedagogy that provide the opportunities for law students to learn in a way that combines the main elements of “legal professionalism—conceptual knowledge, [professional] skill, and moral discernment.”¹⁶⁹ The report asserts that this is an historic opportunity to advance legal education by synthesizing the theoretical and practical strains of legal education that Langdell and his followers put asunder in the nineteenth century.¹⁷⁰ Given the recommendations of the Carnegie Report, reiterating and amplifying much of what the MacCrate Report had suggested years earlier, the time does seem ripe for a pronounced shift in American legal education—a shift that will put even greater emphasis on teaching our students the professional skills and values required in the practice of law.

History teaches us that legal education is hardly a static institution. From the Langdellians to the Legal Realists and from the MacCrate Report to the Carnegie Report, American legal education has engendered debate and institutional change in the past and continues to engender debate and institutional change in the present. Admittedly, change often comes rather slowly to legal education; after all, the law has always tended to be a backward-looking profession. The legal training I received three decades ago is by no measure identical to that received by the generation of attorneys who preceded me, nor was my education identical

165. *Id.* at 13.

166. *Id.* at 17.

167. *Id.* at 13.

168. *See id.* at 185–92.

169. *Id.* at 12.

170. *Id.*

to that which my students receive today, with its somewhat greater emphasis on professional skills. A generation from now, law students will be educated in ways that we may find difficult to imagine, thanks, in large part, to the on-going revolution in technology.¹⁷¹ We are already seeing the advent of classes taught entirely online, which, just a few short years ago, would have been unthinkable—indeed even impermissible—under earlier American Bar Association standards for the accreditation of American law schools. Today, there are even entire online law schools, without any bricks or mortar at all. While none of these virtual law schools, with their virtual classrooms, has yet been accredited by the American Bar Association, that day may well arrive.

Still in all, much of what went on in the legal academy yesterday, what goes on there today, and what will go on there tomorrow has not changed. The fundamental values of learning, professionalism, and public service have changed relatively little since the days of Dean Christopher Columbus Langdell at Harvard Law School, although the societal context in which those values operate has been thoroughly transformed during the course of the last century.

There have been lawyers on both sides of all important controversies in American history. Many of our revolutionary leaders were lawyers, but some of the most prominent colonial lawyers remained loyal to the British Crown. In the late eighteenth century, there were attorneys on both sides of the debate over the ratification of our Constitution. In the nineteenth century, some lawyers fought to preserve slavery even if that meant destroying the Union, while others fought to preserve the Union by destroying slavery. In the late nineteenth and early twentieth centuries, attorneys championed social change and corporate primacy; they championed the New Deal and the Old Order. And, in the middle part of the twentieth century, lawyers led the battles for civil rights and for segregation.

I try not to influence my law students' political views, certainly not while I am on the podium (or roaming the classroom). I know that some of my students might disagree with that statement, but I believe it and do my imperfect best not to use my influence for political purposes. However, I have tried to inculcate on my students professional values based on the idea that the choosing of sides is not, and never has been, a value-neutral process. Students must bear in mind that while there are at

171. On the matter of the influence and use of technology in contemporary legal education, see generally THOMSON, *supra* note 109.

least two sides to every debate, the moral force of the arguments on each side is not necessarily equal. No matter which side of the controversy a student or a lawyer ultimately embraces, it is up to that person to be a constructive force acting in the public interest, as he or she may reasonably see it. I hope that in making their professional choices, students and attorneys will be animated by the knowledge that they can and should act in the public interest. Perhaps this is the most important life lesson that a student will learn during his or her years in law school. Speaking not only as a law professor but also as a member of society, I hope that all law students will learn this lesson well and will carry it with them into their practice of our learned and noble profession.

