

LAW WITHOUT ABSOLUTES: TOWARD A PRAGMATIC SCIENCE OF LAW

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ABSTRACT

Although today the very idea of a science of law—the thought that law could be made a science like any other taught and studied at a modern university—has the ring of an oxymoron, this piece argues that the rejection of legal science was not only overhasty but unnecessary. There is a sense in which we can see law as a science, it argues, but only once we come to see more clearly and accurately just why the tradition of legal science begun in the earliest days of the Western legal tradition and brought to America by Christopher Columbus Langdell was destined to fail. The article accordingly lays out a reconstruction of both the basic idea of legal science and the specific conception that Langdell was effectively working out in the context of the American common law: the rationalist tradition of legal science. It contends that what was distinctive of the tradition was the absolutist way it had understood and framed the intellectual core of the law: its absolutism as to the law’s content, method, and viewpoint. After tracing that tradition from its twelfth-century origins through Langdell’s modern reinterpretation, the article goes on to examine the twofold critique of that science conceptualized by Holmes and later carried out in detail by the American Legal Realists, showing that, contrary to the claims of a rationalist legal science, the law is indeterminate not just in practice but in principle. Understanding this principled indeterminacy thus sets the stage for reconsideration of the failure of rationalist legal science, pioneered by the early fellow-traveler of the Realists, John Dewey—a pragmatic science of law, freed of absolutes.

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... the lawless science of our law,
 That codeless myriad of precedent,
 That wilderness of single instances,
 Thro' which a few, by wit or fortune led,
 May beat a pathway out to wealth and fame.¹

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1. ALFRED, LORD TENNYSON, *AYLMER'S FIELD* 14 (1793).

INTRODUCTION

Today the very idea of a science of law—the thought that law could be made a science like any other taught and studied at a modern university—has the ring of an oxymoron, the punch line of a forgotten joke. Ever since Oliver Wendell Holmes challenged the first dean of the Harvard Law School a century or so ago for peddling a “legal theology” in his first casebook,² itself a first try at legal science in America,³ the idea has received near universal condemnation.⁴ Although critics are divided over exactly where and why a thinker like Langdell got things so badly wrong, there is little question today that he did.⁵ Misled about how lawyers and judges really think when thinking about law, the criticism goes, Langdell inevitably misunderstood what it is that lawyers think *about*. Lawyers no more resolve disputes with deductions from “a few fundamental doctrines”⁶ than car mechanics fix sputtering engines with calculations from the laws of motion or electro-magnetism. Failing to see what lawyers actually *do* when ‘doing’ law, the professor let himself slip into the grip of a picture that was altogether too tidy and so, naturally, false. Just where law is to go from these purely negative observations has eluded the same consensus, with some thinking it should be reworked essentially from the outside, in the image of the “real” sciences of economics or sociology,⁷ while others would demote it to paid partisanship, the lucrative business of getting clients out of court and on the right side of the powers-that-be.⁸ No

2. Oliver Wendell Holmes, *Book Notices*, 14. AM. L. REV. 233, 234 (1880).

3. CHRISTOPHER COLUMBUS LANGDELL, *CASES ON CONTRACTS* i (1871).

4. A recent exception is Nancy Cook’s attempt at rescuing the “paradigm” of legal science through an analogy with twentieth-century philosophy of science. See Nancy Cook, *Law as Science: Revisiting Langdell’s Paradigm in the 21st Century*, 88 N. D. L. REV. 21 (2012). Her emphasis falls, only naturally given that aim, on drawing out the points of similarity between the two. Here, by contrast, I aim to make a direct case for a science of law, by fleshing out the wider sense of ‘science’ that inspired lawyers like Langdell to think of their work as scientific.

5. WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* 5 (1998) (describing the idea of a legal science as “fatuous”).

6. *Id.*

7. See RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (9th ed., 2014); Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC’Y 171 (1998). See also Anthony Townsend Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 337–39 (1988) (discussing the ways that Law and Economics and Critical Legal Studies have sought to study the law from outside the discipline).

8. See Kronman, *supra* note 7, at 338–39 (discussing the “conventionalist” response to Legal Realism); Brian Bix, *Law as an Autonomous Discipline*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 975 (Peter Crane & Mark Tushnet eds. 2003) (arguing that the law’s relative autonomy is due to the distinctive skills lawyers learn as participants in a hierarchically rule-governed and precedent-bound system).

matter the resolution of those debates, however, the contemporary consensus is now quite clear: whatever law is, it is not a science.

This Article argues that this consensus is mistaken, and importantly so. Not only does this blank rejection of legal science rest on an overly crude, indeed at times false, understanding of the tradition of legal science that began long before Langdell thought to make it a theme of his casebook and classroom. It also fails to reckon seriously, if at all, with the possibility that there *is* something intellectually distinctive to law: that there is more than a codeless myriad of past decisions to guide decisions today, and that through its vast wilderness one can cut paths other than those leading to the glory of a headline, or a good living. Just as importantly, though, this overhasty dismissal of legal science has thrown the law into a genuinely practical predicament—the near constant feeling of professional crisis that has come with the hollowing out of its intellectual identity, the loss of its fighting faith.⁹ It was no accident, after all, that Langdell first sketched his idea of a legal science in the preface to a casebook, or infamously opened his first class at Harvard, not with the then-customary lecture, but by asking one Mr. Fox for the facts of *Payne v. Cave*.¹⁰ Indeed, the pedagogical pillars on which the modern profession now stands—the three-year post-baccalaureate degree; the lecture-hall drama of the “Socratic” interrogation; the bread-and-butter genres of modern legal literature, the casebook and law review; even final exams—all were quarried from an idea that is now thought worse than quaint, even faintly ridiculous: the idea that law could be a science, and the library its laboratory.¹¹ Having forgotten if not forsaken its scientific past, law now finds itself at a loss to explain its place alongside the disciplines of a modern university—its status as a genuinely *learned* profession. Law, no longer a science, has not only lost its intellectual focus, but its very point of view.

9. See generally Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885 (1993) (remarking the “identity crisis” facing the “lawyer-teacher” arising from the uncertainty about law’s “integrity and autonomy as an institution”); Jack Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 964–70 (1996) (noting the sense of crisis in the law and its relation to the encroachment of disciplinary outsiders); HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 33–41 (1983) (discussing the crisis in which the Western legal tradition found itself at the close of the twentieth-century, linked to a decline in a viable legal science); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form’*, 100 COLUM. L. REV. 94, 97–98 (2000) (indicating the declining faith of the “American legal consciousness” in its own rationality).

10. Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

11. Christopher Columbus Langdell, Address at Harvard University “Quarter-Millennial” Celebration (Nov. 5, 1886), 3 L.Q. REV. 123, 123–24 (1887); WIECEK, *supra* note 5, at 93.

This Article argues that this rejection of legal science, giving rise today to so much professional and intellectual doubt, was altogether needless—a self-inflicted jurisprudential wound. There *is*, in fact, a sense in which we can see law as a science, but only once we see more clearly and accurately just why Langdell’s science was destined to fail: what about his legal science was so clearly wrong. Part I accordingly lays out both the basic idea of legal science and specific conception that Langdell was working out in the context of the American common law: the *rationalist* tradition of legal science. What was distinctive of that tradition was the *absolutist* way it had understood and framed the *intellectual* character of legal science: an absolutism as to the law’s content, method, and viewpoint. Part II then reviews and examines the twofold critique of that science begun by Holmes and later carried out in detail by the American Legal Realists, showing that, contrary to the claims of a rationalist legal science, the law is indeterminate not just *in practice* but *in principle*. Hardly a decisive objection to a science of law as such, this principled indeterminacy instead sets the stage for a fresh reconsideration of the failure of rationalist legal science, one already pioneered by the early fellow-traveler of the Legal Realists, John Dewey. What Dewey sought was a *naturalized* understanding of the intellectual premises of the law and, through those efforts, a naturalized theory of legal science—a science of law without absolutes. By taking up the naturalism of Holmes, and absorbing the critical lessons of the later Realists, Dewey sought a legal science that would synthesize the law’s distinctive body of concepts and principles in a way that would be useful to the working lawyer yet capable of the growth that was largely lacking in the rationalist tradition of legal science. What he argued for, and what we need now more than ever, is a *pragmatic* science of law—the first article of a new fighting faith for our law.

I. ABSOLUTIZING THE LAW: THE RATIONALIST IDEA AND IDEAL OF LEGAL SCIENCE

The idea and ideal of legal science that Justice Holmes had ridiculed was already quite old by the time it swept across the American legal scene in the dawn of the last century—a century that would see more than one attempt at burying it for good. Indeed, the roots of that legal science, lightly sketched in the first pages of the first modern casebook, reached well beyond the traditional materials of English theory and experience on which American lawyers like Langdell ordinarily drew, and into the very earliest years and oldest sources of Western legal thought. And like those ancestral notions of legal science, the ideal of a legal science that briefly

flourished among American legal thinkers¹² was a vision of absolutes—of law as a system of principles that was practically and intellectually autonomous from any other discipline or field of study. It was this vision that the Realists all rejected in one way or another, and which therefore deserves in this section a somewhat more synoptic depiction than it has usually received.

Before turning to that depiction, however, it is worth noting that the tradition of legal science I outline here is necessarily a simplification, an abstraction away from the actual historical systems and thinkers discussed. What has gone by the name of legal science has differed greatly from one legal thinker, system, and age to the next. Thus, an idealization like the one I pursue here will of course have to rub away important qualifications and complications. Only complicating matters is the fact that the thinkers who articulated the elements of a *theory* of legal science, Langdell among them, were lawyers and jurists, not philosophers.¹³ Perhaps understandably, then, they often displayed little inclination to spell out their analytical assumptions and prepossessions. In what follows I will therefore be aiming less for the faithful biography of the idea of a science of law and more for its philosophical reconstruction, along lines that will be somewhat artificial as a result. This will nevertheless help to lay out more clearly what a legal science has generally been thought to entail—what the idea of a legal science comes to both generically and under the more specific, traditional interpretation that links a relatively modern lawyer like Langdell to the medieval jurists and canonists who helped found our broader Western legal tradition. As we will see, what that traditional science has been thought to involve are three closely-connected assumptions about the *intellectual* character and premise of the law—what it consists of, and how we come to know, justify and use it—all of which were drawn in a spirit of absolutes.

12. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 478 (3d ed., 2005) (noting that towards the end of the nineteenth century the “dominant culture of legal scholarship was infected by Langdell’s ideas of legal science, or converged on the same state”). There is of course not universal agreement that this highly formalistic and conceptualist mode of thinking ever achieved anything like the status of an orthodoxy in that period, although the evidence against it has been less than persuasive. See BRIAN TAMANAHA, *BEYOND THE REALIST-FORMALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010) (disputing the prevalence of Langdell’s type of “formalism” in the same period); Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?* 16 *LEGAL THEORY* 111 (2010) (questioning the cogency of Tamanaha’s historical argument on this point).

13. See WIECEK, *supra* note 5, at 80 (noting that, “like American lawyers of any period,” legal thinkers in late nineteenth-century America were “notoriously indifferent to philosophical inquiry”).

A. The Assumptions of Traditional Legal Science

When Langdell declared at a meeting of the Harvard Law School Association that “law is a science,” and that “all the available materials of that science are contained in printed books,”¹⁴ his audience of lawyers likely sensed nothing especially revolutionary in the air. Nor did they likely catch the echoes of the Scholastic Jurists who had expressed much the same conviction several hundred years before. After all, what Langdell appeared to be saying in calling law a “science” was simply that it was more than mere handicraft. Law, regarded as a science, was also an authentically intellectual discipline, aimed at elaborating and systematizing a body of general propositions or “truths” of law, and which therefore needed the prop of an intellectual culture that valued impartial inquiry and institutions willing to support it.¹⁵ This was hardly startling stuff, at least not to a generation of lawyers raised on systematic treatises like Parson’s *Contracts* or Greenleaf’s *Evidence*, or to the fairly uncommon lawyer in those early days who had picked up his doctrinal basics at a law school like Harvard’s.¹⁶ In this wider sense, Langdell’s science was less a philosophical surmise than a sociological banality—plain fact.

Yet, at a closer look, these bland appearances gave way to a more radical thought. For what Langdell had understood as the *intellectual* substance of this science—the truths that he believed he was uncovering as a legal scientist—and how he thought they related to the prosaic materials of legal life, had amounted to something genuinely new in America, and represented a considerable narrowing of the notion of legal science from its wider sense. It was in fact only the modern flowering of what I will call the tradition of *rationalist* legal science.¹⁷ The fact that Langdell’s was

14. Christopher Columbus Langdell, Address at Harvard University “Quarter-Millennial” Celebration (Nov. 5, 1886), 3 L.Q. Rev. 123, 123–24 (1887).

15. These correspond to the premises that Harold Berman has identified as the founding assumptions of the scientific strain in the Western legal tradition, what he calls its methodological, value, and sociological premises. See Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 930–941 (1977); see also Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999) (discussing the background of early “moral” and later “naturalistic” legal sciences in nineteenth-century American law schools).

16. See FRIEDMAN, *supra* note 12, at 467–77 (reviewing the history of Harvard Law School’s curricular transformation under Langdell and the treatises popular with lawyers in the nineteenth century); see also WIECEK, *supra* note 5, at 38–41 (discussing the early examples of legal science in 19th century American law).

17. By calling this science “rationalist” I do not mean to imply any particular affinity between the view I am attributing to Langdell and the twelfth-century jurists and the various philosophies that

only a modern variant of a much older and more general theory of legal science (and a rationalist one at that) can be seen in the way that he elaborated the three assumptions on which it rested—assumptions relating to the law’s content, to its methodology, and to its viewpoint. These assumptions, held and explored long before Langdell came to apply them to American common law, naturally gave rise to differences between these theoretical variants. Some of the differences, as we will see, are quite substantial. But these were differences lying mostly on the surface, ultimately owing more to the vastly different social and intellectual milieus in which they were conceived—late nineteenth-century America as opposed to twelfth-century Europe—than to the theory that their common assumptions defined. Understanding how those assumptions were worked out in these differing contexts, and especially in the modern and medieval contexts where they achieved their widest influence, will help us to see just what their common theory of legal science really came to, and why, in Realist hands, it was sure to unravel.

1. The Content Assumption: Content Absolutism

The two attributes most clearly—and invidiously—associated today with the leading historical examples of legal science are ones that their champions only rarely addressed directly, and never in so many words. These are what have since become known as their conceptualism and formalism, and both lie at the heart of the rationalism typical of their common intellectual tradition. Just as important as each of these attributes, though, was an assumption implicit in both, and especially when taken together—the assumption that law comprises a set of universal or absolute legal principles of concepts, comprehensive in scope and complete and consistent in its answers to legal questions. It was a picture of law sketched from a vision of conceptual absolutes. Explaining how that absolutism has historically appeared and what more it entails will first require some discussion of the twin attributes associated with the legal science typifying it—its conceptualism and formalism.

In the case of modern legal science, both attributes made an early, if oblique appearance in one of the few places that Langdell ever spoke of a

have since gone by the same name. I am instead following the usage that the philosopher Ronald Giere has suggested for characterizing the logical positivists’ philosophy of science, an “enlightenment rationalism.” See RONALD GIERE, *SCIENCE WITHOUT LAWS* 57–65 (1999). Nor am I the first to use the term in characterizing Langdell’s legal science. See Morris Cohen, *Law and Scientific Method*, 6 AM. L. SCH. REV. 231, 234 (1927) (observing that Langdell “labored under a thoroughly rationalistic conception” of law).

science of law at all:¹⁸ in the preface to his first casebook on Contracts. There, he introduced this effectively new genre of legal literature with typical matter-of-factness:

Law, considered as a science, consists of certain principles and doctrines. To have such a mastery of these as to be to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be trace in the main through a series of cases . . . Moreover the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.¹⁹

Beyond the obvious longing for simplicity and conceptual tidiness is also a theoretical impulse, found where the first and last sentences meet—the point at which his conceptualism emerges. This view holds that law not only consists of certain legal rules, principles, and concepts, together forming what lawyers broadly call “doctrine.” It also consists of these doctrinal “threads” in a certain orderly, systematically-interconnected way: they were thought to run throughout different patches of the common law, invisibly pulling together and binding the rules scattered across the case reporters into a single conceptual garment. These doctrinal threads were accordingly few in number—they collected together many rules, even some that might not have appeared to go together—and were wider in reach than ordinary, case-specific rules of law.²⁰ All the legal scientist need do was uncover these threads.

18. Bruce Kimball has noted in his enlightening intellectual biography of Langdell that, in all of the ten-thousand-odd pages he wrote, Langdell explicitly drew an analogy between law and natural science only three times—the most widely remembered being the one reproduced above. Kimball therefore doubts both the centrality, even the sincerity, of that analogy in Langdell’s understanding of law. Suffice it to say that I disagree with his assessment, and, bowing to received tradition, will pursue the analogy as a live one. See BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* 349–51 (2009).

19. LANGDELL, *supra* note 3.

20. The concepts relevant to this ordering are those, as Thomas Grey has pointed out, that lawyers would consider issue-determinative: concepts like ‘adverse possession’ or ‘collateral estoppel’

This thought alone, of course, was hardly enough to distinguish a unique legal theory, let alone a legal science. Nobody could seriously have denied, after all, that notions like ‘negligence’ or ‘causation’ spanned law in a way that lifted them in a sense out of and above a narrow line of cases. What was distinctive about Langdell’s thinking on this point—the *conceptualism* behind his thought—was his belief that the *entirety* of the common law was amenable to this kind of abstract simplifying, this systematic kind of legal synthesis. Formal legal materials only reflected this universally-valid, hierarchically-ordered system, with legal rule derivable from legal principle, and legal principle bridging one set of expansive legal concepts to another. Thus it came to resemble a formal axiomatic system, probably by design,²¹ but its underlying impulse was the orderly systematizing of the law on the books.

To take one notorious example, Langdell encouraged his students to see the “bottom-level” rule²² governing the acceptance of an offer delivered through the mail not as a question of practicability, convenience, or justice, but as the conclusion of a demonstrative argument: a deductively-valid inference from a set of legal concepts and a legal principle underlying all of contract law. Insofar, that is, as a contract requires valid bargained-for consideration (a legal principle accepted on authority), which in the case of a bilateral contract must be a promise (due to the definitions of ‘bilateral contract’ and ‘consideration’), and since a promise made by letter cannot be conveyed to the promisee until she has read it, a contract by letter consequently cannot be considered made—the offer cannot be said to be accepted—until it has at least been received (the bottom-level rule of acceptance by mail). Thus, the formal legal materials—the principle and several basic concepts—had completely determined the choice of rule: strictly speaking, the only choice was whether to accept what the law entailed. So the alternative rule—that acceptance becomes effective as soon as the promisor drops the letter in the mail (and hence its later name, “the mailbox rule”)—could be confidently rejected out of hand, despite the weight of precedential

or ‘strict liability.’ Categorical distinctions dividing areas of law—between tort and criminal law, say, or contracts and property—need not be of this kind, though they may be. In those cases where they are not, one could say they are differences of organizing *captions* rather than of operative *concepts*. Grey, *supra* note 10, at 1, 9 n. 28.

21. M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

22. I adopt this term and way of framing this example from Thomas Grey’s insightful examination of the finer points of Langdell’s legal science. Grey, *supra* note 10, at 12.

authority backing it at the time (to say nothing about better sense),²³ simply for failing to square with the relevant legal principles and concepts. The formal legal materials had thus not only yielded a new rule for this novel case but had trumped another. Even the apparently hard case had an easy answer.

That lesson, of course, was general.²⁴ What was true of the mailbox rule could and should be true of all the common law, so Langdell believed, with bottom-rung rules systematically brought into line with higher-level legal principles that themselves drew on similarly expansive legal concepts. However dissimilar the dizzying diversity of cases and rules may have seemed, and however they clashed on the page, they all could nevertheless be seen pointing beyond themselves, to a conceptual system that would clarify and resolve them. The principle and concepts constitutive of that system could thus yield fresh rules in new cases, because they were in a sense already there, latent in the scheme they defined and only awaiting discovery and arrangement by the legal scientist, on the one hand, and use and elaboration by the scientifically trained lawyer on the other. Every case would be, quite literally in principle, an easy one. And a messy law of unsorted rules would thus harmonize into a tidy rule by absolutes.

Joined to and rigidifying Langdell's conceptualism, though not entailed by it,²⁵ was his further belief that every legal question that did or could arise had a single, exact, and absolutely certain answer. His faith on this point, typifying his formalism,²⁶ flowed from the thought that these higher-level conceptual materials could supply the premises of a demonstrative argument—argument that was deductively valid and perfectly exact in its subsumption of specific cases within its premises' general terms.²⁷ The "true lawyer," as Langdell put it, could thus bring the law's few fundamental doctrines to bear on legal subjects with a "constant

23. See Grey, *supra* note 10, at 20 (observing that the weight of English and American authority at the time appeared to side with the mailbox rule).

24. As Duncan Kennedy has pointed out, the doctrine of consideration could answer questions across contract law, including whether courts should enforce promises of gifts (no, absent grounds for promissory estoppel) or promises of compensation for a benefit previously conferred (no) or promises guaranteeing somebody else's debts (no). Kennedy, *supra* note 9, at 100.

25. Grey, *supra* note 10, at 8–9 (noting that formal conceptualism differs from an informal one on just this entailment).

26. Brian Leiter has helpfully distinguished between two varieties of formalism: one vulgar, where reasoning from legal materials takes the literal form of the syllogism, and another more sophisticated version under which legal reasoning may stray from the syllogism while still remaining rationally determinate. Leiter, *supra* note 12, at 111.

27. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing both of these aspects of formalism).

facility and certainty,” as he thought he had, for example, in the case of the mailbox rule. And although this would later be lampooned, not altogether unfairly, as a kind of ‘mechanical’ thinking (especially in the context of judicial adjudication), a little charity might instead lead one to say only that his formalism required legal reasoning to be in all cases rationally determinate.²⁸

Every legal question, that is, was thought to have a unique answer that followed demonstrably from what under one’s legal system counted as the relevant legal material, allowing of course for the conceptually wider sense in which Langdell thought of those materials. This meant that, in principle at least, every possible legal question was covered by the system both substantively and procedurally (the law was *complete* and *comprehensive*), and that there was never the risk—again, in principle—of reaching conflicting answers on any question (it was thus *consistent*).²⁹ Coupled to his conceptualism, Langdell’s formalism had thus hardened his understanding of law into a system that was as substantively as it was logically absolute.

It is important to see, though, that simply saying Langdell took these higher-level conceptual materials to be conceptually and formally absolute did not mean that he must have believed they could not or did not evolve.³⁰ After all, in the same breath that he called on lawyers to peel away the many obscuring layers of case law in order reveal the “few fundamental doctrines” just underneath, he also pointed out that law is a “growth,” having evolved into its present state only by “slow degrees.”³¹ And in this way Langdell differed markedly from the early Scholastic Jurists who had expounded their own, similarly rationalistic legal science centuries before, relying on the then-recently rediscovered legal materials compiled centuries earlier under the Roman Emperor Justinian.³² For them, the Roman law revealed through Justinian’s *Codex* was more than just another legal system against which to compare and make a fresh study of their own local feudal customs. Rather, it was “an ideal law, a body of legal ideas, taken as a unified system,” much like the common law would later be imagined by Langdell.³³ Yet, unlike Langdell, they had no sense of the evolutionary potential in the Roman materials from which they

28. See Leiter, *supra* note 12, at 111.

29. Grey, *supra* note 10, at 7–8.

30. See Grey, *supra* note 10, at 28 (discussing Langdell and his followers’ belief in the evolution of the common law).

31. LANGDELL, *supra* note 3.

32. Berman, *supra* note 15, at 898.

33. *Id.* at 907.

proceeded in their legal analytics. They instead treated the legal rules they found there (*regulae*) as what they called legal “maxims.” That term signified not what it does in English now—something closer to a rule of thumb or practical saying—but something theoretically far richer, and more absolute—what Aristotle had called a universal proposition, i.e., a proposition that was considered self-evidently true and which could form the major premise of a syllogism.³⁴ These were rules in the sense of being “independent principles of universal validity” expressing “universal truth and universal justice,” and were therefore not thought to be subject to revision, let alone growth.³⁵ Just like the legal principles and concepts Langdell had imagined settling between the lines of reported judicial opinions, the newly-recovered arsenal of Roman *regulae* were believed by the Scholastic Jurists to make possible a complete systematization of their canon and secular law. These Justinian maxims would thus serve as the conceptual lights by which they would cut their orderly analytical paths through a bewildering underbrush of legal materials they were only beginning to confront.

And the reason they believed they could do this was the same as Langdell’s: they had assumed that the legal principles and concepts unearthed in the Roman texts could play the role of universally valid principles of legal reasoning *for them*—universal, that is, across the vast territory of legal materials they had set out to explore and classify and put in fresh order. So whatever differences there were between the Scholastic’s and Langdell’s legal science—and there were many—they did not fall in the roles they had each envisioned for their respective conceptual materials. Neither side doubted the universality of the principles and concepts they were synthesizing out of the welter of received legal norms. We might say that in both systems these conceptual materials were thus *relatively* absolute—central and indubitable, but only in relation to their respective legal systems.³⁶

Where, then, *did* the difference lie between these two theories of legal science such that Langdell could believe in the growth of his conceptual system while the Scholastics did not? The answer is likely found in the extraneous belief that the Scholastics had with regard to Roman law

34. The Latin term was also Aristotelian in origin, with “maximum proposition” translating the original Greek for “universal” (and hence the short-hand “maxim”). *Id.* at 917.

35. *Id.* at 918.

36. The belief in a kind of relative absolute or necessity may have its affinities with Hegel, yet it lives on today in decidedly un-Hegelian jurisprudential circles. See Brian Bix, *Raz on Necessity*, 22 LAW & PHIL. 537 (2003) (discussing Joseph Raz’s appeals to necessity in his positivist analysis of the concept of law).

generally: they took that law to be more than just the law of a once living but then vanished legal system, but instead a “written embodiment of reason, *ratio scripta*”—not just absolute *for them* but for all rational thinkers.³⁷ They therefore took these received maxims as at once timelessly and inerrantly true, much as they took the immutable truth of Scripture to foreclose the possibility of any later, incompatible revelation.³⁸ Langdell, by contrast, who had read his Darwin³⁹ and could look across the Atlantic to the unfolding of a rival common law, could not have seriously maintained that the legal principles and concepts he postulated for his legal science were the *only* ones possible, any more than a modern physicist could seriously deny the possibility of geometrical systems other than Euclidean, in light of our deepened understanding of phenomena on the scale of collapsing stars as well as falling apples. Law could not only have a structure but a history.⁴⁰ From the standpoint of a lawyer working within the system of common law as it had evolved up to his time, Langdell was only expressing the obvious in saying that the legal principles and concepts he had ‘discovered’ there were universally—and in this sense absolutely—valid *for them*, much as latter-day physicists could assume the validity of the axioms and postulates of Riemannian geometry in working out the theory of general relativity. They were both thought to be on the order of universal generalizations, empirically observed and rigorously confirmed in their respective domains of fact: legal for Langdell, material for physicists.⁴¹ Each may have emerged to meet their specific intellectual—and in the case of law, broadly social—needs, but each also had its own rational structure and a content, an inner logic, absolute in its own domain because universally true of it.

Langdell had thus added to this tradition of legal science an importantly modern qualification: the recognition—almost too obvious to mention today—that there might not only be another, equally authoritative legal system, but one that also had a very different natural history, and, as a result, its own peculiar structure and content—its own inner logic. As to

37. BERMAN, *supra* note 9, at 204.

38. *Id.* at 918 (comparing the Scholastic Jurists’ treatment of Roman texts with scripture). This is not to say, however, that the jurists and canonists of the eleventh and twelfth centuries were not alive to the evolutionary potential of legal materials. See BERMAN, *supra* note 9, at 205 (noting that canon law showed “a quality of organic development” and “conscious growth over generations and centuries”).

39. See KIMBALL, *supra* note 18, at 26–27.

40. So Justice Holmes would later, anonymously, accuse Langdell of crypto-Hegelian sympathies. See *Book Notices*, *supra* note 2.

41. See Grey, *supra* note 10, at 18.

the content of his *own* legal system, however, Langdell joined the Scholastic Jurists in postulating a single system of legal principles and concepts spanning and determining the content of all of its authoritative materials, thus making possible demonstrative argument about and from them. And this formed the core of the first assumption he had thus shared with the jurists and canonists several hundred years before him: an absolutism as to the law's content.

2. *The Methodological Assumption: Categorical Rationality*

The second major assumption made by the tradition of rationalist legal science reaching from the twelfth-century study of Justinian's code into Langdell's analysis of common law was methodological. Here, the central concern was not *what* a theory of legal science was about—viz., the conceptual absolutes just discussed—but *how* those conceptual materials were thought to be arrived at. And on this point, the modern and medieval legal sciences differed remarkably little, at least in general outline. The method they both envisioned was a distinctly *rational* one: a logically disciplined technique for the analysis and synthesis of legal texts that has sometimes, misleadingly, been referred to as induction, but which is better thought of as a process of *abduction*.⁴² It was a method conceived, moreover, in a similar spirit of absolutes. Drawn in the broad terms of categorical principles of rationality, the method would supposedly allow any legal scientist to extract from existing legal materials a body of correct or 'true'⁴³ legal principles and concepts—the absolutes discussed in the last section—from which they could then go on to solve new legal difficulties arising under novel circumstances, all along familiarly formalist and conceptualist lines. Their conceptual absolutism would thus be blessed by an infallible method.

For the Scholastic Jurists who had pioneered this method by sorting through their ragbag of legal authorities—including everything from local custom to Roman law to Scripture—the constant burden was to find a way

42. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 27 (1949) (noting that legal reasoning "is not truly inductive," since "[w]ith case law the concepts can be created out of particular instances"). The term 'abduction' is due to C.S. Peirce, and refers to the process by which explanatory hypotheses are drawn from empirical observation. It has been illuminatingly examined in the context of legal reasoning by Scott Brewer. See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 945–48 (1996).

43. I enclose the word in inverted commas to ward off the too-easy misinterpretation of this account of legal concepts and principles as presupposing a kind of Platonism. See Berman, *supra* note 15, at 919–21 (discussing the nominalist backdrop to the Scholastic Jurists' understanding of legal science).

of reconciling rules and principles that were clearly contradictory. And so, somewhat naturally, the technique they proposed took the form of a dialectic of opposites, a drama of abstractions shaped much like the disputes that took place before the courts of justice at the time, with cases presented for the respective sides that concluded either in their reconciliation or with the victory of one or the other.⁴⁴ Thus a typical inquiry would begin with a question (*quaestio*) relating to a contradiction on some point of law derivable from authoritative sources, from there leading to the assertion of a main proposition (*propositio*) along with its opposite (*oppositio*), both of which were similarly elicited from authorities. A contest of claims would then follow, with reasons and arguments drawn up on both sides from still other authoritative texts, and, after consideration of each, resolution (*solutio* or *conclusio*) was arrived at, accepting one or the other, or their qualified reconciliation.⁴⁵

In an example that Berman provides from the canonist Gratian,⁴⁶ both the New and Old Testaments were taken to forbid killing, yet each revealed cases where the use of deadly force had been approved. The question (*quaestio*) naturally became: when, if ever, was the use of force legally appropriate? Among its many precepts, Roman law had laid down the rule (*propositio*) that force could be used to repel force (*vim vi repellere licet*).⁴⁷ Meanwhile, one could equally point to the example and sayings of Jesus for the clearly contrary proposition that one should instead turn the other cheek (*oppositio*). The task for the scholar then became one of mediating these obviously contradictory positions, backed as they both were by equally weighty authority. They did this by a process of synthesis which we would now call abductive:⁴⁸ the canonist would draw out of the litany of examples and cases from various authorities a rule best explaining and reconciling them, a rule that could then be used to answer the question presented in the immediate, target case.⁴⁹ In the present example, the canonists like Gratian ultimately drew from the contrary maxims found in Roman law and the New Testament a reconciliation taking the form of a series of principles, or other ‘maxims,’ determined when force would be justified or excused (to defend oneself or

44. BERMAN, *supra* note 9, at 147–48.

45. *Id.* at 148.

46. This example was repeated elsewhere by other twelfth- and thirteenth-century canonists. *Id.*

47. *Id.*

48. *See supra* note 42.

49. Berman has somewhat perplexingly likened this to the rule of inference, familiar from predicate logic, of existential generalization, but as explained above the reasoning involved is in fact abductive. *See* BERMAN, *supra* note 9, at 140; *see also supra* note 42.

one's property, for example, or to see that the law is carried out). These were then repurposed in later cases to answer questions arising out of other seemingly unrelated civil and criminal contexts, even being pressed into farther-ranging disputes in political theory and theology (such as in the debates over 'just war').⁵⁰

Naturally, this is a simplified presentation of an already simple example. Of importance here, however, is simply the fact that this method was thought to embody a uniquely and categorically *rational* way of arriving at a set of legal principles and concepts that were themselves believed to underlie and determine the application of lower-level rules across widely varying contexts. In this way, a scattering of rules across dissimilar contexts and from different authorities could give rise to and justify a set of universally valid principles and concepts of law. Law would have both a unique subject-matter and a unifying method. Indeed, as Berman points out, it was precisely these twin beliefs that distinguished the way that the Scholastic Jurists and canonists had used the Roman legal materials (among others) from the use the Romans had themselves made of them. Although the Romans had the same legal concepts and 'maxims' at their disposal, they did not treat either "as ideas which pervaded the rules and determined their applicability,"⁵¹ and so they had no reason to think they required any sophisticated technique to reconcile the varying application of rules, or even different rules, in what looked to be substantially similar contexts.⁵² It was thus the canonists' belief that behind these various and conflicting rules stood a unifying conceptual system—their faith in what I have called content absolutism—that had led them, unlike the Romans (who did not share it), to contrive a correspondingly rational method to elaborate and justify that system. Their theory of legal absolutes was bounded by an account of legal rationality.

The modern method of legal science that flowered centuries later in American law schools would follow much the same pattern. For Langdell, who infamously led his curricular revolution at Harvard in the hopes of realizing this methodological ideal—bequeathing to us both the casebook and the cold call⁵³—the challenge presented by the common law was only

50. Their use of legal *solutiones* in these latter contexts was a natural consequence of their taking the Roman *regulae* as forming a body of law alongside the rules and doctrines that today's hard positivists would consider strictly ethical or theological, i.e., non-legal, sources. See BERMAN, *supra* note 9, at 148.

51. *Id.* at 150.

52. *Id.* at 916 (noting that the "classical and postclassical Roman jurists thought of a legal rule as a generalization of the common elements of decisions in a restricted, specified class of cases").

53. KIMBALL, *supra* note 18, at 6; WIECEK, *supra* note 5, at 93.

slightly less formidable than that faced by the twelfth-century canonists. If law consists of certain fundamental principles and concepts (the same absolutes discerned by the canonists in their own law), how does the legal scientist go about rooting those out from the plethora of cases standing for so many, often-conflicting rules and principles? Just as the canonists several centuries before him, Langdell sought his answer by way of an essentially abductive method.⁵⁴ Much like those early jurists, that is, Langdell believed that by comparing the holdings of various common law appellate decisions (typically American, though occasionally British), one could arrive at a set of relatively few principles and concepts that, as we saw before, were fundamental to the common law (such notions as ‘consideration’ or ‘bilateral contract’). These could then be used, as in the case of the mailbox-rule, to draw out conceptually the ‘correct’ bottom-level rule in whatever situation at issue.⁵⁵ In a perhaps surprising example of this method, Louis Brandeis, then a lawyer but later a Justice, would famously argue for the recognition of a right to privacy that was then unknown to the common law, but which he contended could be detected behind a range of seemingly far-flung cases from across the law of torts and property and contracts.⁵⁶ Although he rested as much of his argument on policy grounds as he did on case law, his argumentative technique was otherwise impeccably Langdellian.⁵⁷ He purported to have teased out of “existing law” a novel legal concept, capable of explaining those apparently unrelated decisions but also siring new doctrinal lines, as it would more than half a century later.⁵⁸

Conspicuously missing from examples like these, though, was even the intimation of the logically disciplined procedure that had been so prominently advertised in the casebook boilerplate and preached from law school podiums—a method worthy of the name. Indeed, that Brandeis could so easily mimic Langdell’s moves in pursuit of purposes that were rather doubtfully scientific in Langdell’s sense points to just how vain the talk of method could become on disbelieving lips. And, as we will see, this

54. Thomas Grey, though repeatedly likening this method to induction, also seems to imply that it would in fact be more accurately considered abductive. See Grey, *supra* note 10, at 18–19, 31. See also Brewer, *supra* note 42.

55. See Grey, *supra* note 10, at 19.

56. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See Grey, *supra* note 10, at 31.

57. His inquiry was accordingly whether “the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.” See Warren & Brandeis, *supra* note 56, at 197.

58. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

was a weakness that the Legal Realists would later exploit disastrously. For now, though, the important point is simply that Langdell, like the Scholastic Jurists before him, nevertheless believed that an account of this method *could* be given—that there was a distinctive line of rationality running through the hand-waving talk that was capable of being traced out precisely and then rigorously translated elsewhere. And once it had been, it could decide and justify the selection of the principles and concepts that Langdell and his followers saw as the lifeblood of the common law.

Of course, this was an assumption taken not only on faith but in a similar spirit of absolutes. Nowhere was this absolutism more glaring than in the way Langdell regarded and treated the law that fell outside the common law he took to be his method's sole subject: namely, the growing body of statutory law and constitutional decisions that then was threatening to overtake, and since has overtaken,⁵⁹ common law decision-making as the preeminent source of American law. Finding them to be either too vague and unprincipled (like the constitutional doctrine of police powers) or too foreign to the existing stock of common law concepts to lend themselves to reasoned integration under his method,⁶⁰ Langdell simply disregarded them as unfit for rational study. In the case of statutory law, he and his followers typically advocated, in formalist spirit, for strict literalism in interpretive method, and largely left it at that.⁶¹ And in the case of constitutional law, Langdell was of the opinion that it should not be taught in American law schools at all: his curriculum at Harvard for some years did not include it even as an elective, and he had nearly withdrawn the institutional support he pledged to the fledgling law faculty at the University of Chicago over their decision to offer it as a part of theirs.⁶²

All of this was absolutism at its purest, its most doctrinaire. And it all had flowed naturally from Langdell's belief that the only areas of law allowing for rational study and synthesis—the law whose conceptual underpinnings were susceptible of categorical justification—were those belonging to judge-made private law. It was thus the modern triumph of the same methodological assumption shared by the jurists who given life to the idea of a legal science some eight hundred years before—an assumption typifying the rationalism of both.

59. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (noting the preeminence of legislation over judicial lawmaking in contemporary American law).

60. See Grey, *supra* note 10, at 34–35.

61. *Id.*

62. *Id.* at 34.

3. *The Viewpoint Assumption: Strict Internalism*

The final assumption common to the tradition of legal science inherited from the Scholastic Jurists and swept into modernity by Langdell dealt with the *type* of theory of law they took their science to be. At the core of this assumption was a point of view about law itself—the way they looked at and approached the materials constitutive of their law in trying to analyze and synthesize it. As such, it has already been hinted at and evinced in the discussion of the two other assumptions they made about law; indeed, in a sense it had pervaded because it shaped the expression of both, in the same uncompromising spirit of absolutes.

In each of the historical examples of legal science surveyed up to now, medieval and modern, we saw that the scholar who took up its work had presumed to derive from a collection of legal texts a body of highly general, abstract law—a system of conceptual absolutes drawn up with the absolute confidence of a rational method. The collection of texts he⁶³ chose was of course far from accidental. They were all taken as authorities, and worked out along lines that were considered authoritatively acceptable. In the case of the Scholastic Jurists this meant that the legal scientist would not only gloss Scripture but gloss it according to accepted interpretive strictures: dogma was as much a part of their intellectual equipment as the syllogism. For Langdell, case law had to be read in light of and somehow made consistent with prior cases that were “on point” (under the principle of *stare decisis*), distinguishing between what was essential to their conclusion as to law—the proposition they stood for, or their holding—and what in them was considered inessential, mere *obiter dictum*.⁶⁴ These were the argumentative techniques and interpretive canons of lawyers who worked *within* the respective systems, in other words, those of participants who had *accepted* these materials and methods and thus felt bound to respect them in their thinking and theorizing.⁶⁵ Together they therefore reflect a certain attitude or point

63. And at the time, the legal scientist was always—regrettably—a “he.”

64. See Harold Berman, *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 447 (1996).

65. Some writers have taken the distinction between the internal and external points of view to align with the distinction between practical and theoretical reasoning. See Richard L. Schwartz, *Internal and External Method in the Study of Law*, 11 LAW & PHIL. 179, 179–180 (1992) (contrasting the internal point of view, as “a species of practical reason,” with the external point of view’s allegedly “cognitive and theoretical” stance). Here, however, I assume the internal point of view capacious enough to include both an academic and practical dimension. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 827 (1989) (noting that Holmes allowed both a practical and more theoretical stance within the internal point of view).

of view that we all can and do take toward at least some norms, of which the legal is only one kind—a point of view which has since come to be known as *internal*.⁶⁶ An *external* point of view, by contrast, takes none of these techniques or canons or even materials as authoritatively given. They are as much open to rejection or acceptance, revision or reinterpretation, as any other intellectual commitment, equally up for grabs. The external view is that taken by the detached and disinterested outsider; the internal that of the invested, convention-bound participant. And as is clear from the description, the point of view presumed by both the medieval and modern legal sciences was resolutely internal.

As much as this internal point of view had colored and shaped the way the Scholastic Jurists and Langdell had respectively worked out the other two assumptions of their legal science, those assumptions also fed back into and reshaped the point of view they took toward their working materials. Once they had come to see in their authoritative legal materials the dim reflection of a far larger and more absolute system of legal concepts and principles, one whose truth they could assure categorically and apply with unquestioning confidence and certainty, they no longer had any reason to believe they needed to look *outside* that system to understand law at all. All one would ever need to know in order to understand and use the law was right there in the legal materials themselves—in the *regulae* of Justinian or the decisions of the Supreme Judicial Court. An absolutism as to the law's content and methodology had thus given their tradition of legal science over to an attitude that was more than just resolute, but itself absolutist. Theirs was a *strictly* internal point of view, one that could on principle refuse the advances of disciplinary outsiders as just that—outside law and so simply irrelevant to it.

Here again there were differences between the medieval and modern variants of legal science, none starker than in the sense that they could and did regard law as autonomous.⁶⁷ In one sense, as we just saw, both could equally lay claim to a kind of *intellectual* autonomy, in the sense of the independence of legal thinking from other disciplinary modes of inquiry

66. See H.L.A. HART, *THE CONCEPT OF LAW* 56–57 (2d ed. 1994); see generally Michael Steven Green, *Leiter on the Legal Realists*, 30 *LAW & PHIL.* 381 (2011) (discussing the prediction theory along with rival accounts of law offered by the American Legal Realists).

67. The two senses of law's autonomy I discuss here are the same that Judge Posner has suggested, and rejected, in several places. See, e.g., RICHARD POSNER, *OVERCOMING LAW* 17 (1995); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761 (1987); Richard Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?* *U. TORONTO L.J.* 333 (1988) [hereinafter *Conventionalism*].

and thought. Yet in another sense of autonomy—the independence of law from broader societal pressures and practical needs—the two schools parted ways, owing to the same difference they had in background intellectual assumptions that were seen in the way they worked out their absolutism as to the law’s content. On the one hand, the Scholastic Jurists could legitimately, or understandably anyway, believe that their legal science was capable of being worked out independent of larger and more diffuse societal pressures, whether political or economic or sociological, not only because they took their maxims as tantamount to natural law, but because they had little reason, looking around at what they knew of history, to think much if anything had materially changed in the millennium separating them from the Romans (whose law they were busy systematizing). Law had a reason and a literature all its own, and could thus comfortably seclude itself from other societal forces when settling its own account. It could realize a *full* autonomy—autonomy in both senses. Not so for Langdell and his legal science, steeped as he and it both were in the historical and historicizing consciousness of the common law. For him, as we saw in his assumption as to the law’s content, law had a reason but also a history, and so it naturally lent itself to an understanding that was at least partly sensitive and responsive to shifting circumstance, even if this was still only visible through the refracting medium of case law. Law in his eyes could not quite achieve an absolute autonomy in the end, but nearly so. Yet this “nearly” was enough to justify its claim to an absolute *intellectual* autonomy, rooted as that was in the strictly internal attitude that Langdell, like his scholastic predecessors, had taken toward the law. This was the only sense of autonomy, and the last absolute, needed to complete the rationalism of their common tradition of legal science.

B. Rationalism and the Traditional Science of Law

That the tradition of legal science sketched above was in fact only that—a single tradition, flowing from a far broader idea and ideal—has been remarked surprisingly little by intellectual historians of law, let alone by legal philosophers. Instead the very idea of legal science has tended to be assimilated to this traditional interpretation, often wholesale, and only then to be written off as the relatively minor, philosophically unsophisticated episode in the intellectual history of law that it largely was⁶⁸—as naïve in its confusions as it was unoriginal in its insights. Yet

68. As noted earlier, Leiter has thus called this view, by no means eccentrically, a “Vulgar Formalism.” See *supra* note 26.

this is a mistake, and a philosophically important one at that. Not only is the idea of a legal science clearly distinguishable from this traditional understanding of its premises, but wresting the idea out of its traditional context can help us see in it some critical lessons for the study of all manner of legal phenomena, legal thinking above all. We can reject what was spurious, implausible, and frankly silly in traditional legal science without turning our backs on the insights of legal science altogether. But to do this we will need to have clearly before us what legal science entails more generally—the sense of legal science at which Langdell’s contemporaries had not batted an eye—and how the tradition begun in the twelfth century and brought to its modern maturity in America ended up distorting it.

In one sense, as noted at the outset, Langdell was hardly sounding a cry to revolution in declaring law a science, and the library its laboratory. After all, in a wider sense of the word, the one likely familiar to the lawyers he was addressing that day, law truly was scientific. For it was (1) a relatively distinct body of abstract knowledge that (2) was studied in an intellectual culture valuing objective inquiry and research and (3) had the backing of a loose network of institutions (academic faculties principally) willing and able to keep its researchers working and its doors open to the students who would later join its ranks as fellow researchers. These are what Berman has identified as the three fundamental premises of a legal science—what we could call the intellectual, the cultural, and the institutional premises. And it was out of those premises that a coherent theory of legal science emerged among the twelfth century jurists and canonists,⁶⁹ and reached maturity in America with Langdell. But legal science in this wider, pre-theoretical sense sweeps more broadly than a theory about just what law or legal thinking involves. It instead denotes a far richer and more complex social phenomenon, of which the growth of the modern university and its diversifying techniques and norms in scholarship and research, the changing relationship between faculties and the profession and between law and other disciplines, are all integral elements. It is this more generic idea of legal science, consisting of these three premises, that is the more fundamental, and which I will therefore refer to simply as legal science. And in this wider, more fundamental sense, the idea of legal science is clearly applicable to both the modern and medieval exemplars surveyed in this section.

69. For Berman, they also forged the first working “prototype” of science in its modern sense. See BERMAN, *supra* note 9, at 151.

Just as clearly, though, the point runs deeper than mere terminological fastidiousness. For once we cleanly separate out this more fundamental idea of legal science from the historical tradition with which it is often conflated, we can begin to see why that tradition was in fact only that: a particular, traditional way of interpreting that more fundamental idea. And, moreover, what had made that tradition of legal science truly distinctive was the particular picture it supposed of the *intellectual* premise of the law, a picture filled in with the bold strokes of absolutism as to the law's content, methodology, and viewpoint. That tradition, as we saw, assumes the law to consist in a single, universally-valid and in this sense an absolute system of legal principles and concepts (content absolutism) that would be known and categorically justified by equally universally-valid, absolute principles of legal reasoning (methodological absolutism), and autonomously worked out from a strictly internal point of view (viewpoint absolutism). Together these three absolutist assumptions frame what I have called the *rationalism* of that tradition. And that rationalism made up the core of that tradition's sense of what the law *is* and, just as importantly, what it *should* be. Precisely because they saw the law as implicitly embodying this systematic conceptual whole, these lawyers also believed, as scholars and not just practitioners of the law, they should try to give as full an expression of it as they could. It was as much an *idea* as an *ideal* of a science of law, no less an empirical description as the articulation of a working program—the program of a *rationalist* legal science.

Just to see things this way, though, opens up the prospect of a broader reexamination of that traditional account of legal science, letting in a fresh view of exactly where and how it went wrong. Assuming as most rightly do today that Langdell and the Scholastic Jurists were wrong about the viability of their legal science, it hardly follows that the nub of that error was their belief that law could be a science in *any* sense. Indeed, their mistake could well have fallen in the way they drew up the *intellectual* premise of that legal science: in the *absolutist* way they had framed the three assumptions outlining the intellectual character of the law. It is entirely possible, that is, that their blunder lay not in their belief in a science of law *as such* but in the rationalism of *theirs*. As I argue in the next section, we can indeed take Legal Realism as having shown exactly that: it was their absolutism as to the intellectual character of law—their rationalism—that they were led astray, and their science led aground. Once we abandon that absolutist way of understanding the intellectual premise of legal science, however, and come to grips with the reasons why

it was bound to fail, we will also see why the idea and ideal of legal science in *another* sense need not have been abandoned.

II. NATURALIZING LAW: THE PROSPECTS OF A PRAGMATIC LEGAL SCIENCE

Nearly a decade after Langdell first outlined the assumptions of his science of law in the preface to his first casebook, a short, unsigned review of its second edition appeared in the *American Law Review*.⁷⁰ Its author was a then-relatively obscure Boston attorney and a future colleague of Langdell's—Oliver Wendell Holmes. And like the remarks of Langdell's that it was nominally out to discuss, it swelled with its own revolutionary ambition. “The life of the law has not been logic,” read its one unforgettable line, “it has been experience.”⁷¹ And as is clear from that line alone, its ambition was in many ways sharply opposed to Langdell's, even if, in others, it was also deeply sympathetic.⁷² Those points of sympathy and disagreement combine to tell the now familiar story of the jurisprudential movement that took them as its fighting faith—the movement now known as American Legal Realism.⁷³ But they also tell a less familiar story: a story not only about how and why the legal science that the Legal Realists rose up against ultimately declined and fell, but also why it need not have. It is the arc of this lesser known tale that I trace in this section, beginning with the critical lessons that the Realists taught about the science of law and leading from there to a brief account of how one of their fellow-travelers—John Dewey—sought to turn those lessons into the tools for its reconstruction.

A. *The Critical Thesis: Some Realism about Legal Reasoning*

Even if, as the saying goes, we are all realists now, we can also now say that there never was a single view that went by the name.⁷⁴ More a mood and a movement than a self-conscious philosophy, Legal Realism

70. See *Book Notices*, *supra* note 2.

71. *Id.*

72. See Grey, *supra* note 65, at 822 (discussing Holmes' attraction to the formalism and conceptualism distinctive of Langdell's legal science).

73. Although throughout I will refer to this movement as “Legal Realism” and the various figures within it as the “Realists,” there was in fact another Scandinavian school that went by the same name in roughly the same years, though of dissimilar views. They are not the subject of the discussion here.

74. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *NATURALIZING JURISPRUDENCE* 15, 15–17 (2007).

has long stood on less than sure, indeed often contested, theoretical grounds. Yet in the last twenty-five years or so a fairly clear consensus has nevertheless emerged around several key claims, all of which do seem to distinguish and typify the Realist point of view tolerably well. Those claims can all be found more or less distinctly in Holmes' early, anonymous critique of Langdell's first casebook, the fount of his legal science.⁷⁵

As noted, there were points of both strong affinity and even stronger difference between Holmes' thinking and the legal science that Langdell advertised at the beginning of his tenure as a legal scholar proper. His review thus divided down the middle: part criticism, part proposal. "Mr. Langdell's ideal in the law," the critique began, "the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system."⁷⁶ Yet this preoccupation "with the formal connection of things" not only led away from the forces that "have actually shaped the substance of the law," "the felt necessity" that is "the seed of every new growth within its sphere." Worse, it tempted the false impression that the law was in substance "a form of continuity" resembling "a logical sequence," as if the form and the sequence were anything but "the evening dress which the new-comer puts on to make itself presentable."⁷⁷ Drawing this line of criticism to a positive point, the review went on:

The important phenomenon is the man underneath it, not the coat . . . No one will ever have a truly philosophical mastery over law who does not habitually consider the forces which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.⁷⁸

In the end, then, the great "legal theologian"⁷⁹ had not only misunderstood how law had come to be, but even what it was—a creature not of logic but of experience.

75. See Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

76. *Book Notices*, *supra* note 2.

77. *Book Notices*, *supra* note 2.

78. *Id.*

79. This was no idle slur either. As a typical contemporary of Langdell's wrote of his religious thinking: "I may describe my forward step by saying that hitherto I had been using the Bible in light of

1. *Practical Indeterminacy*

We will return to the proposal shortly. But the criticism on display in these few lines not only cut deeply into the credibility of Langdell's legal science; it had also set terms of a twofold critique that later came to define the loose movement of lawyers and legal scholars now known as the American Legal Realists. That critique takes its point of departure from one of the claims that we saw was basic to Langdell's thinking about the law: that it was a complete, comprehensive, and consistent system of legal principles and concepts that was, as such, rationally determinate.⁸⁰ For Langdell, as we saw in the mailbox example, this meant that there was a unique, demonstrably correct answer to every legal question based solely on the relevant legal materials—one which spanned the higher-level doctrinal concepts and principles perhaps unseen in the individual case, but discernible from the entire line of relevant cases. And on this point one might say that Holmes simply called Langdell's empirical bluff. As a point of fact as opposed to the exigency of a theory, why would anybody ever believe the law to be nearly this complete and consistent, this determinate? How could any lawyer, for that matter, believe that the *form* of a well-crafted judicial opinion, dressed as it is in a gown of demonstrative inferences, would actually reflect the *substance* of the thinking behind it? And if the legal reasoning on the page could and did diverge this systematically from the legal thinking that actually went into reaching some legal conclusion, how could Langdell then say so confidently that the result in those cases had been *determined* by the legal reasons set forth there? Worse, what if the operative considerations were not even *legal* reasons at all, but the very reasons of justice and equity and convenience Langdell had brushed aside as too vague and unprincipled, too unscientific?

Questions like these help to frame the now standard problem of legal indeterminacy, in one of its forms anyway,⁸¹ and they formed the core of

its statements, but that now I found myself using it in light of its principles." WILLIAM N. CLARKE, SIXTY YEARS WITH THE BIBLE: A RECORD OF EXPERIENCE 120–21 (1909).

80. The qualification matters here: despite the carelessness of some of Holmes' language in his review, very few Realists had or need have denied that the law was rationally determinate in at least *some* cases, rather than in the relatively few that end up on appeal at prominent state and federal courts. Yet their differences with Langdell were no less real for being so modest: after all, to disagree with Langdell all one had to believe was that the law was indeterminate *somewhere*. That Langdell could not concede even this little to Realism was a consequence of his absolutism—his rationalism.

81. Another sense of indeterminacy often mentioned in connection with Legal Realism results from the open-texture, or potential vagueness, inherent in every term with empirical significance—a *linguistic* indeterminacy (as in the standard example of a stroller pushed through a park with a sign

the skeptical challenge pressed by the Realists against Langdell's legal science. For these questions point up two potential gaps in what Langdell saw as the law's seamless conceptual fabric. The first falls between the so-called "paper rule" and the real rule governing a legal question.⁸² On this score, one need only think of the forgiving way that police and the courts enforce posted speed limits: the sign on the highway may say 55 miles per hour, but in point of fact police rarely ticket, and courts seldom uphold citations against, drivers caught going 60 miles per hour.⁸³ The actual "law" of the enforced speed limit—anywhere from five to nine miles per hour over the speed limit—thus strays from the law of the posted sign. Another gap falls between the *legal* reasons formally offered as the grounds for the conclusion reached and the unstated *non-legal* reasons that had actually produced it.⁸⁴ Here the Realists could point to the bevy of appellate decisions where judges openly drew not on formal legal materials to reach their conclusions, but on what were, by nearly all accounts, clearly non-legal reasons, and especially the factual circumstances under which the case arose (or "situation types," as Karl Llewellyn named them).⁸⁵ In either case, it would obviously be impossible to say that the law on the books had in fact *determined* a result: it would at most only have appeared to. And were this phenomenon a genuine one, it would likewise be impossible for Langdell to claim that law was rationally determinate in *all* cases. As these gaps appeared to open and grow, so did the doubts as to just how universally determinate—and universal—the law really was.

And yet, forceful as doubts like these were and are, they still had only set the terms of a problem for a rationalist like Langdell, and an empirical problem at that—a *practical indeterminacy* in the law. As only a

warning, "No Vehicles in the Park"). Even though Hart appears to have taken this to be a major front in the Realist war against the determinacy of legal rules, this indeterminacy did not loom large in Realist thinking. See Leiter, *supra* note 12, at 111 (observing that "most legal reasoning in common-law jurisdictions is given over to explaining why the *applicable rule of law* is, in fact, the applicable rule of law"); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 211–12 (1986) (same); see also Frederick Schauer, *Authority and Indeterminacy*, 20 NOMOS 28, 30 (1987) (noting that distinction between open texture and actual vagueness).

82. See Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2014) (discussing this distinction).

83. *Id.* at 767–68.

84. See Leiter, *supra* note 74, at 24.

85. A notorious example of this is *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (refusing to apply a federal statute prohibiting foreign labor against the hiring of a minister because, as a "Christian nation," the Court did not "believ[e] that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation").

descriptive claim about the way law worked in practice, its force as an objection stood or fell by what it purported to reveal about legal thinking, what the facts really were. Just how real and pervasive a phenomenon was this apparent indeterminacy, and what was its cause? Given how the Realists tended to answer on these empirical points, it is hard to see, at first blush anyway, just how much of an objection they really could make to Langdell's science.

First of all, they generally did not claim this indeterminacy spread much if at all beyond cases decided by appellate courts; they were thus highly unrepresentative of legal questions at large, with some being virtually by definition incredibly close, very hard cases. As only a select few of an already skewed sample of cases, what if these alleged instances of indeterminacy were then traceable to the sloppiness or dishonesty of the relatively few judges who decided them, or to new areas of law where there were few if any prior cases to begin with? In those cases, the gaps between formal legal materials and legal outcomes may have been real but inconsequential, being the result of the normative failings of relatively few officials or an understandable underdevelopment of the law, not an essential shortcoming in the legal materials themselves. Where the indeterminacies were due to the former, they would no more have argued against the determinacy of the law *in fact* than a few bad calls by a handful of corrupt or incompetent referees would argue against the determinacy of the rules of football—or to take an analogy closer in spirit to Langdell's science, no more than the fudged calculations of a few careless or unscrupulous engineers would call into question the truth of Newton's laws of motion. And where indeterminacies resulted from underdevelopment, the objection more begs the question than proves it: only if one restricted the relevant legal materials to the words on the page of the case reporters, as Langdell clearly would not, would the criticism go through. The whole conceit of a conceptual system, after all, is to supply principled answers where formal legal materials turn up empty. However real (or apparent) these discrepancies were between the formal legal materials and the actual legal conclusions drawn, they were nevertheless far from amounting to an objection *in principle* to thinking of the law as fully rationally determinate. At most they could be seen as empirical outliers, mere anomalies that Langdell could explain by explaining them away, at least in general terms.

Of course, if the discrepancies grew too numerous and widespread, one might begin to think differently about the force of this evidence. If, in other words, this indeterminacy ran rampant throughout a legal system, leaving no reliable correspondences between formal legal materials and

the results in particular cases (as some of the more extravagant Realists were wont to say),⁸⁶ one might well be led to think—as an inference to a better explanation—that the rationalist assumptions behind Langdell’s science were seriously off the mark. In that case, one could fairly wonder whether the formal legal materials (and, *a fortiori*, any conceptual systematization of them) were really the key to understanding the intellectual character of the law at all. A judge’s decision might just as well be prefigured in her breakfast as from her bookshelves.

Few of the Realists ever went this far, however. Indeed, the consensus now has it that the core Realist claims to indeterminacy by and large focused instead on the fringe of cases that made it to adjudication on the merits at state and federal appellate courts. Indeterminacy may have been alive and well in the law, but it ran on a fairly short empirical leash—well short of seriously calling into question, on its own, the premises of Langdell’s legal science. What the Legal Realists therefore needed, and what they later gave, was some explanation as to why this indeterminacy was not only practically significant but also a *principled* problem. They needed a kind of indeterminacy that a rationalist like Langdell would not be able to simply brush aside as an anomaly, as practically real yet explicable nonetheless.

2. *Principled Indeterminacy*

The Realists ultimately found the indeterminacy they were looking for just where one might have expected it: in the way Langdell framed the method he believed would determine and justify the selection of the legal principles and concepts making up the backbone of the common law. Drawing on the same body of evidence on which Langdell had built his own system (typically state appellate decisions), the Realists showed that there was not one but always several conflicting rules available in any case, rules that, crucially for the Realists, and devastatingly for Langdell, could draw support from equally justifiable but incompatible conceptualizations of the doctrines and facts at hand. Indeterminacy necessarily fringes the law, the Realists claimed, because there, along that small but salient margin of cases, the law inevitably runs out.⁸⁷ A typical example from the heyday of Legal Realism, from one of the judges often said to have embodied it,⁸⁸ will help flesh out this point.

86. See, e.g., FRED RODELL, *WOE UNTO YOU, LAWYERS!* (2d ed. 1957).

87. Leiter, *supra* note 12, at 112.

88. See RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 31–32 (1990) (observing “that

In June 1914, the firm of Jacob & Youngs put the final touches on a country house they built for a man by the name of Kent, costing somewhere north of \$77,000. For reasons lost to history, as a part of their contract, Kent had specified that: “All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as ‘standard pipe’ of Reading manufacture.”⁸⁹ At some point the following March, Kent discovered that a considerable amount of the pipe installed in the house was not of Reading but some other manufacture.⁹⁰ He informed his architect, who in turn instructed the firm to redo the piping according to the terms of the contract, a do-over which, by that point, would have required them to tear down large swaths of the house, obviously at considerable cost. The firm refused, instead demanding final payment. Kent also refused, citing the unsuitable pipes. In the suit subsequently brought by the firm seeking the outstanding balance, the New York trial court directed a verdict for Kent, but only after excluding evidence offered by the firm that showed the pipe used was in all respects, except its brand, identical with the Reading pipe contracted for.

The case eventually found its way to the Court of Appeals of New York, and into the hands of Judge (later Justice) Benjamin Cardozo. The question on which it turned was deceptively simple: in the absence of a provision clearly addressing the matter, what was required of the firm in order to be entitled to payment?⁹¹ The general rule in American law is that, in the absence of an express provision by the parties to the contrary, courts will imply a condition requiring the adequate performance of the seller before any payment from the buyer legally comes due.⁹² But what would make for an adequate performance in this case? Here two rules presented themselves, vying equally for plausibility. On the one hand, in cases of the “simple and uniform” such as in “a sale of common chattels,” the rule has been for ‘perfect tender,’ giving the buyer the right to reject without liability any performance that fails to live up to the precise specifications found in the contract. Here, of course, this rule would have entitled the

little that has survived of legal realism cannot be found, more articulately as well as more temperately expressed, in Cardozo’s jurisprudential writings”); Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1752 (2000) (noting that Cardozo understood the “substantial degree” to which judges are not “constrained by doctrine”).

89. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 240 (1921).

90. The dissent noted that the total amount of pipe of Reading manufacture appeared to be only two-fifths of that installed. *Jacob & Youngs*, 230 N.Y. at 246.

91. Here I am following the very insightful analysis of this case offered by Todd Rakoff. See Todd D. Rakoff, *Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation-Sense’*, in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 203–213 (1997).

92. *Id.* at 203.

defendant Kent to reject the house as delivered, and refuse final payment, all because of the plaintiff firm's evident failure to mind its brand-names when shopping for pipe.⁹³ On the other hand, in those cases dealing in the "multifarious and intricate," such as in contracts for literal performances and other one-off, special arrangements (say, for the construction of a "mansion or a 'skyscraper'"),⁹⁴ the common law rule had long been for 'substantial performance', which allowed the seller minor deviations from the details set down in the contract without risking its right to payment (subtracting whatever damages resulted from the non-conformity). Under this rule, it was Kent who then would be out of luck. With the evidence excluded at trial tending to show that the difference in value and quality of the pipe was either "nominal or nothing,"⁹⁵ what breach there was of the agreement was minor at worst (not material, in legal terms). As a practical matter, it was thus beyond dispute that the firm had substantially lived up to its agreement on this point. Kent would have to pay up.

There were thus two opposing rules open to the court, leading to inconsistent results. Which should govern? If it is difficult to imagine just what Langdell would have said here that is because the choice facing the court seems so obviously unavoidable. This is not to say that arguments, even apparently demonstrative ones, could not be given. He might well have looked askance at the entire line of cases upholding a rule for substantial performance, for example, sensing how vague and undisciplined their inquiries into the substantiality of performance would necessarily become (was two-fifths conformity really substantial, and how could one say?), and how unsystematically they would vary across cases as a result. Adopting a standard this conceptually slack would in any case be to let judicial sympathy oust formal precision: it would let the distaste for the perhaps silly punctiliousness of one defendant overrule the need of preserving scientific rigor across the law. And as we saw, Langdell's science was nothing if not driven by concern for just this sort of formal

93. Moreover, this would have justified the trial court's refusal to admit the evidence as to the pipe's value: all that mattered was whether the firm had lived up to the letter of its bargain, which, here, it clearly had not. There is thus a clear connection between this formalism and the thinking that came by most accounts to dominate American law in the late nineteenth century. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992); see also Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RESEARCH IN L. & SOCIOLOGY* 3, 4-5 (Steven Spitzer ed. 1980) (discussing the rise of classical legal thought); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 9-32 (1995) (reviewing classical legal thought as a "formalism").

94. *Jacob & Youngs*, 230 N.Y. at 242 (internal quotation marks omitted).

95. *Id.* at 244.

precision and conceptual tidiness, nowhere more glaring than in his dismissal of constitutional law.⁹⁶

Even if this were a plausible (or plausibly rationalist) resolution of the case, it is frankly impossible to see how Langdell's method could justify it. As Cardozo put the point, almost as if thinking of Langdell: "Those who think of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred."⁹⁷ The familiar metaphor Cardozo uses here, of dividing lines cutting across conceptual space, may lead one to think all he meant to point out were the usual vagaries of general classifications, and why choice necessarily followed—a line of thinking also frequently associated with the Realists.⁹⁸ But not only would that have failed to answer an argument like the one hazarded above (except question-beggingly), it would also have missed an importantly different, and no less distinctively Realist, line of analysis one could instead see him advancing there. As Cardozo suggests, the reason why these two rules had appeared among the cases to begin with was that, among those same cases, there were two distinct ways of *conceptualizing* the underlying doctrine requiring performance before payment. The bottom-level rule specifying the implied condition divided because the higher-level doctrine itself fractured along two different understandings.

One can see this fracture emerge from the way that the doctrine was portrayed from one line of cases to the next, with what Cardozo called the "simple and uniform" typically set to one side, and the "multifarious and intricate" swept to the other. In the former cases, as in the sale of manufactured goods, it made a good deal of sense to think of 'performance' as involving execution of exact specifications. Items like these were often easily made and sold in large quantities, so that even if they were not always as simple as crates of apples or boxes of staples, they were at least reasonably generic, and so generally replaceable without extravagant effort or loss. Under circumstances like these (a 'situation-type' in Llewellyn's sense), where a performance was more naturally thought of as a literal reproduction of some item, a rule for perfect tender only made sense (in what Llewellyn would call 'situation-sense'). Not so, however, in the latter cases, where what was contracted for was stereotypically much less like a mass-manufactured toy or a bag of onions. In these cases, the performances agreed to were instead more one-off,

96. See *supra* note 62.

97. *Jacob & Youngs*, 230 N.Y. at 242–43.

98. See *supra* note 81.

more complex and individualized—like painting a portrait or playing a gig or putting up a skyscraper. In these circumstances, and in contrast to those in the case of sales of goods, ‘performance’ was more naturally thought to entail a standard of approximate rather than exact reproduction: it would be silly after all to feel cheated when the crooner at the mic sounds little like the bodiless voice in the earbuds. In situations of this type, a rule requiring substantial performance, rather than literal conformity, had only made sense.

Not only, then, were both of these rival rules equally and amply justified by the case law, but so too were the rival doctrinal conceptualizations that made sense of them. And the latter was the truly decisive point. Each rule could lay claim to an equally justifiable *conceptualization*—what we might call a *model*⁹⁹—of the same pivotal doctrine, a model that would then systematize, as its doctrinal consequences, the relevant area of law into directly applicable, bottom-level rules. Here, where that doctrine called on the court to imply a condition for adequate performance, Cardozo then faced not only the choice of which bottom-level rule to apply (perfect tender versus substantial performance) but also, and more importantly, the choice of how to think of the higher-level concept (‘performance’) that would decide the fitness of that rule. Deciding which rule to apply meant that Cardozo would have to choose which of these models better fit the facts of the case. Did this look more like a sale of a crate of oranges (the sale-of-goods model) or more like a promise to paint somebody’s portrait (the unique-performance model)? To Cardozo and a majority of the court the practicalities decisively favored the latter: Kent would have to pay. But as Cardozo heavily underlined, there was simply no *formally conceptual* way out of the decision they as judges had to make:¹⁰⁰ no amount of analyzing and synthesizing case law would relieve them of their burden of choice since *both* models had (and still do have) a place in our law. The lines of

99. I adopt the term from Ronald Giere, who has argued that models in essentially the same sense capture the “cognitive structure” of all scientific theories. See GIERE, *supra* note 16, at 97–117 (1999); Ronald Giere, *An Agent-Based Conception of Models and Scientific Representation*, 172 SYNTHESE 269 (2010).

100. A less formalist conceptualist, perhaps like Ronald Dworkin, might argue that Cardozo was wrong if he thought that *no* conceptualist argument could decide between one model or another. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); see also Grey, *supra* note 10, at 9, n.27 (noting that Dworkin exemplifies an informal conceptualism). The Thomistic doctrine of *determinatio* might also have been a gesture in this direction. See THOMAS AQUINAS, *SUMMA THEOLOGIAE*, Ia–IIæ q.95 a.2.

decision had indeed blurred—precisely where, and because, the conceptual shadows had crossed.¹⁰¹

Here was a kind of legal indeterminacy that no rationalist legal science would be able to explain away, to dismiss as an explicable outlier, an indeterminacy that therefore meant the end of their science, as they had understood it.¹⁰² It was one thing for the Realists to point to the hard cases of law, like those that often come before appellate courts, where the paper rules seemed not to determine the results reached by the courts, and leave it at that. This practical indeterminacy was perhaps a troubling, even embarrassing, fact for a rationalist like Langdell to explain, but not a difficulty in principle. Yet it was quite another thing for the Realists to then go on to show that the formal legal materials did not determine a result in those cases because they *could not*; that in those situations the law *inevitably* runs out. This was the principled objection the Realists were looking for—a *principled indeterminacy*.¹⁰³ And what a judge like Cardozo and an avowed Realist like Llewellyn had helped to show was its source: the rival conceptual models built into the very framework of ordinary legal thinking, throughout the common law and even statutory and constitutional contexts.¹⁰⁴

For rationalist legal science, this was as close as it could get to outright refutation. This principled indeterminacy pointed up the futility in Langdell's thinking that the law would, in point of fact, formally and uniquely determine an answer to every legal question. It had also exposed this stronger indeterminacy by exploding the assumptions that made that belief credible in the first place—the rationalist assumptions that the law was even intelligible as a conceptually absolute system that could be known by a categorically rational method. Descriptively, this was simply not how legal concepts worked. On the contrary, as exemplified by Cardozo's analysis in *Jacob & Youngs*, from one situation-type to the next

101. George Lakoff has discussed in some depth the various ways that rival models produce these effects. See generally George Lakoff, *Cognitive Models and Prototype Theory*, CONCEPTS 391 (Eric Margolis and Stephen Laurence eds. 1999).

102. What I have called a principled indeterminacy is one way of spelling out a point heavily underlined by the pioneers of Critical Legal Studies. See generally Altman, *supra* note 81.

103. This way of presenting this critical side of Realism—as a conflict over rival doctrinal models—is hardly new, though it does add an analytical, explanatory layer over the now fairly standard account. See, e.g., G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984) (noting that the “Realists demonstrated that such [legal] principles were always contradictory, that for every principle there existed a potential counter principle”).

104. Karl Llewellyn famously made the same point in the statutory context. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

one could in fact justify multiple, conflicting rules because one could no less justifiably systematize the implied condition of performance—the concept of ‘performance’—under the sale-of-goods model as under the unique-performance model. The law could support not a single conceptual systematization as the rationalist legal scientists had presumed, but many. These competing models drew their substance, moreover, directly from the logic of the situations from which they emerged, situations that differed systematically and so conflicted in fact. To believe, as the rationalists did, that one could nevertheless appeal from these conflicting situations to the tribunal of a universal conceptual system, which would then render final judgment either by reconciling them both to some absolutely ‘correct’ type or by selecting one as ‘true’—was to simply close one’s eyes and dream away the facts of our conceptual life, the way we really live with and use and make concepts.¹⁰⁵ Just as elsewhere in our conceptual lives, there was not one but always potentially many ways to model the general doctrines of our law: as many models as the novel situation inspires in the attentive lawyer. To insist otherwise, as Holmes had pointedly said of Langdell, would be to make a theological necessity out of the accidents of history.¹⁰⁶ This was a *conceptual* Realism,¹⁰⁷ in short, and it took on Langdell’s science where it was most vulnerable—in the absolutism of its assumptions as to the law’s content and methodology. The truth of this indeterminacy told the falsity of that absolutism, his rationalism.

Of course Langdell could always have made the reply imagined before, that he *could* systematize the doctrine here by simply assimilating every case to the perfect tender rule (and, implicitly, the sale-of-goods model that made sense of it). That assimilation he might then justify by pointing to the formal values it would serve—presumably, the enhanced administrability and *ex ante* certainty that comes with formal simplicity. But note that the argument would then have shifted ground. There would no longer even be the pretense of a formal, rational compulsion guiding this simplifying absolutism, no *uniquely* categorical justification of a *single* system of legal concepts and principles. Indeed, as Holmes saw all

105. In the philosophical literature, essentially the same point is made in terms of a definitional theory of concepts, which has undergone extensive criticism since W.V.O. Quine attacked it through his famous critique of the analytic-synthetic distinction. See generally Eric Margolis and Stephen Laurence, *Concepts and Cognitive Science*, CONCEPTS 1, 8–27 (Eric Margolis and Stephen Laurence eds. 1999).

106. *Book Notices*, *supra* note 2.

107. I take it that this would also capture the gist of Legal Realism as Leiter understands it. See Leiter, *supra* note 12, at 112. The relation between Leiter’s Legal Realism and the one I sketch above is close, and I have drawn considerably on his illuminating account of that movement here.

too clearly in the first stirrings of Langdell's science, what we instead behold is a mere "striving" after a "logical integrity" that is not *there* in the law in any actual sense, and certainly not in the sense Langdell had advertised in his famous preface. If there was ever a formally and conceptually absolute system behind the American common law, it was one that Langdell and his fellow scientists would have needed to put there, for reasons that might be sensible, surely idiosyncratic, and even, in its own ways, heroic,¹⁰⁸ but none of them rationally compulsory. Langdell could have salvaged his science only by eviscerating it. And this made for the lasting critical lesson that Legal Realism left for the idea of a science of law. Whatever else that science was, it could not be the absolutist system that Langdell and the Scholastic Jurists before him had assumed it to be. A *rationalist* legal science simply could not be made to work.

B. Another Realism, Another Legal Science

What I have surveyed so far has been the history of an idea whose time many believe has come and gone. In the heyday of Legal Realism it would surely have been thought worse than wishful thinking, even a little quaint, to keep toiling on in the belief that there was something left in the traditional idea of legal science, let alone something worth resurrecting.¹⁰⁹ In the decades since Legal Realism passed from being a loose but lively movement of jurisprudential heretics into a virtual platitude among lawyers and legal scholars, there have been occasional stirrings in the direction of reviving a legal science, especially in the flanking schools of Critical Legal Studies (to the left) and Law and Economics (on the right).¹¹⁰ But by nearly all accounts, a legal science, in Langdell's sense or in any other, would seem to have passed from the scene for good.

In many ways, not least philosophically, we are still living with the uncertainty and intellectual fragmentation that only naturally followed its dissolution as a viable organizing idea and ideal for the law.¹¹¹ It was no

108. See *infra* note 146.

109. In fact, some of the Realists did hope to build a *new* science of law, but none believed that it would bear much resemblance to the legal science conceived by Langdell and urged on by his followers. See, e.g., Herman Oliphant and Abram Hewitt, *Introduction*, in *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* ix (1929) (noting that "there is now no such thing as a science of law unless one is willing grossly to abuse the word 'science'").

110. See Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 337–339 (1988) (discussing the "scientific" reaction to the challenge raised by Realism against adjudicative determinacy).

111. See WIECEK, *supra* note 5, at 16 (noting that, since the collapse of the "comprehensive structure of thought" that Langdell helped shape, "much of the [Supreme] Court's work today remains

accident, after all, that Langdell's science arose in an age hungering for a model of law that could answer the challenges of a rapidly industrializing, suddenly urban society, any more than it was mere coincidence that the first legal science emerged in a period when the Western Church was struggling to assert the independence of its clergy from the authority of the secular figures who had long dominated it.¹¹² Whatever else the scientists themselves may have said, their legal sciences were always at least in some measure justified by the practical fruits they bore for the culture and institutions they would help create and sustain. A science of law always was as much the solution to a social need as it was the answer to a philosophical question. And much the same need persists today.¹¹³

If this point sounds strangely Realist, echoing more Cardozo than canonist, it is because it is, and at one time was. In the same years as Realists like Llewellyn and Jerome Frank were still toying with jurisprudential formulas that more sophisticated Realists today can only look on with a mixture of exasperation and regret,¹¹⁴ another of the leading philosophical figures associated with Realism—John Dewey—was beginning to work out an approach to the law, only naturally from a philosophical angle, that would make it at once fully subservient to the social needs Holmes saw as its moving force *and* a coherent, integrated, and relatively autonomous body of abstract knowledge. What Dewey was working toward, in sympathy if not quite in tandem with the Realists, was his own legal science.¹¹⁵ In the pages left here I lay out what I take that science to involve, and where I think it differs from the rationalist tradition of legal science Dewey opposed and why it founders on none of the rationalist's mistakes. I also hope to make clearer, even if only schematically, what work remains to be done in order to make that science viable today.

vulnerable to challenges to its legitimacy"); Cook, *supra* note 4 (discussing the "void" left by the collapse of what I have called rationalist legal science).

112. See BERMAN, *supra* note 9, at 520–521.

113. See WIECEK, *supra* note 5 (noting that American law has still not moved beyond the collapse of classical legal thought).

114. See Leiter, *supra* note 74, at 15 (noting the regrettable "Frankification" of American Legal Realism by later commentators, and the resulting confusion of their philosophically respectable, core theses); KARL N. LLEWELLYN, *THE BRAMBLEBUSH* 5 (2008) (claiming that "[w]hat these officials do about disputes is, to my mind, the law itself").

115. Dewey had made some contacts among legal scholars while a professor at Columbia University, where in the 1920s he gave a course in the law school entitled "Logical and Ethical Problems of the Law" that was reportedly attended by a number of law professors. See Edwin W. Patterson, *Dewey's Theories of Legal Reasoning and Valuation*, in JOHN DEWEY: PHILOSOPHER OF SCIENCE AND FREEDOM 118, 119–120 (Sidney Hook ed.) (1950).

1. From Absolutizing to Naturalizing Legal Science

If the lawyers who gave us the idea and tradition of Western legal science were clearly no philosophers, the philosopher who sought to revive that idea early in the last century was just as clearly no lawyer. In fact, although the law and legal subjects occur repeatedly and prominently in his writings, Dewey himself never set down anything resembling a legal philosophy proper, or even a full work on law. What he did have, and what he gave abbreviated expression to in several places, was a point of view on the law, a way of approaching jurisprudential questions that rested on fundamentally the same basis as the Realists' views. For him, that basis would go by the name of naturalism. And one can begin to see its emerging outlines in the words of the lawyer he most admired, about the rationalist science both would decisively reject.

In the passage that we saw earlier from Holmes' critique of Langdell's science, there were two leading thoughts on display.¹¹⁶ There was first of all, and perhaps most famously, the negative thought that would harden into the two indeterminacy theses, practical and principled, that later galvanized the Realists and solidified them into a reasonably coherent jurisprudential movement. But there was also a more positive thought evident there, dimly expressed though it was, that Holmes sought to relieve against the benighted backdrop of Langdell's legal theology—a constructive proposal mingling with a diagnosis. As he hinted in contrast to Langdell's taking at face value the outwardly logical appearance of legal thought, what mattered instead was the “man underneath,” the show of formality, the “history and nature of human needs” bubbling up all around the edges and through the cracks of its dialectical and demonstrative argumentation. What Langdell had overlooked in his haste to make a science out of law was the way he was approaching that science, how law should be thought of and studied as a social phenomenon. “As a branch of anthropology, law is an object of science,” as Holmes went on to say, but this meant that “the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.”¹¹⁷

There were thus two senses of science that Holmes was invoking in his critique of Langdell. The first was the sense in which law itself could be

116. See *supra* note 78.

117. *Book Notices*, *supra* note 2.

thought of as a science—as in the working formula I have followed Berman in suggesting here, that would see law as an organized body of abstract knowledge (the intellectual premise) supported by a culture valuing objective research (the cultural premise) and institutions making that research possible (the institutional premise). There is little evidence that Holmes had any objection to regarding law as a science in *this* sense at all, in any of its three premises. As he says near the end of his review of Langdell’s casebook, and as he repeated elsewhere, there was indeed great value in having faculties devoted to working out the law’s postulates as a body of abstract knowledge, which could then be imparted to students as one, however “arbitrary,” way of understanding how the law “hangs together.”¹¹⁸ There was something essential, Holmes conceded, and essentially right, in taking the law as at least in part a conceptually coherent system, as something more than just “a rag-bag of details.” Like many lawyers of his day, including Langdell of course, Holmes seems to have had little trouble identifying law as scientific in this more fundamental sense.

In another sense, however, Holmes was clearly signaling his departure from the way Langdell had understood that science. Their difference came down to how they would *approach* an understanding of that science: in effect, how they thought a *philosophy* of that science of law should work. As we saw in his analysis of that science’s intellectual premise, Langdell supposed that understanding the law as a science meant that one would be engaged in an effectively conceptual and logical enterprise: a *logical analysis* of the postulates of the law that would be dominated by the analytic and *a priori* (the conceptual absolutes), whose principal intellectual work was to articulate a method of *justifying* the specific absolutes postulated there (a theory of categorical legal rationality). This was what Holmes found “unscientific” in Langdell’s theory, what had given Langdell over to a pseudo-Hegelianism. Where Holmes thought the law would instead “fin[d] its philosophy [was] not in self-consistency,” not in any *a priori logical* analysis at all, but in history and anthropology.¹¹⁹ One should study the science of law as one would any human phenomenon, Holmes was saying—empirically, scientifically, or as we would say today, naturalistically.¹²⁰ The law, considered as a science

118. *Id.*

119. *Book Notices*, *supra* note 2.

120. Ronald Giere has recently given a sense of naturalism—what he calls a *methodological naturalism*—that Dewey would likely have found congenial. See GIERE, *supra* note 17, at 69–83, 151–173.

in its more fundamental sense, was no less amenable to scientific observation and analysis as any other natural phenomenon. Law is fundamentally human, after all. And as the “great anthropological document” that it always was,¹²¹ the law demanded a philosophical lens that would not distort away all the conceptual imperfections and logical deformities that grew from its messy natural history. The science of law needed to be naturalized.

Some decades later, when thinking through the implications of his logical theory for legal thought, Dewey had come to much the same diagnosis, and arrived at essentially the same approach. As to the latter, he was among the first American philosophers to call himself a naturalist, and had done so in the same years as he was beginning to work out his general approach to law.¹²² Thus, in perhaps his most famous piece on the law proper, he began where Holmes had left off nearly forty years earlier: in an analysis of “human conduct.”¹²³ And a number of years later, in his only piece laying out his own “philosophy of law,” he remarked that his “standpoint” had led him to look on law as “through and through a social phenomenon: social in origin, in purpose or end, and in application.”¹²⁴ Understanding law thus required an analysis of “human activities,”¹²⁵ natural facts that are clearly susceptible to study and examination in an anthropological and psychological vein—from the point of view of the natural and social sciences. His views on law were as thoroughly naturalistic as was his philosophy generally.¹²⁶

Yet the way that Dewey had begun to work out that naturalistic approach to law—incompletely, by his own admission—took a somewhat different direction from Holmes’, as Dewey also saw.¹²⁷ That turn in his thinking away from Holmes had come chiefly from a preoccupation with

121. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

122. His most famous exposition of his naturalism occurs in *Experience and Nature*, published only a year after his most famous article on law “Logical Method and Law” appeared in *The Philosophical Review*. See JOHN DEWEY, *EXPERIENCE AND NATURE*, 1 JOHN DEWEY: THE LATER WORKS, 1925–1953 (1925).

123. John Dewey, *Logical Method and Law*, 33 PHIL. REV. 560 (1924).

124. John Dewey, *My Philosophy of Law*, 14 JOHN DEWEY: THE LATER WORKS, 1925–1953 115, 117 (2008).

125. *Id.*

126. Leiter has similarly thought of this as the hallmark of a naturalized jurisprudence. See Leiter, *supra* note 74, at 40 (noting that “Jurisprudence . . . is ‘naturalized’ because it falls into place . . . as a chapter of psychology (or anthropology or sociology)”).

127. See John Dewey, *Justice Holmes and the Liberal Mind*, 3 JOHN DEWEY: THE LATER WORKS, 1925–1952 177, 182 (2008) (contrastively noting the “realistic strain” in Holmes’ thinking that led him to his externalist, prediction theory of law).

logical theory and the philosophy of language and psychology that Holmes, as a lawyer, did not share.¹²⁸ But it had also come from the sharpened diagnosis of the failures of Langdell's science that had accompanied the Legal Realism rising in those years. Holmes himself had taken as one of the lessons of Langdell's failures that the law could be thought of as a science (and understood scientifically), but only by effectively dissolving "in cynical acid" the point of view that had given rise to that science in the first place: Langdell's strictly internal point of view within and toward his science of law. Holmes instead abandoned altogether that internal point of view toward law—under which one takes certain materials in one's thinking as authoritative—and replaced it with a purely *external* point of view (and, hence, the predictive theory of law he infamously advocated some years later).¹²⁹ Holmes, as naturalist, would thus have salvaged a science of law by excising from it the internal viewpoint entirely: by letting the purely legal point of view fall away.

Dewey, however, was never tempted by this externalist assumption about the law's viewpoint, and rightly not.¹³⁰ His concern was instead to find a way of making sense of the obviously internal point of view lawyers take in their reasoning with legal materials, yet without succumbing to the "delusive exactness" that he and Holmes had scorned in Langdell's science.¹³¹ He had sought a way of preserving a broadly scientific concern for evolving a "logical systemization with a view to the utmost of generality and consistency"¹³² without lapsing into the rationalist belief that this meant "fixing a concept by assigning a single definite meaning, which is then developed by formal logic."¹³³ He would have kept alive the hopes of a legal science that would preserve, to some degree, the same conceptual systematizing and formal development of the law that Langdell had explored, all from a similarly internal point of view. But he would also have done so in a way that respected "[t]he judgment, the choice, which lies behind the logical form," the twofold indeterminacy that Realists like Llewellyn and Cardozo had shown lurking along the margins of the law.

128. JOHN DEWEY, 12 LOGIC: THE THEORY OF INQUIRY, JOHN DEWEY: THE LATER WORKS, 1925-1952 537 (2008) (referring to logic as his "first and last love"); *see also* JOHN DEWEY, STUDIES IN LOGICAL THEORY (1903).

129. *See* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991 (1997).

130. *See* Brian Leiter, *Postscript to Part II: Science and Methodology in Legal Theory*, in NATURALIZING JURISPRUDENCE 183, 188-91 (discussing the naturalist appropriation of Hart's argument for the internal point of view).

131. Dewey, *supra* note 127, at 180.

132. Dewey, *supra* note 123, at 562.

133. Dewey, *supra* note 127, at 180.

Dewey, too, wanted to naturalize the science of law, then, but his naturalism had led him to a different picture of what the *intellectual* content of that science was—away from the rationalism of traditional legal science and towards another destination entirely. His science was to be as conceptually and formally rich as Langdell's, yet vulnerable to none of criticisms that had made the latter's conceptualism or formalism empirically untenable. It was to have the intellectual heft of a relatively autonomous discipline, while being no less useful for the working attorney. And he wanted to do all this without assuming any of the absolutes that had doomed Langdell's science to a fanciful piety, an impossible dream. What he sought, but never gave, was naturalistic proof of the possibility of a *pragmatic* legal science.

2. *Toward a Pragmatic Legal Science*

Just what this naturalized legal science would have come to in Dewey's hand and how he would have defended it are, like any counterfactual of history, impossible to know with any certainty. More to the point, and taking Dewey at his own word, they are largely beside the point.¹³⁴ What Dewey left us was something immeasurably more valuable than any detailed roster of theses or intricately elaborated philosophical system. He left us a point of view; a line of thinking clear enough in its direction to amount to a viable working program. What that working program comes to, as is clear by now, is a new kind of a science of law: a *pragmatic* legal science. And that program takes as its basic framework of assumptions the same legal science that the Realists and their sympathizers, like Dewey himself, had hoped to fully and finally dislodge from the center of the intellectual tradition of our law nearly a century ago: the rationalist tradition of legal science. Below I therefore lay out how I believe those revised assumptions—as to the law's content, methodology, and viewpoint—should be understood from Dewey's point of view, and why their restoration in our law is so vital today.

a. *The Content Assumption: Conceptual Experimentalism*

As a naturalist in his philosophy of legal science, Dewey believed one could and should approach a study of the law in a way that comported with the best empirical account not only of how lawyers think when

134. See John Dewey, *Nature in Experience*, 14 JOHN DEWEY: THE LATER WORKS, 1925-1952 140, 140-41 (2008) (alluding to his "definite point of view" informing his philosophy).

thinking about law, as the Realists also believed,¹³⁵ but of what they are thinking *about*. What he believed Realists like Cardozo and Holmes had shown through the argument for principled indeterminacy was that lawyers were thinking not along the lines of any absolute system of legal principles and concepts, but of multiple, conflicting doctrinal *models*—different idealized conceptualizations of the same formal legal materials. For Dewey, this insight had not only formed the core of his logical theory, through a pragmatist theory of concepts,¹³⁶ but it had also laid the basis of a larger normative project that he called conceptual *reconstruction*.¹³⁷ Its upshot for legal science was nevertheless more general: whatever the ultimate account one can and should give of these doctrinal models, they were far from absolutes. These models are always merely hypothetical, held only contingently—and in this sense, *experimental*. Moreover, like in other contexts in our conceptual lives, rival models can and do subsist side by side. Even if one ultimately has to say which model to apply in one case, or which to make more or less central to a given concept as a part of systematizing an area of law, there is always a choice to be made in situations like these, as Cardozo had owned up to in *Jacob & Youngs*.¹³⁸ As these conceptual models thus come to replace conceptual absolutes, a conceptual absolutism gives way to what we might call a *conceptual experimentalism*.

b. The Methodological Assumption: Instrumental Rationality

The way that lawyers and judges make their decisions—the way they decide not only which model to apply but what models there are—also differs radically from the way that a rationalist like Langdell thought of it. Just as Dewey rejected as mere falsehood the belief in a single complete, comprehensive, and consistent set of legal principles and concepts that defined the law's content, he also jettisoned the accompanying belief in a method that would categorically justify any such a system. He, along with Holmes, instead insisted that what justified the selection of a particular model in some case, or the development of a new model for a range of

135. See Leiter, *supra* note 74, at 39–46 (discussing the Realists' naturalized approach to a theory of adjudication).

136. See Dewey, LOGIC, *supra* note 128; see also Jady Hsin, *Laws, Demands, and Dispositions: John Dewey and his 'Concept Pragmatism'*, 50 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 286 (2014) (arguing for a roughly model-based account underlying Dewey's theory of concepts).

137. See James Campbell, *Dewey's Method of Social Reconstruction*, 20 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 363, 380–385 (1984).

138. 230 N.Y. at 243.

later cases, were the consequences that flowed from its adoption or creation. Models would thus be justified *instrumentally*, not categorically, tested by their value in solving social problems and answering social needs, not merely by the extent to which they cohered with an arbitrarily privileged set of legal postulates. In this legal science, an *instrumental rationality* replaces the categorical rationality of the rationalist tradition, and an unworkably absolutist methodology surrenders to a practicable scheme of empirical investigation and test by consequences—a methodological experimentalism.

c. The Viewpoint Assumption: A Pluralist Internalism

Once we leave behind these two prior absolutist assumptions, we can see that the naturalist commitment to preserving the internal point of view toward law also has to undergo yet another, and final, transformation from the rationalist tradition. As we saw earlier, the absolutist way that that tradition understood the prior assumptions fed back into and transformed the internal point of view that it took for granted: not only was the law's point of view internal but it was also absolutely autonomous. This was the case because the body of knowledge that the rationalist assumed as the law's content, and the method by which the rationalist legal science could come to know it, required only a knowledge of the formal legal materials themselves: disciplinary outsiders could no more presume to teach a lawyer law than a lawyer could presume to teach a chemist chemistry.

Having witnessed the collapse of the rationalist's absolutism as to the law's content and methodology, however, we must also come to recognize how much less absolute that autonomy must be. Not only can other disciplines—across the social and even natural sciences, from economics and sociology to epidemiology and environmental sciences—help lawyers understand the consequences that their choice of models will likely have in answering social needs; they can also aid in framing and developing the postulates of new models: disciplines like philosophy and political science especially, and the humanities more broadly, all can and do contribute to framing the conceptual raw materials that go into the many, various, and changing models composing our law. Yet this is far from conceding away *all* of law's autonomy, as if welcoming in the insights of another discipline were to deny that lawyers had any of their own.¹³⁹ On the contrary, as Dewey made sure to point out,¹⁴⁰ it is up to lawyers, and lawyers alone, to

139. See *supra* note 8.

140. See John Dewey, *The Historic Background of Corporate Personality*, 35 YALE L.J. 655

build the final models that go into our law, and to draw out their consequences for the workaday minutiae of the practicing attorney and the presiding judge. It is lawyers, after all, who in our society build the bridges from formal legal schemes to principled models to practicable rules of law. The premises of our law may not be entrusted exclusively to lawyers' concern, but their legal implications should be and largely are.

In their moments of theoretical repose lawyers thus are, or at least could be, more and less than they have been thought—more than the social janitors that Judge Posner sees, but also less than the priests of Langdell's legal seminary, divining a mythical law beyond the cases.¹⁴¹ One could instead call them our social architects though that, too, risks some exaggeration, particularly now that so many of the law's blueprints are the work of legislators, not all of whom are lawyers or, when they are, particularly learned ones at that. More fitting then may be the title of social coder, authors of the apps for a social world endlessly in the midst of technical and fashionable upgrades—the evolving source code of a Legal Science 2.0.¹⁴² Whatever the image, the lesson is clear enough. Even if the broad outlines of the legal vision for our society may not be entirely or even mainly of lawyers' imagining, its blueprints, the lines of code, are. This is enough for law to enjoy a *relative* intellectual autonomy,¹⁴³ unified by its own point of view—by its *pluralist internalism*.

CONCLUSION

The century since Langdell's legal science began its steady descent into obsolescence tells the tale of our disenchantment with law. Today, perhaps more than ever before in our history, Americans have come to distrust not just the policies and personages of a Congress or an administration, but the

(1925) (arguing that what makes a corporate body a "person" under the law is "whatever the law makes it mean").

141. Posner, *Conventionalism*, *supra* note 67, at 338; *see also supra* note 79, and accompanying text.

142. *See* Posner, *Conventionalism*, *supra* note 67, at 338. This work, moreover, is already a staple of legal scholarship. *See, e.g.,* Todd Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006) (discussing the move away from the classical, bargaining model of boilerplate in contracts to other sociologically-grounded models); Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84 (2007) (recounting the contract, tort, and statutory erosions of the at-will employment model over the last century and suggesting the need for a new "hybrid" model better fitting these trends).

143. Considering law as a body of doctrinal models would also explain law's resilience in the face of the many disciplinary perspectives (the so-called "law and's"). *See* Balkin, *supra* note 9 (discussing the same).

very rule of our law.¹⁴⁴ Politicians may still pay their lip-service and we may still dutifully nod along, but for many Americans the rule of law has never felt more elusive, less real, than it does today. Although this complex phenomenon naturally has many causes, one powerful force of disintegration has come from within law itself: from the “fragmenting jurisprudence” of the last half century,¹⁴⁵ which has corroded away the belief, first among lawyers and consequently among others, in a distinctively legal aim or intellectual method—in the legal point of view.¹⁴⁶ Many lawyers, disillusioned with the centuries-old belief that law could be made rational, have now given up on making it even seem reasonable. And as law has come instead to be seen as the expression of colliding interests or raw political will or just the dictate of the deep-pocketed, our fellow citizens have begun to give up on law, too.

Just under a century ago, as the world looked on in horror at the vast carnage of its first modern war, Dewey could also feel the same forces of disintegration, of disbelief in the power of ideas to rule social life, acidly coursing through public opinion.¹⁴⁷ And like the generation of legal scholars before him who came of age in the shadow of a savage civil war, he too saw the need to restore the public’s faith in “intelligence and ideas . . . as the supreme force in the settlement of social issues”—its faith in law as a rational system of justice.¹⁴⁸ Like his legal idol Holmes, however, he had no illusions about what that system—what Langdell had so triumphantly called a science of law—could realistically do, or what it had to be.

As this Article has explained, it simply could not be the absolute system of rules and principles that lawyers like Langdell or jurists like the twelfth-century canonists dreamed it was. So long as “life is still going on, it is still an experiment,”¹⁴⁹ the rationalist faith in a system of law frozen in time, absolutized into a bloodless and impractical conceptual perfection, was an obstacle, not a help, to resolving social conflict—a formula of repose, not a postulate for living. To their great credit, the Realists helped us to see why that was. And yet, after the rationalist idols finally came

144. See, e.g., Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL’Y 583, 584 (2016) (discussing the “general populist unease that now infects much of our public discourse” and its relation to a decline in faith in the possibility of the rule of law).

145. Berman, *supra* note 15, at 943 n. 84.

146. For an insightful analysis of the concept of a ‘point of view’ in this sense, see Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1566–81 (1998).

147. Dewey, *supra* note 127, at 183.

148. *Id.* at 182.

149. *Id.* at 183.

crashing down, they also offered precious little help in picking up the pieces.

As this Article has also argued, even as the mainstream of the legal tradition began to fray after the Realists themselves had come and gone, another tradition—the far older counter-tradition of legal science—quietly lived on. While other Realists were lunging down their jurisprudential dead-ends, philosophers like John Dewey and even some of the foremost Legal Realists like Walter Wheeler Cook were busy rebuilding that tradition in the image of a very different conception of legal science—the pragmatic conception discussed in these pages. It is fair to say that that tradition, overwhelmed as it was by the misfortune of circumstance and shifting intellectual fashion, never got the hearing it deserved. But as this Article has shown, there is far more to that tradition of legal science, conceived in that experimentalist spirit, than our more cynical jurists would care to admit. At the very least, that conception of legal science can escape the fate of its rationalist ancestors: we need not turn our back on the insights of the Realists to believe in the possibility of a legal science, at least of the pragmatic kind. Law can be a science in this sense, and in many ways it already is. In our present age of disenchantment, its full revival as a working postulate of our law—as an article of a new fighting faith—is not just long overdue, but sorely needed.