RUTGERS LAW RECORD

Volume 29 Spring 2005 Number 21

"A SUGGESTION OF A FUNDAMENTAL NATURE": IMAGINING A LEGAL EDUCATION OF SOLELY ELECTIVES TAUGHT AS DISCUSSIONS

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Article Abstract

The article offers a proposal for reforming American legal education. Commentary about legal education is rich with sharp criticism of the dominant model for law schools, a set of institutions and pedagogical assumptions that date to the nineteenth-century innovations of Harvard Law School Dean Christopher Columbus Langdell. The picture of modern legal education that emerges from these commentaries is one of missed intellectual opportunities, student disengagement and passivity, hostility to women and minorities, and declining academic rigor. Unfortunately, most of the literature either stops short of prescribing specific solutions or descends into a vague incrementalism, failing to come to a complete reckoning with the extent of the identified problems in law schools still operating within Langdell's paradigm. Yet, the article argues, no matter how unlikely any particular proposal's adoption, the legal academy should not shrink from taking steps to reform itself at least as bold as Langdell's own "big ideas."

Aiming to improve law student outcomes and invigorate the process of legal education with the intellectual energy that it now tends to lack, the article describes a dramatic alternative to Langdell's law school. In short, the proposal calls for discarding Langdell's pedagogy and his architecture in favor of oval wooden tables, uniformly smaller classes of about twelve students, and complete freedom of curricular choice for students during all three years. Recalling the history and

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practice of discussion section teaching at Phillips Exeter Academy, a high school that has institutionalized deep participatory and collaborative norms into its curriculum, the article proceeds to analyze the benefits and costs of adapting the model to legal education and addresses how such a transformation would impact students, faculty, and the practicing bar.

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Education is not in reality what some people proclaim it to be in their professions. What they aver is that they can put true knowledge into a soul that does not possess it, as if they were inserting vision into blind eyes. . . . But our present argument indicates that the true analogy for this indwelling power in the soul and the instrument whereby each of us apprehends is that of an eye that could not be converted to the light from the darkness except by turning the whole body. Even so, this organ of knowledge must be turned around . . . together with the entire soul, like the scene-shifting periactus in the theatre, until the soul is able to endure the contemplation of the essence and the brightest region of being. – Socrates[1]

One may think of the body of all the law as an immense granary. In law school, grain – law knowledge or information – is delivered to the students. But the grain must be ground, else unusable, and a mill is needed to do the grinding. Analytic skill is the mill…. So the law school must do more than deliver grain. It must deliver the mill which grinds the grain and makes it usable . . . . Not only does analytical skill once acquired stay with one for life, but that skill is infinitely flexible, and so can "grind" so to speak, an infinite variety of grain. – Bernard Savin[2]

Compassion without technique is a mess; and technique without compassion is a menace. – Karl N. Llewellyn[3]

But above all, it is expected that the attention of instructors to the disposition of the minds and morals of the youth under their charge will exceed every other care; well considering that though goodness without knowledge is weak and feeble, yet knowledge without goodness is dangerous, and that both united form the noblest character; and lay the surest foundation of usefulness to mankind. – John Phillips in the Original Deed of Gift, Phillips Exeter Academy[4]

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[1] SOPHIE HAROUTUNIAN-GORDON, TURNING THE SOUL: TEACHING THROUGH CONVERSATION IN HIGH SCHOOL 1 (1991) (quoting PLATO, REPUBLIC 518b-d).
[2] David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 486 (2001) (quoting Savin).
[3] Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 510 (1987) (quoting Llewellyn).
[4] Phillips Exeter Academy, Mission Statement, at http://www.exeter.edu/pages/visit_mission.html (last visited Jan. 17, 2005).

THE CLASSROOM OF LAPTOPS, THE BIG IDEA, AND THE CLASSROOM OF A DOZEN SETS OF ELBOWS

At Harvard Law School, as at the many law schools that consider Harvard the standard-bearer of legal education, professors teach the major courses at the heart of the curriculum in much the same format that professors have taught those same courses for more than one hundred years. American legal education remains haunted by the ghost of Harvard Dean Christopher Columbus Langdell – the 1L common law frameworks, the brutal meritocracy of all-important final examinations and law review, the enormous classes taught by professors who challenge individual students on their mastery of the assigned reading and their on-the-spot analytical thinking. For generations, law students have run this three-year gauntlet and have believed that, at its conclusion they have learned to "think like lawyers."

My legal education at Harvard still fresh in my mind, I believe that, in all but the hands of the most able professors, most large doctrinal classes now lack the power to do what Socrates himself suggested was the project of education – "turning the soul." Indeed, whatever rigor and intellectual transformations the Langdell classroom once made possible are in serious decline. For the phenomenon's most graphic example, I think of the rows of bright laptop screens in nearly every large class at Harvard - checking email, fixed on the *New York Times*, rapt with résumé adjustments, engrossed in games like Spider Solitaire, even chatting with other students in the same class. For another egregious example of student disengagement, I need only remember the swinging doors of classes during the October hiring season, the second and third year students in their crisp suits and loud shoes ducking out early, arriving late, or missing class altogether to court Covington, Ropes, or Skadden at the Charles Hotel. With the majority of students so physically or mentally absent, the majority of professors seem content to hold the interest of a few attentive students, insistent on continuing the teaching methods of their own teachers, still trapped within Langdell's paradigm and his architecture, no matter how many times deconstructed and reconstructed by juristic schools and renovation contractors. The fixes of the last thirty years - the slow death of "Socratic" hazing, isolated hiring of academic innovators, group work in some large classes, slight reductions in first-year section size, or half-hearted investments in clinical education - though hard-fought and slow in coming, have been little more than cosmetic. Despite its historic pretensions, law school grows more passive an endeavor with each passing year. We are a long way from the Socratic ideal of transformation.

So, what to do?

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Wrought from the Cleveland industrialist Stephen Harkness's wise investments in Rockefeller's Standard Oil, the Harkness family fortune was a major

force in American higher education during the early part of the last century.[5] A generation removed from the Gilded Age's boom, Harkness money made the house plan at Harvard and the college plan at Yale a possibility.[6] In New York City, Harkness money founded the Medical Center of Columbia University, the first teaching hospital to combine patient care, medical education and research facilities in a single complex.[7] And at the Phillips Exeter Academy, the alma mater of antebellum Senator Daniel Webster and Christopher Columbus Langdell himself, the industrialist's son, Edward S. Harkness, attempted to transform American secondary education.[8]

Lewis Perry, the principal of Phillips Exeter, befriended Edward Harkness during the 1920s.[9] After giving several small gifts to the school in 1929, Harkness told Perry and George Rogers, Director of Studies, to go to England on a research mission: "and if you will get up a scheme, I'll give you all the money you need to put into operation." Basing their discussions on Perry's research at twenty-one English schools, the Exeter faculty deliberated on modest proposals, each of which Harkness rejected. Harkness complained that these proposals were not "suggestions of a fundamental nature – so sweeping and different from methods prevailing here that one could see at a glance that, were they adopted, the whole educational system in our secondary schools would not only be changed, but changed enormously for the better." Harkness ultimately agreed to fund an ambitious $5.8 million plan in November 1930[10] that he hoped would revolutionize secondary schools across the country: "What I have in mind is [a classroom] where [students] could sit around a table with a teacher who would talk with them and instruct them by a sort of tutorial or conference method, where [each student] would feel encouraged to speak up. This would be a real revolution in methods."

With Harkness's money, Exeter "refounded" itself.[11] The Academy's physical plant expanded substantially – adding a major new building of classrooms, four dormitories, four dining halls, and two new wings to the existing Academy

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[5] Richard F. Niebling, *Edward S. Harkness 1874-1940*, EXETER BULLETIN, Fall 1982, at 5-6, *available at* http://www.exeter.edu/academics/Harkness_Niebling.pdf.
[6] *Id.* at 6.
[7] Matthew Dougherty, *Images from the Past; Vision of the Future*. IN VIVO, April 28, 2003, *available at* http://www.cumc.columbia.edu/news/in-vivo/Vol2_Iss08_apr28_03/medical-history.html.
[8] Biographical Directory of the United States Congress, Webster, Daniel, *at http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000238 (last visited Jan. 17, 2005);* Bruce A. Kimball, *Young Christopher Columbus Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 197-204 (2002).
[9] The account of the Harkness plan's adoption is taken from Niebling, *supra* note 6, at 7.
[10] In 2003 dollars, the gift would be between $65 and $200 million, depending on the index used. *See* Economic History Services, *How Much is That?* (2003), *at* http://eh.net/hmit/.
[11] Niebling, *supra* note 6 at 5.

Building. To accomplish Harkness's "revolution in methods," the school engaged carpenters to custom-make oval wooden tables to seat twelve students and a teacher. Academy lore suggests that Harkness himself sat at a table prototype, and found that he could not see the eyes of every other person at the table.[12] In order to correct this flaw, the tables were made to be rounder, the builders having to join them within the classrooms themselves, as the completed tables would not fit through doors or windows.[13] With the remaining two-thirds of the gift, Exeter halved the size of all its classes and added twenty-five new teachers to the faculty.[14]

Despite its innovations, Harkness's conception of the "conference method," even as it developed to be the keystone of Exeter's academic (and now residential) culture, failed to revolutionize secondary education in the United States. Few public schools had the financial resources required to invest in the system, and the idea assumed a remarkable maturity of students and significant preparation time for teachers. Despite its modest impact in high schools, Harkness's big idea was simple and radical, in much the way that Langdellian legal education, perhaps forged in the austerity of 1840s Exeter,[15] was simple and radical in the nineteenth century. Could it be that legal education, mired in institutional inertia and faculties married to Langdell's assumptions, needs a new "big idea?"

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Phillips Exeter continues to follow the Harkness model. Classes utilize the "conference method" with small groups of students converging around one of the fabled tables, empowered by the implementation of what English instructor Charles Terry describes as the ideal "Harkness posture": "elbows on the table, books open to the page, to that page under scrutiny, as they search for anchors to their eventual generalizations."[16]

In the Harkness classroom, teachers serve as guides, questioners, facilitators, and resources, never lecturers, interrogators, or taskmasters. Outside of the classroom, these teachers coach athletic teams, lead intramural sports, coordinate extracurricular adventures, open their homes, and share their meals with students, making the Exeter educational experience profoundly human. Over time Exeter has leveraged the student engagement that characterizes Harkness learning, building principles of discussion and shared enterprise into residential life, the practice of community service, fine and performing arts, as well as the natural sciences.[17] In

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[12] Tyler C. Tingley, *Educating with the Harkness Table* (2002), *at* http://www.scholarsearchassoc.com/previous%20articles/Exeter/NHPHE060402.htm.
[13] *Id*.
[14] Niebling, *supra* note 6, at 5.
[15] Kimball, supra note 8, at 197-204.
[16] Charles L. Terry, *Harkness Learning is Still the News*, EXETER BULLETIN, Fall 1999, *at* http://www.exeter.edu/publications/exeter/fall_99/harkness1.htm.
[17] *See, e.g.*, Katherine K. Towler, *Changing Face: Enduring Values*, EXETER BULLETIN, Summer

2001, donors led by the Phelps family helped the Academy erect a $27 million, 72,000 square foot science center around the Harkness philosophy.[18] Every classroom now contains a discipline-appropriate laboratory, state-of-the-art instructional technology, and most importantly, a new Harkness table.[19]

Imagine, for a moment, a legal education with the Harkness philosophy at its center, with much smaller classes, and no core curriculum, with student-centered discussion the dominant pedagogy. This Article shall endeavor to consider whether such a fantasy is desirable and what stands in its way. The conclusion will be unsurprising after these opening notes – law schools need dramatic reform, and Langdell's architecture and pedagogy deserve an imminent demise. We would do well to take up, in the tradition of Edward S. Harkness's reforms at Exeter, a "suggestion of a fundamental nature" – a curricular and pedagogical commitment to the Harkness method, will all of its intellectual rigor, its close fit with necessary ends of legal education, its energy, and its power to build community and compassion between students and faculty.

THE CONSEQUENCES OF THE TRADITIONAL FRAMEWORK FOR LEGAL EDUCATION

Christopher Columbus Langdell's contributions to modern legal education have been well chronicled, and although his scientific jurisprudence has long since passed into legal history, his model persists in most American law schools.[20] Observers have noted that most of what is recognizable about law schools was either originated or popularized by Langdell – the casebook, the case method of instruction, the academically-oriented faculty without considerable time in practice, large classes, cold-calling, the "Socratic" teaching style of interrogation, competition for top grades and seats on the Law Review, the first-year curriculum of common law

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2000, *at* http://www.exeter.edu/publications/exeter/summer_00/change1.html.

[18] Stanford N. Phelps PEA '52 led the fundraising effort with a $15 million gift in 1999. Mr. Phelps is the chairman of Commonwealth Oil Refining. *The 1999 Slate 60*, SLATE, Feb. 16, 2000, *at* http://slate.msn.com/id/2058595/entry/75179/.

[19] *See id. See also* Phillips Exeter Academy, Science Teaching, Harkness Style, *at* http://www.exeter.edu/sciencecenter/psc_harkness.html (last visited Jan. 17, 2005).

[20] John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 160 (1993). *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 51–64, 264-79 (1983) (describing the rise of Langdellian methods in legal education and their hardiness in the face of proposed reforms); JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 20–67 (1978) (providing a less sympathetic account of the "Harvardization" of legal education). While a number of law schools have experimented with alternative programs, these are frequently local schools that cannot attain ABA accreditation, like Massachusetts School of Law and San Francisco Law School. Law schools that strive to serve nontraditional students or use nontraditional methods, such as Southwestern University Law School and Chicago-Kent College of Law, are also marginalized in rankings and in perceived prestige.

and the moot court competition.[21] All of these puzzle pieces fit together, creating a picture that rests tremendous power in the faculty, provides a fairly regimented "lock-step"[22] first-year experience within clear confines, and does not imagine any natural patterns of student-student interaction.[23]

Critics of Langdellian legal education have long attacked its premises and outcomes.[24] Indeed, as Carl Auerbach wrote in 1984, "My spirit is vexed because the current debates about legal education echo so many past controversies and add so little that is new[,]" (referring to complaints surrounding poor student faculty relations, law school competitiveness, and rationalism's trampling of personal values.[25] Such criticisms can be grouped into two main categories. The first alleges that Langdell's law school in action, particularly in today's world, fails to deliver on its promises, while the second insists that Langdell's premises are wrong-headed at their core.

A. Student Outcomes in Langdell's Law School

Even assuming some academic value to a well-administered large-class method of instruction with professors at the center, critics have noted that law schools with Langdellian features have intense disadvantages for women[26] and

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[21] *See, e.g.*, Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524 (1998).
[22] Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 J. LEGAL EDUC. 491, 492 (1989).
[23] *See id.* at 491. *C.f.* MARY ANN GLENDON, THE LAMP OF LEARNING 249 (1994) (characterizing demanding law teachers most true to Langdellian methods as extremely popular among students and as not belonging to the "laissez-aller school of legal pedagogy.")
[24] Although the following discussion will refer to "Langdell's law school" and the "Langdellian" aspects of legal education, I do not mean to disparage Langdell himself. His innovations immeasurably strengthened legal education in the United States and began the process of demolishing the class barriers to the upper echelons of the legal profession. It should be possible to respect Langdell's extraordinary nineteenth century foresight and shrewdness, while sparing today's deployment of his model of legal education no honest critique.
[25] Carl A. Auerbach, *Legal Education and Some of its Discontents*, 34 J. LEGAL EDUC. 43 (1984).
[26] Professor Lani Guinier's path-breaking study of women's experiences at the University of Pennsylvania Law School demonstrated that women, as a group, do not experience the same success in law school as white males, as a group. Lani Guinier et al. *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). Among the possible sources of this disparity, Guinier posited that, although often admitting an equal number of men and women, law schools fail to provide healthy and comfortable classroom settings as well as necessary mentoring and support for women. The dearth of women professors to be role models also plays some role, according to Guinier. Others have filled in the outlines of Guinier's case, through empirical studies and additional suggestions. *See, e.g.*, Paula Gaber, *"Just Trying to be Human in this Place": The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165 (1998); Sarah E. Theimann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17 (1998). Yale and Harvard have also been the subject of additional studies of

minorities[27] and have let fester patterns of student and faculty dysfunction that degrade community and diminish student enthusiasm and engagement.[28] Professor Iijima of William Mitchell College of Law provides a representative description of law school's intensely anti-social atmosphere:

> One's life consists of a net of complex interrelationships, both internal and external, that provide support, encourage growth, and help define the self…. Law school allows (or even encourages) students to sever most of these connections. Law school's arguable focus on a narrow definition of success – getting high grades and securing prestigious employment – undermines the foundation that previously gave students a sense of self-worth, purpose, and personal fulfillment.
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> Before law school, most students enjoy family, friendship, and community networks that provide social and emotional support, as well as a sense of belonging and personal value. During law school students often lose contact with these networks. First, the inordinate amount of time required for study leaves little time for family and friends. Second, students' preoccupation with their new environment (including people, terminology, teaching methods, and thinking style)

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student experiences that focus on gender's impact on classrooms, both of which paint an unflattering picture of the disparity in patterns of participation and engagement between men and women students. *See* Yale Law Women Report (2002), *at* http://www.yale.edu/ylw/; Study on Student Experiences at Harvard Law School (2004), *at* http://www.law.harvard.edu/students/experiences/. The question of gender disparity on law review editorial boards has also been cause for discussion at Harvard in recent years. *See, e.g.*, Lauren A. E. Schuker, *Law Review Draws Fire for Gender Gap*, HARV. CRIMSON, November 10, 2003, *available at* http://www.thecrimson.com/article.aspx?ref=349956.

[27] For a compelling narrative of an African-American's experience at Columbia University Law School, *see* Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997). *See generally* Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998) (arguing for professors to develop a complex and nuanced approach to managing classroom participation with a sensitivity to race and gender and a commitment to monitoring student attitudes).

[28] A Harvard student delivers a stunning indictment of Harvard Law School's effect on its students in this regard in Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998). The student notes, in particular, "the ultimate effect of the pacification process: any notion that a Harvard Law School degree confers limitless possibilities has long since been abandoned. Graduates are by no means broken, but their sense of agency has been sorely undermined. In general, they no longer view themselves as capable of having an impact on the world, much less setting it on fire." *Id*. at 2042. In addition, she cites the well-known drop-off in student engagement at elite schools: "by the middle of 2L year, a remarkably high proportion of the class has 'checked out,' disengaged from the law school, and is just marking time." *Id*. at 2042.

> may cut them off from those outside law school.
> While law students are losing their former support networks, law school affords few opportunities to develop new ones. Students tend not to establish close relationships with their teachers because of the relatively high student/faculty ratio, the predominance of large classes (particularly in first-year courses), the lack of regular feedback, and the common perception that the faculty are distant and unsupportive. Perhaps more important, law school is so competitive that students may have difficulty developing supportive relationships even with their peers. [29]

By and large, one can attribute this range of disastrous outcomes, namely the severance of supportive social ties, eventual disengagement with academics, and marginalization of women and minorities, to institutional failures of the law school in adapting the Langdellian model, particularly its fixation with grades-based elitism and its lack of attention to non-academic student needs.

While often retaining nostalgia for Langdell's traditions, the profession has launched its own attack on the failure of law schools to provide law students with sufficient practical experience to complement the "fundamentals" and prepare students for real world practice. In 1992, a task force of the ABA released the widely discussed and debated MacCrate Report, which offers a comprehensive account of the inadequacy of current law school programs, most notably the under-emphasis of rigorous skills training and a set of prescriptions for reform.[30] Some suspect that the frequent but perhaps misleading comparison of law schools with the world of medical education was a generative force behind the Task Force's recommendations.[31] Nevertheless, the MacCrate Report suggests that a law school without a focus on clinical experience and professional responsibility to balance the densely academic leanings of the Langdellian classroom poorly serves the needs of the legal profession and those clients who must rely on recent law graduates' skills.[32] The profession's critique of law schools reflects the academic/professional dichotomy that has troubled American legal education since law schools became the dominant training ground for attorneys in the early part of the twentieth century. Yet, the critique focuses on curricular balance, rather than questions about the efficacy of law school in developing analytical capacities and laying substantive foundations, which are traditionally perceived as the strengths of the Langdellian method.

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[29] Iijima, *supra* note 21, at 527-28.
[30] Costonis, *supra* note 20, at 174-75.
[31] *See id.* at 175.
[32] See *id*. at 174, 181.

B. The Problems with the Core Assumptions of Langdell's Law School

Another group of critics assails law schools on more fundamental grounds. They believe that the pedagogical and curricular underpinnings of the typical law school class are riddled with faulty assumptions that themselves institutionalize the failings of legal education, thereby dooming students to the undesirable outcomes described above and, in turn, doing considerable damage to the profession. Although hardly speaking in one voice, these commentators collectively make a compelling case that piecemeal reforms, whether enhanced faculty hiring of women and minorities, well-resourced support systems for students, or recalibrations of law school's focus on competition, are simply not enough.

In the late twentieth-century, Professor Duncan Kennedy of Harvard Law School, known for finding fundamental fault with legal education, argued that law schools "reproduce hierarchy," particularly through pedagogy, and also through the continued deployment of the full range of Langdell's innovations.[33] In attacking the basically conservative ideological bent of legal education and its efficiency in steering elite students into narrow careers in large corporate law firms, Professor Kennedy argues that law schools mirror and reinforce all the oppressive hierarchies of society, incapacitating students into a passionless conformity:

> Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the link-bank that completes the system: students do more than accept the way things are, and ideology does more than damp opposition. Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicity into everyone's life story.[34]

Professor Kennedy's sense of the need for radical changes to the "authoritarian classroom" extends more broadly to admissions, student-faculty relations and school administration.[35]

One can hear echoes of Kennedy's perhaps extreme characterizations of legal education in other critiques, particularly in the commonly voiced perception that Langdellian pedagogy is to blame for the passive and pacified student bodies of American law schools. The most trenchant of these critiques is a narrow one, but

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[33] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).
[34] *Id*.
[35] *Id*. at 612-14.

with deep implications: Langdell's one-on-one questioning of students about cases before a large group of peers (no matter how softened by the possibility of passing, the acceptability of policy-based responses, or the institution of panels responsible for a given day's reading) fails to teach students how to interact and collaborate with one another in legal or civic deliberation.[36] While interactive for the student on the spot, the pedagogy is dominantly passive:

> In sum, there is little open conversation in class among faculty and students, except for those few who are called upon or volunteer to participate. Combined with large class sizes, which ensure that a student will be called on at most a few times during a semester, the result is an abundance of passive learning. Students generally receive information from books, lectures, or observation of another student in Socratic dialog rather than construct knowledge and develop skills through active engagement.[37]

The defenders of Langdellian classroom methods assert that the pedagogy, at its best, hones analytical skills and legal reasoning through its participatory features, ignoring critiques of the pedagogy's encouragement of passivity and spectatorship.[38] Insofar as critics are empirically correct, then, the modern Langdellian classroom tends to undermine its own intended outcomes – subverting the very intellectual engagement and faculty-student interaction it means to foster.[39]

Even in the ideally interactive rigors of Langdell's classroom, the professor must be the lead instigator of any large-class discussion. The professor-urged inductive discoveries about the material that students make on the spot almost always return to the professor for restatement and refinement, rarely setting the stage for

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[36] The long-running debate about the virtues of the "Socratic method" has been the venue for many of these critiques. *See, e.g.*, Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 63-67 (2003); Jenny Morgan, *The Socratic Method: Silencing Cooperation*, 1 LEGAL EDUC. REV. 151 (1989). *See also* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113–22 (1999) (surveying the debate). C.*f.* Ruta K. Stropus, *Mend It, Bend It, Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996); Alan Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 409 (1971) (offering defenses of Langdellian classrooms as participatory and "electric"). It is important to keep separate the curricular issues surrounding the "case method" of Langdell from the pedagogical issues of Langdell's classroom, as entangled as they have become.

[37] Henderson, *supra* note 36, at 65.

[38] Stropus, *supra* note 36, at 452–56. *See generally* Paul D. Carrington, *Hail! Langdell!*, 20 L. & SOC. INQUIRY 691 (1995).

[39] Leon E. Trakman, *Law Student Teachers: An Untapped Resource*, 30 J. LEGAL EDUC. 331, 332 (1979).

students to build on each other's insights and never involving more than a few students in the discussion of a given topic. As the applause that concludes the last session of many large classes reveals and the amphitheatre architecture of most classrooms reinforces, the Langdellian classroom places the professor squarely at the center of an academic semester-long performance.[40] By design, this centering of professors – often in positions of complete academic control – has two consequences. First, students do not talk to each other during Langdellian classes except through the professor. Additionally, the students tailor their preparations for class, most often done individually, though occasionally in study groups, to succeed at each professor's particular student-professor interaction and final examination practices. Both of these inherent characteristics of Langdellian classrooms call into question its relevance to legal practice, which generally involves neither the kind of narrowly individualized work of law students nor the task of placating one decisionmaker without regard to a complex web of other stakeholders. Indeed, the complex tasks of legal and intellectual collaboration and negotiation among peers or almost-peers have no place in Langdell's classroom.[41]

A distinct body of criticism of Langdell's law school claims that, curricularly and pedagogically, the present form of legal education fails to ask the underlying "fundamental questions" about the doctrines studied, analyze critically the normative foundations of law and provide the relevant historical and political contexts for those discussions. We hear this overarching concern in Professor Kennedy's "fingering of the unexamined masks the participants in legal education wear,"[42] and in Professor Todd Rakoff's sense that the scope and character of law school's traditional first-year curriculum do not reflect modern conditions.[43] In analyzing what he calls law school's "ordinary religion" of careerism, zealous advocacy for clients, instrumentalism, faith in fair procedures and rules, and the legitimacy of our social

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[40] I owe this insight to Harvard Professor William Stuntz, who concludes his classes with a refusal to accept the customary ovation. *See also* Morgan, *supra* note 36, at 155; Iijima, *supra* note 21, at 528 ("Typical law school pedagogy does nothing to mitigate the students' isolation…. The focus is on individual effort.").

[41] Arguing that legal education frequently ignores the conclusions of the literature on teaching and learning in higher education and offering ideas to integrate those conclusions into law teaching, Professor Gerald F. Hess, Director of the Gonzaga Institute for Law Teaching, makes the case that law school cultures and classrooms well-established principles of adult learning: voluntariness, respect, collaboration, context, activity, and evaluation. Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School,* 31 U.S.F. L. REV. 941, 946-962 (1997).

[42] Kennedy, *supra* note 33, at 603.

[43] Rakoff, *supra* note 22, at 493. *See also* Henderson, *supra* note 36, at 75 (proposing to redesign the first year curriculum with a focus on legal history, law and society, and professional norms); David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL EDUC. 49, 56 (1995) (calling the structure a "historical artifact" and calling for redesigned core courses that would bring several subject matters together).

order, Professor Roger Cramton puts the dilemma this way:

> The 'ordinary religion' is often experienced by students as not only not on the [academic] agenda, but as not discussable in the law school classroom…. (bottom of page 512) My point is that the approach of implicitly answering fundamental questions by not asking them pervades legal education… Many teachers find it difficult or inappropriate to raise the fundamental questions…. Few law teachers have a background in moral philosophy or other disciplines that permits a confident approach to ultimate questions…. The language of our individualistic, instrumental, and technocratic society has rich resources for dealing with individual rights and autonomy, efficiency, and technique, but it is impoverished in dealing with 'the habits of the heart.' These and other difficulties lead most of us most of the time to neglect issues of love, justice, or ultimate reality. We pretend that we are technicians teaching technique in a value-neutral context in which everyone decides individually the uses to which technique is put.[44]

Cramton articulates law school's tendency to ignore vital parts of its social and professional purposes as a product of those purposes' inherent difficulty, focusing on law professors' lack of specific expertise in value-laden inquiries. Indeed, his conceptualization of law school places professors at the classroom's center. Nonetheless, the implications of the fixation of Langdell's law school on specific and indivuated "technique" act in combination with the private law focus on the mandatory and recommended curriculum to generate a powerful source of student malaise. This is illustrated by the comment of a recent Harvard student that, "by the end of the first year, law students have learned to maintain a detached attitude toward the law, and consequently become alienated from their former ideals."[45]

C. Are the Complaints Overstated? The Virtues of Langdell's Law School

Taken together, these various criticisms of Langdellian teaching methods, institutions and curricular design paint a gloomy picture of law schools. As a recent law school graduate, part of me swells with appreciation for my law school experience. My professors were uniformly brilliant and mostly engaging, and most classes could hardly be called, in Professor Kennedy's terms, a "Kafka-like riddle-

[44] Cramton, *supra* note 3, at 10, n.9 & 10.
[45] Note, *supra* note 28, at 2030.

state."[46] I managed to take two clinical courses, and had the ability to devote considerable coursework to my particular legal and policy interests. In time for my first year, Harvard had reduced section sizes to eighty students, added the option to take one completely elective class at the law school during the second semester of the first year, and had long since embraced a broad curricular diversity in second and third-year course offerings.

Langdell's law school retains powerful arguments for its continued usefulness. Langdellian meritocracy has contributed a powerful social mobility to the legal profession. Although radical in Langdell's time, promoting such mobility for the intellectually capable was a key intention of his law school's innovations,[47] and it is likely that recent humanizing changes at law schools have tempered the hard and dispiriting edge of Langdell's sink-or-swim design.[48] Moreover, the skills and mental toughness that Langdellian classrooms engrain in students – advanced analytical legal thinking and independent research and study habits – are fundamental to the practice of law, especially in the dominant workplace for law graduates, the medium-to-large law firm.[49] Harvard Professor Mary Ann Glendon sees a renaissance of interest in the study of legal procedure and constitutionalism amid strong student demand for Langdellian methods and classes as well as promising faculty research in traditional areas.[50] Others, including law school deans and admissions staff, see modern law schools as retaining their intellectual rigor, challenge, and excitement, content to highlight the challenges inherent in Langdell's law school as strengths of their institutions.[51]

Are the critics, then, too shrill? Perhaps harboring bitterness that Langdell's law school is somewhat hostile to their ideological agendas? While some professors and students may draw their critiques from a frustration with law schools' tendency to move slowly on progressive initiatives and the general lack of innovation in elite

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[46] Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* David Kairys, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 56 (1998).
[47] Kimball, *supra* note 15, at 237.
[48] Kerr, *supra* note 36, at 114.
[49] Stropus, *supra* note 36, at 471.
[50] GLENDON, *supra* note 23, at 247–51 (extolling the vibrancy of the common law tradition in law schools and celebrating an emerging "postideological" mood).
[51] *See, e.g.*, Elena Kagan, Dean's Welcome (2004), *at* http://www.law.harvard.edu/dean/ ("Harvard Law School provides in its classrooms, clinical settings, and extracurricular activities an extraordinary educational experience. If you are a student here, the School will expect much of you; from the very first day of class, it will challenge you to think and do things you didn't know you could. It will reward you by exposing you to ideas that will captivate and inspire you, by teaching you skills and ways of thought that will serve as the foundation of your career, and by making possible relationships, with both faculty and fellow students, that will enrich and even change your life . . . At Harvard Law School, and for all these people connected with it, the study of law is not an arid intellectual exercise. The study of law matters, and this is what gives Harvard Law School its sense of purpose and mission.")

legal education, their critiques still retain much of their bite, especially when taken together. The appreciation I feel for my legal education ultimately sits beside a firm conviction, born of my memories of Exeter - the sense that law schools could be profoundly better places, with more student-student collaboration and collective engagement, broader commitments to humane and effective teaching, and robust educational missions that include instilling compassion *and* technique in new lawyers. Langdell's law school, by design and by its record, cannot fully embrace these ends.

EXISTING CURRICULAR AND PEDAGOGICAL ALTERNATIVES

With Langdell's law school in such question, one naturally asks – what is the alternative? There are innumerable possibilities, but it is worthwhile here to identify some conventional responses that could provide an alternative model for legal education.

A. Medical School Models

Frustrated with the sluggish pace and inadequate opportunities for training at Langdell's law school, the practicing bar and many familiar with both legal and medical education have long lamented legal education's inability to provide new lawyers with the depth of clinical experience and substantive knowledge often common in entry-level physicians.[52] Proposals advocate law schools to adopt medical school educational innovations, with the goal of both teaching "more law" more efficiently and requiring extensive in-house education in practical skills.[53]

When considered in full measure, medical school requires two years of cumulative instruction in detail-rich subjects, two years of supervised practice in the various specialties, and a four-year postgraduate residency.[54] Through different methods, the model afflicts students with many of the same psychological effects that law students experience – indeed, the "walking wounded"[55] may be as apt a

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[52] Costonis, *supra* note 20, at 174-75.

[53] Indeed, the MacCrate Report itself may be seen as implicitly reflecting this agenda. *Id. See also* Paul T. Wangerin, *The Problem of Parochialism in Legal Education*, 5 S. CAL. INTERDISC. L.J. 441 (1997); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243 (1992). These proposals that look to medicine for models have as their predecessors the proposals of Jerome Frank and Karl Llewellyn for more focus on skills training in law schools. *See, e.g.*, Jerome Frank, *Why Not A Clinical-Lawyer School*, 81 U. PA. L. REV. 907 (1933); Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 663 (1935).

[54] See, e.g., Carl Bianco, *How Becoming a Doctor Works*, *at* http://people.howstuffworks.com/becoming-a-doctor.htm/printable *(*last visited *Jan. 17, 2005).*

[55] Note, *supra* note 28, at 2027 (quoting Professor Morton Horwitz).

description of medical students as of law students.[56] Other criticisms of medical schools involve the extraordinary all-consuming intensity and length of the educational experience, the failure of schools to steer students into non-lucrative community practice, the questionable wisdom of several years of largely passive memorization, and the fiscal distress occasioned by the expense of running teaching hospitals.[57]

Yet medical education nevertheless may offer important lessons for law schools, particularly for clinical legal education. Indeed, the "rounds" model of the latter years of medical school formed the basis for advances in clinical programs at law schools since their inception.[58] As clinical legal education matures, it continues to learn from medical schools as they have added more specific training in skills to balance the once-exclusive focus on cases.[59]

Although law and medicine share the status of being professions and have important practice-related parallels,[60] importing the virtues of the medical school model to legal education would, at best, respond only partially to the dominant critiques of law school's student outcomes and fundamental assumptions. The flawed centering of professors is axiomatic in both models, and the retention of large sums of absolute detail so critical to medicine has no real place in legal study.[61] Oddly enough, if we were to share Langdell's faith that law is a science[62] with black-letter rules that, discerned through rigorous analysis of the legal sources, offer reliable predictions on a given set of facts, then medical schools could provide an

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[56] Both the American Medical Student Association and George Washington Medical Center have assembled online bibliographies of resources and medical research on medical student stress. Medical Student Well-Being (last visited May 2, 2004), *at* http://www.amsa.org/well/wellres.cfm; Surviving Medical School (last visited May 2, 2004), *at* http://www.gwumc.edu/library/resources/students/survive.cfm.

[57] Clinically, there are also deficiencies of the teaching hospitals as the sole training grounds for new doctors; Harvard Medical School is experimenting with more comprehensive ways of acquainting students with disease. *See* Rich Barlow, *How Do You Make a Better Doctor*?, BOSTON GLOBE MAGAZINE, May 2, 2004, at 24.

[58] *See generally* WILLIAM PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS (CLEPR 1980).

[59] David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 208 (2003).

[60] Geoffrey C. Hazard, Jr., *"Practice" in Law and Other Professions*, 39 ARIZ. L. REV. 387, 388-89 (1997) (highlighting the practice-related features in common).

[61] While medical schools do not pretend to convey to students all the details of known medical knowledge, they cover considerably more substantive ground than law schools, at least partially because "[t]he American legal system has grown too complex to be singularly understood in every detail, and the commands and rationales of the multitudes of lawmakers are no longer thought to pursue coordinated goals according to a comprehensive philosophy." Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 628-629 (1997).

[62] *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

attractive model for law schools to emulate. Yet, Langdell himself understood that the project of legal education must include, at least as a first step, the honing and development of the student's analytical mind. Few of the critics of Langdell's law school question that analysis of legal issues, rather than retention of vast stores of legal rules and doctrines, is a crucial skill to instill in law students. Some have compared the match between legal analysis and diagnosis, but the two skills probably require different inputs of primary information and distinct counseling strategies. For the purposes of this Article, the frequency of certain critiques of medical schools suggest that medical education, especially its first years, has little to offer law schools that responds to the myriad of human deficiencies and the crisis in student academic engagement in Langdell's law school.

B. Tutorials, Independent Research, and Lectures – American and British Graduate Study

Looking abroad to the United Kingdom, as Lewis Perry did on behalf of Edward Harkness for Phillips Exeter, one could also suggest an alternative model for legal education with centuries of success – the tutorial programs of the great universities of England. Relatively few commentators suggest this approach,[63] perhaps owing to its high costs, with which the British are currently struggling. As a utopian matter, however, the system – anchored by significant writing and intimate consultations with and evaluation by professors, and supplemented by a rich array of lectures and self-directed research – provides an intriguing alternative that would address some but not all of the various deficiencies of American legal education, provided schools could afford its implementation.

The keystone of the Oxford tutorial method of instruction[64] is the weekly or bi-weekly meeting with faculty tutors. As Oxford undergraduates studying law, students must attend their tutorials, and have the option to attend the wide range of University lectures offered across campus. As described on Oxford's law program website:

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[63] *C.f.*, Trakman, *supra* note 39, at 355 (arguing for student tutors modeled after European programs); Clive Parry, *The Cambridge Supervision System*, 7 J. LEGAL EDUC. 1 (1954). Despite the costs, various undergraduate colleges in the United States have attempted to incorporate tutorial-style components into their courses of studies, most recently Williams College. *See* Press Release, Williams Increases Scope of Tutorial Program, *available at* http://www.williams.edu/admin/news/releases.php?id=603 (Williams College Dec. 30, 2003).

[64] Oxford University and Cambridge University employ distinct variations on the tutorial theme. *See* Parry, *supra* note 63, at 7. The Oxford model has been particularly introduced to elite American students through the Rhodes Scholarship to Oxford; many Rhodes scholars eventually attend American law schools. In legal studies, most students studying law at Oxford do so as undergraduates.

> At the heart of the Oxford undergraduate law programme is the 'tutorial system'. A tutorial is a meeting between a single law tutor and (usually) two or three students. In most of your examinable courses you will have seven or eight tutorials, which will be paced either weekly (over one term) or fortnightly (over two terms). Sometimes your tutorials may be supplemented by preparatory classes, depending on the learning methods favoured by your tutor. However adequate preparation for tutorials is mainly your job, and will always require a great deal of independent study. You will have a reading list to guide you. You will also be able to take advantage of a wide range of lectures on various aspects of your courses.[65] You will choose which of these to attend, based on your current study priorities and interests, together with the recommendations of your tutor. Attendance at lectures is not compulsory. But attendance at tutorials is compulsory.[66]

Although Oxford moves in as much curricular lockstep as American law schools, the tutorial system assumes a high level of academic maturity and requires significant faculty-student interaction on a consistent basis. As many tutorials involve multiple students under one law tutor, the system at least potentially includes student-student review of writing assignments and academic conversation, although at the same time the program seems premised on a strong assumption of potentially isolating individual work. Despite the fixed nature of the subjects of study, tutors can exercise discretion in the precise sources and assignments they require of students, with some similarity to the way individual law professors choose their own materials, casebooks, and examination formats. Overall, the English tutorial program incorporates three distinct strategies – a smorgasbord of crafted faculty lectures, intense and independent research and writing, and close faculty-student contact, none of which form a significant part of American legal education.

One could also look closer to home for an alternative to legal education along the lines of the tutorial – the conventional graduate program in the arts and sciences, with a sequence of classes aimed at comprehensively surveying the discipline, oral or written examinations on the full discipline, and the requirement of a dissertation forged in collaboration with a professor.[67] Most graduate programs aim to train academics or researchers. Indeed, the Ph.D. is the preeminent credential for almost

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[65] For a list of current lectures, see Faculty of Law, Lecture List, *at* http://www.admin.ox.ac.uk/pubs/ lectures/law.pdf.
[66] Oxford Law, Undergraduate Study (2004), *at* http://denning.law.ox.ac.uk/undergraduate/bafaqs.shtml.
[67] Douglas E. Comer, *Notes on the PhD Degree*, *at* http://www.cs.purdue.edu/homes/dec/essay.phd.html (last visited Jan. 17, 2005).

all fields of university study in the United States.[68] While the graduate model typically has allure for the sophistication of the scholarship it generates, the multi-year dissertation requirement, the isolations associated with the independent work required, and the fixation of the model with "a deepening probe into a narrowing horizon" counsel that it perhaps should have limited application to law.[69] Indeed, Professor Paul Carrington of Duke University School of Law has cited concerns about the degree to which legal education has already embarked on emulating certain aspects of other graduate disciplines:

> [F]ashions in legal scholarship and teaching have changed as law schools have become more academic, more deeply and more intricately involved with other disciplines and with the universities of which most law schools are a part…. But, just as the clinical studies movement has mistakenly perceived medical education as a proper model for making legal education more practical, so we may now be in danger of mistaking graduate schools as the model for elevating legal education intellectually…. [I]t is my continuing hope that we may be wise enough to resist both models, to develop patterns of professional education that are more intellectually liberal than clinical medicine, and more functional than contemporary graduate training…. [A] professional faculty that has lost interest in most of the work of its alumni has also lost interest in its students, and forfeited the legitimacy of its claim for their support.[70]

Insofar as graduate education has lessons for Langdell's law school, it may be that the tutorial presents the same innovations – the possibility of intimate and intellectual rigorous work with faculty, the rewards of encouraging some measure of student independence, discretion, and time for study, and the utility of inviting scholars and experts to share their insights with students through presentations, colloquia, and lectures. Although modern law schools offer glimmers of these promising features of the tutorial – in seminars, required longer writing projects advised by faculty, and visiting academic lecture series, the critiques cited in Part II reveal that they have had little success deriving much benefit from these appendages to the traditional framework.

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[68] *See* DEANE G. BORNHEIMER, ET. AL., THE FACULTY IN HIGHER EDUCATION 121 (The Interstate Printers & Publishers 1973).
[69] Paul D. Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11,12 (1986)
[70] *Id*. at 11–12.

C. Collaborative Learning Modules and Add-ons in a Traditional Law School

For many years, in scattered and haphazard ways, law schools and particularly individual law professors have deployed collaborative learning techniques inside and outside of Langdellian classrooms, aimed at improving student engagement, curricular utility, and student-student and faculty-student relationships. "Non-traditionalist" and "quasi-traditionalist" professors have long argued that one can supplement and enhance Langdell's law school with a range of pedagogical and curricular changes, to students' benefit.[71] The uniformity of suggestion along this line is striking – again and again, these reform-minded academics hold up a diverse but dominantly humane array of teaching techniques and curricular changes that specifically respond to the critiques of the Langdellian methods they themselves level.[72] They call for collaborative course design,[73] incorporation of student feedback during the semester,[74] problem and group-centered work,[75] and short discussion pairings with other students[76] as well as heightened listening to students' responses[77] in otherwise Langdellian classes. Those concerned with dysfunctional student outcomes seek to build into the curriculum sets of discussions that help students maintain personal balance in school and afterwards.[78] For reformers

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[71] *See generally* Kerr, *supra* note 36.

[72] "Changes in teaching style are possible, however, and modest amendments in this regard could produce significant improvements in the level of student engagement, enthusiasm, creativity, and self-regard." Lawrence S. Krieger, *What We're Not Telling Law Students – and Lawyers – That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from its Roots*, 13 J. L. & HEALTH 1, 42 (1999). In a great service to law teachers, Professor Arturo López Torres of Texas Tech and others have compiled four annotated bibliographies compiling the latest literature on new teaching techniques and methods. Arturo L. Torres & Mary Kay Lundwall, *Moving Beyond Langdell II An Annotated Bibliography of Current Methods for Law Teaching*, 35 GONZ. L. REV. 1 (2000); Arturo L. Torres & Karen Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 1994 GONZ. L. REV. 1 (1994); Arturo L. Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998); Arturo L. Torres & W. Clinton Sterling, *Will Law Schools Go the Distance? An Annotated Bibliography on Distance Education in Law*, 91 LAW LIBR. J. 655 (1999).

[73] Hess, *supra* note 41, at 954. *See also* Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law Schools*, 52 J. LEGAL EDUC. 75, 96-97 (2002).

[74] Hess, *supra* note 41, at 955. *See also* Hess, *Heads and Hearts*, *supra* note 73, at 97.

[75] For a particularly successful experiment in recalibrating a large Constitutional Law class into an innovative suite of collaborative group assignments and discussion, see Elizabeth A. Reilly, *Deposing the "Tyranny of the Extroverts": Collaborative Learning in the Traditional Classroom Format*, 50 J. LEGAL EDUC. 593 (2000). *See also* Hess, *supra* note 41, at 960–61.

[76] *See* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 914 (1997).

[77] *See* Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. LEGAL EDUC. 247 (1993).

[78] *See* Iijima, *supra* note 21, at 537 (describing the Collaborative Legal Studies Program at William

concerned with the dearth of important conversations about race and gender in law school classrooms, the suggestion is often to offer more small classes to provide safe venues for these discussions.[79]

Yet, even at their most effective, innovations lose momentum. For example, all vestiges of Professor Rakoff's largely curricular "First-Year Experiment"[80] at Harvard had disappeared by my own first year in 2001. All of my first-year coursework, save one spring elective, was more or less traditional and doctrinal, and incorporated, as "reforms" in line with the Law School's Strategic Plan, the less than substantial requirement that professors assign some ungraded written work during first-year classes (typically practice examinations) and the reduced section size mentioned earlier.

It is possible that institutional support and professorial initiative in the law schools will eventually multiply the prevalence of pedagogical variety and curricular improvements that these commentators and teachers propose. But it remains difficult to imagine this outcome, especially within a system of faculty hiring that continues to reward and reinforce those who enjoy success in the first-year of law school, law review entrance competitions, and accession to choice judicial clerkships after collusion for recommendations with the very established professors who are the sustainers of Langdell's law school. With so many professors laboring (often in relative isolation) to retrofit the traditional framework to incorporate the benefits of interactive and effective collaborative work, Professor Hess describes the dramatic success of his adherence to the principles of adult learning in his teaching of a seminar on none other than legal education:

> Recently I taught a seminar on legal education to twelve upper-level students, most of them in the second semester of their third year. Many of them suffered from the distress and alienation that comes with two and a half years of law school. We collaborated in the design of the seminar during the first two sessions. We established high expectations of one another. Our interactions in class and online were engaging, respectful, and supportive. We took pleasure in

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Mitchell College of Law).

[79] *See, e.g.*, Thiemann, *supra* note 26, at 29–32; Gaber, *supra* note 26, at 254. Professor John Calmore of Loyola of Los Angeles makes a compelling case for "race seminars" that involve "strong democratic talk" to confront the challenges of intercultural tension and misunderstanding in law and society. John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 905–15 (1997). ("Strong democratic talk moreover is not merely advocacy talk… [but] allows parties to explore mutality, and reformulate views… My seminars are self-consciously taught to reflect Paulo Freire's notion of 'education as the practice of freedom.'" at p. 906-907.)

[80] Rakoff, *supra* note 22.

> learning together and giving another feedback. We created a teaching and learning environment that allowed us to exceed our expectations.[81]

Hess then proceeds to describe the challenge of translating this energy into his teaching of a Civil Procedure class of 200 students, a task he accepts.[82] Perhaps the flaw that collaborative modules and add-ons perpetuate is the assumption that this translation should be necessary at all.

A RADICAL PROPOSAL: A "HARKNESS" CLASSROOM ECOLOGY AND A PURELY ELECTIVE CURRICULUM

With this backdrop of disengaged law students poorly prepared for practice and the failings of the paradoxically passive Langdellian classroom, the time has long since passed for incrementalism and half-measures. It is my suggestion that it should be the project of at least one elite law school to overhaul law teaching and the curriculum with a singular "big idea" - to make dramatic improvements in the lives of students and their professional competency upon graduation, to reshape dysfunctionally inhumane law school communities, and to saturate legal education with the fundamental questions and contexts that underlie the doctrinal puzzles that currently consume most instruction. I will argue that, just as at Phillips Exeter Academy in 1930, the "big idea" should involve an end to all large classes and the introduction of a de-centered and collaborative pedagogy built on a simple piece of furniture – an oval table seating thirteen. To complement that pedagogy and respond to the curricular critiques of Langdell's law school, I also propose that the orientation year of law school no longer involve the familiar private law sequence of courses, and provide the same full array of classes from which second and third-year students choose. This Part will lay out the implications of this "revolution of methods."

A. A Deep Restructuring of Faculty Skillsets and Student Experiences

A law school of Harkness tables would require a reconceptualization of law teaching, as the project of guiding student discussion in fruitful and rigorous directions as a classroom manager and contributor is fundamentally different from the professor's central and controlling role in a Langdellian classroom.[83] Even at

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[81] Hess, *Heads and Hearts*, *supra* note 73, at 111.
[82] *Id*.
[83] The road for new Harkness teachers is long, but there has been ample work in educational theory and practice that aims to describe how small group discussions should proceed for optimal student engagement and outcomes. *See, e.g.*, ERNEST G. BORMANN, DISCUSSION AND GROUP METHODS: THEORY AND PRACTICE (2d ed. 1975); JEROME RABOW ET AL. LEARNING THROUGH

Exeter, where they have spent seventy years refining the Harkness method, teachers often struggle with the role of facilitator, occasionally lapsing into lectures to advance discussion or calling on quiet students to draw out contributions. For professors familiar only with Langdell's law school, who have been more than hesitant to implement even modest changes in classroom dynamics, and for new professors who have seldom, if ever, experienced a genuinely participatory small-group discussion, learning to provide guidance and direction will prove challenging. The preparation for each discussion session is similarly more demanding than in traditional teaching formats. While the faculty role and the deliberateness of its realignment are key to a Harkness classroom's success, so is the collective ability of students to participate in constructive ways that build upon each other's contributions to the material under discussion.

A law school of Harkness Tables would dramatically change law students' orientation to their education, their peers, and the faculty. Few students could hide, unprepared and unwilling to participate, in classes of such a small size, as there is no "back bench." One of the hallmarks of Harkness discussion sessions, made feasible by their small size is the absence of hands in the air vying for permission to speak; instead, students learn the conventions and requirements of participating in discussions without a single gatekeeper for contributions. In fact, with faculty no longer occupying the conspicuous center of the classroom, students can share equally in the educational responsibility for the success or failure of a given course.

Engagement.

Harkness learning makes possible the classroom of thirteen sets of elbows perched on the central table, requiring student attention and shelving even the possibility of classrooms of a hundred laptops. Put more broadly, the intellectual thrill of involvement in the process of inductive discovery would be common and natural, without the exceptional coercive threat of Langdell's methodology. In addition, the Harkness method of instruction could encourage and reward independent research and writing by students, possibly in advance collaboration with professors, to inform class discussions on given topics. We also might expect, with complete first-year student choice of courses, that the favorable intensity of the Harkness method would grow as students became more skilled in participatory discussion, rather than flame out within the first two semesters, as currently occurs within law school's first year.

Rigor.

Harkness classrooms would give no ground to Socratic dialogue and student-

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DISCUSSION (3d ed. 1994); ROBYN M. GILLIES & ADRIAN F. ASHMAN, CO-OPERATIVE LEARNING 69–86 (2003) (and sources cited therein). Indeed, in designing training for faculty, law school administrators would be indulging the same parochialism described by Wangerin, *supra* note 53, if they were to ignore this literature.

faculty interaction in Langdell's law school on the precision and sophistication of classroom inquiries. Indeed, with able students – as all law students at elite law schools are – the miracle of structured discussion would be its capacity to allow the very exchanges that currently hone analytical thinking in Langdellian classrooms to involve more than just the typical one professor and one student. Instead of the professor-student pairing, each discrete discussion may involve many of the students at the table, allowing them to engage in a process of intellectual collaboration with the professor – to mine the reasoning and rationales of cases, to analyze the appropriate responses to a legal problem, or to generate possible interpretations of a statute or regulation, just to name a few of the more conventional possibilities. In short, the Harkness classroom can do everything for which Langdell's is renowned, with considerably more chance of students redirecting the professor's agenda into fruitful analytical territory, while still leaving ample room for the use of any of the more modern collaborative methods.

Relationships.

Within the Harkness model, students must build academic relationships with each other, even more than with the faculty leader. Very early on, students learn each other's first names, developing a collaborative rapport and discovering the distinct analytical and ideological approaches different participants in the discussion bring to the consideration of the material, including the professor. Over the course of a semester-long exploration of several legal subjects in concurrent classes, students develop close relationships with several dozen classmates and several faculty members, premised on the disciplined practice of listening to each other. Over the course of a legal education, each student's intellectual support network will become diverse and substantial, the kind of rich resource that can temper student alienation. The different class-year cohorts of students would be more integrated, broadening the law school community and forestalling the first-year section insularity that is so common in Langdell's framework.

Compassion.

One of the principal innovations of using the Harkness method in legal education would involve its flexibility to include far richer discussions of contextual materials and values in courses. Indeed, Professor Calmore's seminars of "strong democratic talk" on race and law are only possible in some version of a Harkness classroom.[84] As Harkness methodology has matured at Exeter, the school has slowly come to embrace some aspects of Lawrence Kohlberg's "just community" conception of education, where discussions of moral dilemmas provide the foundation of inter-group empathy and dialogue and students are themselves given major roles in community governance.[85] At law schools, where every class should

[84] *See* Calmore, *supra* note 79, at 905–15.

[85] Charles L. Terry, *Moral Education in* RESPECTING THE PUPIL, *supra* note 16, at 113. *See also*

involve issues of principle, morality, values, and justice, the Harkness method would provide an infinitely more promising platform for the difficult conversations that attend moral questions than Langdell's classroom.

This kind of "moral education" can be both explicit, as Calmore suggests, and deliberatively implicit, taught both through the specific subjects and through the conventions of the Harkness Table. I believe that Professor James Boyd White has just this kind of teaching in mind in his essay recasting legal education, *Doctrine in a Vacuum*:

> In an important sense "the law" one studies is thus the law that is actually made in the classroom, made out of the materials of case and statute, as the class thinks and talks about particular questions. . .. This means that the proper focus of attention is not on what the student is learning to repeat or to describe but what she is learning to see and to do; on the doctrine or language of the law not abstracted from experience, but embedded in it, as the object and medium of thought, expression, and intellectual action . . .. Yet a moment of true speech by an individual voice speaking to others as they actually are about the facts of the world – at such a moment, whether in a poem or a legal argument or a classroom, the world is reborn.[86]

For White, law students are engaged in as creative and imaginative an enterprise as writers, artists, or composers of music. He continues:

> In this kind of legal education the student is defined not as a learner of facts and doctrines and rule, nor even as the learner of rhetorical moves – of the means of persuasion available to the lawyer – but as a speaker and writer, the maker of new compositions. Attention is focused on what the student can find to say in the language of law, upon his capacity to transform that language, and thus upon the resources and character of his own mind . . .. This sort of education is also a kind of moral education, for it is a training in the responsibilities of the self that resist the contemporary tendencies towards nihilism and authoritarianism alike. The lawyer is trained to recognize and respect authorities external to the individual will or whim, especially the authority of the law and the authority of other

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LAWRENCE KOHLBERG ET AL., LAWRENCE KOHLBERG'S APPROACH TO MORAL EDUCATION (1989). Kohlberg's theories draw heavily from the work of John Dewey and Jean Piaget.

[86] James Boyd White, *Doctrine in a Vacuum in* FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 17-18 (1999).

> people's experience. This training takes place in the constant establishment of community with others – clients, other lawyers, judges, - and in the maintenance of the language by which community itself is defined and made possible. From this point of view a central part of the significance of legal education – of what makes it worth doing for the student and for the teacher alike – is that it is inherently antibureaucratic and antiauthoritarian: it insists upon the reality both of the individual person and of the community at large.[87]

It is this very confluence and animation of rights and responsibilities that law schools could both teach *and* enact in Harkness classrooms. In short form, then, "true teaching uses things to teach people."[88] For too long, law schools and the legal profession have traded on the currency of warring policy arguments, as if their at-times befuddling collision mid-classroom or mid-courtroom was somehow sufficient for education or adjudication. Around a Harkness Table, the war becomes instead a project of both individual and collective imagination about reality:

> Gifted students must ultimately be purged of the cant that "academics" are mere methodology, or the "facts," as they sometimes disdainfully say, have nothing to do with one's social and emotional being. The classroom *is* the center of our schools, and we should affirm that idea boldly, at the same time redressing the balance in those classrooms so that intellect and emotion are as perfectly integrated as we can make them. And then, superb day, our classrooms will be models for the larger community, and we will know when we pursue "excellence" just what we mean by that word.[89]

B. Defining the "Harkness" Classroom

1. The Subject for Discussion: Texts and Subtexts

What, precisely, would be taught around the Harkness Table? As I have previously suggested, almost no materials and subjects covered in traditional law school classrooms would be out of place as topics for Harkness discussions. In most law classrooms today, the material covered consists of a set of texts, whether judicial

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[87] Id. at 18-19.
[88] Cramton, *supra* note 3, at 510 (citing Howard Lesnick).
[89] Terry, *supra* note 79, at 118.

opinions, statutes, or scholarship, with the basic task being the precise discernment of outcomes – legal rules, case holdings, the outlines of a statutory or administrative regime as modified by case law – and the arguments supporting or contradicting those outcomes. The same project would continue in Harkness classrooms, but also possible would be thorough and searching discussion of subtexts, as discerned by the professor and students working in collaboration. Support of those discussions would necessarily flow from more consistently assigned supplemental materials and reconceived casebooks, following the present trend of adding contextual reading materials, in philosophy, politics, and history, as part of law school reading assignments. Implementing Harkness teaching need not entail an entirely new array of courses, though over time it could.

2. Professors Stepping Back

Architecturally and pedagogically, professors must withdraw from the position of sole authority in Harkness classrooms, the position they now occupy, whether in lecture or Langdellian dialogue. But they retain a special role – they do, after all, have superior knowledge and experience as well as the classroom's store of academic and legal expertise. In general, this element distinguishes the Harkness classroom in law school from Exeter's implementation of the method. At Exeter, some teachers often harbor the notion that their ideal role is silence, which may make sense where students largely lack the undergraduate and life contexts for their discussions and teachers may destroy the classroom dynamic when articulating those contexts as a learned adult.[90] That same tension would exist in law schools, but the sense of peer relationship between law professors and student in Harkness law classrooms would be less fragile, as all law students are (at least approximately) adults and the discussion methodology would serve to continually reinforce and validate that sophistication and maturity. Nevertheless, despite the professor's expert role, an integral part of the Harkness classroom must be long stretches of professorial silence and listening, rather than the more conventional pattern of "helpful" interruption of student discussions.

The contrasts with traditional classrooms are dramatic. Aside from the size of classes, which for effective discussion should be no more than thirteen and no less than nine students, the most significant difference would be the patterns of interaction and participation.[91] Additionally, in Harkness classrooms, professors would have no monopoly on defining the class's progress through the material; indeed, fruitful tangents that could change the course's upcoming content might emerge from students as well as the professor. In the framework of Harkness

[90] *See* Terry, *supra* note 16.
[91] *See* Appendix, *infra* p. 67.

discussion, professors could make short lecture presentations or may judiciously attempt to draw out the quieter members of their classes, but these modes of instruction would necessarily be infrequent. These moves would be, then, in support of broader classroom discussions and not in opposition to them.

3. Discussion Management

Professors must develop a new set of teaching skills, to add to their expertise in lecturing and Langdellian Socratic questioning, namely the immensely difficult practice of discussion management. Few academics with advanced training have this skill innately. Discussion management in diverse classrooms also requires the kind of sensitivity to issues of difference that law professors and students have often shown they lack.[92] Indeed, an advantage of wholesale reform of this character would be to force the law school, for the first time, to develop an intensive and mandatory program of professional development for teachers, possibly including a series of summer institutes, term-time teaching seminars among faculty that take the Harkness format, and faculty mentoring by master discussion leaders. A side effect of the professor's displacement from the classroom's center, one of the more imposing challenges of implementing Harkness methods in law school, will be the recalibration of professors' destination mentality ("I must cover this material in this set order, with the end goals remaining fixed from semester to semester. If we do not have time for Socratic dialogue, I will lecture through sizable chunks of the content") into a more flexible and open spirit of collaborative inquiry. With some supplements to the Harkness method such as optional lectures, professors might direct these goal-oriented energies in the disciplined direction of crafting Oxford-style presentations open to more than just one section of students. In that the classroom's openness and flexibility must not be proxies for intellectual laziness, a consequence of openness entails consistent and deep preparation for discussions by professors, so they can be ready to fulfill their expert role in whatever permutation of the discussion students choose. This requires an expansive creativity, variants of which excellent professors currently demonstrate in one-on-one dialogue in Langdellian classrooms.

4. Evaluation

Perhaps controversially, the Harkness classroom would necessitate the evaluation of students on their contributions to discussions. Eliminating the usual regime of blind grading of all-important final examinations, professors would ideally provide students with detailed semester-end feedback on their individual and

[92] *See* Ayo Griffin, *Zero-L*, LEGAL AFFAIRS, July-August 2002, *available at* http://www.legalaffairs.org/issues/July-August-2002/scene_griffin_julaug2002.html.

collective performance, in narrative form with a letter grade attached. A faculty could choose to eliminate the letter grade if politically and practically possible, but the more significant evaluation would be the narratives, which would signal places for student improvement and offer suggestions. In other words, the evaluation system must provide incentives for students to see the classroom as a venue for continual development of their own abilities, rather than a place for dumping their opinions, passing the time, or grandstanding. Harkness discussions are doomed to failure without high expectations by all involved.

Students must also be evaluated on their writing, in whatever diverse formats individual professors choose. Such formats could range from conventional examinations, seminar research papers, weekly reflections, to practical documents common to practice. With more but smaller classes and the many more faculty members required to run a Harkness program, professors would never be tasked with the grading of hundreds of ten-page examinations in one semester, as can currently occur. Yet, students must receive more feedback through the semester and work on their writing skills more consistently; that much is clear from the current critiques of Langdell's law school. A fuller exposition of the role and evaluation of legal writing in the Harkness context would require further study.

C. Ending the Obsession with First-Year "Fundamentals" and Loosening Faculty and Bar Course Prescriptions Thereafter

To propose a reformulation of the teaching method at law schools is not necessarily to propose an overhaul of their long-standing curriculum. But a thread of criticism that attends the traditional law school particularly attacks the traditional curriculum, and the Harkness philosophy in law schools with its de-emphasis of institutional centering of the faculty would pose an additional challenge to the conventional ordering of courses of study. With teaching demonstrably less obsessed with control and prescription, the curriculum should follow. Without abolishing the courses themselves, the implementation of the Harkness method should also include the abandoning of the required first-year curriculum of private law and allow students the autonomy to select their own curriculum, with whatever guidance the faculty chooses to offer.

1. First-Year Freedom and a Cross-Curriculum Focus on Skills and Their Contexts

Much of the rationale for imposing a set curriculum on first-year students has diminished, as the work of lawyers has grown more specialized, various, and complex, and the practice of public and global law has exploded. In this way, there is nothing more essential to the study of Contracts and Property than the study of Administrative Law or International Law. Indeed, as a means of improving law

student outcomes and competency for the bar, the impulse in law school faculties seems more to offer prescriptions for second and third-year studies than to loose the shackles of first-year required curriculums.[93] I prefer precisely the opposite approach – letting students come to their own conclusions about the proper course of study for their aspirations.

The fundamental problem with curricular prescription is that it conceives of legal education as primarily driven by the "content" of classes and is premised on the professor-centered model of information delivery.[94] Indeed, prescription seems contrary to even the Langdellian assumption that the classroom is a vehicle for learning a mode of "thinking like a lawyer" to tackle whatever legal problems emerge in later practice. There may be a century-long history behind using elementary private law to introduce legal analysis, but the introduction of Harkness teaching would provide an opportunity to discard that history in favor of the long-desired cross-curriculum focus on the skills of lawyers and their contexts, broadly conceived.

Of course, first-year students would require orientation to the Harkness Table, the legal system, and its vocabulary. A two-week program of intellectual introduction, perhaps led and designed by collaborating third-year students and faculty, would likely be sufficient to prepare first-year students to learn at the Harkness Table, in classes of their choosing, with second and third-year students. In addition, a nervous faculty could prescribe some small number of basic undergraduate courses as a way to smooth some aspects of the learning curve. First-year students should be expected to adopt some extra measure of humility in the classroom to compensate for their relative inexperience discussing law, without at all diminishing their ability to participate on equal footing with classmates. First-year students might also be welcome to observe other classes, particularly those with advanced themes, to help acculturate them to conventions of legal inquiry and cooperative discussion.

2. Advisory and Staged Course Groupings without Privileging Classes

Under this curricular scheme, the law school faculty would be able to provide whatever guidance in the catalog and in information sessions for entering law students as to desirable courses of study. Harvard Law School currently offers a Course Groupings Manual, which highlights the disciplinary relationships between sets of courses.[95] In this spirit, the faculty, including individuals on the faculty who

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[93] For the rationale for changing the way first-year classes are taught *rather than* reformulate the first-year curriculum, *see* Rakoff, *supra* note 22, at 492.

[94] *See generally* Becker, *supra* note 2.

[95] Harvard Law School, Course Groupings – Introduction (2003-2004), *at* http://www.law.harvard.edu/academics/registrar/catalog/cgroups/intro.php. ("Several years ago,

happen to disagree on appropriate courses of study, should be free to provide advisory groups of courses that will assist students in making course selections.

Similarly, courses may, consistently with the assumption of student choice, involve staging or sequencing, allowing for students and faculty to engage in advanced discussions or year-long courses. Some upper-level classes may thus persist with their requirements of prerequisites, just as they do now, focused around topics of faculty interest and scholarship. This practice should not run rampant, however.

The faculty must avoid making their advice too strong. At Harvard, for example, many more students than perhaps would otherwise choose to take Corporations, Constitutional Law, Taxation, and Accounting enroll in those classes due to the design of the course selection process and the faculty's "recommendation" that students take those courses. At local and regional schools, faculties often aim to prepare students for the bar exam with relatively limited second and third-year courses. Both paths defeat the intention of freeing students to explore their interests, by creating a conventional curriculum that many feel obliged to follow.

3. Optional Lectures

As described previously, the intellectual climate of the law school could be broader than the few Harkness Tables around which students and professors congregate – through a program of hour-long lectures that occupy a consistent block of weekly time, during which no other classes are scheduled. Ideally, a student's Harkness classroom will spark both explicit recommendations and independent interest that will drive students to attend lectures, which could be digitized into video and Internet streams. This conception of optional lectures would allow skilled and renowned lecturers to deliver crafted presentations that would proceed quickly through topics of law. Lectures could be in series, such that Professor Laurence Tribe could present his interpretation of Constitutional Law during one semester, and concurrently during another block, Professor Charles Fried could present his version of the same subject.[96] To connect the law school more thoroughly with practice,

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the School's Legal Education Committee concluded that the Law School should offer students more guidance about the School's upper-level program. But the Law School's curriculum allows for so many different paths of study that it is difficult and not particularly helpful to give general advice. What is true of the corporate law courses is not necessarily the case for the fields of jurisprudence and litigation. Accordingly, the Committee decided that it would not be fruitful to prepare a generalized statement of curricular policy.") *But see id.* ("[These groupings] supplement descriptions of the individual courses in the Harvard Law School Catalog and the faculty statement appearing as Appendix B in the Catalog, which recommends a balanced program of study including Accounting, Constitutional Law, Corporations, Taxation, and clinical and international courses.").

[96] *Compare, e.g.*, Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) and

lecturer spots should be offered to active practitioners, many of whom are talented speakers but currently uninterested in taking on the time and responsibility required to evaluate students. The faculty, as a whole, could help fill whatever void exists in the absence of core class requirements by encouraging students to attend a more-or-less systematic progression of lectures about themes the faculty believes students should experience before graduation. Such lecture series' would be recommended by the faculty leading Harkness classes in related subjects, and would also draw curious students eager to learn about different views. In my opinion, these sorts of lectures should be open to the whole University and to the public, unlike the Oxford model, where one must be an Oxford student to attend.

D. The Role of Clinical and Externship Experience

How would clinical instruction fit into this curricular and pedagogical vision? So far, my discussion has largely ignored the vibrant and growing part of law school curriculums devoted to actual practice experience and skills instruction. This omission has been intentional, as clinical education involves its own unique set of questions, including the where, the how, and the funding. But there is no reason to bundle the recent innovations in clinical education into the package of Langdell's law school, which Harkness teaching and curricular freedom would replace. Indeed, it would be entirely consistent with my proposal for clinical courses to be the only required courses in legal education, allowing students to build professional skills during school in more than one practice area. In my own law school career, I have perhaps learned more from my experience as a clinical student than in conventional classes; I am convinced of clinical work's extraordinary value. It may be possible that law schools should consider adding a ten-week summer term with a broad array of mandatory clinical classes, with the ancillary benefit of ending the mindshare large law firms occupy for second year students on elite campuses as they jockey for summer positions.

Some aspects of Harkness teaching already inform clinical classes. The widespread practice of modeling medical "rounds" in weekly debriefing seminars with fellow clinical students and their instructors is fundamentally participatory in much the way that Harkness classrooms are.[97] After working with real clients and addressing live legal issues, students should have just this kind of opportunity for reflection, assessment of performance, and discussion of practice strategy. The precise design of such seminars is somewhat beside the point; again, it should fall to the faculty and students. With a cross-curriculum focus on skills and their contexts,

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LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-1 (3d ed. 2000).

[97] See Elliott S. Millstein, *Clinical Legal Education in the United States*, at http://www.aals.org/2000international/english/Amerian2.htm (2000).

it would be my hope that clinical education would not experience the same practice/theory divide that leaves clinical instructors as lesser members of the faculty and students with administrative barriers to taking advantage of clinical opportunities. I am less confident in the role of externships, which loose students on legal offices that may or may not have the training and supervision capability to provide students with meaningful and useful experiences.

E. The Room for Pedagogic Variation Within the Proposed Classroom

The Harkness Table should be a palette for faculty and student creativity in curriculum and learning opportunities. The only vital constant should remain small classes and the spirit of student-faculty and student-student collaboration; without those emphases, the philosophy loses its force. As previously noted, faculty need the freedom to cover material occasionally through background lecture and to request the participation of students in Harkness classrooms. Faculty and students must also be free to collaborate in the design of courses, group work, and outside research assignments.

The Harkness platform is in its way as much a specified form with certain conventions as Langdell's classroom or, for that matter, a sonnet. All such forms create an open space for imagination, novelty, experimentation, and excellence. Yet, notwithstanding the myriad collaborative modules described in Part III.C, Harkness's starting assumption of student autonomy and community responsibility would provide just the humane foundation that Langdell's starting assumption of professorial centrality makes impossible.

THE DURABILITY OF THE LANGDELLIAN METHODS, CENTRAL COURSES, AND FINANCIAL IMPERATIVES

There would no doubt be a chorus of faculty, students, and lawyers opposed to this kind of pedagogical and curricular overhaul at an elite law school. It is worth describing and evaluating their anticipated responses.

A. What Virtues of Langdellian Teaching Would Harkness Discussion Forgo?

Anonymity in Large Classes.

Many students relish their ability in law school, by contrast with undergraduate and secondary school experiences, to remain largely anonymous to professors. One can even argue that large-class anonymity is one of law school's glimmers of compassion towards students; Langdellian exchanges do not count in blind grading regimes, and professors cannot coercively demand faculty-student interaction. Indeed, quiet and reserved students, who now manage to observe large

quantities of Langdellian instruction without fear when not on panel or after their interrogation by the professor is over, would do poorly in a regime of mandatory classroom participation. One could also argue that large classes may bring together enough students, heard over the course of the semester, to give voice a wide range of approaches and experiences, which inform student responses to professors' questions and enrich the classroom in ways that would be impossible in uniformly smaller classes.

Insofar as students will lose their anonymity in a law school experience centered around the Harkness Table, it is a cost I suspect that engaged and curious students would be willing to pay, although a cost nonetheless. In addition, the claim that large classrooms provide a meaningful forum for the exchange of diverse ideas is contrary to the empirical evidence that Lani Guinier and others have collected in studying law schools in the context of axes of difference, including race and gender.[98]

At the same time, Harkness methods in the hands of an unskilled or insensitive teacher must be recognized as dangerous to students who are more quiet and reserved by nature. The challenge for discussion leaders and classmates is considerable but surmountable – the creation of a "safe" space for all students' participation with a simultaneous emphasis on the analytical rigor of discussion. Skilled Harkness teachers evaluate students on the basis of the quality of students' contributions, not their quantity. The system does reward participation, but the work worlds of practice, policy, and even scholarship do as well. Langdell's law school rewards only those who quickly adapt to law school examinations – a decidedly less subtle and less useful skill than the full range of participatory and writing competencies a Harkness teacher must evaluate.

Accountability.

With the professor at the center, the professor also holds the responsibility for students' educational outcomes. Under a consumer model of educational experience, students know whom to blame for poor results in Langdell's law school – the faculty. Accordingly, the spread of information about teaching quality across the field of applicants through rankings provides market incentives for teaching to improve. In a de-centered classroom, these same incentives would be absent. Classes could drift aimlessly; immense numbers of educational dollars will be spent, and some students will fail to realize any or much return.

A well-designed Harkness classroom does not transfer *all* responsibility for course outcomes to an ambiguous collective. Additionally, Harkness methodology, at its core, rejects the education-as-consumption passivity that distances students from responsibilities. While Harkness teaching, as all teaching does, would prove

[98] *See supra* note 26 & 27.

uneven, the effects of a poor teacher in Harkness classrooms may be less significant than in Langdell's classroom, where virtually everything rises and falls with the professor's skill.

"The Tyranny of the Extroverts."[99]

Most law students know well, that even in the professor-dominated Langdellian classroom, several outspoken and eventually tiresome students seem to dominate any classroom discussion that calls for volunteers. In strictly professor-centered classes, this problem does not exist. In a Harkness classroom, by contrast, the lack of a central figure would allow the extroverts, whose contributions may or may not be valuable, but clearly prefer talking to listening, to flourish. Indeed, my classmates at Exeter had coined a phrase for these people, dubbing them "Harkness warriors." So, if the epidemic of "gunners" is severe in secondary Harkness classrooms, how can they be seriously proposed in law schools, where the number of initially arrogant and self-important students must be considerably higher?

Without doubt, displacing "the tyranny of the extroverts" is one of the most significant and challenging teaching skills Harkness discussion leaders need to master. Yet, effective discussions remain possible, even with and sometimes because of particularly vocal students. In a small group, relationships among students and professors may create more of an environment that allows students to respect each other's contributions, rather than disdain them in half-envious mocking. Indeed, Langdell's law school does a poor job of rewarding excellent contributions to class discussions, promoting a great deal of distance between the brave or unwise frequent participants and the non-participants. Professors with different styles will encourage different degrees of this problem, but the collaborative character of good Harkness classrooms allows for students to adopt different roles in different discussions in different classes.

B. Are Fundamental Courses and a Distinctive First-Year Important to Legal Education?

Professors and others convinced of the first-year's success narrative[100] will resist such dramatic tampering with the one time that they perceive as *the* resounding victory of Langdell's law school: the occasion for Langdellian methodology's true usefulness. They will suggest that no short orientation could match the year-long introduction to legal inquiry that the private law sequence of courses provides first-

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[99] Barbara Millis et al., *Cooperative Structures for Higher Education Classrooms, in* INTERACTIVE LEARNING THE HIGHER EDUCATION CLASSROOM 204 (Harvey C. Foyle et al. eds. 1995). *See also* Reilly, *supra* note 75, at 598.

[100] *See* White, *supra* note 86, at 8-9.

year students. There is also the sense that there remains something fundamental about the building blocks of American common law, including the courts' role in defining crimes, the procedural means of pressing cases based on it, and the statute-like measures by legislatures and academics to alter the common law firmament, such as the Rules of Civil Procedure, the Model Penal Code, the Uniform Commercial Code, and the Restatements. One might insist that no one should graduate from law school without these basics.[101] Others will no doubt suggest that the first-year of law school, the legendary "1L year," is too significant a tradition, too rich with the same large-section of students having the common experience of all first-year classes together, and too central a part of the legal profession's identity to be withdrawn from the next generation of law students.

Serving the diverse and non-unitary bar, law schools must have the courage to change, without a fear of that change and the impulse to cower in century-old traditions. Even Harvard's congratulatory historian Arthur Sutherland admits this exigency of adaptability in a rapidly changing legal, political, and human landscape.[102] The rationale for privileging private law subjects over others no longer has currency, no matter how stridently the profession's elders assert they are "building blocks." If law school's fundamental task, in Langdell's view or any conceivable alternative, is the provision of "the mill" and not any specific "grain,"[103] claims of the primacy of this or that subject's indispensability are likely to be overstated. The precise materials and topics that students engage over the course of a legal education are less important than the twin honing of students' compassion and technique; it is my contention that three years of intimate discussion of legal subjects in a spirit of collaboration with peers and faculty, perhaps balanced by a required clinical course of study, would yield better student outcomes and more competent practitioners than the heralded first-year and the disengaged after-taste of the second and third years ever have.

C. How Would "Harkness" Reforms Look to the Practicing Bar?

One can anticipate the critique of some in the practicing bar that this "reform" would drive legal education further down the path of intellectual rarification and the academy's divorce from substantive and practical competency, by indulging the academic flights of fancy, not only of professors but also of students. Simultaneously steeped in Langdell's traditions and critical of them, many in the profession would resist this level of pedagogical and curricular innovation, precisely

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[101] Unlike many other schools, Harvard does not insist on the centrality of Constitutional Law enough to make it part of the first-year curriculum. Perhaps these judgments of centrality are grounded more thoroughly in faculty's student experience than in any principled rationale.

[102] ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 360-69, (Harvard University Press, 1967).

[103] *See supra* note 2 and accompanying text.

because they might believe, quite practically, that "better the devil you know than the one you don't." They would likely also pale at the prospect of the costs involved in implementation of the Harkness method in law schools, the wealthier ones expecting some dire requests for support from law school deans.[104]

Notwithstanding the general conservative streak of the practicing bar, Harkness reforms would respond surprisingly well to the urgent criticisms of legal education in the recent MacCrate Report. My proposal of Harkness teaching, in combination with substantive lectures and required clinical courses, would create a law school that would deliver new lawyers to the profession with more confidence and capacity for leadership, a wider range of interpersonal competencies, and more willingness to make contributions to teams. Further, a cross-curriculum commitment to practice skills *and* professional values is precisely the solution advanced by the Report.[105] Although de-centering professors and allowing considerably more student autonomy may strike lawyers as unnecessary or superfluous, many would admit the salience of the full range of critiques leveled against Langdell's law school based on their own disengagement and alienation in its halls. And ultimately, we should not indulge those concerned with the Harkness method's distance from practice their disdain for classrooms as impractical - legal education must be truly intellectual, in the best sense of that word.[106]

D. How Could Law Schools Ever Afford to Eliminate All Large Classes?

Of all the potential costs, the economics of implementing Harkness classrooms in any law school are perhaps the most daunting. First, to have enough Harkness classrooms, a law school would have to expand its physical plant dramatically to accommodate the smaller Harkness rooms. Second, Harkness Tables are quite costly, but vital enough to the program that to replace them with rectangular tables or student desks arranged in the round would do the goals of proposal a great disservice. Third, to offer supplemental lectures would entail yet more space, these akin to the larger amphitheatres of law schools, which would then likely have to be shared with the rest of the University of which the law school is a part. Fourth and most significantly, just as at 1930s Exeter, the most substantial cost of a law school built around the Harkness method would be the expansion of the faculty, perhaps necessitating a doubling or tripling of its number. The new members of the faculty would be a non-capital cost, institutionalizing a continuing drain on University budgets, a need for additional and substantial alumni giving, and increased tuition.

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[104] *See infra* subsection V.D.

[105] Costonis, *supra* note 20, at 179-189.

[106] *See* White, *supra* note 86, at 174 ("The most practical education is perhaps not the most theoretical, certainly not the most academic, but the most *intellectual* education one can obtain or imagine.") (emphasis in original).

This economic reality leads to the conclusion that this proposal could only work at one of the country's most elite institutions, and probably with the assistance of a donor of Harkness's proportions who believed in the idea. Are we risking a further stratification within legal education, setting an impossibly expensive standard for local and regional schools, who now struggle with all the demands of ABA accreditation and the Langdellian mold? As has been noted, Langdell's perhaps greatest coup was his persuasion of universities that legal education was inexpensive.[107] The kind of education that Professor White, Edward Harkness, and I have envisioned is decidedly not. At least initially, Harkness teaching, should it spread, would be available only to the top strata of American law schools, although there may be options for funding a required clinical curriculum during the summer that could reallocate law school funding to the classrooms and faculty.[108] The only possible response to level the field would likely be dramatic government subsidy of lower-tiered law schools, a prospect for which I would be perhaps a lonely advocate in our political climate.

But no matter how dim the economics of my Harkness proposal for elite schools, it is worth considering if we are serious about responding to the serious critiques of legal education that swirl a the plodding academy that insists on making only interstitial changes. Indeed, Langdell's classrooms seemed all but doomed to failure in their early days, including in a financial sense.[109] And most importantly, as Professor Reilly asserts of her own use of collaboration in the classroom:

> Good collaborative learning increases all students' higher-order thinking skills, concept attainment, critical thinking, judgment, mastery, and retention. Besides mastering ambiguity and judgment along with the substance of the material, students organize and synthesize material better after collaborative learning experiences. Motivation increases, as do self-initiated learning strategies. If the substantive learning rewards are not enough to encourage use of collaboration, proof that students learn other critically important skills may be. Students leave collaborative learning experiences with improved interpersonal and communication skills and better problem-solving strategies. Collaborative work helps students to learn from diverse others more effectively.
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> The simple fact is that I tried it. And it worked.

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[107] STEVENS, *supra* note 20, at 268.
[108] *See* Barnhizer, *supra* note 43, at 56–59.
[109] See Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 533 (1973).

> Given opportunities to learn collaboratively, students can learn to be better law students, better lawyers, and better people.
>
> Seems worth the risk to me.[110]

I believe that my proposal for a Harkness Plan at elite American law schools is likewise worth its risks. We already cannot afford the failures of legal education's inaction.

CODA: CAN A BIG IDEA HELP BUILD A BETTER LAW SCHOOL?

Small ideas, like collaborative teaching modules in existing courses, come relatively easily, at little expense and with little impact. "Suggestions of a fundamental nature," such as Harkness's reinvention of secondary education at Exeter or Langdell's restructuring of Harvard Law School, are of much greater difficulty and require devotion, drive, and capital. But we must not stop imagining what could be – education as revelation, as introducing students to new ways of seeing the world and each other. I repeat here in closing the questions of Professor White, addressing the faculties of law schools:

> Can we in law schools find a way to teach that recognizes that our students have different capacities and virtues? That we ourselves have different things to teach? That the subject "law" is not the same in every classroom any more than the subject "history" is? And can the students find a way to assume more responsibility for their own education, conceiving of themselves as engaged in a project that has its own interest and importance to them, independent of its significance of prelicense training? Can their education be seen as truly a liberal education, that is, as the development of their own individual capacities, not as a training into a sort of sameness? Can we help them imagine the profession they are entering as one in which such an education is of priceless value, for it is upon those individual capacities, which they shall have to rely? If we could do these things we might come to see more clearly that the law that we teach, and that we hold out as entitled to respect and authority, is not a set of rules to be learned but a set of ways of thinking and talking and acting together about questions of justice, a method and a community that it should be our task to exemplify and constitute.[111]

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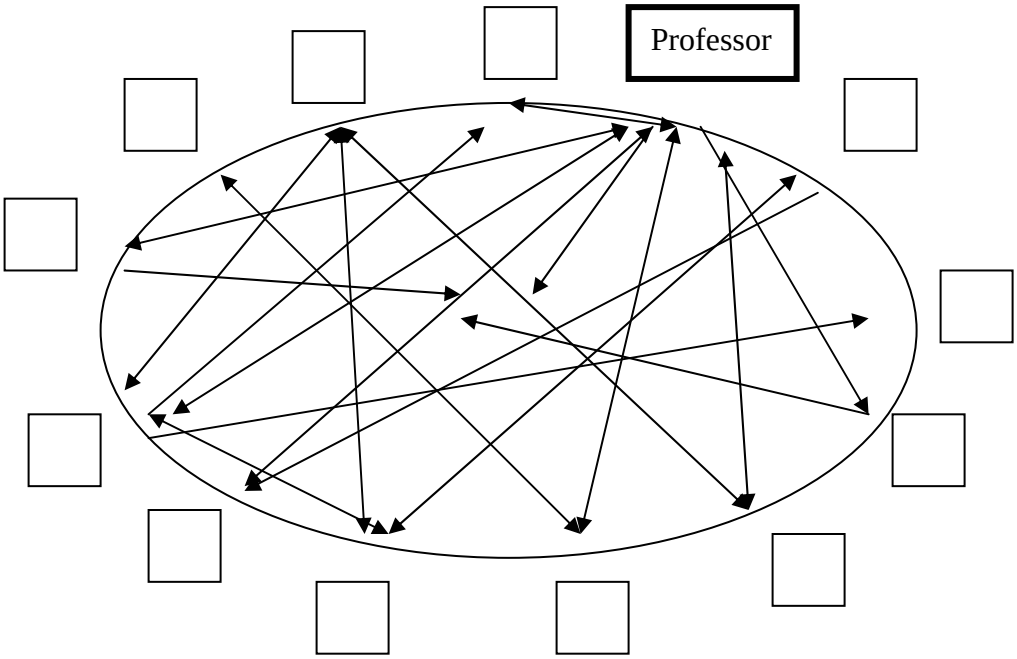
[110] Reilly, *supra* note 75, at 614.
[111] White, *supra* note 86, at 16.

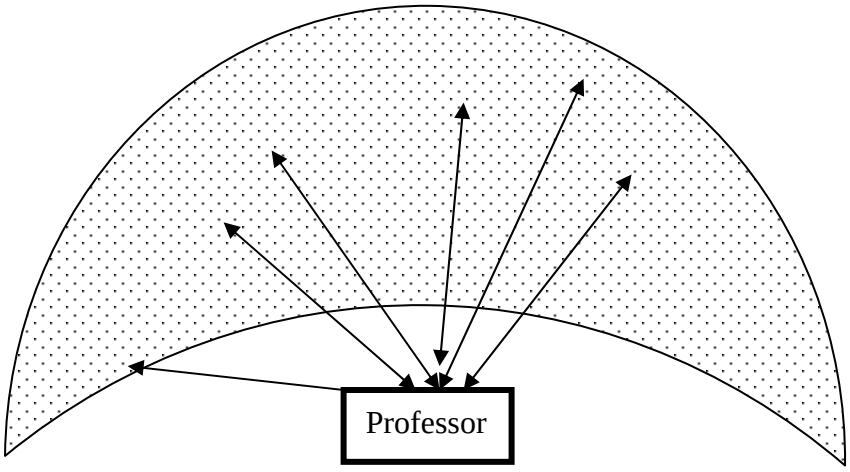
Can we? It would be a challenge. With faculties and professions as with students – as Socrates, the false patron saint of Langdell's classroom,[112] said: "[T]he eye…, this organ of knowledge must be turned around… together with the entire soul."[113]

[112] Stropus, *supra* note 36, 453–54.
[113] PLATO, *supra* note 1.

APPENDIX: GRAPHICAL REPRESENTATIONS OF THE HARKNESS VERSUS LANGDELLIAN MODELS



The Harkness Classroom



The Langdellian Classroom