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## LANGDELL'S AND HOLMES'S INFLUENCE ON THE INSTITUTIONAL AND DISCURSIVE CONDITIONS OF AMERICAN LEGAL SCHOLARSHIP\*

### *LA INFLUENCIA DE LANGDELL Y HOLMES SOBRE LAS CONDICIONES INSTITUCIONALES Y DISCURSIVAS DE LA PRODUCCIÓN ACADÉMICA JURÍDICA EN LOS ESTADOS UNIDOS*

FERNANDO MUÑOZ LEÓN\*\*

**ABSTRACT:** Can we expect changes in the organizational structure of law schools to result in changes in the kind of scholarship they produce? This paper opens up that question and suggests an affirmative answer, putting forward the example of the United States. In American law schools, it is argued, the institutional structure set up by C.C. Langdell and the theoretical orientation laid by O.W. Holmes created the conditions for the emergence of forms of scholarship that question the existing legal and power order and confront legal problems in an interdisciplinary form.

**Key words:** legal scholarship, institutional autonomy, justificatory discourses, Christopher C. Langdell, Oliver W. Holmes.

**RESUMEN:** ¿Puede esperarse que cambios en la estructura organizacional de las escuelas de derecho chilenas resulten en un cambio en el tipo de producción académica que ellas generen? Este artículo plantea dicha pregunta y sugiere una respuesta positiva, proponiendo como un caso para la reflexión el ejemplo norteamericano. Aquí, la estructura institucional creada por C.C. Langdell y la orientación teórica propuesta por O.W. Holmes crearon las condiciones para el surgimiento de formas de producción académica que cuestionan el orden jurídico y las relaciones de poder existentes, y que enfrentan los problemas jurídicos de manera interdisciplinaria.

**Palabras clave:** producción jurídica académica, autonomía institucional, discursos justificatorios, Christopher C. Langdell, Oliver W. Holmes.

## 1. THE HEURISTIC VALUE OF AMERICAN LEGAL ACADEMIA AND SCHOLARSHIP

Chilean legal academia is undergoing a potentially revolutionary process of institutional change. In the last five years, more and more schools have increased their

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proportion of full-time academics,<sup>1</sup> making it possible for lawyerly-trained individuals to specialize in the production of juridical knowledge and to disseminate the results of their intellectual endeavors through their teaching. The process of accreditation and the increasing visibility of law school rankings, which prize the existence of full-time faculty numbers and the amount and quality of their publications, promise to sustain these changes in the near future. Interesting social processes back up these changes in legal education; in the end, they come as the result of the market competition between law schools, whose high number are in turn due to the liberalization of higher education during the Military Regime. Furthermore, these changes replicate the process of professionalization that took place in Germany during the early nineteenth century and in the United States in the three last decades of the same century, when a division of labor emerges in the legal field between scholars and practitioners.<sup>2</sup> In short, Chilean legal academia is experiencing an increasing professionalization.<sup>3</sup>

Despite the importance of the changes that Chilean legal academia is experiencing, there seems to be scant consideration among us of the scholarly implications that these changes can eventually have.<sup>4</sup> It is safe to say that the methodological approach known as legal dogmatics, characterized by the systematization of legal norms from the perspective of a committed user of the system,<sup>5</sup> currently dominates the intellectual landscape of Chilean law schools.<sup>6</sup> Legal dogmatics seems to match the theoretical concerns of a legal education system that both trains future practitioners and finds most of its professors among practicing members of the legal profession; in other words, an educational system exclusively focused on legal practice. As a result, and because of its theoretical and practical commitments, Chilean

<sup>1</sup> See QUÉ PASA (2010).

<sup>2</sup> In Europe, this trend implied separating the professoriate from the clergy, a process that took place during the nineteenth century. See KLINGE (2004) 123-128. In the United States, the case was more similar to that of Chile, as teaching positions began as part-time jobs and only became a full-time activity in the late nineteenth century. See, e.g., MACGILL & NEWMYER (2008) pp. 56-59.

<sup>3</sup> See REIMANN (1993) p. 188 (defining professionalization for the German and American cases as the emergence of "a separate career track with its own entry requirements (potential as a scholar and a teacher), recruitment rituals (the law school hiring procedures), levels of advancement (from assistant to associate to full professor), and professional ethos (to treat law as a science, and an academic career as an end in itself)," all elements that distinguish legal academia from the practice of law).

<sup>4</sup> The most explicit discussion of this issue, so far, has been a sustained debate between law school deans Pablo Rodríguez (Universidad del Desarrollo), Juan Enrique Vargas (Universidad Diego Portales) and Rodrigo Correa (Universidad Adolfo Ibáñez). In this discussion Rodríguez has defended a traditional understanding of legal education that puts practicing lawyers as the archetype of legal educators and legal dogmatics as the main model of legal scholarship, while Vargas and Correa have promoted the change of this structure to put it in line with international standards of legal education. See RODRÍGUEZ (2010), VARGAS (2010), RODRÍGUEZ (2011), and CORREA (2011).

<sup>5</sup> See PEÑA (1996) pp. 123-124 (declaring that legal dogmatics "amounts to a reflective activity executed from the internal point of view although, as it is well-known, its participants often present it as forming part of the external point of view").

<sup>6</sup> For a study of the characteristics of legal dogmatics in the broader Ibero-American context, see NINO (1989).

legal dogmatics eschews forms of inquiry such as the performance of interdisciplinary research or the critical interrogation of the social impact of the law.

So the question I would like to pose is the following: can changes in the institutional and organizational structure of Chilean legal education –namely, the shift from a primarily practicing professoriate to full-time researching faculties– trigger changes in our form of studying and understanding the law that is, a move from an exclusionary concern with legal dogmatics towards more heterogeneous forms of interrogating the objects that constitute our field–. Will the increase in full-time scholars, isolated from the constraints and demands of the practice of law, impact on the *kind* of scholarship that Chilean academia produces?<sup>7</sup> Will it make room for approaches to the understanding of law complementary to legal dogmatics? Could we even witness the displacement of legal dogmatics as the primary form of scholarly inquiry about the law among us?

This article does not seek to answer this question directly –an impossible prognosis– but rather to shed light on the issue by looking historically at the relation between legal scholarship and its institutional context in the case of the United States. The case of the United States, I believe, suggests that the institutional conditions under which scholarship is carried out matter a good deal. As Robert Gordon observes, the prevalent mode of legal education in the United States nowadays, which he describes as “a broad liberal legal education in law” conceived “as a branch of political economy, moral philosophy, social and historical study, and practical statesmanship,”<sup>8</sup> is dependent upon a series of social and institutional conditions. My intuition is that for the Chilean case the social changes of the last decades –particularly, increased access to legal education and the resulting competition between law schools–, together with the afore mentioned institutional change –in other words, the expansion of full-time academic faculty– can result in a change in the prevalent model of legal education in Chile.

One could wonder about the usefulness of using the case of the United States as a heuristic device to trigger discussion about the process currently taking place in Chile. After all, the United States is a more prosperous society than we are; and also, this comparison involves two periods of time separated by over a century. Interestingly, these two objections seem to cancel each other: late nineteenth century American society and higher education institutions experienced processes of social differentiation and growth similar to the ones that present-day Chilean society and higher education institutions are going through. Moreover, it must be taken into account that this comparison has a *heuristic* rather than a *predictive* value; this paper does not seek to prophesy how will legal education in Chile evolve, but rather wants to invite reflection on this issue by

<sup>7</sup> Note that I speak of the *kind* of scholarship produced in the sense of the *forms* it takes, not of its *quality*. There seem to be intuitive arguments to believe that full-time scholars would produce better scholarship; still, the thrust of my argument is not whether scholarship would improve in those circumstances, but rather whether it would assume more heterogeneous forms, departing from the prevalent model of professionalizing legal dogmatics.

<sup>8</sup> See GORDON (2003) p. 189.

sketching the historical developments that gave American legal education its present form. This move is not so original; one of the findings of the literature consulted for this work is that at that time, American law professors were making similar comparisons with the development of German legal education half a century earlier.<sup>9</sup>

Certainly, this topic can also be approached from a wide array of perspectives. Narrowing down its object, this article focuses on the justificatory discourses that shaped American legal academia at the end of the nineteenth century and gave it the outlook that has characterized it since then. More specific institutional characteristics, such as the role of tenure in securing the autonomy of legal academia from the requirements of the Bar, have already been explored in the case of American law schools and its universities at large.<sup>10</sup> Other aspects that could be of interest for a Chilean audience, such as the economic viability of the professionalization of legal academia in Chile, require a separate treatment of their own. This article, then, tries to construct a genealogy of American legal scholarship by looking at the discourses that shaped it at its origin and which seem to still inspire it. It focuses on the scholarly discourse fashioned by Christopher C. Langdell, the first Dean of Harvard Law School; and by Oliver W. Holmes, distinguished faculty member of the same school and influential Supreme Court Justice. As I will argue, paradigmatic examples of American legal scholarship such as the law and economics movement and legal feminism have been made possible both by the Langdellian law school model, which separates the practice of law from the study of law, and the Holmesian emphasis on undertaking explorations of the law from an external point of view.

I should make it clear from the outset that I do not propose, either in this article or in my academic work more generally, that Chilean legal academia should be revamped along American lines. Certainly, as this work demonstrates, I believe in the benefits of comparative conversations about the law; an approach that has always enjoyed a good reputation among us. Still, I need to insist on the *conversational* rather than *replicating* character of this kind of endeavor. I do not suggest importing indiscriminately the theoretical trends of American legal scholarship or its general orientation, detached from the practice of law to a point that generates criticism even in the United States.<sup>11</sup> Rather, I believe that the example of American legal academia could be a basis for starting a debate about the future of Chilean legal academia; working as a catalyst for our individual reflections and our collective conversation. This, I believe, is the function that American legal academia served in a period when we were actively engaged in the discussion of what meant to be students of the law for Chilean academics.<sup>12</sup>

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<sup>9</sup> See REIMANN (1993); CLARK (1987); and HUPPER (2007).

<sup>10</sup> See, e.g., POST (2006).

<sup>11</sup> See EDWARDS (1992).

<sup>12</sup> For American accounts of the process of dialogue and mutual learning between American and Chilean scholars that took place in the late 60s and early 70s, see GARDNER (1980) pp. 126-190 and MERRYMAN (2000). For a Chilean contextualization of that process and an appraisal of the situation since then, see SIERRA (2003).

In this work I would like to relate the forms of scholarly inquiry present in a certain situation with their institutional contours in order to shed light on the problems I have already delineated. What are the possibilities for independent inquiry that arise from the safety of autonomous institutions, e.g. law schools whose intellectual horizon is conceived as distinct from the demands of the practicing sections of the profession and whose organizational structure reflects this separation? And conversely, what kind of institutional demands creates the pursuit of a legal science that seeks to understand the broader social context within which the law takes its form? The history of American legal academia offers us some answers to these questions. With Langdell, American law schools began their road towards securing institutional autonomy from the Bar. With Holmes, American legal thinkers began engaging explicitly with the extra-legal elements in their analyses of the law. These two elements have come to define the face of contemporary American legal scholarship, and they have made room for some of the most distinctive developments in American legal scholarship of the last decades, some of which have even been able to influence the practice of the law. Langdell and Holmes established the study of law as a social practice in itself, a subsystem of society endowed with its own justificatory discourse; in other words, with its own internal point of view—and with organizational structures responsive to the social functions deemed relevant by that discourse.

## 2. LANGDELL AND THE INSTITUTIONAL AUTONOMY OF AMERICAN ACADEMIA

Contemporary American law schools enjoy an important degree of institutional autonomy that entails two things. First, it means that they are structured as professional schools, in the guise of medical or business schools; an organizational form that gives them a certain independence from the central university administration. Second, and more importantly, it means that the academic character of their faculty, benefitting from the guarantees of the tenure system, gives them relative autonomy from the expectations and demands of the practicing section of the legal profession.<sup>13</sup> In other words, law professors find their wages, social esteem, and intellectual horizon not in the legal market, the respect of the Bar, nor the opinions of practitioners—that is, in the professional world—but in the tenure track, the ‘publish or perish’ dynamics, and the inspiration of other professional schools and graduate departments—e.g., in the academic realm.<sup>14</sup> To understand the genealogy behind this institutional structure and its tensions, we must comprehend the aims of the creator of the modern model of American law school: Christopher Columbus Langdell.

<sup>13</sup> This autonomy is only relative; as Gordon points out, “for law as either a technical or liberal science of policy to be taken seriously enough to be given an institutional home and support, some segments of the practicing profession must be sympathetic to receiving it”. GORDON (2003) p. 202.

<sup>14</sup> Undeniably, this autonomy results in a frustration, on the part of the practicing segment of the profession, with the products of legal scholarship, too academic for their palate. See, among others, EDWARDS (1992).

All accounts of American legal history agree that Langdell transformed American legal education, giving it the face that has –arguably– been maintained to date.<sup>15</sup> To be sure, his work was not unfounded: for example, his transformation of Harvard Law School relied on the previous work of Justice Joseph Story at that institution;<sup>16</sup> and his Socratic method seems to have been predated –perhaps in a less purified form– by Theodore Dwight at Columbia.<sup>17</sup> Langdell's Deanship at Harvard, however, allowed him to put these elements together to transform the law school into a model of legal education adapted to the new demands of the rapidly changing American society and, perhaps more importantly, capable of seducing the markets with its trainees. During his tenure as Dean of Harvard Law School he sought to transform the training of future lawyers from a craft into an academic activity structured around theoretically sound methodologies; in other words, into a 'science.' Paradoxically, despite his foundational role in shaping American legal education, Langdell has since become a figure either forgotten or caricaturized.<sup>18</sup> Paradigmatic is the unfair treatment that he received at the hands of Yale law professor and legal realism prodigy Jerome Frank, who declared Langdell a "cloistered, bookish man;" a "brilliant neurotic" who "seduced" American legal education in such a way that it "went badly wrong".<sup>19</sup> In light of Frank's theoretical commitment to broadening the scope of legal analysis, his attack could only hit the petrified caricature of Langdell; not the man who revolutionized legal pedagogy by omitting from his creation, the casebook, "what treatise writers provided," i.e. "didactic instruction," and including "what was usually omitted: factual background about the historical situation of each case".<sup>20</sup> What remains indisputable in Frank's invective is that Langdell influenced the structure of American legal education in a way that no other man has.<sup>21</sup>

<sup>15</sup> For a more detailed account of Langdell's achievements as the first Dean of Harvard Law School, see FERMANDOIS & MUÑOZ (2008). For in-depth studies of Langdell's work from the perspective of American legal history, see LAPIANA (1994) and KIMBALL (2009).

<sup>16</sup> See MACGILL & NEWMYER (2008) p. 45 (observing that, "as Supreme Court justice and chief judge on the New England circuit, with close personal connections to the leading entrepreneurs of the region, Story was attuned to the economic transformation of the age. As Dane Professor, he was in a position to refashion legal education to fit the needs of the market revolution").

<sup>17</sup> SHEPPARD (1997) p. 586 (explaining that, "[w]ith the rote approach of his dictated lectures, Dwight also employed a colloquial examination of students, testing their reading and understanding of assigned texts").

<sup>18</sup> Kimball has classified the literature on Landgell in these periods: Memorials (1906), Biographical Research (1906-1909), Revisionism (1910s), Counter-Revisionism and Response (1920s), Age of Caricature (1924-1970s), Reassessment and Return to the Sources (1980s). See KIMBALL (2004). Kimball himself has been an active participant in the stage of reassessment and return to the sources, authoring a biography of Langdell and several articles on his work.

<sup>19</sup> FRANK (1947) p. 1303.

<sup>20</sup> KIMBALL (2007) p. 351.

<sup>21</sup> See GORDON (1995) p. 1231 (observing that Langdell, "as Dean of Harvard Law School in the 1870s, developed what would become the prototype for modern legal education in the United States: the three-year, postgraduate sequenced curriculum of private-law courses staffed by a faculty of full-time academics teaching by the 'case method' the interrogation of students primed with the reading of appellate cases").



In his speech to the Harvard Law School Association in 1886, Langdell summarized retrospectively his main goal as placing the law school "in the position occupied by the law faculties in the universities of continental Europe;"<sup>22</sup> namely, to transform the training of lawyers from "a species of handicraft"<sup>23</sup> into an academic enterprise, worthy of being taught at universities. Until then, lawyer-aspirants were mainly trained as apprentices in law offices, which would then certify them for admission to the Bar after a couple of years.<sup>24</sup> Some of them also attended so-called proprietary schools, such as the one founded by Judge Tapping Reeve in Litchfield; or university law lectureships, such as the one endowed by Isaac Royall, Jr. at Harvard.<sup>25</sup> These two latter forms of legal education combined lectures with the use of reading books or manuals with a strong emphasis on memorization. However, all three forms of lawyerly training had significant problems: the apprenticeship model failed "to teach law as a coherent system - or, as contemporaries liked to say, as a science;"<sup>26</sup> proprietary schools, too reliant on their owners, lacked institutional stability;<sup>27</sup> and lectureships, too informal, lacked rigor.<sup>28</sup> None of them, ultimately, were appropriate for the systematic and simultaneous training of high numbers of students; yet they planted the seeds for the emergence of contemporary law schools, which largely evolved from the last two models. For example, Yale co-opted a proprietary school in New Haven; and Harvard Law School would progressively grow out of its lectureships.

The revolution at Harvard was the result of the synergy between Langdell and Charles Eliot. Eliot, a chemist, had toured Europe between 1863 and 1865, where he was "impressed by the scientific rigor of continental universities".<sup>29</sup> After his appointment as President of Harvard in 1869, Eliot embarked in a thorough reform of the professional schools. Soon, Eliot would hire Langdell to be the new Dane Professor with a clear purpose in mind. He observed that Langdell "had in mind some reform in legal education, some reconstruction of the Law School which I much wished to hear about, having some visions of my own about educational reform".<sup>30</sup> Soon, Langdell was elected by his two other colleagues in the faculty to fulfill the new position of Dean, "whose duty," we are told, "should be to keep the records of the Faculty and prepare its business".<sup>31</sup> And so

<sup>22</sup> LANGDELL & HOLMES (1887) p. 124.

<sup>23</sup> LANGDELL & HOLMES (1887) p. 124.

<sup>24</sup> LANGBEIN (2004) p. 20.

<sup>25</sup> For a history of the Royall professorship and an assessment of its ties with slavery, see HALLEY (2008).

<sup>26</sup> MACGILL & NEWMYER (2008) p. 39.

<sup>27</sup> See LANGBEIN (2004) p. 30 (arguing that "in a proprietorship, succession frequently poses difficult or insurmountable problems," whereas "[u]niversities, by contrast, are long-lived; they are designed as institutions of perpetual succession").

<sup>28</sup> See LAPIANA (1994) (observing that at when Charles Eliot became President at Harvard, "[t]he course of study occupied only eighteen months; students could begin studies whenever they pleased and could likewise end them. There were no examinations, and many students did not bother to stay long enough to obtain the degree").

<sup>29</sup> MACGILL & NEWMYER (2008) p. 50.

<sup>30</sup> ELIOT (1920) p. 518.

<sup>31</sup> ELIOT (1920) p. 519.



Langdell went on to change the nature of the study of law both as educator and as Dean, gaining for the study of law the academic status that until then had been so elusive in the United States. This outcome was the result of various efforts, including his innovative teaching techniques as well as his determination to demand more rigorousness on the part of students and professors.

Langdell's educational premise was that law was a methodical enterprise or, as the language of the time favored, a 'science;' and that "all the available materials of that science are contained in printed books".<sup>32</sup> In addition to this, and taking distance from the focus on general principles that Blackstone had taken in his four-volume *Commentaries on the Law of England*,<sup>33</sup> Langdell strongly believed that "law could only be taught or learned effectively by means of cases in some form".<sup>34</sup> As he put it, the practical demands of teaching a "large class of pupils, meet them regularly from day to day, and give them systematic instruction"<sup>35</sup> led him to consider the "feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher".<sup>36</sup> This is how *A Selection of Cases on the Law of Contracts*, the first American casebook, was born between 1870 and 1871.<sup>37</sup> Langdell also believed that "the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study".<sup>38</sup> From this simple assumption about the justification of student's attendance to classroom activities, emerged the so-called Socratic method; a pedagogic technique in which the professor and the students engage in a dialogue about the principles and doctrines that constitute the law. In turn, the Socratic method would give rise to simple but structured forms of analysis consisting in the identification of the facts and the holding of a case, which evolved into the IRAC (Issue, Rule, Application, Conclusion) method, all too well-known by American law students. In this way, Langdell, the educator, gave American legal education a literary form (the casebook), a method of teaching (the Socratic method), and forms of legal analysis and reasoning (IRAC); all of which helped ground the academic status of the study of law.

As Dean, Langdell would further this achievement in various forms. He established an "examination for admission;"<sup>39</sup> a "course of studies which we require to

<sup>32</sup> LANGDELL & HOLMES (1887) p. 124.

<sup>33</sup> See LANGBEIN (2004) pp. 21-22 (observing that "Blackstone's emphasis on redirecting the initial phase of legal study away from practice and toward the study of principles was the theme that pointed toward university legal education").

<sup>34</sup> LANGDELL (1871) p. v.

<sup>35</sup> LANGDELL (1871) p. v.

<sup>36</sup> LANGDELL (1871) p. vi.

<sup>37</sup> See Kimball (2007) p. 348 (observing that "Langdell's writings on contracts began to appear in October 1870, when Little, Brown published the first half of his *Cases on Contracts*, the first teaching casebook in law or any other field". Kimball reports that "[t]he massive project of preparing the casebook took nine months at most," as Langdell "began no earlier than February 1870, when he left his active practice in New York City and joined the faculty at HSL").

<sup>38</sup> LANGDELL (1871) p. vi.

<sup>39</sup> LANGDELL & HOLMES (1887) p. 124.

be pursued in the prescribed order;"<sup>40</sup> "annual examinations, to be held at the end of each year, in the work of that year,"<sup>41</sup> requiring "every candidate for a degree to pass his examinations in the studies of the first year at the end of his first year, as a condition of being admitted into the second year,"<sup>42</sup> and so forth; and "made three years of study necessary for a degree".<sup>43</sup> With all this, Langdell put an end to the organizational disorder prevailing until then in the pursuance of the law degree by students. Also, he promoted a momentous change in the very structure of law faculties, one in which the model would be the European model of education. When he became Dean, "[n]early all law professors maintained a legal practice and taught part-time, receiving compensation directly from the tuition paid by students;"<sup>44</sup> an arrangement that Langdell considered inadequate for his aim of transforming the study of law in a methodical endeavor, *a professional activity in itself*. He contended that what qualified a person "to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, short, in using law, but experience in learning law".<sup>45</sup> The law professor was not to emulate the Roman advocate, the Roman praetor, or the Roman procurator, but the Roman jurisconsult. The experience "in the kind of study in which students were being trained"<sup>46</sup> was the fundamental qualification expected by Langdell; and he would find it in one of his students, James Barr Ames. Ames was appointed as Harvard law professor in 1873, almost immediately after graduating from one of the first batches of Langdellian students. As Macgill and Newmyer observe, "[t]he academic branch of the legal profession dates from that appointment".<sup>47</sup> The "professionalization of faculty," as Kimball correctly labels it, "faced powerful opposition from practitioners in the field who had traditionally filled the faculty role and thereby gained additional status and compensation;"<sup>48</sup> however, the revolutionary process had already been set on course. Years later, when Ames assumed the Deanship at Harvard and his own disciples became professors, "Langdell's original principle was unequivocally established as policy in the school".<sup>49</sup> Other schools would follow suit, in this as well as in the other aspects of the Langdellian model.<sup>50</sup>

Langdell found initial opposition to all of his innovations, but in the short run his model prevailed. New institutions would emerge from the success of the Langdellian

<sup>40</sup> LANGDELL & HOLMES (1887) p. 125.

<sup>41</sup> LANGDELL & HOLMES (1887) p. 125.

<sup>42</sup> LANGDELL & HOLMES (1887) p. 125.

<sup>43</sup> LANGDELL & HOLMES (1887) p. 124.

<sup>44</sup> KIMBALL (2006) p. 620.

<sup>45</sup> LANGDELL & HOLMES (1887) p. 124.

<sup>46</sup> MACGILL & NEWMYER (2008) pp. 52-53.

<sup>47</sup> MACGILL & NEWMYER (2008) p. 53.

<sup>48</sup> KIMBALL (2006) p. 620.

<sup>49</sup> KIMBALL (2006) p. 618.

<sup>50</sup> See MACGILL & NEWMYER (2008) p. 54 (observing that "[b]y the early 1890s Harvard graduates were in demand as missionaries to other law schools, frequently at the behest of university presidents anxious to speed their own institutions along the scientific path".).

reformation; namely, an alumni association in 1886, with occasion of the 'quarter-centennial' of Harvard;<sup>51</sup> and the Harvard Law Review in 1887, founded by students "moved in part by the desire to create a forum for their faculty's scholarship and a pulpit for propagating the Harvard gospel".<sup>52</sup> The Langdellian model of law school, has since then been often criticized and even condemned but has never been displaced.<sup>53</sup> It has defined the study of law as an academic discipline detached from the practice of law and endowed with its own immanent logic. As the second Dean of Harvard, Ames confided in 1903 that he distrusted "greatly the judgment of lawyers as to the teaching ability of their personal friends;" instead of relying on their recommendations, he would rather select "the Faculty from our own recent graduates after giving them a trial of a year or so as instructors".<sup>54</sup> The professionalization of faculty, in fact, entailed a distinction between law-teaching and law-practicing; two different 'industries,'<sup>55</sup> or as I would rather say, two distinct social practices.

However, while the structure of American law schools is Langdellian, its discourse is Holmesian. Oliver Wendell Holmes, Langdell's contemporary –and, in opinion of many, nemesis–, set forth a form of imagining the law that embraces the indeterminacy of legal texts and looks to the extra-legal world for the causes of their specification. In the next section I will explore the foundations for this discourse of legal responsiveness in Holmes's legal thought.

### 3. HOLMES AND THE RESPONSIVENESS OF AMERICAN SCHOLARLY INQUIRY

Oliver Wendell Holmes plays a central role in the imaginary of American legal scholarship. The opening lines of *The Common Law* have become the flagship of the American way of thinking about law and the "central slogan of legal modernism,"<sup>56</sup>

<sup>51</sup> LANGDELL & HOLMES (1887) p. 118. See GORDON (1995) p. 1234 (noting that "Harvard's gamble, after a slow start, finally paid off" in the form of an "active group of alumni –including James Coolidge Carter and Louis Brandeis– [that] propagandized the virtues of the case method to the practicing bar").

<sup>52</sup> MACGILL & NEWMYER (2008) p. 54. This also reinforced the professionalizing functions the Langdellian model of law school; see GORDON (1995) p. 1234 (observing that the "invention of the law review –and its membership based on class rank– also helped to sort and certify a legal elite whose members were in sudden demand as associates in the new metropolitan corporate firms").

<sup>53</sup> Jerome Frank's vigorous attempts at pedagogic reformation would result in the proliferation of clinics in the Langdellian law school. See FRANK (1947). But clinical education became a complement, not a surrogate, of Socratic method classes. Similarly, legal realism transformed the casebook into books of cases and materials; and encouraged eclecticism in the classroom discussion. All of these changes, however, can be seen as variations of the original Langdellian themes.

<sup>54</sup> See KIMBALL (2006) p. 643.

<sup>55</sup> See PRIEST (1988/99) p. 681 (asserting that "[b]oth legal practice and legal education are industries," that "change over time as other industries change," whose "increase in sophistication and specialization" has led in the recent decades "to an increasing distance between legal practice and legal education"). The starting point of this distance, I believe, is this moment of origins marked by Langdell's reforms at Harvard.

<sup>56</sup> GREY (1983) p. 1.

practically known by everyone who has devoted some time to its study.<sup>57</sup> Here Holmes declared that

*The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematic.*<sup>58</sup>

These words sound "like a rejection of abstract systems of thought, at least in the legal sphere,"<sup>59</sup> and reverberate with the cutting-edge themes of nineteenth century German legal academia: Savigny's historicism, and Jhering's instrumentalism.<sup>60</sup> They signaled a way for their audience to understanding the law as a product of its times and power relations.

Holmes also argued that "[t]o be master of any branch of knowledge, you must master those which lie next to it," thus "[i]f your subject is law, the roads are plain open to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life".<sup>61</sup> Much of the interdisciplinarity that came afterwards seem to find its justificatory genealogy in this kind of arguments put forward by Holmes.

Holmes gave a further methodological admonition in his 1897 address entitled *The Path of the Law*. In this momentous piece, Holmes advocated approaching the law from the perspective of its real-life, extra-legal consequences. He argued in this way not so much for theoretical reasons as for practical ones. Holmes believed that only this approach would allow practitioners to satisfy the interests of their clients. In order to identify the real-life, extra-legal consequences of the law, Holmes proposed to look at the law with a certain detachment that he identified with the perspective of a "bad man," who even if he "cares nothing for an ethical rule which is believed and practiced by his neighbors," he still is "likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can".<sup>62</sup> Holmes thus distinguished two perspectives on the law: that of the "bad man" who "cares only for the material consequences" of his knowledge of the legal system, and the "good man," who "finds his reasons for conduct" in ethical considerations.<sup>63</sup> Holmes posited the perspective of the bad man as the methodological starting point of an observation of

<sup>57</sup> The first line of this quotation has even been inscribed in one of the arches of the Yale Law School.

<sup>58</sup> HOLMES (1881) p. 1.

<sup>59</sup> NUSSBAUM (2000) p. 54.

<sup>60</sup> On the German influence on American legal academia, see RIESENFELD (1989) and POSNER (2000).

<sup>61</sup> HOLMES (1891) p. 23.

<sup>62</sup> HOLMES (1897) p. 459.

<sup>63</sup> HOLMES (1897) p. 459.

the law from the outside, and therefore as a departure from legal doctrine concerned with the internal construction of consistent explanations of legal concepts. Holmes's "bad man" is not concerned with the logic of legal norms, but with their observable regularity.

These remarks represent precisely what has become the standard account of the contributions by Holmes to American scholarly development: his fight against legal formalism and the excessive doctrinal orientation of legal thought. However, the extent to which Holmes's ideas represented a rupture within academia, and particularly with Langdell, has often been exaggerated;<sup>64</sup> not the least by Holmes himself, whom, after having praised Langdell's works on contracts<sup>65</sup> from which he even borrowed some insights,<sup>66</sup> came to call Langdell "the greatest living theologian" while suggesting that Langdell was a "Hegelian in disguise, so entirely is he interested in the formal connection of things".<sup>67</sup> It would seem that Holmes as the killer of the legal formalism dragon plays the legendary function of giving a mythical foundation to American legal scholarship. If Langdell is the father of American legal education, Holmes played the Oedipal role of the primeval rebel, the alpha male who became so by sacrificing the father. Unsurprisingly, he became for later generations the Yankee from *Olympus*: the hero who fought and killed the "overly rigid" formalists and their "strictly logical" reasoning oblivious "to purposes, circumstances, consequences, or justice;"<sup>68</sup> a scheme where Langdell played the role of the "preeminent formalist,"<sup>69</sup> and thus that of the bad guy. Holmes's tenure in the Supreme Court, including his oft-quoted dissent in *Lochner v. New York*,<sup>70</sup> bolstered this image of the rebellious sociological jurisprude/legal realist, allowing his admirers to establish a legal culture or, if I may, a legal cult around his image.<sup>71</sup> As one commentator puts it, "[t]o a large extent, then, we are Holmesians".<sup>72</sup>

<sup>64</sup> See KIMBALL (2009) p. 5 (observing that "[g]uided by the Procrustean interpretation of Oliver Wendell Holmes Jr., scholars have long associated Langdell with a sterile approach to legal study known as 'legal formalism' or 'classical legal thought'").

<sup>65</sup> See, e.g., KIMBALL (2007) p. 357 (commenting that "Holmes praised Langdell's 'most valuable' *Cases on Contracts* for a third time in 1871 when reviewing a different work").

<sup>66</sup> See KELLEY (2000) p. 1756 (noting that "much of Langdell's substantive analysis lived on in Holmes's contract theory" laid out in *The Common Law*; to the point that the "notable similarities" between some of Langdell's works and "Holmes's treatments of the same topics" suggest that "Holmes borrowed, without attribution, Langdell's doctrinal insights that were consistent with Holmes's positivism").

<sup>67</sup> HOLMES (1880) p. 234.

<sup>68</sup> TAMANAHA (2010) p. 59.

<sup>69</sup> TAMANAHA (2010) p. 51.

<sup>70</sup> *Lochner v. New York* (1905).

<sup>71</sup> Tamanaha comes close to perceive the structuring role that what he calls the formalist/realist divide plays. See TAMANAHA (2010) p. 201 (attributing the pervasiveness of this account to "the seductive attraction of narratives constructed around polar opposites"). Still, he remains prisoner to intellectualist explanations (see *id.*, suggesting that "[s]tark oppositions of this sort make a story more compelling and easier to repeat and grasp," "allow for sharper distinctions and analyses," and "help build simplified models"), instead of embracing a cultural explanation of the kind I am suggesting here.

<sup>72</sup> BURTON (1992) p. 2.

It is perhaps this capacity to appeal to a shared imaginary of struggle and victory over formalism, reminiscent of images of resurrection and regeneration, what allowed the proliferation of a heterogeneous array of scholarly approaches to the law in the United States. Once Holmes triumphed over the varieties of legal dogmatics practiced by people at his time, the imagination of future academics was set free to undertake the interdisciplinary path he so advocated. Even though according to some,<sup>73</sup> legal formalism was largely an imaginary enemy, it was an enemy nonetheless; and even better, a defeated one. The question within American academia, since the demise of formalism or doctrinalism, has become: what will there be instead of this defeated jurisprudential approach? For this reason, American legal scholarship from Holmes onwards looks like an endless pursuit of approaches –and, often, of labels– with which to replace the long-forgotten formalism.

#### 4. FEMINISM AND *LAW AND ECONOMICS* AS PARADIGMATIC FRUITS OF AMERICAN LEGAL SCHOLARSHIP

Nested in Langdellian institutions and shaped by Holmesian understandings, during the twentieth century American legal scholarship became home to uncountable scholarly approaches focused on identifying the extra-legal elements nurturing the law. A list of this kind of movements would include the legal process school,<sup>74</sup> the critical legal studies movement,<sup>75</sup> critical race theories,<sup>76</sup> a myriad of ‘law and’ movements, and recent developments such as democratic constitutionalism,<sup>77</sup> redemptive constitutionalism,<sup>78</sup> and demosprudence.<sup>79</sup> These approaches tend to coincide in questioning the capacity of legal rules to determine the practice of law and to point, in the face of this indeterminacy, to the extra-legal context in which legal analysis and decisions take place.

One consequence of this move towards theoretical questioning of the law coupled with interdisciplinary answers has been the abandonment by law professors of the doctrinal systematization of law; a result that many have criticized in the name of the requirements and demands of legal practice. Harry Edwards, a tenured professor turned judge, put forward what could be considered as the classic critique of “abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner”.<sup>80</sup> Edwards contended that as a consequence of this turn towards the theoretical, “judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the

<sup>73</sup> See TAMANAHA (2010).

<sup>74</sup> HART & SACKS (1958).

<sup>75</sup> KENNEDY (1983).

<sup>76</sup> BELL (1985).

<sup>77</sup> POST & SIEGEL (2007).

<sup>78</sup> BALKIN (2007).

<sup>79</sup> TORRES (2007); GUINIER (2008).

<sup>80</sup> EDWARDS (1992) p. 34.

academy;<sup>81</sup> accusations that go reiterated from time to time.<sup>82</sup> This line of criticism includes a warning: if law professors persist in these forms of scholarship, the prestige of law schools among practitioners of all sorts will suffer. Edwards argued that "too many important social issues are resolved without the needed input from academic lawyers" because "too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners".<sup>83</sup>

Social dissatisfaction with the products of scholarship, to be sure, is not an uncommon problem; but this does not turn that dissatisfaction into an authoritative guideline for the problem. As Finkin and Post observe, the "whole point of academic freedom is to insulate professional judgment" from crude social or political control, obligat[ing] "scholars to use disciplinary standards, not political standards [broadly speaking] to guide their teaching".<sup>84</sup> Similarly, in the 1960s Chile witnessed tensions and struggles between those who advocated a university focused on the solution of social problems, and those who claimed to defend the independence of educational institutions.<sup>85</sup> This historical background reminds us of the need to discuss the interaction between the university and social expectations of all kinds with conceptual clarity about the social functions of both higher education and scholarship.

Looking again at that landscape, we find an answer to the discomfort with academic legal scholarship by pointing to the contributions that Langdellian-Holmesian legal scholarship has made in the United States to the practice of the law, broadly understood.<sup>86</sup> Langdellian institutions give academics the institutional resources for reflecting independently and without conflicts of interests about the qualities of the legal practice, making it possible to advance unconventional points of view or speak on behalf of the interest of the powerless. Holmesian approaches adopt perspectives that legal dogmatics and other forms of doctrinalism neglect by definition. Feminism and

<sup>81</sup> EDWARDS (1992) p. 35.

<sup>82</sup> See HRICK & SALZMANN (2005) p. 762 (observing that during their time as law firm associates they "too infrequently found articles written by law faculty that addressed the legal issues our clients faced". Behind this alleged deficiency lies a "shift in focus from practical to theoretical," *id.*, p. 766, due probably to the fact that "law professors frequently have little or no practice experience, and they often have graduated from law schools where they were taught by professors with little practice experience". *Id.*, p. 769.).

<sup>83</sup> EDWARDS (1992) p. 36. Similarly, Hricik and Salzmman have argued that the reduction in what they term 'engaged scholarship' "can and will reduce the prestige of law faculty in the eyes of both bench and bar, who, not unimportantly, directly affect the prestige of the entire law school". HRICK & SALZMANN (2005) p. 779.

<sup>84</sup> See FINKIN & POST (2009) p. 104.

<sup>85</sup> For the situation at Universidad Católica, see CASTILLO (1997); for the process at Universidad de Chile, see HUNEEUS (1973).

<sup>86</sup> Kahn has replied to these criticisms taking exactly the opposite way. He observes arguing that "[t]heory has substantially failed to separate itself from practice," as "the central assumption of both the scholar and the lawyer is that [proposing legal] reform is the appropriate end of scholarship." KAHN (1999) p. 7. For Kahn, this engagement with legal practice amounts to a "collapse of the distinction between the subject studying the law and the legal practice that is the object of study," and is "the central weakness of contemporary legal scholarship." KAHN (1999).



the law and economics movement, would seem to, exemplify these advantages of Langdellian-Holmesian academic work.

Feminism has managed to question and often to transform, with various degrees of success, an impressive array of areas of social life: family,<sup>87</sup> pornography, employment, sexual harassment<sup>88</sup> and sexual abuse, the structure of the legal profession,<sup>89</sup> among many others. It has even questioned our very understanding of the terms involved in these process, such as our notions of the State,<sup>90</sup> the power of law over society,<sup>91</sup> and the forms in which legal change takes place.<sup>92</sup> Feminism has also offered a singular combination of social mobilization, theoretical reflection, and activist lawyering that renders it a valuable source of learning about the multiple ways in which legal and social change interact.<sup>93</sup> In all this, feminism has not conducted itself as a single bloc united by “a single set of commitments to a particular set of reforms,” but rather as a broad movement committed “to identifying the ways in which the law disadvantages women and to advocating changes to eliminate those disadvantages”.<sup>94</sup> For this reason, feminism has accomplished its purposes largely by providing “new ways of talking”<sup>95</sup> about long-standing social practices, institutions, and discourses.

Feminism, to be sure, did not emerge originally nor exclusively from the safety of the law classroom. It manifested itself in various social forums and political contexts such as the suffragist movement or the fight for reproductive rights, structured by shared experiences of oppression and marginalization, and forming complex alliances with other similar movements. Law schools, however, have provided an institutional space for the expansion of feminist reflections and their focusing on the way that the law impacts on the female condition. Certainly, one could object that American law schools have failed to fulfill this function satisfactorily. The rates of female full-time faculty, according to data garnered by the Association of American Law Schools, has risen since 1991 to date only from 24.1% to 37%;<sup>96</sup> numbers that should and could be higher. While I agree with the criticism that could be leveled against law schools for being slow at transforming their faculties into more inclusive and diverse bodies, I believe that this does not undermine my more general observation: that law schools and the tenure system provide an appropriate space for denouncing injustice in a theoretically complex way, in the name of the voiceless.

Another important theoretical current born in American law schools is the interdisciplinary approach known as Law & Economics. The ‘law & econ’ movement

<sup>87</sup> See, e.g., BARTLETT (1999).

<sup>88</sup> See, e.g., MACKINNON (1979); and MACKINNON & SIEGEL (2004).

<sup>89</sup> See, e.g., SHEEHY & MCINTYRE (2006).

<sup>90</sup> See, e.g., MACKINNON (1989).

<sup>91</sup> See, e.g., SMART (1989).

<sup>92</sup> See, e.g., SIEGEL (2006).

<sup>93</sup> For a theoretical account of these entanglements, see SCALES (2006).

<sup>94</sup> BARTLETT (1999) p. 476.

<sup>95</sup> SIEGEL (2004) p. 8.

<sup>96</sup> See ASSOCIATION OF AMERICAN LAW SCHOOLS (2010).

distanced itself from the mere elaboration of legal doctrine in order to pursue extra-legal answer to juridical problems, in a Holmesian way. An important consequence emerging from Holmes's remarks is that the law tends to lack determinate and unequivocal answers to a variety of problems that come under its cognizance, a problem that contemporary legal theory knows as the indeterminacy of law. This view of law contrasts with the one held by various approaches such as the French exegesis school,<sup>97</sup> legal dogmatics,<sup>98</sup> and some strands of positivism,<sup>99</sup> whose methodology assumes that by synthesizing various legal texts we can arrive at determinate and unequivocal conclusions,<sup>100</sup> at the *immanent rationality of the law*. But interdisciplinary approaches such as Law & Economics steer clear from this assumption, embracing the possibility that the law has certain gaps that need to be filled with reasons from other social spheres; in this case, from economics. As 'law & econ' giant and influential judge Richard Posner articulates in an article suggestively entitled *The Decline of Law as an Autonomous Discipline*, "indeterminacy is a frequent problem in interpreting statutory and constitutional provisions, especially old ones;"<sup>101</sup> a task for which "conventional legal doctrine, with its emphasis on the analysis of judge-made doctrine," does not provide a good training. Law & Economics finds a source of determinacy for the law in the immanent logic of markets, efficiency. To cite again Posner, "[i]n analyzing a wide variety of legal doctrine," "economists and economically minded lawyers have found that the law uncannily follows economics".<sup>102</sup> Proponents of this approach argue that efficiency must be protected against inefficient forms of legal allocation of resources; thus, often, from redistribution. For law and economics, "efficiency as wealth maximization"<sup>103</sup> seems to be the non-legal way out of legal determinacy.

These jurisprudential currents seem to suggest that certain forms of theoretical inquiry require a significant degree of institutional autonomy. Without it, intellectual pursuits that do not already count with social support, especially on the part of those social segments that have the power to make decisions about the professional destiny of others, will lack the adequate conditions to emerge and develop. The institutional autonomy of legal academia makes it possible for legal scholars to be responsive in an open and self-conscious way to the claims of the powerless –e.g., women– and to the perspectives of other observers of the social practice –e.g., economists–. Conversely, if

<sup>97</sup> See BONNECASE (1924).

<sup>98</sup> See NINO (1989).

<sup>99</sup> See BOBBIO (1961).

<sup>100</sup> This methodology is rooted in the medieval appropriation, by the study of law, of hermeneutic strategies developed in the context of religious strategies. See Berman (1983) p. 131 (observing that the "scholastic method of analysis and synthesis" –which presupposes both "the absolute authority of certain books" and the possibility "that there may be both gaps and contradictions within the text," which is why "it sets as its main task the summation of the text, the closing of gaps within it, and the resolution of contradictions"– underlay "the curriculum and the teaching methods of the law schools of Bologna and of the other Western universities of the twelfth and thirteenth centuries").

<sup>101</sup> POSNER (1987) p. 777.

<sup>102</sup> POSNER (1983) p. 5.

<sup>103</sup> POSNER (1983) p. 6.

legal academia lacks autonomy, it will produce forms of legal scholarship that match the immediate needs and requirements of the practicing legal profession; something that legal dogmatics accomplishes satisfactorily. Certainly, there is no problem with that. The point is that with a gain in institutional autonomy, scholarship can serve more ambitious functions: incorporating insights from other social groups and disciplines, and improving the practice of law in the long run.

## 5. CONCLUSION: THE SOCIAL FUNCTIONS OF SCHOLARSHIP

In the previous paragraphs, I suggested that a discussion of the various possible forms of legal scholarship demands a broader discussion of the social functions that scholarship in general needs to fulfill. Like any important discussion, this discussion would ultimately be a reflection about 'us,' about the overlapping communities that we are part of and about the way they interact. In this case, it would be a conversation about what does the Chilean society expect from its academics, those whom it bestows the opportunity to dedicate themselves to the elaboration of knowledge. Like in the Parable of the Talents, society can be pictured as asking us –scholars and educators– what have we done with that which we were entrusted with. Society, of course, does not have homogeneous demands and expectations, and we must always reflect on whose questions are we specifically answering. Have we responded to the expectations that the disadvantaged can be rationally expected to be putting on those who, like us, have more than they do? Or have we rather opted for following the demands of those who do have a voice and that demand us to provide them with readily usable products?

Legal scholarship, as any other product of human elaboration, can satisfy a variety of human needs, and thus it can be said to fulfill a variety of social functions. Understood as 'ideal types,' it is easy to see how legal dogmatics and critical approaches such as legal feminism fulfill quite different social functions. Legal scholarship can also be seen as having different audiences; and in the same line, it is also easy to see legal dogmatics and Law & Economics having different groups of readers. While I think that a change in the organizational aspect of law faculties can engender changes in the kind of scholarship they produce, I think that more valuable than the structural flow these changes can produce is the self-conscious discussion that they can open up in our academic community, and the dialogues they can generate with other disciplines and even with other social groups. For this reason, I end this paper with a call for reflection on what social demands and expectations do we want our scholarship to respond to. An increased self-awareness on the part of legal academia not only enables us to perform our intellectual tasks more comprehensively; it also charges us with a higher ethical load, as the life of the self-conscious community is the highest expression of the ethical life.

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