# Desegregating Legal Education

(The Guys on the Refrigerator)

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We law professors initiate people into a profession that is central to how we function as a society and how we relate to one another. The Carnegie Foundation's thoughtful critique of legal education has made law faculties across the country more conscious of the responsibility we therefore hold. Your faculty has been more diligent than most in considering the implications of the Carnegie Report, so it is with great humility that I offer some of my thoughts about it.

I focus today on just one aspect of the Report – its recommendation that we "integrate" the cognitive, the ethical and the practical apprenticeships.

I accept wholeheartedly the Carnegie criticism that legal education wrongfully neglects the ethical and the practical and move on to consider what "integration" should mean and how it should be achieved. I argue that we cannot respond adequately to the Carnegie critique by simply making sure that we have on each law school campus a proper mix of Socratic and seminar courses, clinical and simulation courses and courses in professional responsibility. I will spin my story out, but the take-away is this: **We must take care not to segregate that which we have neglected, for segregation perpetuates misunderstanding and facilitates further neglect.**

We segregate the cognitive from the practical and the ethical for a variety of good and bad reasons. I often make a feminist argument that cultural and psychological biases incline us to ghettoize practical and ethical work and to privilege what we think of as cognitive work.1 I stand by that claim, but make a distinct argument here: We have segregated "cognitive" development from "practical" and "ethical" development in part because we have misunderstood and derailed what I will call the Langdellian revolution.

I introduce my argument with a personal reminiscence.

When I was a first year law student in 1965, I sat – mostly in the amphitheater-styled classrooms of Langdell Hall – for "Langdellian" or "Socratic" classes in

1 *Slay the Three-Headed Demon* (arguing that relational aspects of practical and ethical work lead us to associate the work with femininity and subordination and therefore to disparage it).

Contracts, Torts, Criminal Law, Property, Constitutional Law and Civil Procedure. I thought this was the "real stuff" of law school. Most – well, some – of my law professors were dazzling practitioners of Socratic method. I was almost as thrilled by their erudition and agile wit as I was terrified that they would glance up from their seating charts and call out my name. I still keep their pictures on my refrigerator.


That same year, I had “skills training” in Legal Research and Writing. I remember Legal Research and Writing as a necessary nuisance taught by bored third (or maybe second) year students. This program ended with a mandatory Moot Court competition. I remember Moot Court as a marginalized but mysteriously satisfying experience that convinced me of the necessity of

developing research and writing skills but seemed oddly incomplete.

I went to law school before Watergate and the obligatory course in professional responsibility, so attention to ethical issues was a hit or miss thing. I do recall that the Dean sometimes cautioned during 1L orientation that we should "never, never commingle our funds and our clients' funds," but I don't recall much more in the way of an ethical apprenticeship.

Entering the world of practice, I felt spottily prepared. I enjoyed analyzing and synthesizing cases, and I thought I did it pretty well, but I did it in a strangely isolated way. I thought that interpretations of case law should be objective and insightful. I had never really thought about being an advocate or giving counsel or structuring a relationship. Or about the difficulty of

interpreting law in a way that was both responsible and true to my client's interests. I had never thought about how to resolve a dispute without litigation. I thought I wrote pretty clearly, but I hadn't thought about what it takes to write persuasively. I wasn't used to speaking without being called on or worrying much about the effect my words and demeanor would have on others.

Over ten years of practice I was awakened to these things, but law school had nothing to do with it.

After thirteen years of practicing and judging, I joined the NYU Law School faculty. There, under the tutelage of folks at least as dazzling as the guys on the refrigerator, I have repeatedly revisited the disparate parts of the traditional legal education I received all those years ago. In the process, I have come to understand why I was so confused in law school and why I was so spottily

prepared to lawyer or to judge. In the process I also stumbled on the fascinatingly related history of Langdell's derailed initiative in legal education.

## I. The Derailment Story

*The Langdellian Revolution*

We now know that what we call Socratic or Langdellian teaching was not so much the brain child of Langdell as it was the product of Charles Eliot's study of European learning theory. Eliot was president of Harvard University when, in 1870, he appointed his friend, Christopher Columbus Langdell as dean of the Harvard Law School. Legal education had recently migrated from law offices with apprenticeship arrangements to university campuses, and it was a rather informal affair. No required courses, no examinations and no pedagogy

beyond the recommendation of treatises and the presentation of lectures summarizing bodies of law.

Elliot was heavily influenced by a number of education theorists in Europe and in the United States. I'll mention just two:

Johann Heinrich Pestalozzi influenced the "progressive" school of education championed by Francis Parker, John Dewey and Maria Montessori. He believed that the "aim of . . . teaching was **to develop the children's own powers and faculties rather than to impart facts; to show not so much what [but] how to learn.**" An early opponent of corporal punishment, Pestalozzi argued that it was wrong either to strike children or to force-feed them information. Children should be lovingly supervised as they followed their own curiosity through carefully selected activities. They

should learn things by experiencing them. They would then find or be given language for the things they had learned and solidify their knowledge as they repeated the process in increasingly challenging activities.

Friedrich Froebel, who studied with Pestalozzi, captured this idea when he coined the term "kindergarten," to express his view that the child's inherent curiosity and drive to activity should be cultivated as one would cultivate a garden. He designed games or "Gifts" with which a child could gain knowledge and skill in acts of play.

Eliot consistently brought these experiential methods in higher education. Before he became president of the university, he revolutionized the Harvard chemistry department by having students conduct laboratory

experiments rather than listen to lectures. He then designed and taught laboratory sciences at M.I.T. **We can imagine the laboratory experiment as a Froebelian Gift that puts the chemistry student in an educational state of play.**

Just as Eliot was insisting that people learn best as active problem-solvers, Langdell was setting about to make active problem-solvers of law students. He gave his students sets of judicial opinions rather than treatises. And he transformed his classes from a lecture format to a dialogic format. No longer did students sit and listen; they became active players in the classroom drama. The Centennial History of the Harvard Law School describes in this way the first few minutes of the first meeting of Langdell's new kind of class:

Langdell: "Mr. Fox, will you state the facts in the case of Payne v. Cave?"

*Mr. Fox did his best with the facts of the case.*

Langdell: "Mr. Rawle, will you give the plaintiff's argument?"

*Mr. Rawle gave what he could of the plaintiff's argument.*

Langdell: "Mr. Adams do you agree with that?"

Rather than take the judicial opinion -- or the teachers interpretation of it -- as received wisdom, Langdell's students were given Froebelian Gifts in the form of hypothetical questions. What arguments might have been made responsibly on each side? How might they have been answered? How might they have been received? These questions replicated problems of practice. They required students to perform rather than simply to absorb.

Eliot approvingly described Langdell's innovations in a 1920 essay in the Harvard Law Review:

> Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, and Montessori; yet his method of teaching was a direct application of some of their methods. It was a strong case of education by **drawing out from each individual student mental activity of a very strenuous and informing kind**.

How was this new kind of teaching received? Langdell's students complained that they weren't learning anything. They even suggested that Langdell gave up lecturing because he didn't know anything and hence had nothing to say. Soon only seven or eight students were attending his class.

Langdell persisted despite three consecutive years of declining enrollments. Graduates of his program were well-prepared for practice and got good jobs. When the Carnegie Foundation commissioned its 1914 report on legal education in the United States, it pronounced the Socratic Method a success. Law schools were settled into a dialogic method for training novice practitioners.

On this account, we can understand the Socratic method as the first of several moves toward giving

law students the chance to learn in the way psychologists increasingly say that both children and adults learn best: by working collaboratively and at the growing edge of their abilities – at times sharing and applying collaborators' knowledge and methods, at other times gaining new knowledge and developing new methods.

The next step from this kind of learning might reasonably have been progression to simulation and clinical courses in which students could be still more active and independent. As we will see, however, the relationship between Langdellian teaching and simulation or clinical teaching came to be understood much differently.

*The Clash of Progressive Education and Progressive Legal Scholarship*

Despite widespread acceptance of the Langdellian method, student anxiety did not entirely abate. Students wondered – and wonder to this day – what exactly they are meant to learn in a Langdellian classroom. Does the dialogic dance lead invariably to identification of a right answer? If so, why doesn't someone figure out the right answers and write them down? If not, what are law students supposed to learn? Socratic back and forth was fine, but at the end of the day there had to be a place to go to for settled answers.

Along come the Legal Realists with the news that there simply are no right answers. Lawyers and judges are regularly faced with situations for which there is no precedent and to which the texts of statutes and prior judicial decisions do not speak

definitively. The corollary was that scholars, lawyers and judges should stop searching for fixed answers to legal questions and begin to find principled ways of working with an inevitable indeterminacy. They should look beyond the four corners of authoritative legal texts to examine how law is constructed, interpreted and argued.

Realists might have adopted a friendly attitude toward Langdellian discourse, seeing it as going beyond judicial opinions to wrestle with the underlying arguments from which those opinions emerged. Alas, this did not happen.

Realists concerned with legal education focused on the scientism of Langdell's writing rather than on the progressive and empowering qualities of his teaching method, so much so that they argued that his

deanship at Harvard marked the beginning of absolutist thinking in the legal academy, and hence in the legal profession.

They argued that up to the time of Langdell's ascendancy in legal education, lawyers and judges in the U.S. accepted the need to respect text and precedent but also understood the need to apply and shape the law so that it is true to its perceived functions and to a shared sense of justice.

For the realists, Langdellian method was not a move in the direction of active and student-centered learning. It was a natural but misguided strategy of university-based legal theorists who were pridefully aloof from the world of practice.

These arguments presumed an intellectual divide between legal practitioners and legal theorists. This is illustrated in an unusually influential article by Jerome Frank. Although Langdell was an experienced and successful practitioner, Frank described him as an almost pathologically reclusive man who was largely ignorant about the practice of law and similarly ignorant about -- and inept at -- human interaction. According to Frank, “the so-called case system . . . was the expression of the strange character of a cloistered, retiring bookish man,” and it was “[d]ue to Langdell’s idiosyncrasies,” that law school came to be focused almost exclusively on books. Students who learned about law from appellate opinions were “like future horticulturists who confined their studies to cut flowers,” blind to the roots and the developmental life of the legal matters they needed to understand. In

Frank's term, law students needed a Alawyer-school@ rather than a Langdellian law school.

## II. Getting Back on Track

*Sniffing Out False Dichotomies*

A lawyer-school rather than a Langdellian law school. The problem lies in the "rather than." This is a false dichotomy. It distorts the function of Langdell's case method in at least two ways.

First, as we have seen, the case method was not designed to make law students reclusive or cerebral. It was designed to engage them in dialogue. It was designed to enliven their learning by making it experiential rather than simply receptive.

Second, the case method does not presume scientistic absolutism. Whether as a result of his own proclivities or as a result Eliot's influence, Langdell did think of the law as a science. But it does not follow that he only asked fill-in-the-blank questions. Langdell was a sophisticated scholar who realized that, science or not, law poses hard questions that can't be, or at least haven't been, resolved with certainty. It may be, then, that he sometimes asked what philosophers of language would call **genuine questions** -- questions about which the questioner is genuinely curious. For example, when Langdell asked Mr. Adams what he thought of the plaintiff's arguments, perhaps he wasn't looking for a particular answer. **Perhaps he actually wanted to discover and discuss what Mr. Adams thought.**

*Framing a Desegregation Plan*

I did not offer my story of derailment to suggest that legal realism all by itself distorted or destroyed the Langdellian revolution. Langdellian teaching chugs on, albeit in unnatural isolation from the rest of the law school curriculum. There are lots of alternative derailment stories, and my clinical colleagues are no doubt itching to tell some of them. We could imagine the apprenticeship model steadily perfecting itself and then getting derailed when legal education was handed over to universities. Within the university setting, we could imagine a growing clinical movement getting derailed by academics who wanted legal education to seem more scholarly and scientific. And on and on. Each of these stories has a grain of truth, but each has a generous sprinkling of unwarranted blame.

It is the blaming that leads us to invent or exaggerate dichotomies and to remain factionalized. What's needed is some Barackian tolerance. And, as our President would say, we can not achieve tolerance unless we confront the differences and misunderstandings that have kept us apart. In the spirit of correcting misunderstandings and achieving the tolerance that educational reform will require, I propose a friendly amendment to the Carnegie Report. Instead of calling for integration, let's call for desegregation.

The advantage of the term "desegregation" is that it reminds us that we need to undo something. We don't just need to put the three apprenticeships together; we need to undo the effects of their segregation by resolving the misunderstandings that caused us to keep them apart.

It isn't hard for what Carnegie unfortunately called the cognitive teachers to find common ground with those of us who focus on practice skills and ethical judgment. Surely Frank was right, **and in harmony with Charles Eliot's vision of education**, when he argued that some of professional training should occur in clinical settings. And a hundred years of work in the fields of psychology and education tell us that Eliot and Langdell were right about how people learn. Indeed, the ironic truth is that the reasoning behind the Langdellian method has been embraced by clinical teachers and scholars even as it has gone ignored by most Langdellian teachers.

Thinking in these more harmonious terms, law schools are beginning to achieve the kind of meaningful integration that the Carnegie critique

requires. We continue to learn at every turn, but I think we're getting some things right.

First, law professors across the country increasingly understand Langdellian teaching as an experiential enterprise. Langdellian teachers continue to put – and to make a point of putting – students in role. **We ask our students to do cognitive work toward hypothetical but practical ends, and we challenge them to do it responsibly.** We have also developed new teaching methods that build on experiential learning theory. The problem method casebook is a prominent and increasingly popular example. I recently polled my clinical and academic colleagues to ask how many of them required students to answer questions or do assignments in role, used or had written problem-method casebooks or had developed simulations for their courses. Only one of

the 31 colleagues who responded had done none of these things; all but two reported that they questioned students in role or had them do assignments in role.

Increasingly, law schools are working to achieve what the great practitioner-scholar-clinician Anthony Amsterdam envisioned when he created our Lawyering program: to assure that over the three years of legal study every student has the opportunity to learn in increasingly realistic and active professional contexts.

The desegregation process is not proceeding with very deliberate speed. There are still Langdellian teachers who tell students that they should not take clinical courses. There are still clinical teachers who tell students that Langdellian classes are of little use. Genuine integration is necessarily hard to achieve.

But we have made steady progress toward the day when no student leaves law school as I did -- without having thought about what it means to use the law in the responsible service of a client or a cause.

We’re not perfect, but we’re doing a lot better than the guys on the refrigerator.