THE SOURCES OF LAW IN A CHANGING LEGAL ORDER*

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INTRODUCTION

My subject for this TePoel lecture arises from a difficulty I have had in my current work, which is the preparation of a casebook on comparative law and, specifically, that part of the casebook which deals with the continental European civil law systems. My difficulty was not unlike what those of you who are first-year law students may be experiencing—how does one grasp and present a legal system as a whole? How do we penetrate its formal structures and technical apparatus so as to fully understand it and—if it is a foreign legal system—usefully compare it with our own? In trying to deal with this difficulty, I encountered another problem which was this: the widely accepted categories of legal thought in civil law systems (the way most legal scholars understand and explain their own system to themselves and others) did not seem to correspond to the actual predominance of the various materials of legal reasoning in those systems. But then I had to ask myself whether the American situation is really any different in this respect. Have not the conceptual tools which are now generally in use in American law schools become increasingly obsolete over the past sixty or so years? If I am able to persuade you today that they have, this does not mean that law as a discipline is especially retarded. I ask you to consider in this connection the fact that Charles Darwin's essay On the Origin of Species was published in 1859, but it was not until the 1940's that the classification systems used in the life sciences were adjusted to reflect the changes brought about by Darwin's theories.1 Obviously, it takes a long time for a new outlook to enter the mainstream of a field, and the changes that have taken place in law in our century, I will argue, are comparable in magnitude to the effect of evolutionary theory on biology.

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What I propose to do in this lecture, therefore, is, first, to make out in a very general way the elements of a case that the sources-of-law theories and other widely accepted categories of legal thought in modern Western legal systems still do not adequately reflect the changes brought about by the gradual transformation, over the past century, of liberal laissez-faire states into modern regulatory social welfare states. Then, I would like to explore with you some implications of this transformation for legal education and legal methods.

In a sense, my topic is of a homely everyday sort, but let me try to explain why I believe it needs attention by reminding you of why things like classification systems matter. We all take for granted that the customary terminology, categories, and divisions of a given area of knowledge are indispensable for regular on-going work within that field. We need them to enable ourselves to organize, retain, communicate, and build on what we learn. Yet this same apparatus can also constitute an impediment to intellectual advance of a really fundamental sort. This is because it has a powerful influence in determining which issues are raised and treated as important as well as which are excluded or overlooked. In our own field of law, our conceptual apparatus determines to a great extent how law is taught and how our legal culture is transmitted from one generation to another.

In both common and civil law countries, legal writers and educators accept certain divisions of law that determine how legal subjects are allocated to various courses in the curriculum and how different subjects are arranged in textbooks, bibliographies, and library catalogues. These divisions do not have any inherent logic. They have been produced by various historical factors and have been maintained without much reflection. Besides the standard divisions of the law into subject matter areas, a certain account of the nature and relative importance of the various sources of law within each legal system is widely accepted. Traditional sources-of-law theory insists on the centrality of court decisions to the common law and of the civil codes to civil law. Case law, with its


3. See generally Max Weber on Law in Economy and Society, ch. III (fields of Substantive Law) and ch. IV (Categories of Legal Thought) (M. Rheinstein ed. 1954) (first published 1922) [hereinafter cited as Weber].


The classical common law theory, as accepted by Karl Llewellyn in the 1930's, was:
accompanying elaborate techniques for dealing with precedent, is supposed to be the lifeblood of the common law, while the civil codes, with their refined methods of statutory interpretation, are considered the heart of the civil law. In civil and common law systems alike, these models (which never precisely corresponded to reality) still govern much theoretical discussion about the materials of legal reasoning, their binding or non-binding character, the hierarchy among them, and judicial techniques for dealing with them. Yet as soon as one moves from legal theory to the systematic treatment of any given legal subject matter and, even more so, when one enters the world of the practitioner, the widening discrepancy between theory and reality is apparent.

The relative predominance of the various sources of law is now quite markedly at variance with the classical common and civil law descriptions. In addition, and equally important, the very nature of two of the main sources, legislation and case law, has been profoundly altered since these descriptions were formulated in the late nineteenth and early twentieth centuries. I will suggest here

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Case law modified by statute is the essence of the Anglo-American judicial system. For the case law is the background against which statutes are viewed; it governs wherever no statute has entered. Indeed, statutes are in the main regarded as innovations on case law, to be limited in their application. . . .


The continuing centrality of the Civil Code of 1804 in the French system is exemplified by the following introductory passage from Jean Carbonnier's great treatise on the civil law, where the term "civil law" is used in a narrow sense to refer to the law in those areas covered by the civil codes:

It is customary for an introduction to the study of civil law to serve in addition as an introduction to the general study of law. This is because the civil law traditionally has had the vocation of offering models to other legal disciplines. This is not necessarily because it has the most extensive field of application: if it did a century ago, doubtless it no longer has today, having lost a great deal to other sectors of the law (such as administrative law, labor law, etc.). But what remains true is that it presents the highest degree of accomplishment and, if one may say so, perfection:

Fundamentally, first, because it corresponds in the purest manner to the image one has of the essence of law, an equilibrium imposed from above upon two individuals, a scale in the hands of a goddess;

Technically, also, because, being older, it has explored its concepts more deeply, and so well that the other legal disciplines have not been able to do better than to borrow them afterwards.

1 J. Carbonnier, Droit Civil 9 (10th ed. 1974).

According to Roldolfo Sacco, in Italy:

The civil code, in 1865, as well as in 1942, occupied the place of honor among the sources of civil law. It was located practically at the summit of the hierarchy of these sources; other laws quite naturally were subjected to the scale of values that the code had made its own.

Sacco, La codification, Forme Dépassée de Législation?, Italian National Reports to the XI Int'l Congress of Comparative Law 65, 66 (1982).
that the fundamental changes that have taken place have pro-
duced significant areas of convergence between civil and common
law systems, casting doubt on the utility of many of the tradition-
ally accepted distinctions between the common and the civil law.5

What has happened over the past sixty or so years to render
traditional ways of organizing knowledge about law increasingly
less useful? In the first section of this lecture, I will review briefly
the series of interrelated developments that have altered the legal
landscape in the twentieth century. Then, I will make some sug-
gestions about how legal education, especially in the first year,
might adjust to these changes. In the concluding section, I will of-
fer some observations about their implications for certain method-
ological problems of comparative law and legal sociology.

SOURCES OF LAW IN MODERN WESTERN STATES

The traditional ways of thinking about the materials of legal
reasoning began to be unsettled by the “discovery,” proclaimed by
several nineteenth century writers in Europe and the United
States, that the judicial function is not merely a mechanical pro-
cess of finding and applying legal norms contained in earlier cases
or in legislation. Von Jhering in Germany, Bentham and Austin in
England, Holmes in the United States, and Gény in France all ef-
effectively demolished the illusion of the internal logic and com-
pleteness of the law. While the news that judges were often
engaged in a creative law-making process held the attention of the
academy, however, time-honored methods of thinking and commu-
nicating about law were being decisively and permanently affected
by events in a rapidly changing society. Five aspects of the transi-
tion from market to mixed and regulated economies in particular
undermined classical sources-of-law notions: the rise of legisla-
tion, the increasing variety of legislation, the decline of precedent
in the common law, the emergence of administrative law, and the
expansion of the functions of the state.

THE RISE OF STATUTORY LAW

Starting in the late nineteenth century, in both civil and com-
mon law systems, there was an outpouring of a kind of legislation
which displaced both the judge-made common law and the conti-
nental civil codes with essentially the same kind of new law. What

5. For a discussion of the basis for grouping certain countries within civil law
and common law traditions, see M. Glendon, M. Gordon & C. Osakwe, Compara-
tive Legal Traditions in a Nutshell 4-8, 13-14 (1982).
kind of law was this? It belonged to the age of what was then
called universal suffrage\(^6\) and to the spirit of men like Jeremy Ben-
tham who believed that legislation could and should be used as a
"scientific" instrument of social reform and control.\(^7\) National leg-
islatures, elected by increasingly broader constituencies, adopted
factory legislation, workmen's compensation laws, rudimentary so-
cial legislation, and laws regulating employment contracts, and be-
gan to regulate commerce and public utilities.\(^8\) This modern
legislation removed great areas wholly or partially from the cover-
age of the judge-made common law in the Anglo-American sys-
tems and from the civil codes in the continental systems.
Moreover, it not only took territory from these traditional sources,
but it was fundamentally inconsistent with their underlying ideol-
ogies of protection of private property and enforcement of private
ordering through contract.

Then, in the first part of the twentieth century, mainly in re-
sponse to economic crises, a second wave of modern legislation ap-
peared. Legislatures in industrialized countries came to the
assistance, at different times and to varying degrees, of farmers,
debtors, and unemployed workers. The state started to attend sys-
tematically to the elementary needs of its disadvantaged citizens.
Each country laid down the main lines of its legal treatment of in-
dustrial relations. The administrative apparatus of the modern
state began to take on its present contours.

What is of particular interest to us in this oft-told tale is how
academic lawyers did and did not respond to the new situation.
The growing importance of statutes as sources of law in the United
States over the first half of the twentieth century was early re-
marked upon by Pound and Landis in articles which are now re-
garded as classics.\(^9\) In 1947, Felix Frankfurter wrote that "as late
as 1875 more than 40% of the controversies before the [Supreme]
Court were common-law litigation, fifty years later only 5%, while


\(^8\) Id. at 259-302; L. Duguit, supra note 6, at 32-67; Alvarez, Dominant Legal Influences of the Second Half of the Century, in The Progress of Continental Law in the Nineteenth Century, 11 Continental Legal History Series 31, 36, 52-56 (1918); Duguit, Changes of Principle in the Field of Liberty, Contract, Liability, and Property, in The Progress of Continental Law in the Nineteenth Century, 11 Continental Legal History Series 65, 83-86 (1918).

today cases not resting on statutes are reduced almost to zero.”

In 1982, Guido Calabresi summed up the long trend: “The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.” In the civil law countries, of course, legislation had been the primary source of law since the acceptance of parliamentary supremacy, with the great nineteenth century codifications of civil law enjoying pride of place. What is interesting there is that the civil codes have receded steadily in importance, as more and more of the matters with which they are concerned have become the subject of what civil lawyers call “special legislation.” The ever-growing body of separate statutes reinforces the traditional preeminence of enacted law within civil law systems but diminishes the influence of the codes themselves.

THE MANY VARIETIES OF STATUTORY LAW

The important position of statutes alongside case law in the common law and codes in the civil law is now well recognized. Indeed, the only place where this aspect of modern legal life seems to be insufficiently appreciated, is, as I will discuss further presently, in the usual law school curriculum. It has been less widely noticed, however, that modern enacted law differs in kind both from older common law statutes and from the great continental

12. “The 19th century was the century of codification in Western Europe, between the Napoleonic codification of 1804-1810 and the German codification of 1900. The code was considered the natural means of presenting legal norms, that is enacted law, which was then considered to be the exclusive source of law.” Tallon, La Codification en France, 27 ANNUAIRE DE LÉGISLATION FRANÇAISE ET ÉTRANGÈRE 12 (1978).

Justice Ellen Ash Peters of the Connecticut Supreme Court has pointed out the extent to which statutes predominate in the work of state court judges. A recent sample of cases from her own court revealed that only 10% were pure common law cases. Peters, Common Law Judging in a Statutory World, 43 U. PITTSBURGH L. REV. 995, 996 (1982).
SOURCES OF LAW

codifications. There is not just more of it; it now comes in greater variety. Some of these varieties are new in the relatively brief history of legal regulation. Part of the reason we do not notice this is because we use the single word "statute" to describe many different types of legislation. For example, in the common law systems, there are still statutes of the sort known to Blackstone—mere restatements of or patches on the common law. 15 There are also statutes of the kind, to which Pound and Landis devoted much attention, which potentially establish new principles or directions for the common law. 16 But in addition, and, in the United States especially since the New Deal, the body of statutory law has been greatly augmented by what one may call bureaucratic law: the statutes which create regulatory agencies with broad delegated powers to make rules and to adjudicate and the great laws of the welfare state—revenue-raising laws, social security laws, and the various public assistance laws. To the extent that the regulatory laws which increasingly dominate modern legal systems tend to be highly detailed and specific, they create a world of their own in which the role of judge-made law is limited. 17 Insofar as such legislation represents the temporary compromise of conflicts among organized interests, 18 or "the pressures of narrow interest groups rather than any coherent view of the public interest," 19 it poses special interpretive problems for judges who must attempt to apply it. The judge's search for a guiding principle or policy may be futile: such statutes often have multiple purposes, some of which may be in tension or conflict with each other.

At first it was difficult for common law judges to adjust to the proliferation of legislation within the legal system. Their back-

15. Much of the work of the National Conference of Commissioners on Uniform State Laws has produced statutes of this type.

16. Statutes establishing new rights and obligations of landlords and tenants would be examples of this type of legislation. Pound, who was familiar with continental European theories of code interpretation, suggested that the new American statutes could, in appropriate cases, be treated as sources of principles for the decision of cases not expressly covered by their words or as starting points for reasoning by analogy. The principles embodied in modern legislation were, he argued, entitled to as much respect as were the old principles of the common law. In fact, after the 19th century "discovery" that judges were often making, not finding, law, legislation began to seem to have a superior claim to legitimacy than did the common law. Pound, supra note 9, at 406-07. See also Landis, supra note 9, at 217; Williams, Statutes as Sources of Law Beyond Their Terms in Common-Law Cases, 50 Geo. Wash. L. Rev. 554 (1982).


18. G. Calabresi, supra note 11, at 77.

ground and training had given them little preparation for dealing with statutes. Roscoe Pound called attention to this problem in his 1908 essay complaining about judicial obstruction of social legislation.20 The judges' hostility to such legislation was due not only to their disapproval of its content, he said, but to the fact that they regarded a statute as an "alien element" in the legal system.21 They had been taught that statutes were either declaratory of the common law or remedial, and they expected legislation to "[furnish] rules for particular, definite situations."22 But modern statutes increasingly failed to comport with these models, and many judges were at a loss as to how to handle them.

In the early 1930's, a young professor at Harvard Law School took up the problem posed by Pound of the proper relation of the courts to modern legislation. Even more than at the turn of the century, the legal world was by then dominated by statutes. James Landis wrote in 1934: "Though . . . perhaps, the major portion of the law is now skeletonized between the covers of the statute books, little beyond mere recognition of that fact has altered the present approach to law."23 At that stage in his life, Landis believed that legislation was the most important source of law, and he pioneered in making it both an academic subject and a science.24 He was intensely interested both in the art of statutory drafting and in the role of judges who had eventually to decide concrete cases in statutory areas. In a still influential essay, he outlined new ways of dealing with statutes, methods more appropriate to modern legislation than the wooden approaches of nineteenth century judges.25 He educated judges to see statutes not as mere exercises in rule-making but as frequently representing "[c]hanges of attitude, new points of departure, germinating principles."26 In many cases, he pointed out, what was called for was not for the court to fit the statute into the background of common law but to mold the common law to the statute.27

Eventually, after the historic struggle over the constitutionality of the New Deal legislation, American courts came to accept the new economic and political order and judges became more adept at meshing statutory and common law. Even with this general in-

20. Pound, supra note 9, at 383.
21. Id. at 384-85.
22. Id. at 389.
23. Landis, supra note 9, at 213.
25. Landis, supra note 9.
26. Id. at 219.
27. Id. at 223.
crease in judicial-legislative interaction, however, Llewellyn's study of the work of state appellate courts in the 1950's showed that American judges were still much less at home in working with statutes than they were with case law. He noted "[t]he unevenness, the jerkiness, the consequent lessening of reckonability which attends statutory work as against work with case law authorities. . . ."28 He contrasted American efforts with the techniques of civil law lawyers:

It is indeed both sobering and saddening to match our boisterous ways with a statutory text against the watchmaker's delicacy and care of a theologian, or of a continental legal craftsman, or even of a good American lawyer when the language he is operating with is that not of a statute, but of a document.29

As recently as 1978, the then Chief Judge of the First Circuit Court of Appeals, stating his impression that statutory interpretation problems were the number one claimants on his court's time, lamented that lawyers arguing before that court too often only scratched the surface of complex statutory problems.30

Part of our continuing difficulty in dealing with statutes arises from the fact that the variety of modern statutes calls for a more differentiated treatment than that offered by conventional theories of statutory interpretation and construction.31 Even Pound's and Landis' demonstrations of how statutes could be used as the starting points for development of a new, vigorous, principled body of case law apply to fewer and fewer statutes. It is, of course, possible to find exemplary "lines" of statutory interpretation that are comparable in their way to lines of case law development.32 Such elegant theories and models for statutory interpretation are of decreasing utility, however, in dealing with the really difficult problems of statutory interpretation that are quite common today. Let us see why this is so.

In the first place, piecemeal amendment tends to destroy any original coherence or rationality a regulatory scheme may have

29. Id. at 380.
31. As Justice Breitel wrote in 1959: "All statutes are not alike, and, in fact, are not treated similarly. Yet judicial standards of construction and rationale of interpretation purport to apply a single approach to all statutes. What is required is an acknowledged pluralistic treatment." Breitel, The Courts and Lawmaking, in LEGAL INSTITUTIONS TODAY AND TOMORROW 2-3 (M. Paulsen ed. 1959) (citation omitted). See also G. CALABRESI, supra note 11, at 214.
32. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 27-57 (1949).
had. Another difficulty is that statutory interpretation often does not simply involve a single statute and the kind of problem that is usually presented in legal methods materials. As the legislative mills grind on, the courts must frequently deal with the tension, conflict, and interplay among two or more statutes—sometimes within the same field but passed at different times in response to different problems, sometimes within different but overlapping fields, sometimes complicated by the presence of administrative regulations in the area, and sometimes further complicated by the relation between state and federal law. Labor law and securities law, for example, are replete with such problems. In such circumstances, the value of precedent is diminished; overrulings and changes of direction are frequent. Many scholars have recently lamented the fact that repeal of statutes is much less common than the passage of new laws which often fit uneasily with preexisting legislation. In dealing with the problems of giving content to, or reconciling, conflicting statutes, state and federal judges, as a Te-Poel lecturer pointed out in 1977, are engaged, not in traditional judicial decision-making, but, for better or worse, in statesmanship. The foregoing is not a list of atypical situations. These are the kinds of statutory problems that young lawyers have to deal with every day when they leave law school for most jobs in the public or private sector. Are we preparing them in law school to deal with such problems? Do our course materials contain such problems? Do we have a view of the legal system that enables us to construct such teaching materials?

Our civil law colleagues encounter parallel difficulties. Just as modern statutes in common law systems have little resemblance to their nineteenth century predecessors, there are significant differences between modern continental legislation and the nineteenth century codes. The civil codes, which now constitute only a small part of the total volume of existing legislation in such coun-


35. G. CALABRESI, supra note 11, at 6; Savatier, supra note 14, at 43.


37. N. HORN, H. KÔTZ & H. LESER, supra note 13, at 52; Sacco, supra note 4, at 68; Tallon, supra note 12, at 17.
tries, tend to lay down general principles rather than to provide specifically for particular situations. Ordinary legislation does not maintain the same level of generality, however, nor is it characterized by as much conceptual and terminological consistency as are the codes.\(^{38}\) Regulatory legislation, such as land use control, tax law, wage and price control, labor law, rent and eviction control, etc., is more particularistic and more sensitive to political and economic currents than the codes. The fact is that legislatures have often found it hard to make necessary reforms within the structure of the hallowed civil codes, especially where the interests of organized economic groups are affected.\(^{39}\) They have resorted instead to statutes outside the codes which are more easily amended as constellations of interests and power shift and as circumstances change. Modern statutes in civil law systems require different approaches from those brought to the interpretation of the codes.\(^{40}\) In both the Anglo-American and Romano-Germanic systems, therefore, statutes are not only pervasive but increasingly regulatory, volatile, and little related in form and spirit to the former primary sources of law.

The increased volume of enacted law of all kinds in modern Western legal systems has increased the necessity for its construction, interpretation, and application by courts. Thus, in this sense, common law courts have become more like their civil law counterparts in that they are now largely engaged in dealing with enacted law. But in neither system are traditional techniques of interpretation particularly well-suited to the task of dealing with the various types of modern statutes. This brings me to my next point which concerns changes in judge-made law.

**The Decline of Precedent**

One of the major differences between case law in a common law system and case law in the civil law is that the judicial function in the civil law systems has traditionally been regarded as limited to deciding particular cases,\(^{41}\) while common law courts are not only supposed to settle disputes between the parties before the

\(^{38}\) In France, much modern legislation has been collected into what have been called "codes." But, as Denis Talon has pointed out, these "codes" merely collect diverse statutes and regulations within a given subject matter area. Tallon, *supra* note 12, at 16-17.


\(^{40}\) See generally L. Duguit, *supra* note 6, at ch. 3. See also, for Italy, Sacco, *supra* note 4, at 67.

\(^{41}\) *E.g.*, *French Civil Code*, Art. 5: Judges are forbidden to decide cases submitted to them by way of a general and regulatory decision.
court but also to give guidance as to how similar disputes should be handled in the future. The reasoned elaboration of precedent has traditionally been the principal device for achieving the optimum balance between continuity and growth in Anglo-American law. Changes occurring over the twentieth century, however, have considerably affected this function of the common law courts. We have already noted that the proliferation of regulatory law, while affording an abundance of occasions for litigation, does not necessarily offer the court wide scope for interpretation or for reasoning from principles contained in statutes. Second, courts in the United States, especially federal courts, have increasingly been called to rule upon problems of social conflict which cannot easily be resolved by the reasoned elaboration of principle. The judge in public law litigation has increasingly become a public "policy planner and manager." Third, decisions of the United States Supreme Court in important cases in recent years often show little effort on the opinion writer's part to build a bridge to preexisting authority. They often seem to simply balance the interests involved or react to the facts of the particular case. Frequently, they appear to be merely the products of majority vote.

Finally, there seems to have been a significant change in the very nature of decision-making in common law courts generally. This change concerns the relative importance of the two traditional functions of common law case law: that of settling the dispute between the parties and that of providing principled guidance for the future. As P.S. Atiyah pointed out in his inaugural lecture at Oxford University in 1978, there is apt to be a tension between these two functions: a decision which does justice in all the circumstances of the case is often likely to conflict with the desire to encourage or discourage certain types of behavior in the future. Atiyah makes a convincing case, which seems to be applicable at

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42. As Karl Llewellyn put it:

_The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes._ Our legal theory does not admit of single decisions standing on their own. If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a new rule as they decide.


44. Atiyah, _From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law_, reprinted in 65 Iowa L. Rev. 1249, 1250 (1980). This is essentially the same distinction Llewellyn made between the "fireside equities" and the "situation sense." For Atiyah, as for Llewellyn, attention to guidance for the type of situation was the more important of the two functions. _The Bramble Bush_, supra note 28, at 44, 245, 268; _The Bramble Bush_, supra note 42, at 159-60.
least as much to the United States as to England, that modern
common law courts are less inclined than their nineteenth century
predecessors to resolve disputes by adhering to principle and are
giving much greater weight to the problem of individualized justice
in the particular case. I do not suggest that we should uncritically
accept this thesis. In particular, it seems to me that the way facts
were found and the outward appearance of principled decision-
making in the nineteenth century must have masked some very
subjective judgments in many cases. But to the extent that Atiyah
is correct, Anglo-American judicial decisions have quietly come to
assume in fact a role similar to that ascribed in theory to decisions
of civil law courts.

Speculating on the causes of the change he asserts to have
taken place in case law, Atiyah tried out the hypothesis that per-
haps the task of laying down broad rules for the future is now seen
as primarily legislative while the role of the courts is mainly just to
resolve disputes.  The problem with this analysis, however, as Atiyah
recognizes and as we have already noted above, is that much modern legislation is
itself decreasingly concerned with principled guidance for the fu-
ture. Modern statutes themselves are frequently complicated by
the effort to adapt to numerous individual fact situations. In tax
law, for example, response to considerations of individual justice,
to intense lobbying efforts, or to political trade-offs have produced
a patchwork of provisions where the thread of principle can barely
be found.

All of these factors bring into question the traditional view of
the role of case law within a common law system. Our folklore has
it that the common law has the ability to adapt to new circum-
stances while maintaining continuity with the past, that it offers
reasonable reckonability through rational elaboration of principles
which are at least implicit in prior case law, statutes, or the Consti-
tution. The good judge is supposed to be not only a virtuoso of
rational activity—finding latent principles, harmonizing apparent
inconsistencies, analogizing and distinguishing—but also an artist
of persuasion, winning acceptance for his decision and legitimacy
for the judicial process in general with each convincing, well-con-
structed opinion. As Llewellyn described what he called the
"Grand Style" of judicial decision-making, it consisted in:

46. M. Glendon, M. Gordon & C. Osakwe, supra note 5, at 133.
47. Atiyah, supra note 44, at 1259.
[A]n as-of-courseness in the constant questing for better and best law to guide the future, but the better and best law is to be built on and out of what the past can offer; the quest consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow.

It is a way of on-going renovation of doctrine, but touch with the past is too close, the mood is too craft-conscious, the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform.48 The good judge, Llewellyn said, seeks to fit rule and decision “with the feel of the body of our law,” to assure “that they go with the grain rather than across or against it, that they fit into the net force-field and relieve instead of taunting the tensions and stresses.”49 Cardozo, Llewellyn, and Levi have produced memorable accounts of the process at work.50

But just as the traditional idea of a statute increasingly fails to correspond to modern legislative reality, this traditional depiction of case law is an inadequate description of present-day judicial behavior in modern common law countries. Llewellyn was able to maintain the illusion in the 1950’s only because he concentrated heavily on private law, especially those areas which above all others had remained oriented to the practices and expectations of the groups they served—contracts and commercial law prior to the development of “consumer law.” Private law was the stronghold of common law case law, and, as it shrinks, case law of the traditional type does too.

While there thus seems to have been a certain diminution in the role of precedent in the common law, court decisions have increasingly come to be treated as important sources of law in the civil law systems. As a practical matter, it is now generally accepted in civil law systems that judges do and should take heed of prior decisions, especially when a consistent line of cases has developed.51 Even when the case law has not become settled, individual prior decisions nevertheless have some weight which varies

49. Id. at 191.
51. N. HORN, H. KÖTZ & H. LESER, supra note 13, at 63; MacLean, Judicial Discretion in the Civil Law, 43 LA. L. REV. 45, 47-48 (1982); Sacco, supra note 4, at 68; 1 K. ZWEIGERT & H. KÖTZ, supra note 4, at 64.
according to the number of similar decisions, the importance of the
court issuing them, and the intrinsic persuasiveness of the opin-
ions. Civil and common law differ, of course, in that case law is
said to be binding in the common law by the rule of stare decisis,
while in civil law theory cases are said to be of no authority apart
from their intrinsic merits. Given the narrowness of the doctrine of
stare decisis, and the fact that decisions of certain high courts in
several civil law countries have been made binding by statute,
however, the sometimes asserted contrast between civil and com-
mon law systems in this area begins to appear as more of a nuance
than a major difference.

Finally, as courts in the United States begin to delegate brief-
reading and opinion-drafting to large and layered staffs and fre-
quently to dispose of cases without opinion or with short memo-
randum opinions, another traditional legal distinction begins to
fade: that between adjudication and administration. The tension
between fairness for the immediate parties and guidance for the
situation-type is complicated by the presence of other factors: con-
cern for efficiency and system maintenance. No study of the judi-
cial process is complete, in the United States at least, that does not
take account of the bureaucratization of the courts. This has been
one of the more recent manifestations of those changes in govern-
ment which earlier in the century produced in increasing quanti-
ties a kind of law that came to be known as administrative.

THE RISE OF ADMINISTRATIVE LAW

Starting in the late nineteenth century, as we have seen, mod-
ern statutes began to displace case law in the common law systems
and codes in civil law systems as the predominant sources of law.
Over the twentieth century, administrative regulations and deci-
sions became an increasingly important part of the legal landscape
in modern states, rivaling both legislation and judicial decisions as
sources of law. In the United States, Ernst Freund was one of the

\[52. \text{The decision of a higher court is binding on lower courts in the same jurisdic-
tion in cases "on all fours" with each other. In all other situations, stare decisis in the}
common law is not a "rule" but merely an observable aspect of judicial beh-
avior. In England, however, it was only in 1966 that the House of Lords announced}
that it considered itself free to overrule its own prior decisions.}

\[53. \text{R. Schlesinger, Comparative Law: Cases, Text, Materials 551 (4th ed.}
1980).}

\[54. \text{See Clark, Adjudication to Administration: A Statistical Analysis of Fed-
eral District Courts in the Twentieth Century, 55 S. Cal. L. Rev. 65 (1981); McCree,}
Bureaucratic Justice: An Early Warning, 129 U. Pa. L. Rev. 777 (1981); Vining, Just-
tice, Bureaucracy, and Legal Method, 80 Mich. L. Rev. 248 (1981).}

\[55. \text{Clark, supra note 54, at 66.} \]
first to see the growing significance of administrative government. As early as the 1890's, he was producing scholarship far ahead of his time, anticipating the legal problems that pervasive regulation would pose and insisting that legal theory take notice of legislation and public administration. But it was not until the 1930's, when many academic lawyers became architects of the New Deal, that administrative law found a place in the regular law school curriculum. Among these lawyers was James Landis, who lost his faith in legislation because he considered it too slow and cumbersome to be adequate to the tasks of modern big government. Government needed flexibility, efficiency, and expertise, all of which seemed to Landis to be offered by administrative agencies. The academic subject which now seemed to him much more important, interesting, and challenging than legislation was administrative law. Combatting resistance to expanding administrative law courses, he told Harvard alumni in 1937: "It is not going to make any difference who controls the government in Washington. . . . They can be Democrats, Republicans, Socialists, or what not—the pervasive character of government will continue." When he returned to academic life as Dean of the Harvard Law School in 1945 he told the curriculum committee: "We must train men to handle the combination of law and government. We can't go on teaching law in the old-fashioned way." Landis saw that, in a sense, the age of legislation was already over. Nineteenth century protection had passed into twentieth century direction. The New Deal had become the new deck.

The phenomenon was soon reflected in the caseload of the federal courts. Mr. Justice Jackson wrote in 1952: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." Felix Frankfurter, who in 1947 had called the attention of the legal community to the great proportion of the Supreme Court's work involving statutes, took up his pen in 1957 to write about the degree to which the Supreme Court by then was occupied with administrative law: "Review of adminis-
trutive action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the court's work, comprising one-third of the total cases decided on the merits.\textsuperscript{62} Administrative law, the child of the nineteenth century, came into its own everywhere in the industrialized West in the twentieth century.\textsuperscript{63} New areas came under regulation; government's role in providing social services increased. Despite sporadic and modest attempts at deregulation, as more areas of public concern are identified, such as protection of the environment or health and safety in the workplace, the scope of administrative law continues to expand. Today, in any highly developed Western legal system, the laws that have the most direct impact on the lives of most people, the laws that an ordinary person encounters most often in the course of a lifetime, are the predominantly administrative bodies of tax law, social security law, public assistance law, housing law, immigration and naturalization law, and so on.\textsuperscript{64} Administrative law adds to modern case law and particularistic legislation yet another source of law in which reckonability is problematic. Out of the necessity to deal with a multitude of unforseeable day-to-day contingencies, it has to repose great confidence and discretion in officials. It is often, as Charles Szladits has said, an "ad hoc creation," uncertain, volatile and "easily affected by social, political, economic, atmospheric, etc. changes."\textsuperscript{65}

Though administrative law has become a permanent and important source of law in modern nations, lawyers generally still tend to be unfamiliar with it and to feel uncomfortable about it, much as their ancestors once did with regard to statutory law.\textsuperscript{66} Legal education, by usually relegating the study of administrative law to a separate course, encourages this tendency to treat administrative law as exceptional and apart, thus inhibiting the capacity to deal with it.\textsuperscript{67} The fact that these courses and the teaching materials designed for them are devoted primarily to judicial decisions reviewing administrative action leaves important aspects of administrative government entirely out of view.

\textsuperscript{63} See generally E. Freund, Administrative Powers Over Persons and Property (1928).
\textsuperscript{64} See K. Davis, Administrative Law Text 3-4 (3 ed. 1972); Alvarez, supra note 8, at 49-50.
\textsuperscript{66} K. Davis, supra note 64, at 19.
\textsuperscript{67} A notable attempt to remedy this is J. Mashaw & R. Merrill, Introduction to the American Public Law System: Cases and Materials (1975).
Yet, administrative authority everywhere begins to look like an important coordinate branch of government whose workings are insufficiently examined and understood. \(^{68}\) It seems likely that if legal educators accorded it a higher priority, we might make more progress in learning how to maximize its benefits while limiting its ill effects. Comparative study warns us that more is at stake here than merely promoting efficiency and minimizing over-regulation. Administrative law, in modern times, has been a principal legal tool of totalitarian regimes. A characteristic technique of the despot has been to leave the bulk of the legal system unchanged and simply to by-pass it with administrative regulations. \(^{69}\) Of more immediate importance to Americans, perhaps, is the fact that the interaction of federal courts and federal agencies raises largely unexamined problems concerning the legitimacy of both within the framework of traditional democratic theory. \(^{70}\)

**The Rise of Public Law**

In classical common and civil law alike, the role of direct government intervention was supposed to be minimal, and it was assumed that two of the main functions of the state were to protect private property and to enforce legally formed contracts. From this individualistic base, in which private law had predominated and property and contract reigned supreme, the civil and the common law systems alike began moving in the late nineteenth century toward modifying ownership rights, limiting or channeling the power of private persons to make their own enforceable contrac-

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68. If the New Deal marked the transition to administrative government in the United States, in France, it was the Constitution of the Fifth Republic in 1958 that was the decisive turning point in the history of the relationship between legislative and administrative authority. The 1958 Constitution accorded to the executive an autonomous, non-delegated, law-making power. In Article 34 of the 1958 Constitution, those matters falling within the parliamentary law-making domain are enumerated. (French Constitution of October 4, 1958, in H. de Vries & N. Galston, Materials for the French Legal System 3, 17 (1969)). Then, in Article 37, the Constitution states that matters other than those reserved for the legislative domain by Article 34 are of an executive character. *Id.* at 19. Thus, the legislative law-making power, though it covers the most important matters, became the exception and the executive-administrative jurisdiction the rule, in direct repudiation of the traditional French doctrine of legislative supremacy.


SOURCES OF LAW

In the traditional private law areas, modern legislation established a new and competing set of premises. Freedom of contract was still enshrined in the common law and the civil codes, but a variety of mandatory provisions and prohibitions was introduced by statutes in the name of public policy. In the area of property, the common law and the codes still accorded a special place to private rights, but legislation qualified the property right by subtracting elements in the public interest or modified it by adding social obligations. The new area of labor law, unlike the common law of master and servant and the employment contract in civil codes, emphasized the group over the individual, downgraded the role of the will of the parties, and was replete with mandatory rules which could not be changed by agreement. As the twentieth century wore on, courts in the United States and Germany, in particular, began, with and without direct or indirect legislative sanction, to take upon themselves the task of conforming contracts to judicially generalized notions of fairness and reasonableness. In many places, too, the authority of the civil codes and the common law as sources of principles began to be superseded, not only by statutes, but by constitutions.

While private law was thus taking on an important public dimension, public law was being augmented by the body of rules necessary for the organization and management of public services. Just as private law had been transformed by the idea that every person has social obligations, so public law had been transformed by the social functions of government. No longer limiting themselves to providing defense, police, and dispute settlement, modern states, directly and indirectly, became involved in the provision of education, social assistance to the poor, transportation, electricity, post, telephone and telegraph services, and numerous other public works and services. Contract and the market were increasingly supplanted or supplemented as ordering mechanisms by new kinds of law regarding competition, the structure and activities of corporations, and employer-employee relations. Yet public authorities often used government contracts and pri-

71. A. Dicey, supra note 7, at 259.
vate institutions to carry out their functions. All of these developments made it difficult to maintain another traditional distinction in legal theory: that between public and private law.\(^7\)

The civil law systems have long been bedevilled by their formal division of the law school curriculum into public and private law and of scholars on law faculties into “publicists” and “privatists,” with the result that workers in one field are sometimes unfamiliar with important developments in the other. The difficulties civilians have had with “fitting” labor law into these categories betray the obsolescence of the distinction. Civil law writers often say that labor law is *sui generis*, a “special branch” which is “neither private nor public,” or where “public law and private law rules are actually intermingled.”\(^7\) In an important sense, however, far from being unique, it is the very prototype of modern law.

Though the common law lacks such a clear-cut and formal division of functions between public and private law specialists, it nevertheless suffers from similar problems. Constitutional law scholars, who comprise many of our “publicists” and who often aspire to do jurisprudence, on occasion show little knowledge of, or sensitivity to, the role of the private order or even of that part of the work of the Supreme Court which is not concerned with constitutional questions. Some of our “privatists,” on the other hand—teachers of property, torts, contracts, and family law—inhabit an essentially nineteenth century world, sustained in the illusion by teaching materials that do not take sufficient account of the extent to which the private law subjects have come under statutory and administrative regulation and to which their underlying premises have been irrevocably altered. To a great extent, the law curriculum and the content of individual courses have adapted to the rise of public law. As the functions of government have increased, new offerings have appeared: civil rights law, employment discrimination law, environmental law, consumer law, and so on. Teachers of the traditional private law courses to some degree have incorporated their public dimension, but much remains to be done.

**Summary**

Civil and common law systems alike were fundamentally

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transformed in the transition from liberal laissez-faire governments to modern social welfare states with planned or regulated economies. In the process, the source of law that had distinctively characterized each legal system, and the legal methods associated with it, lost their centrality. First, case law in the common law and codes in the civil law lost ground to modern statutes; second, judicial decisions in the common law were increasingly detached from their moorings in precedent while civil law judges were becoming more conscious of and willing to exercise their law-making powers; finally, administrative law has encroached on all preexisting sources of law. We have entered the age of legislation triumphant, the judge militant, and bureaucracy rampant.

Taken together, the trends described above, the increase in regulatory and administrative law, the widening room for discretion, the transition from market to mixed economies, tend, as we have seen, to blur many of the usual distinctions made between the legal systems of civil law and common law countries. Zweigert and Kötz state in their treatise on comparative law that "[t]he theory of legal families has so far proceeded as if the only law worth taking into account were what European lawyers call private law." No doubt, this has been due in part to the fact that comparatists have traditionally concentrated on private law. In the future, as comparative lawyers increasingly turn to the study of constitutional and administrative law, and to particular areas, such as labor law and property, where public and private law are mixed, it is likely that the Anglo-American and Romano-Germanic systems in developed countries will be seen as parts of a single "Western" legal family. Within this family, it is probable that new and unconventional groupings of legal systems will emerge and that a country may be said to belong to a given legal group for one purpose but to others for other purposes. Already, differences between adversarial and non-adversarial systems, and between systems with greater or lesser degrees of judicial review are the bases for new and important classifications.

Neither the present day Anglo-American systems nor the Romano-Germanic systems exist any longer in the forms they had at the turn of the century. Their distinctive style of reasoning, which Max Weber called logical formal rationality, and contract, which he

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74. K. Zweigert & H. Kötz, supra note 4, at 59.
75. Id.
identified as their distinctive legal institution, are both in decline. Many of the differences that once seemed significant between the civil and the common law are becoming blurred or hazy, as are the great separations within legal systems between public and private law, courts and legislatures, and formal adjudication and administration.

In the new situation, the traditional mechanisms for maintaining reasonable predictability and continuity, while permitting flexibility and growth, have fallen out of equilibrium. Traditionally, in the common law, predictability and continuity were afforded by legal rules developed in cases and by the doctrine and practice of stare decisis, while flexibility and growth were furnished by the rules of equity and the techniques for limiting and distinguishing precedent. In the codified systems of the civil law tradition, predictability and stability were promoted by the "written law" of the codes, while flexibility and growth were permitted, internally, by general clauses tempering rigid rules and externally by interpretation, made more supple by the absence of a formal rule of stare decisis.

In both of these traditional systems, the present-day predominance of regulatory law has diminished the role of the traditional mechanisms—case law and the codes—for maintaining continuity and reckonability. In this new situation, it would seem at first that the civil law systems have the methodological advantage, in that techniques for statutory interpretation are now of more utility than are pure case law techniques. But in both systems, the use of traditional legal methods to gain relative predictability is of limited utility because modern statutory law, unlike the civil codes, generally is neither stable nor particularly rational (in the sense of being principled and systematic). The practitioners of law have had to struggle to deal with these changes, but legal theory has lagged behind. If one acknowledges how profoundly the sources of law have been transformed, one must also recognize how inadequate the tools currently used for legal analysis have become.

**IMPLICATIONS FOR LEGAL EDUCATION**

What are the implications for legal education of the fact that we approach the study of our present legal system with a conceptual apparatus that was developed for an earlier and different system? It will not come as a surprise to you that I am going to advance the view here that the exaggerated place still accorded,
respectively, to case law and civil codes in common and civil law education does not promote the development of the skills needed to survive in and improve the legal environment of administrative states. But I wish to make clear at the outset that my criticism of our over-emphasis on court decisions does not imply condemnation of the case method as one method of teaching law.

It is helpful, I think, to remember why Christopher Columbus Langdell introduced both the reading of cases and the case method of teaching at Harvard Law School in 1870. He was motivated by a concern similar to the one I have expressed here: he wanted to introduce primary sources into a curriculum that relied almost exclusively on textbooks. At that time, it was only natural that, as his idea caught on, American law schools in their formative stages would concentrate on the source of law that then appeared most important (court decisions) and the type of law that then seemed central (private law). We cannot blame Langdell and his followers for the fact that, over a hundred years later, our own curriculum, especially in the first year, has failed to keep up with changes in the primary sources and types of law. It is hardly Langdell’s fault that we still concentrate mainly on reading appellate decisions involving private controversies. If we followed his reasoning, rather than copying his curriculum, we would have diversified our offerings long ago. Instead, our law schools have remained extraordinarily court-centered. We rely mainly on cases in law teaching; we emphasize the judicial development of the law; we produce an enormous literature on the Supreme Court, and our legal philosophers concentrate heavily on the nature of the judicial process. This court-centered tradition has been pervasive in the American law school, but it has been most tenacious in the usual first-year law school curriculum, a fact which has given rise to much criticism in recent years.

80. Stewart Macaulay wrote in 1982: There is probably far more legislation in the first-year courses today than when I was a law student. Nonetheless, my perusal of first-year casebooks suggests to me that the common law is taught as the core while statutes are viewed as intrusions which create “exceptions.” Perhaps this is less true of criminal law and civil procedure than contracts and torts. Of course, even contracts can become a statutory course if large amounts of the Uniform Commercial Code are considered: yet it is hardly a typical statute.

Macaulay, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. Legal Educ. 506, 519 n.47 (1982). In the same journal, Roderick Macdonald stated: Collectively, the courses making up the compulsory curriculum imbue students with the view that relations between private citizens, as mediated by the courts in an adversarial adjudicative context on the basis of an uncodi-
Despite well-founded criticisms of excessive emphasis on the common law in the curriculum, few would deny that the case method of teaching law is still well-suited for the purpose that led to its practically universal adoption in the United States.\(^8\) As Max Rheinstein wrote,

> It has proven to be by far the most effective device to turn a student into a lawyer, i.e., a person who knows how to use concepts, rules and institutions, to give close attention to facts, to use precedent or to distinguish the new case from the old, to recognize the interests at stake, to see the individual issue within the context of the public interest, in other words, to think as a lawyer.\(^2\)

What is needed is not the abandonment of the case method but its supplementation with other materials and methods. Critics of the case method often seem to be unaware of the extent to which this has already taken place. After all, it is a rare set of law school teaching materials today that does not contain, in addition to court decisions, statutes, excerpts from treatises and law reviews, newspaper articles, forms, social science data, and, in a return to the pre-Langdellian usage, textual passages written by the author.\(^3\)

The pure "casebook" is a thing of the past. Similarly, law school teaching methods, while still concentrating heavily on case analysis, have become more varied, with teachers using the lecture technique where appropriate, devising problems for discussion or drafting exercises, and calling on audio-visual aids which are now readily available in most law schools.\(^4\) Nevertheless, it is still generally the case that law teachers and the materials they use do not give the same careful, scholarly attention to the products of legisla-

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\(^1\) It would be surprising if many students did not take away from the first year some strong impressions, e.g., that the common law is primary; that appellate decisions are the chief source of law and the skills of marshalling and parsing them the chief techniques of legal persuasion; that the most significant part of legally cognizable activity occurs in private, proprietary dealings and relationships; and that formally adversarial formats comprise the quintessential mode of working out conflict.


\(^4\) Id. at 332.
SOURCES OF LAW

tures and administrative agencies that they do to the work of courts and scholars.

The logical place to start to cure what is essentially a distortion of emphasis is by providing incoming students with a systematic overview of the legal system. In a first-year introduction-to-law course, with proper materials, the parts of the legal order and their relation to each other should fall into place. This is hardly a new idea. Over 200 years ago, William Blackstone deplored the way students in the Inns of Court were plunged into the study of law with no sense of the system as a whole:

A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and, by a tedious, lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little, therefore, is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!85

What law student of today would not agree with Sir William that "if . . . the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labor, delay and despondence."86

Even though American law students now receive their legal education in an academic setting rather than in courses organized by the bar, most of them are still initiated into the mysteries of the law by the time-honored method of direct immersion. Some of the modern advocates of the sink-or-swim system have even claimed that its defects are really virtues: they will make a better man of

85. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *31.
86. Id. at *35.
you. The following is from the *Centennial History of the Harvard Law School*:

[The student] is the invitee . . . , who, like the invitee in the reported cases, soon finds himself fallen into a pit. He is given no map carefully charting and laying out all the byways and corners of the legal field, but is left, to a certain extent, to find his way by himself. His scramble out of difficulties, if successful, leaves him feeling that he has built up a knowledge of law for himself. The legal content of his mind has a personal nature; he has made it himself.87

This boot camp approach to the first year may have its merits, but my guess is that most beginning students would benefit more from an introductory course of the type Blackstone outlined in his initial lectures as the first Vinerian Professor of English law at Oxford:

[The law teacher] should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged . . . "in tracing out the originals and as it were the elements of the law."88

This course, as Blackstone envisioned it, should include legal history ("[t]hese originals should be traced to their fountains, as well as our distance will permit")89, jurisprudence and comparative law ("[t]hese primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries")90, and even what we would now call legal sociology ("their history should be deduced, their changes and revolutions observed, and it should be shown how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom").91

Blackstone advocated this approach, which has yet to be tried on any large scale, against that of many of his contemporaries who believed that on-the-job training was preferable to the unsystematic legal training then being offered by the bar in the Inns of Court. Blackstone argued that apprenticeship, even to a skillful

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87. *Quoted in R. Stevens, supra* note 81, at 54.
88. *1 W. Blackstone, supra* note 85, at *35.
89. *Id.*
90. *Id.* at *36.
91. *Id.*
attorney, was not an adequate remedy for the shortcomings of academic legal education:

If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: . . . he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.\(^\text{92}\)

The virtue of a systematic introduction to law, then and now, is that it furnishes the beginning student with a framework for the organization and retention of the knowledge he or she is acquiring about law. The difficulty is in constructing a framework that is reasonably faithful to the geography of the legal world that students will enter upon their graduation. Perhaps this difficulty explains why introduction-to-law courses—which were rather popular in the 1950's and 1960's—by 1970 were on the wane.\(^\text{93}\) In the course of preparing this lecture, I examined the catalogs of the thirty-six law schools whose student bodies had the highest LSAT's and undergraduate grade averages according to a recent survey.\(^\text{94}\) Of these thirty-six, only four had a required first-year course on legal method or legal system, while four others had one-week intensive introduction-to-law courses.\(^\text{95}\) I then examined the standard texts available for teaching first-year courses surveying the legal system, and I found that, with very few exceptions, these books tend to concentrate on appellate court decisions and private law.\(^\text{96}\) I therefore speculate that the reason these courses are not so widespread as they once were may have something to do with the lack of adequate materials. The lack of adequate materials brings us

\(^{92}\) *Id.* at *32.
\(^{93}\) R. STEVENS, supra note 81, at 212.
back to the conceptual problem I identified at the beginning of this lecture: that of the effect that long-unexamined terminologies and categories have on our everyday professional life.

This problem has meant not only that first-year law students generally fail to get a good sense of the legal system as a whole but that they get very little exposure to modern statutory analysis and to public and administrative law. It is nothing short of astonishing that in 1982 a Harvard Law School committee, appointed to study the curriculum, was urging the same type of reforms that Ernst Freund had suggested at the turn of the century and which James Landis had advocated in the 1930's. The Harvard committee's recommendations, though, are only for an experimental "alternative" first-year program:

We would . . . hope that the alternative program would give due attention to such matters as legislative politics as a source, and statutes as a form, of law; the impact on the legal system of modern governmental activity—fiscal, managerial, and regulatory; the impact on the legal system of features of modern social and economic life such as organizational size, bureaucracy, transactional complexity, and technological advance; and the possibilities of modes of dispute resolution that are non-adversarial or non-formal.97

It is testimony to the power of institutional inertia that a program so modest and obvious is to be entered upon only as an experiment in one of the nation's leading law schools.

Yet, so long as such courses do not exist, or present courses do not more accurately correspond to current legal reality, future lawyers start out ill-equipped for their journey across the terrain of the modern administrative state. The map they carry was falling out of date at the end of the nineteenth century, and their compass points in the direction of a past that can never be recaptured. Most of them will survive, just as students in the Inns of Court did, by studying their surroundings and figuring out for themselves, after much effort, what skills they need. But they and the legal system could be better served if academic legal education performed its precisely academic function more conscientiously by providing them with a more adequate theoretical framework for their studies.

Unlike most law students in the United States, aspiring lawyers in England and the continental countries typically become ac-

97. Harvard Law School Committee on Educational Planning and Development, Ch. 4—Reexamination of the First Year, Report 4-5 (Tent. Final Draft, June 1982).
quainted with the structure and the grammar of their legal systems through formal introductory courses which purport to be general and systematic. The continental law student, in particular, is not left to sink or swim in a sea of primary sources. Indeed, many years ago, the civil law method of legal education was held up as a model for American law schools by several distinguished legal educators concerned about what seemed to them to be our rather unscientific approach to learning law. The idea remains a good one, but today the European courses which inspired it have encountered the same kinds of difficulties as did the American introduction-to-law courses of the 1950's and 1960's. Introductory law courses in continental law faculties are typically taught by professors of civil law and consist mainly of an introduction to the law of the civil codes. This basic orientation to the fundamental concepts of private law in the codes, like that of the common law student to case law, largely fails to take account of the legal materials and the types of law which are in fact predominant in modern legal systems. As in the United States, but further hampered by their division of labor between the public and private law sides of the faculty, European law schools find it difficult to construct a comprehensive course and materials on the legal system as a whole.

Now, I would like to take a moment to rule out two possible, but unintended, inferences from what I have been arguing. First, I would not wish to be understood as suggesting that an introduction-to-law course should simply conform to the de facto predominance of statutes and public and administrative law in contemporary legal systems. The problem with this approach, to paraphrase Blackstone, would be that if statutes, administrative law, and public law are all that law students are taught, that is apt to be all they will ever know. The advance of government regulation in modern societies does not mean that the study of private ordering should be abandoned by the law schools, any more than urbanization means that small communities should be ignored by the sociologist. Legislation and regulation do not cover everything, nor are all disputes litigated. Indeed, it is important for the law teacher to pause for a while in those areas where law defers to other social norms—religious, conventional, and customary—even though these are becoming as rare in the administrative state as

98. J. Redlich, The Common Law and the Case Method in American University Law Schools 41-45 (1914); Tiedeman, Methods of Legal Education—III, 1 Yale L.J. 150, 151 (1892).
99. J. Baumann, Einführung in die Rechtswissenschaft 38-39 (6th ed. 1980); 1 J. Carbonnier, supra note 4, at 9; N. Horn, H. Kötz & H. Leser, supra note 13, at 66 ("[T]he BGB has maintained its position as the centerpiece of all legal education").
are wilderness areas in a crowded world. Teaching materials have been designed for some of these purposes, but the only book which attempted to cover all them was Hart and Sacks' *The Legal Process*, issued in 1958. Not particularly intended for first-year students and now outdated in several respects, its influence and popularity over the years attest to the fact that it met a real need of professors and students for a comprehensive treatment of American law and legal institutions. It was one of the many great virtues of these materials that they emphasized the role in our legal system of private ordering by individuals and non-governmental institutions.

My second caveat is that implementing the principles I have outlined here would not necessarily require the curtailment or elimination of the traditional first-year private-law subjects. The usual substantive courses on property, torts and contracts can and often do serve as our best vehicles for presenting a variety of aspects of modern legal systems. The prevalence of legislation, the rise of public and administrative law, and the widening role of discretion in adjudication are irrevocably altering the way teachers approach these basic first-year courses. Further, as some proponents of curricular reform fail to recognize, these courses have all changed greatly in content in recent years: contract materials now widely incorporate the Uniform Commercial Code; tort books, the increasing variety of methods of risk distribution; and property texts, the proliferation of constitutional issues and state and federal statutory and administrative regulation. That these "big three" still dominate the first-year curriculum reflects the depth of the commitment our legal system once had to private ordering. Whether they deserve to dominate depends on how well their content has adjusted to quite a different mix of market and public regulation. I would, however, like to pose the question whether the required first-year program should not also include some course which is as paradigmatic for the legal system of today as contract was for the late nineteenth century. A very few schools have moved in this direction. Of the thirty-six supposedly leading law schools whose latest catalogs I have examined, only three require first-year courses on legislation, one on labor law, and one on administrative law. In seven schools which have first-year elec-

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tives, a student may choose a statutory course.\textsuperscript{105}

Of all the possible candidates for inclusion in the first year as a vehicle for teaching modern law, it seems to me that labor law is made-to-order. With the proper materials, it could introduce the beginning student to all of the interacting components of the American legal system. The collective bargaining relationship affords the opportunity to look at private ordering, negotiation, arbitration, mediation, and the role of an important intermediate group in our society. The functioning of the National Labor Relations Board and its relation with the federal courts provides an excellent introduction to the administrative process. In addition, the field is a museum of important and interesting statutory interpretation problems, arising both under legislation which reinforces the collective bargaining process and that which, like Title VII, displaces it. It is also the setting for a number of historic constitutional law decisions and an excellent point of entry into the complexities of federal-state relationships. Recent state court treatment of the individual employment at-will contract furnishes material for a classic study in case law evolution.\textsuperscript{106} Also, far from least important, labor law is an area which is likely to immediately engage a first-year law student's interest. Everyone brings to the classroom recollections of his own and his family's experiences in the work place, thus minimizing the difficulties that might attend a first-year course in, say, tax or administrative law. Finally, opinions, assumptions, and values are apt to become explicit rather quickly in such a course, opening a window to the moral and political issues that are often ignored in legal discourse.

I have dwelt here on the first-year curriculum because it is there that the grip of the past is tightest. But a surprisingly unsystematic approach to learning is not only a defect of the first year; it pervades the entire law school curriculum. Persons who have devoted much time and effort to curriculum reform in recent years have lamented that the program of most American law schools "has no perceptible structure, sequence, or organization,"\textsuperscript{107} although it does communicate strong and rather misleading


messages to the students by emphasizing litigation over its alternatives and cases over other sources of law.

It is apparent by now, I hope, that what I have proposed is not a revolution, but rather recognition, consolidation, and furtherance of advances that have already taken place here and there in American law schools. What is needed, often, is not new courses, but new teaching materials. I have made only a few specific suggestions and have not offered any observations about what, if anything, should be omitted from the first year. This is because, ultimately, the curriculum of each law school does and, I believe, should reflect the strengths and interests of its personnel. Especially in a period of what Thomas Kuhn calls "paradigm change," diversity and experimentation among law schools seem highly desirable.

IMPLICATIONS FOR COMPARATIVE LAW AND LEGAL SOCIOLOGY

The technical apparatus and formal qualities of legal systems not only present obstacles to first-year students and to those of us who would like to understand our own legal system better, but they pose formidable methodological problems for comparative lawyers and legal sociologists. How can we penetrate the external characteristics of a familiar or foreign legal system so as to really comprehend it and to be able to compare it with other systems? This was one of the problems that Max Weber took up in his essay on law in Economy and Society. Weber there developed a set of analytical tools which are still found useful by persons who are engaged in the sociological or comparative study of law. However, the civil and common law systems with which Weber was concerned no longer exist in the forms in which he knew them over sixty years ago. The legal order he described has slowly been transformed into the bureaucratic order that he foresaw.

Given the time and place of his writing, it is hardly surprising that Weber should have regarded contract as the "most essential feature" of modern private law. As Anthony Kronman has pointed out, Weber devoted more of his sociology of law to contractual association than to any other topic. Weber observed that, in

109. T. KUHN, supra note 2, at 66.
110. See generally Weber, supra note 3, at ch. III (Fields of Substantive Law) and ch. IV (Categories of Legal Thought).
111. Id. at 101.
comparision with past societies, his own society seemed to be characterized by a greatly expanded freedom of contract in economic relations but by a much narrower range of freedom in sexual relations than had existed in many other cultures.\textsuperscript{113} Today, of course, the situation is again reversed, with restrictions on sexual relationships rapidly dropping out of Western legal systems and with economic relations widely and heavily regulated.

As contract was for Weber the characteristic legal institution of his time, what he called logical formal rationality was its special style of reasoning.\textsuperscript{114} Logical formal rationality is the method of legal thought in which rights and obligations of individuals are determined in a process which takes into account only the general characteristics of the facts and subjects them to abstract rules, themselves derived through logical generalization from facts.\textsuperscript{115} A leading example, in common or civil law, would be the classical law of contracts: in theory,\textsuperscript{116} if the contract was entered into in the proper way, any formal requirements were met, and it was not illegal, the court would enforce it without looking into the surrounding circumstances, the individual characteristics of the parties, or the social effects of the agreement. The transformation of case law in common law systems and the marginalization of the civil codes in continental systems represents, in Weberian terms, a transition from systems in which logical formal rationality was predominant to ones in which "substantive rationality" and "substantive irrationality" now figure more importantly. To the extent that this move has been toward individualized justice, in which decisions are influenced by the particular facts of each case, judged on "an ethical, emotional, or political basis," rather than according to general norms, the move has been toward substantive irrationality.\textsuperscript{117} For example, marital property cases in England and the United States, where the judge no longer divides property on divorce according to who owns it or according to a fifty-fifty community property rule, but rather is authorized by the legislature to divide it in the way that seems just under all the circumstances, would fall into the substantively irrational mode. To the extent that the move has been toward decision-making according to principles, but prin-

\begin{itemize}
\item[113.] Weber, supra note 3, at 100-01, 135.
\item[114.] Id. at 275.
\item[115.] Id. at 63.
\item[116.] In practice, the courts were probably less formalistic than their opinions would indicate. See Friedman, supra note 17, at 163.
\item[117.] "Lawmaking and lawfinding are 'substantively irrational'... to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis, rather than by general norms." Weber, supra note 3, at 63.
\end{itemize}
principles which are ethical, utilitarian, or political, rather than legal principles derived by generalization or interpretation, the method has become, in Weber's terms, substantively rational.\textsuperscript{118} Cases in which equalization of bargaining power or economic duress are explicit factors in decision-making would be examples of decisions in the substantively rational mode.\textsuperscript{119}

Against the background of Weber's legal sociology, one recalls that the rise of what Atiyah calls "principle" in nineteenth century Western legal systems coincided with the need of a large private economic order for what Weber called "calculability."\textsuperscript{120} Just as Weber speculated about the complex connections between modern capitalism and logical formal rationality in law, today we are led to wonder how the gradual transition described above from principles and calculability to administrative and judicial discretion and legislative and administrative particularism is related to the decline in the private order. But this is a subject for another day.

As we have seen, logical formal rationality had already begun to erode, and freedom of contract had begun to decline, even in the continental legal systems of Weber's time. Indeed, he foresaw why and how both would or could move off center stage. He realized that demands for "social" law in the late nineteenth century would lead to a decline in formalism.\textsuperscript{121} In the German Civil Code of 1900, the safety valves in the form of general clauses, importing standards of good faith and good morals into its highly formal structure would tend, he predicted, to lead toward individualized decision-making.\textsuperscript{122} Weber saw another threat to formality in the fact that "realist" and "free law" theories would appeal to lawyers and judges by making them feel more important.\textsuperscript{123} So far as contract is concerned, Weber knew that freedom of contract had never been without limits wherever it had existed and that it expanded and contracted with the market.\textsuperscript{124} Thus, in a marketless society, he speculated, legal rights would rest mainly, not on contract, but on

\textsuperscript{118} \textit{Id.}
\textsuperscript{119} A further distinction may be taken within the substantively rational mode between principles which directly bear on results and those procedural norms that affect the structuring of institutions or organize participation, without directly influencing the outcome. The latter form of rationality has been called by some writers "reflexive." Teubner, \textit{Substantive and Reflexive Elements in Modern Law}, \textit{17 Law and Soc'y Rev.} \textit{239, 251, 255} (1983).
\textsuperscript{120} \textit{Weber, supra} note 3, at 305.
\textsuperscript{121} \textit{Id.} at 308-09.
\textsuperscript{122} \textit{Id.} at 307.
\textsuperscript{123} \textit{Id.} at 309.
\textsuperscript{124} \textit{Id.} at 100.
the commands and prohibitions of the law itself. 125 In this respect, many later events now seem to have been but the unfolding and detailing of Weber's intuitions.

Weber had also speculated that traditional "private law" could conceivably disappear from "wide areas of social life which would today fall within its sphere." 126 In such a case, which Weber said had "never prevailed anywhere in its pure form, . . . all forms of law become absorbed within 'administration' and become part and parcel of 'government'." 127 He foresaw that with the advance of rational, functional, and specialized organization in both governmental and private association, the legal system itself—its structures, personnel, and norms—would become bureaucratized: that regulatory law would become the dominant form of law.

In his treatment of freedom of contract and the formal qualities of law, Weber identified dilemmas which persist in all modern Western legal systems. Formal rationality, because of its abstract character, will often violate ideals of substantive justice in individual cases. 128 Freedom of contract, because it in essence delegates the power of the state to private individuals, will tend to favor the economically stronger, to promote the unequal distribution of economic power and, to perpetuate the status quo. 129 This critique of formal justice has been absorbed into modern legal thought, but Weber's companion analysis of substantive justice generally has not. Weber pointed out that substantively rational (or irrational) justice can counteract the power of the economically stronger and offer the hope of more finely tuned individual justice but that it inevitably introduces into the system more arbitrariness (because individuals become more dependent on the grace and power of the authorities) and instability (because predictability and the basis for future planning are lost). 130 Thus, we get a characteristically complex and agonizing Weberian conclusion: formal justice promotes the interests of those who wield economic power at any given time but also offers reckonability and shelter from the arbitrary power of the state; substantive rationality and irrationality, on the other hand, promote individualized justice and provide shelter from the power of the economically stronger but promote authoritarianism and lend themselves to tyranny. 131

125. Id.
126. Id. at 44.
127. Id.
128. See id. at 228.
129. Id. at 98-101.
130. Id. at 228-29.
131. On the one hand, formal justice is "repugnant to all authoritarian powers
At this point it is well to remember that Weber's categories of substantive and formal rationality or irrationality are merely heuristic devices. No legal system or institution is a pure example of formal or substantive rationality or irrationality. As a practical matter, modern Western legal systems appear to be seeking simultaneously certain goals which are always in tension—the predictability and protection from the Leviathan that are associated with formal justice and the refined sense of individual fairness and protection from the economic power of the stronger that are associated with substantive justice. Thus, Weber identified one of the principal problems of law in modern administrative states: how do we find the right balance between substantive and formal justice? In this light, some of the most significant differences among legal systems today may be in the means with which they have chosen to maintain their notions of the rule of law while pursuing the ambitious goal of constructing social welfare states.

This lecture has been a plea for renewed attention to legal method, not because method is an end in itself, but because an improved methodology can aid us to identify and address the urgent legal-political problems of our time. The categories of legal thought are not and never will be to law what the periodic table is to chemistry. As Karl Llewellyn once said, "to classify is to disturb." Thus, as we order our knowledge, the idea should be to disturb as little as possible. This means that our legal classifications must be revised from time to time to keep them as close as possible to a changing social reality. Method should become in law what it has begun to be in certain other human sciences: not an object of study or "a set of rules to be followed meticulously," but a "framework for collaborative creativity." 

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133. B. Lonergan, Method in Theology xi (1972).