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Ronald Chester
1@1.com

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RESHAPING FIRST-YEAR LEGAL DOCTRINE: 
THE EXPERIENCE IN THE LAW SCHOOLS 

Ronald Chester
I. INTRODUCTION

In a previous article, Scott Alumbaugh and I attempted both to diagnose problems with what is being taught in the first-year curriculum and to suggest how this doctrinal package could be better structured. We suggested teaching the bulk of what now constitutes the courses of Contracts, Torts, and Property within a single course called Civil Obligation. This course would functionally rearrange tort, property, and contract doctrine. For example, if the doctrines of promissory estoppel in contracts, misrepresentation in torts, and home builder’s warranties in property all serve the same underlying purpose (e.g., imposition of liability because of justified reliance), then each would be taught as examples within the “Reliance” section of the course.

In addition to Reliance, we discussed other organizing principles such as Status, Duty, Bargain, and Excuse for Changed Circumstances, arguing that much of Contracts, Torts, and Property could be taught more coherently in this fashion than as presently structured. We also proposed placing greater emphasis on statutory and regulatory material at the expense of traditional common law analysis, in recognition of the growing pre-eminence of these forms of law in the modern Regulatory State.

As we envisioned it, teaching these “private law” courses by organizing principles would both de-mystify current doctrinal analysis and
eliminate needless redundancy,\(^7\) thus empowering students.\(^8\) At the same time, teachers under the revised system would be better able to experiment with new forms of classroom instruction.\(^9\) Thus, functional organization of doctrine would make humanization of the process of legal education easier. In turn, this process would be informed by a rigorous discussion of doctrine which uses these organizing principles to focus ultimately on questions of fairness and justice.\(^10\)

Alumbaugh and I ended the prior article by suggesting that the functionalizing of "private law" doctrine could eventually be expanded into other areas of the curriculum.\(^11\) As I currently see it, for example, basic courses in Civil and Criminal Procedure could be taught simply as "Procedure," and Criminal Law might be combined with the three private law courses into a broader course than Civil Obligation called, for example, Legal Obligation. In this last regard, Status, Duty, Reliance, Bargain, and Excuse seem to work as well in the Criminal Law area as in the other three courses, particularly when our proposed emphasis on "public law" is included.\(^12\)

In upper-level courses, one might, for example design courses around doctrinal problems peculiar to particular industries or types of customers served by lawyers or according to a particular function served by certain lawyers, such as tax and estate planning. Each area identified would be taught by integration of the subject matter into the legal construct experienced by a practicing lawyer when confronting such problems.

Sporadic attempts at a similar reorganization of upper-level curricula along functional lines are already being tried at various schools. The course in "Practicing Business Law" once offered at New England Law School and taught by several specialists is but one of many

7. *Id.* at 54.
8. *Id.* at 83.
9. *See, e.g., id.* at 82-84.
10. *Id.* at 58.
11. *Id.* at 84.
12. Examples of Status-based offenses would be statutory rape, involuntary manslaughter, felony-murder, drunken driving, and conspiracy; Duty is involved in embezzlement and other "white-collar" crimes where it is closely connected to Reliance. Reliance is also present in criminal fraud. Bargain has obvious connections to conspiracy, illegal contracts, and anti-trust arrangements. A large number of offenses that are will-based (based on individual intent) like Bargain, but in the unilateral, rather than bilateral sense, would require a new organizing principle. Examples of such offenses are murder, voluntary manslaughter, larceny, burglary, and assault and battery. Excuse from otherwise criminal conduct is seen in such defenses as insanity, minority, diminished responsibility, self-defense, ignorance, mistake, and leaving a conspiracy. *See generally* Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1991) (analyzing Excuse in criminal law).

As in civil obligation, most criminal obligation is owed to other individuals or entities. The crucial difference conceptually is in the sanction, not in the breaking of the obligation itself.
examples. I will allude briefly to such efforts and then focus on the track system being used throughout the entire curriculum at George Mason University Law School.

I believe that such attempts should build upon the first-year conceptual framework I have described. Though the possibilities for upper-level functional integration are many, they should mimic to the extent possible the ways in which practicing lawyers confront actual legal problems. This will generally involve applying legal doctrine from a number of the traditional fields to a common problem.

The focus of this Article is not, however, to prescribe the exact shape of such curricula. Rather, it is to convince the reader that such changes are practical in the modern law school setting. With this in mind, I devote much of the Article to the implementation of the new pedagogical jurisprudence: the move from theory to practice.

II. SCOPE OF THIS ARTICLE

The first step in my research was to examine what had been written regarding the making of a paradigm-shift in what is being taught. I started with Harold Lasswell's and Myres McDougal's prodigious attempt to restructure legal education as policy science during World War II. With this background sketched, I moved rather quickly to several modern articles reflecting current efforts at making radical change.

Some of these propose that legal education be made more

13. See, e.g., NEW ENGLAND SCHOOL OF LAW, 1988-89 CATALOGUE 80 (1988). Subtitled The Saga of Jack Cronin and the Family Business, this course was a “semester-long simulation exercise integrating, inter alia, relevant aspects of partnership, corporations, and family law along with professional responsibility and lawyering skills.” Id.


15. Harold D. Lasswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 YALE L.J. 203 (1943). This effort is more fully described infra text accompanying notes 28-38.

“realistic,” and several propose that justice be made the organizing “metaprinciple” for a restructured legal education. I think both of these goals can be achieved through implementation of my proposed system.

My second step was to examine major reforms in first-year curriculum that were tried during the 1980s or that are being implemented today. I found that while very modest steps had been taken toward integration at a number of schools such as Miami and Cleveland State, and to a slightly greater extent at Columbia, the more far-reaching changes tried at Harvard, CUNY-Queens, and just begun at Georgetown were deserving of more thorough analysis. I will discuss in some detail the approaches utilized at these three schools and suggest the successes and shortcomings of each, while recommending ways each might utilize the approach I have delineated.

Finally, I felt it necessary to examine how any major curricular change actually is or can be effected in the law schools. This involved


20. See Todd D. Rakoff, The Harvard First-Year Experiment, 39 J. LEGAL EDUC. 491 (1989). A number of unpublished papers of the faculty concerning this and related Harvard curricular changes are available to member and fee-paid schools from the Association of American Law Schools (AALS), Washington, D.C. See also infra notes 71-84 and accompanying text.


22. See GEORGETOWN UNIVERSITY LAW CENTER, REPORT OF THE COMMITTEE ON CURRICULUM REFORM (Fall 1990) (on file with author). The new curriculum is detailed in the Georgetown Law Center's 1990-91 catalogue. See also infra notes 99-125 and accompanying text, which includes an interview by the author with Georgetown Professor Mark Tushnet, a founder of the program.
an inquiry into the workings of a law school as an institution and into how major change can be achieved in such an institution. To do this, I drew on several articles discussing in general the politics of the curricular reform process. I then looked at how actual reform occurred at particular law schools. This latter information was gleaned through curriculum committee reports, interviews, and personal experiences. With this groundwork established, I close by detailing the process necessary to effect the particular reform program I espouse.

III. SHIFTING THE LEGAL EDUCATION PARADIGM: DEMOCRATIC VALUES AND JUSTICE

The Langdellian construct was “successful” to a large extent in divorcing law from justice. Along with its post-World War II reincarnation as “reasoned elaboration,” it focused on making the process of rendering decisions fair and logical, rather than on the substance of the legal outcomes this process produced. One can readily understand the desire of an established American elite to view law as a product of science and thus to separate it from conceptions of justice being devel-


24. In addition to reading all the recent relevant curriculum documents collected by the AALS, see supra note 20, and the articles cited supra notes 19-22 about curricular changes at particular schools, the author interviewed Professor Anthony Chase at Nova University Law Center in Ft. Lauderdale, Florida; Professor Ken Casebeer of the University of Miami Law School; and Professor Mark Tushnet at Georgetown University Law Center in Washington, D.C., about the reforms at their schools.

25. Christopher Columbus Langdell received his LL.B. from Harvard in 1853 and practiced law in New York City until 1870. From 1870 to 1895, Langdell served as dean of Harvard Law School. By selecting what he thought were the important reported appellate cases, he deduced certain abstract formal rules and doctrines which he applied across-the-board to contracts cases that had formerly been segregated into separate fields. Thus, the same rules would apply to contracting parties A and B regardless of whether they were similarly situated individuals or, for example, a large corporation and its lowest-paid worker. This method was then applied by other scholars to other fields such as torts. Because it divorced law from both the characteristics of the parties and the situation in which the dispute arose, it reached a logical legal result without regard to whether—in the broader sense—that decision was just. See Chester & Alumbaugh, supra note 1, at 26 nn.7-8 (citing GRANT GILMORE, THE DEATH OF CONTRACT 98 (1974); CHRISTOPHER C. LANGEDLL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii-ix (1871); ROBERT STEVENS, LAW SCHOOL—LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's 38 (1983)).

oped by the multicultural influx that threatened this elite's hegemony. Thus, whether preservation of the property and prerogatives of the elite was in any broad sense "just," it was held out to be "scientific" because it was attained through "objective" law.

World War II, however, posed the question for American legal scholars of what made our system so different from those of the Axis powers, and thus so worthy of preservation. Legal Realism had largely served to shore up Langdellianism by bringing its tenets down to the realm of practicality. In the process, it substituted *a posteriori* for *a priori* reasoning; it largely described the workings of the existing system without asking what values informed that system.27

At the height of the war, Professors Harold Lasswell and Myres McDougal at Yale tried to reverse this situation, giving American law a purpose: that of preserving and promoting democratic values. Their carefully reasoned attempt to cause American lawyers to think and talk about law in a different way ultimately had little effect outside of their own classrooms.28 However, their effort to construct a new pedagogical jurisprudence and use it in teaching bears significant discussion here.

Lasswell and McDougal wanted to restructure the legal educational system to emphasize the policy-making aspects of law. They observed that the existing curriculum was not oriented toward the achievement of democratic values.29 In their proposed curriculum, by contrast, democracy—"the realization of human dignity in a commonwealth of mutual deference"—was the "cardinal value."30

"Democracy" to Lasswell and McDougal was defined largely in terms of "process:" It is difficult to find in their construct a *substantive* idea of justice. They began by describing three values whose proper relationship "determines whether we are justified in calling any group democratic . . . . [These values include] power, respect, and knowledge."31

They defined "power" as "the ability to participate in the making of important decisions."32 "Respect" was the "absence of interference with individual choice [and] equality of access to opportunity for maturing latent capacity into socially valued expression."33 "Know-

28. See generally Stevens, supra note 25, at 264-70.
30. Id. at 217.
31. Id.
32. Id. at 219.
33. Id. at 223.
ledge” was the understanding of the potentialities of human beings for congenial and productive interpersonal relations, which makes it possible for them to remain loyal to democratic ideals.34

Next, Lasswell and McDougal proposed anchoring the curriculum with six courses that reflected the democratic values and variables they had identified. These were “Law and Control,” “Law and Intelligence,” “Law and Distribution,” “Law and Production,” “Law and Character,” and “Law and Community Development.”35 They also proposed various upper-level courses, such as “Ideology,” “Diplomacy,” “Economy,” and “Strategy.”36

Short of attaining such a complete restructuring of the curriculum, the authors suggested redirection of each course within the standard course format. Teachers in each course would systematically call students’ attention to the concept of law as a reflection of society’s response to its values and goals within different contexts. In the process, they would discredit the notion that the Langdellians’ arbitrary categorization of law represented some definitive, all encompassing embodiment of right and wrong. Because the social goals emphasized in each course would be the same, this limited approach would provide functional integration of doctrine even where traditional course boundaries remained.37

Either complete curriculum redesign of the sort indicated or the limited reform offered as a backup was pretty heady stuff for most lawyers. Although it was healthy for legal educators to conceive of their students as acting within the confines of the Regulatory State, the connections between what ordinary lawyers do on a day-to-day basis

34. See id. at 225. Additional variables related to democratic values include “balance,” “regularity,” “realism,” “character,” “safety,” and “health.” Id. at 226-32.
35. Id. at 256-62. The following list provides a synopsis of the base courses:
(1) “Law and Control” studies power, how it is distributed and “how legal syntax, procedures, and structures affect, or can be made to affect, this distribution.” Id. at 256.
(2) “Law and Intelligence” investigates how “more people can be given access to, and skill in interpreting, the facts necessary to decisions that will promote democratic values.” Id. at 257.
(3) “Law and Distribution” examines “the effect of legal syntax, procedures, and structures upon property distribution and . . . their potentialities for the attainment of varying states of balanced distribution.” Id. at 259.
(4) “Law and Production” involves the “role of money in relation to the technical processes of production.” Id. at 260.
(5) “Law and Character” considers “factors affecting the distribution of respect in society.” Id. at 261.
(6) “Law and Community Development” cuts across all major values and variables in considering “the relation of legal syntax, procedures, and structures to the utilization of resources in communities of varying size.” Id.
36. Id. at 275-78.
37. Id. at 248-56.
and what the authors proposed was too abstract to gather the support of the bar.\textsuperscript{38} Furthermore, it required lawyers to learn a language unfamiliar to them, the language of political science. I suspect that to be accepted, a functional reorganization of doctrine must use concepts such as Status, Bargain, Reliance, Duty, and Excuse, which are implicit in existing legal discourse. Certainly, these principles developed out of the American legal system’s desire to foster “democratic ideals” or “justice,” at least of the procedural, nonjudgmental kind. Focusing on them initially rather than on a metaprinciple like justice should be much more acceptable to lawyers: It would provide structure, though of a less detailed kind than at present. This would allow analysis to proceed in ways somewhat akin to existing legal discourse. Once conclusions were reached as to liability or nonliability in given situations by means of this discourse, the ties to metaprinicples such as justice or democratic ideals could be made explicit.

Like the rest of American institutions, American law sought not utopia, but a “return to normalcy” after the horrors and dislocations of World War II. Legal educators, in turn, sought relief from the anomic influences of Realism, finding it in the reassuring “objectivism” of neo-Langdellians such as Henry Hart, Albert Sacks,\textsuperscript{39} and Herbert Wechsler.\textsuperscript{40} Under this regime, truth—or at least a truth of sorts—could be found in the “reasoned elaboration” of legal argument in search of “neutral” principles.\textsuperscript{41} Further, in a pluralistic society rife with potential disagreement on the substance of law, emphasis on legal process continued to afford comfort.

Thus, the pedagogical jurisprudence I faced upon entering law school in 1966 seemed oddly detached from the exciting world of ideas to which college had introduced me. By the time of my graduation in 1970, however, law school’s coldly rational emphasis on rigorous, reductive analysis had been profoundly shaken by events outside the academy. Thus, it is not accidental that much of the leftist critique of legal education during the 1970s and 1980s came from my contemporaries, who also experienced these changes. Their attack, which is dis-

\textsuperscript{38} See generally Stevens, \textit{supra} note 25.

\textsuperscript{39} See Hart & Sacks, \textit{supra} note 26. The authors co-taught a course of the same name at Harvard for many years. Their contributions to American jurisprudence are discussed in White, \textit{supra} note 26, at 144-50.

\textsuperscript{40} See Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law} \textit{71 Harv. L. Rev.} 1 (1959); see also White, \textit{supra} note 26, at 146-48.

\textsuperscript{41} The basic idea of these scholars was that American jurisprudence should focus on process rather than the substance of law and reach conclusions through careful published analysis of the reasons for a given result. In this way, the precedent each conclusion represented could be used as a reliable guide to the solution of future disputes. See generally White, \textit{supra} note 26, at 144-52.
cussed and cited in the previous article, was largely critical rather than reconstructive. By the mid-1980s, however, as this generation reached middle age and gained prominence on law faculties, the focus began to turn from deconstruction to reconstruction.

IV. PRESENT SUGGESTIONS FOR REFORM: A FOCUS ON JUSTICE?

My contemporary, David Barnhizer, chronicles this shift in The Revolution in American Law Schools, an article appearing in 1989. He observes that the withering criticism from the left in the '70s and '80s both signaled and contributed to the breakdown of the Langdellian/Legal Realist compromise in legal education. Thus there has occurred "a loss of a sense of organic unity in the law schools because a unified vision has been replaced by a much more fragmented and complex collage of interests." The fact that old methods of discourse (Langdellianism and Legal Realism) were expanded to their limits and used up necessitated the development of alternative intellectual paradigms.


44. Barnhizer, supra note 18.
45. See id. at 227-28.
46. Id. at 233.
Ideally, this change should shift attention away from subdividing legal scholarship into increasingly smaller doctrinal units toward viewing the legal system as a whole. I, like many of my generation of law teachers, no longer assume the value neutrality of legal rules; thus we are uncomfortable teaching law as merely a series of rules to be memorized and then applied by our students.

Barnhizer believes that the 1990s will witness some sort of consolidation of the diverse thinking that has evolved regarding alteration of the legal educational paradigm. Although most of his article is descriptive rather than prescriptive, he does indicate that the focus of this consolidation will be on justice, the driving “metaprinciple” behind the legal educational paradigm. If Barnhizer is right, one can only conclude that such a consolidation will be healthy. One view of how that consolidation could occur is outlined in the previous article; it involves de-mystification and reorganization of existing doctrine in ways that would ultimately facilitate discussions of justice or fairness. To reiterate, I do not believe it realistic to skip doctrinal analysis altogether in making this shift.

As Barnhizer correctly points out, there are a number of new paradigms now being tried out. Many are frankly less structuralist than my own approach, emphasizing diversity and pluralism. It is difficult to see how the views of Critical Legal Studies, Critical Race Studies, Feminism, Post-Feminism, and Legal Semeiotics, just to name a few, can be consolidated into a new paradigm unless that paradigm, like my own, serves as a facilitator rather than as a dictator of how such views should be expressed.
A recent article by Anthony D'Amato elaborates Barnhizer's notion that discussions of justice can provide the new focal point for legal education.\textsuperscript{57} Like Barnhizer, however, D'Amato seems content to analyze a metaprinciple like justice without first reorganizing existing doctrine.

D'Amato suggests that rather than teaching students to manipulate "law-words" in formulating legal arguments, professors in existing courses should "teach ways of reinterpreting those rules in light of an assumed legislative purpose to be just."\textsuperscript{58} This shift, he claims, would not necessitate a total realignment of the courses or casebooks. For example, he suggests teaching justice through the case-law method, but changing the focus in courses from discovering the rule of law that the case announces to analyzing whether justice was done to the parties.\textsuperscript{59}

D'Amato advocates teaching law through a series of "justice-dialogues."\textsuperscript{60} Under this technique, students would be presented with a decision as to who actually won in a given case. From there, the discussion would focus upon whether justice was done in that situation. For example, the instructor might inquire whether certain facts were left out that might have been relevant to a just decision. Finally, the instructor might ask, "Did the court actually reach a just result?"\textsuperscript{61}

The focus would be "justice questions"—questions that are factually-based rather than law-based.\textsuperscript{62} "Excessive preoccupation with the tools (the law-words) . . . elevates tools over goals, form over substance, manipulations over justice."\textsuperscript{63}

Ultimately, D'Amato recommends the revision of casebooks to include much fuller versions of the cases than those which casebook editors presently select from the reporters. He wants them to read transcripts of trials and to present excerpts of evidence presented at trial, even contacting the lawyers involved for additional information.\textsuperscript{64} Finally, the editors should discover and include information regarding the post-litigation status of the parties.\textsuperscript{65}

It is apparent that D'Amato's new approach centers much more on increased factual analysis than on doctrinal revision. While I do not

\textsuperscript{57} See D'Amato, \textit{supra} note 18, at 1.
\textsuperscript{58} \textit{Id.} at 38.
\textsuperscript{59} \textit{Id.} at 47-48.
\textsuperscript{60} \textit{Id.} at 53-54.
\textsuperscript{61} \textit{See id.} at 51-52.
\textsuperscript{62} \textit{Id.} at 53.
\textsuperscript{63} \textit{Id.} at 55.
\textsuperscript{64} \textit{Id.} at 53-54.
disagree with the need for more factual analysis, I think this can best be accomplished within the kind of loose, yet helpful, doctrinal framework I have proposed. I also believe that the production of sets of "business school"-type problems, whether or not constructed from reported cases, would be a more efficient way of teaching doctrine than D'Amato's approach of more exhaustively investigating appellate decisions already rendered.

The need for organizing principles less general than "justice" (such as those proposed in the previous article) to help develop the type of case analysis D'Amato proposes is highlighted by his own difficulty in defining that concept:

[I] believe that justice does not have a "content" that can ever be expressed in words. My conclusion is not a negative one, but is, perhaps surprisingly, optimistic. For if anyone could state the content of justice in a Text, then the Text itself would be subject to interpretation, misinterpretation, application, and misapplication. The Justice Text would become just one more set of words. Suppose that a nation simply enacts the Justice Text as its basic law. Would law and justice then be fused? Clearly not; the Justice Text would be nothing more nor less than law-words, and thus it would be subject to our interpretation or misinterpretation in the light of our sense of justice! (There is also a second reason: general statements about justice can never solve specific cases.) My conclusion is simply that justice cannot, by its nature, ever be reduced to words.66

I agree with D'Amato's further point that students come to law school with a collective sense of "justice," formed from common experiences, and that it is this ideal which should form the foundation or backdrop for legal education.67 However, I do not believe that useful classroom discussion can be had of "justice issues," with only D'Amato's vague definition of justice as a guide. As my research assistant commented after carefully considering D'Amato's proposals:

I do not think that the study of actual legal doctrine should be deemphasized to the point that [it] appears inapposite. Theoretically, at least [doctrine] is formulated on the basis of judicial decisions which embody society's vision of what is or is not just. It also forms the backdrop for judicial decisions. To eliminate this emphasis to any great extent could serve to eliminate the foundation for a critical study of justice versus injustice. . . . I think more structure is

66. D'Amato, supra note 18, at 39 (footnotes omitted).
67. Id. at 42.
required when attempting to facilitate participation in large group
discussions. . . .

This student is not alone in her search for "structure." Whatever its
faults, Formalist discourse, though modified by Legal Realist and Le-
gal Process theorists, provides such a structure. The emerging field of
legal semeiotics helps explain why we need it.

First of all, we all participate in language games to get about in the
world. As Professor Jack Balkin sees it:

We not only play these games—we live them. The discourses that we
use constitute who we are. These discourses speak us as much as we
speak them. They are the "grooves" in which our thought travels
when it grapples with legal, moral, and political problems. Because
these grooves in a sense constitute us, they have a certain power over
us. . . . But this power is not external to us. It is already within us.

Because existing legal discourse has such power over us, a convinc-
ing new language is necessary for us to make the effort required to
break out of the old "grooves" of discourse. This "convincing new
language" is precisely what I propose. I doubt that talk about justice
without new structure is sufficient to convince lawyers to make this
difficult paradigm shift.

V. CURRENT ATTEMPTS TO RESTRUCTURE FIRST-YEAR EDUCATION

A. Harvard

Beginning in the fall of 1983, Harvard Law School began experi-
mental sections in its first-year classes. The fundamental premise of
these sections was that the traditional case-law method was outmoded
and should make way, at least in part, for consideration of the mod-
ern Regulatory State. This in turn made necessary the integration of
doctrine in new ways.

Scholars in the Administrative Law area had been struggling with
such changes before Harvard began its experiment. Still caught in old

68. Memorandum from Rhonda Wagner, Research Assistant, to the author (Nov. 1991) (on
file with author).
69. J.M. Balkin, Remarks at the Association of American Law Schools 1992 Annual Meet-
ing, Mini-Workshop on Jurisprudence, San Antonio, Tex. (Jan. 4, 1992). See also J.M. Balkin,
Postmodern Jurisprudence: An Introduction, in Association of American Law Schools, Pro-
70. Balkin, Remarks, supra note 69.
71. Rakoff, supra note 20, at 492-93.
ways of analysis, however, they "quickly retreated to assessing the judiciary's response to the policy-making functions of the Regulatory State; they had no conceptual framework for a legal analysis of statutes, regulations, [and] administrative enforcement strategies . . . ."\(^\text{72}\)

Thus, the struggle in Administrative Law has been to construct new forms of discourse in the public law arena. "While it draws on law and economics, critical legal studies, and other current intellectual trends, [current Public Law] represents a new approach, deriving its methodology from a wide range of academic disciplines, and its ideology from the norms that animate the modern [Regulatory State] itself."\(^\text{73}\) It is noteworthy that this same pluralistic approach was applied in the Harvard experiment as it attempted to analyze the connections between regulation and the common law.

Quite properly, the experimental Harvard curriculum was set up to "teach across the boundaries of traditionally separate courses."\(^\text{74}\) One way to achieve this synthesis was to have the first-year teachers coordinate their lesson plans. They worked together "so that certain connected or coinciding issues or principles were taught contemporaneously in different courses."\(^\text{75}\)

Secondly, in an effort to "drop the boundaries altogether," the students participated in three "bridge periods" in each semester. During these periods, all of the professors in an experimental section used a cooperative format to teach an intensive week integrating their courses by means of a cross-cutting perspective: e.g., Law and Economics, Law and Justice, or the Significance of Legal Realism. These bridge periods utilized new materials developed by the professors that sought to illuminate common law and regulatory problems already touched on in the standard courses.\(^\text{76}\)

A primary virtue of the Harvard experiment, as seen by the students, was that they no longer had to search for "some primary, immutable category" into which to fit a legal problem; rather, they viewed "the problem in relation to the legal system as a whole."\(^\text{77}\) According to Professor Todd Rakoff, a participant in the program, the experimental curriculum better prepared students for upper-level


\(^{73}\) Id.

\(^{74}\) Rakoff, supra note 20, at 493.

\(^{75}\) Id.

\(^{76}\) Id. at 496-97.

\(^{77}\) Id. at 497.
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courses, and seeing the professors working together during bridge periods "liberated the students' minds." Presumably he meant by this that their minds were freed from the Langdellian/Legal Realist construct by exposure to alternative paradigms presented by institutionally-legitimized sources.

Professor Rakoff mentions two difficult and related practical problems with the Harvard program: (1) the tremendous amount of time and effort devoted to the program by professors; and (2) the need for long-term institutional assistance to sustain it. These problems became acute with the appointment in 1989 of politically conservative professor Robert Clark as dean. Since that time, institutional support (in terms of money, course loading and "credit" for the new teaching rather than research) has dwindled. Finally, in the fall of 1991, no experimental section at all was offered to incoming Harvard law students.

The apparent death of the Harvard experiment raises several areas of concern for potential reformers. It also has something to say about the politics of curricular reform, a topic I will examine in detail at the end of this Article. At this juncture, however, I would like to focus on the structure of the Harvard program.

Although it does not really solve the doctrinal redundancy problem described in the first article, the coordination of lesson coverage by the Harvard instructors seems like a good, if ad hoc, step toward breaking down traditional legal categorization. My understanding, however, is that this aspect of the program gradually fell into disuse, placing greater and greater responsibility on the bridge periods to provide integration. Undoubtedly the lack of a set of common organizing principles to guide this integration would have made the coordination of lesson plans onerous, time-consuming, and, ultimately, piecemeal. What about the bridge periods themselves?

The Harvard bridge periods represent a typical response of "liberal education" to an outdated thought-paradigm: present students with a variety of readings suggesting alternative ways of viewing the issues. Certainly, a Harvard student who had experienced the experimental curriculum would gain a more complete notion of how first-year doctrine might fit into the overall legal system than would his or her more traditionally-educated counterparts. The problem is, however, that

78. Id. at 498.
79. Id. at 498-99.
81. Telephone interviews with several participating Harvard law professors (Fall 1991) [hereinafter Telephone interviews].
while a variety of integrating strategies might be helpful for the experienced scholar, for the first-year student, even at Harvard, it might finally produce more intellectual chaos than coherence.

The chief difficulty, then, of the Harvard experiment's structure would appear to be its teaching of doctrine under traditional course headings, in more or less traditional form, coupled with periodic attempts during bridge periods to suggest, from different perspectives, ways of integrating that doctrine. I would submit that some consensus—even at relatively broad levels—on how that doctrine can be reshaped for students should have been reached first.82

In the prior article, Alumbaugh and I recommended that the integration of doctrine should proceed along functional lines.83 Within this revised structure (new paradigm), it would then seem feasible to suggest, for instance, Law and Economics or Legal Realism as different ways to illuminate functional relationships in the doctrine itself.84 While I understand that Harvard's laissez-faire approach to structural change was probably considered necessary for political purposes, the varied, often contradictory insights this necessitated may have contained the seeds of the experiment's ultimate demise. Certainly it contributed to the experiment's failure to broaden its political appeal both within and without the institution.

B. CUNY-Queens: Curricular Reform in a New Law School

Curricular reform at an established institution like Harvard may present somewhat greater difficulties than does "starting from scratch" in a new school.85 Still, such difficulties are far from absent in a new school, as can be seen from the experience at CUNY-Queens.

The Queens Law School of the City University of New York originated in the early 1980s with a self-consciously different focus than most law schools: public service. The most distinctive features of its curriculum were its emphasis on humanistic teaching and its focus on "experiential learning."86 Among other things, courses in the new cur-

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82. The degree of integration with other courses in the section was, of course, at the ultimate discretion of the teacher of each course, further confusing students. For a student's somewhat dim view of the experiment, see generally RICHARD D. KAHLNBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL (1992).

83. See Chester & Alumbaugh, supra note 1, at 27.

84. Thus, I am suggesting that revised legal doctrine, at least at these relatively general levels, be the initial focus of attempts to analyze law from different theoretical perspectives. I realize that this is structuralist to a degree and cuts somewhat against recent trends toward diversity and pluralism in legal scholarship. See, e.g., articles collected supra note 16. See also Chester & Alumbaugh, supra note 1, at 44-55 nn.78-82, and accompanying text. The ultimate purpose of these analyses would, however, be to focus on justice and fairness as the ends of law.

85. See infra text accompanying notes 127-28.

86. Steffey & Wunsch, supra note 21, at 159-60.
riculum were designed to break down "three unnecessary divisions CUNY [saw] in the usual courses: between different private law doctrines; between private and public law; and between the study of law and other disciplines." 87

The 1991-93 CUNY-Queens catalogue lists such required first- and second-year courses as "Liberty, Equality and Due Process in Historical and Philosophical Context"; "Law and a Market Economy"; "The Work of a Lawyer"; "Responsibility for Injurious Conduct"; "Civil and Criminal Procedure"; "Public Institutions and Law"; and "Constitutional Structures and the Law." 88 It can immediately be seen from this menu that functional integration of the basic subjects has been attempted along with a strong emphasis on law in the Regulatory State.

A recent article by Matthew Steffey and Paulette Wunsch 89 describes in detail the progress of the CUNY curriculum since its inception. The gist of the article is that the program, which originally represented a radical departure from the norm in legal education, has undergone major modifications largely because of the low bar pass rate of its students.

First, as a result of bar exam pressure, the law school has expanded its coverage of black letter law, which, in turn, has lessened the amount of time devoted to experiential learning simulations. Whereas the original curriculum did not emphasize test-taking, the new emphasis on learning rules is currently supplemented by a series of exams designed to measure students' mastery of them. 90

In addition, institutional pressures have forced the founders of the program to abandon the group decision-making process, which is one of the main tenets of humanistic teaching, in favor of traditional hierarchical policy-making. The university itself has also been putting pressure on Queens law professors to publish at a rate equivalent to professors at established schools. This takes away from the time the teachers were devoting to the new curriculum. 91 Thus, Steffey and Wunsch conclude, pressure both from outside and inside the univer-

87. Id. at 163. Functionalization and integration of doctrine is rampant in these courses. For example, "Responsibility for Injurious Conduct" combines tort and criminal law; "Civil and Criminal Procedure" is a unitary course; and "Law and a Market Economy" stresses law's relationship to individual economic associations like corporations, and finally covers administrative law and labor. This last course also seeks to demonstrate the interdependence of public and private law. See id.
89. Steffey & Wunsch, supra note 21.
90. Id. at 169, 177.
91. Id. at 172.
sity is stifling the program before it can be completely developed, leaving the school "adrift toward mainstream." 92

That bar exam pressures and the "publish or perish" mentality have combined to retard the Queens experiment should surprise no one. In an ideal world, we might expect the bar exam to change to accommodate realistic innovations such as those at Queens. The California bar exam, for example, now contains a day of "performance" testing that puts the applicant into a situation testing his or her lawyering skills. 93 In such situations, the applicant is given the raw material (from statutes, regulations, and a "file") that a new lawyer might process, and asked to deal with a "real life situation" involving not so much application of memorized doctrine, but integration of the presented material within the broad legal understanding needed to provide solutions. Certainly, this tests conceptual integration of doctrine as well as pragmatic skills; it thus might fit rather well with a progressive curriculum such as that at Queens.

Even in California, however, bar applicants are required to take a day of traditional essay type questions and one day of the multiple-choice Multistate exam. Each of these components assumes that traditional doctrine, once memorized, is certain enough to provide more or less "correct" answers to legal problems. This type of testing constitutes the entire bar exam in most states. 94 Not only does such an approach disregard the scholarly work of the '70s and '80s regarding the indeterminacy of legal doctrine, 95 but there are so many hypothetical problems presented in these tests that the emphasis is largely on issue-spotting at the expense of analysis. In general, then, the typical modern bar exam can be viewed as a dysfunctional and retrograde "rite of passage," presenting a severe roadblock to those who would reform legal education.

The problems inherent in changing the bar exams are complex and difficult. If enough schools in a particular jurisdiction—as well as the "national" schools—were to make major innovations in curriculum, this would eventually force bar exam change. In the meantime, however, students in progressive schools would be faced with the necessity of learning how to be lawyers in law school and studying separately for the bar exam. Students such as those admitted to Columbia and Harvard, because of their success at traditional exams, can be ex-

92. Id. at 177.
94. See BAR/BRI Digest, 1992 Edition, at 4-8, for a state-by-state analysis.
95. See, e.g., articles cited supra note 42.
pected to be better at this balancing act than students admitted under the "diversity" admissions policy of a school like Queens.96

Of course, law professors already face the difficulty of trying to prepare their students to be lawyers when these students feel the need to be taught "rules" in order to pass the bar exam. Thus, at Queens, a progressive curriculum exacerbates an existing problem in legal education and, at least in the case of the relatively weak test-takers that constitute its student body, dooms many of them to fail the bar exam unless they receive additional instruction. What is needed, then, is reform directed at the bar itself. At first blush, this would seem an almost impossible political task for those already struggling to change curricula within the law schools themselves. However, were these reformers to promote the idea among leaders of the bar that a performance-based exam would allow law schools to train students more effectively for practice, the bar itself might carry out this needed change.

An alternative might be to eliminate the bar exam entirely. Wisconsin allows students graduating from its two law schools to become members of the bar without taking the exam. Could this "diploma privilege" be followed in other states? The perceived problem in doing this is "quality control," although the bar exams are largely ineffective in providing it. The United States already has too many law schools graduating too many lawyers. For various political and economic reasons, many schools take substandard students, and once they do, do little to assure that only those who would make competent lawyers graduate. Thus the bar itself understandably feels some pressure to assure the citizenry that it will not be admitting unqualified people. Ultimately, however, the bar too succumbs to political pressure by providing those who fail several or even unlimited chances to retake the exam. Thus, whether or not these graduates have become competent to practice law, most are admitted on their second or subsequent attempts.97

In sum, the outdated "rite of passage" which is the bar exam puts takers through pointless aggravation so that the legal profession may pretend it is keeping out unqualified people. If this felt need persists, the examiners at least might attempt to make the exam relevant to the practice of law. However, the examiners are not for the most part professional educators and have generally taken the path of least resistance, molding their tests after those they took in law school. As a

96. See Steffey & Wunsch, supra note 21, at 168.
97. See generally Stephen P. Klein, Bar Examination: Ignoring the Thermometer Does Not Change the Temperature, 61 N.Y. St. B.J., Oct. 1989, at 30 ("On a licensing test, such as the bar exam, an applicant can eventually pass by retaking the test one or more times.") (emphasis in original).
first step to reforming the bar exam, then, established schools such as Harvard and Georgetown, with their influence on the bar, rather than schools like Queens, must take the lead. Such a step has already been undertaken at Georgetown, where an attempt has been made to include members of the bar as advisors in reform of the first-year curriculum. 98

In contrast to the bar exam barrier, the "publish-or-perish" problem is relatively easy to address. Politically, law schools feel a need to require, or (after tenure) to encourage, publication, to justify the low teaching loads and high salaries of their professoriates to legislatures, universities, and boards of trustees. While not without its own difficulties, the giving of credit, money, and release time for work on innovative curricula equal to or greater than that provided for traditional scholarship is largely a matter of institutional will, coupled with successful institutional politics. In fact, it may be easier to convince the world outside the law school that demonstrable additional work focused on teaching is worthier adjunct to a five- or six-credit teaching load than is yet another law review article.

C. Georgetown: Pathway to the Future?

1. In General

The most recent and far-reaching experimental first-year curriculum at an established school was begun in the fall of 1991 at Georgetown. The Curricular Reform Committee report announcing the experiment addresses at least to some degree the concerns raised by the Harvard and Queens experiences. 99

The Georgetown reform has traceable roots in the Harvard experiment. Abram Chayes, a senior Harvard law professor, spent two years at Georgetown in the late 1980s sharing his experiences in the Harvard program. His insights, coupled with the energy and innovation of a group of six younger Georgetown faculty members, produced a program designed to overcome previous problems. 100 While the Harvard program had been perceived internally as the child of the "left" in that faculty's bitter internal debates and had little support

98. See, e.g., REPORT, supra note 22, at 3. In an interview with Professor Mark Tushnet, Professor of Law at Georgetown University Law Center (Jan. 10, 1992) [hereinafter Tushnet Interview] and a participant in the experimental program, the author learned that bar involvement has not so far been substantial. Perhaps what contact there has been was sought more as political "base-touching" than for substantive advice. Id.

99. See GEORGETOWN UNIVERSITY LAW CENTER, supra note 22, at 1-12 (describing the political and educational care with which the experimental section was put into action).

100. Tushnet Interview, supra note 98.
among alumni and bar outside the institution,\textsuperscript{101} Georgetown's program took pains to nurture more widespread acceptance even before its inception.\textsuperscript{102}

First, the school applied for and received a substantial grant from the U.S. Department of Education to fund the experimental first-year section. Next, careful internal politicking was carried out with the support of the Dean, which resulted in the fall of 1989 in "overwhelming approval" by the faculty of an "experimental first-year curriculum in principle," subject to final faculty approval, which was to be required before the actual curriculum was implemented.\textsuperscript{103} Then, "the Dean appointed a committee of distinguished practitioners to serve as advisors to the [Curricular Reform] Committee, and this group was regularly consulted and provided much useful advice as the courses developed."\textsuperscript{104} In the fall of 1990, "the Committee hosted an open house for students at which the proposed curriculum was discussed."\textsuperscript{105} Finally, "throughout the fall, each member of the committee ... presented his or her course to the faculty and gathered suggestions for improvements."\textsuperscript{106}

Besides touching all the necessary political bases, this process included elements which specifically addressed the Harvard/Queens problems. First, the Department of Education grant, besides establishing legitimacy, "provided release time for committee members and will provide additional money for release time and evaluative efforts during the first two years of the experiment."\textsuperscript{107} This relieved financial pressure on the institution to place the committee members in additional courses, while making committee members' efforts important enough to allay fears about reduced scholarly production.

By including leaders of the bar to help guide the program, Georgetown not only provided further external legitimacy for its efforts, but probably gained insights about how far its reforms practically could go.\textsuperscript{108} Thus, the Curricular Reform Committee's report specifically addresses the following practical questions: "Will the students learn all they need to know to be successful lawyers? To understand their upper class courses? To pass the bar exam?"\textsuperscript{109}

\textsuperscript{101} Telephone interviews, \textit{supra} note 81.
\textsuperscript{102} Tushnet Interview, \textit{supra} note 98.
\textsuperscript{103} \textit{See} \textbf{GEORGETOWN UNIVERSITY LAW CENTER}, \textit{supra} note 22, at 2.
\textsuperscript{104} \textit{Id.} at 3.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} at 2.
\textsuperscript{108} \textit{But see} Tushnet Interview, \textit{supra} note 98 (questioning how important such efforts actually were).
\textsuperscript{109} \textbf{GEORGETOWN UNIVERSITY LAW CENTER}, \textit{supra} note 22, at 11.
The Committee answers: "The whole point of the experiment is to revise the curriculum in such a way as to better prepare our students."\textsuperscript{110}

Although not all subjects covered in all current first-year courses will be covered in the same depth (or even at all) in the experiment, much of the experiment consists of repackaging existing material into new course units. We have made a conscientious effort not to eliminate anything crucial to the career of our students. Toward this end, each member of the committee has prepared a "crosswalk" that gives a rough guide to what is and is not covered from the standard curriculum. . . . The Committee is persuaded that students in the experiment will not suffer any significant disadvantage and, indeed, will be better prepared, because of their participation.\textsuperscript{111}

This, of course, is a crucial section of the report and seems to raise significant problems of its own. It contains no criticism of current bar exams; thus, it is critical to "repackage" existing material. Unfortunately, the means of this repackaging are left entirely to the discretion of each participating faculty member, without the guide of any approved organizing principles such as those proposed in the first article. As will become apparent when I analyze some of the course descriptions, this omission leaves each faculty member somewhat "at sea" as to how to "pitch his or her repackaging."

Major differences in outlook appear in descriptions of the courses, which range from entirely new configurations like "Democracy and Coercion," to a course called "Property in Time," which the instructor rather ruefully admits is basically the traditional property course with a greater emphasis on historical development.\textsuperscript{112} Additionally, as of the date of the report, the makeup of each student's small section "Integration" course had not been developed.\textsuperscript{113} Apparently inspired by the "successful bridge program" at Harvard,\textsuperscript{114} these sections are designed to integrate the other courses through discussions of topics such as "the nature and history of legal education, the nature of legal practice and the legal profession, a comparative perspective on a number of legal issues, and the jurisprudential movement from formalism

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} See id. at Abstract for the course "Property in Time."
\textsuperscript{113} Id. at 12.
\textsuperscript{114} See id. at 5.
to realism."

Again, I would venture that this *laissez-faire* approach may confuse students rather than provide the coherence that functional integration would allow.

2. **Evaluation**

With any major curricular change, it would seem a good idea to identify specific goals before undertaking it, and then to design evaluative techniques that could measure the achievement of these goals. This in fact was recommended by the Law School Data Assembly Service at the 1991 Annual Meeting of the Association of American Law Schools. If the goals of such reforms were easily quantifiable, such as increased bar exam passage or increased access to "big-name" law firms, this would not be too difficult to do. However, what I am after and what it seems the Georgetown program wants, is a good deal more complex than that and involves significant subjective elements. Thus while Georgetown's evaluative techniques might be criticized as not sufficiently rigorous or scientific, they may be more useful than such "objective" methods in measuring "success."

First, individuals in the program will be given detailed questionnaires at various points during and after their law school careers. Their grades will be tracked throughout law school and compared to those of students in other sections. Finally, at the conclusion of each school year, participating faculty will conduct a symposium on the experiment at which faculty members from Georgetown and other institutions will be asked to evaluate the experiment's success and to suggest revisions. Nonparticipating students and faculty will be included to determine effects on the institution as a whole.

3. **The Courses Themselves**

The basic courses in Georgetown's experimental section are entitled "Bargain, Liability, and Exchange," "Democracy and Coercion," "Government Processes," "Legal Justice," "Process," and "Property in Time." In reading through the course synopses provided in the appendix to the Committee's Report, one thing at least is clear: the first-year Georgetown student who is exposed to this curriculum will likely be educated more broadly and deeply about law and the legal system than any other first-year student has ever been. The mate-

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115. *Id.* at 12.
117. *See Georgetown University Law Center, supra* note 22, at 10-11.
118. *Id.* at 8.
120. *Georgetown University Law Center, supra* note 22, app.
rials are rich, complex, and thought-provoking. Although a *laissez-faire* approach to course design is again evident, there is a certain thread of functionalism throughout: The arrangement of doctrine is, on the whole, accomplished by emphasizing the function rules perform, rather than their traditional common-law categorization. This is greatly facilitated, of course, by the use of courses which, for the most part, eschew traditional common law labels.

Noteworthy for our purposes is Professor Gary Peller's course entitled "Bargain, Liability and Exchange." According to the course abstract, "this course is conceived as an introduction to what we conventionally think of as the 'private law' courses of the first-year curriculum. Its main overlap with the traditional first-year curriculum is with the contracts and torts courses, and to a lesser extent with property." Interestingly enough, however, Peller states that "the 'theory part' of this course proceeds from the bottom up—that is, from an initial consideration of the technical, doctrinal issues of private law and an exploration of how those traditional doctrinal questions raise the theoretical problems that the course focuses on." To do this, Peller focuses on the structure of legal argument, drawing on Hohfeldian analysis:

\[ \ldots \text{that legal relations should be understood in terms of a small set of jural opposites and correlatives that are "zero sum" in the sense that the expansion of one side of Hohfeld's jural relations necessarily entails a contraction of the other side. Accordingly, the same set of arguments will always be available \ldots to argue for or against a particular doctrinal outcome}. \]

Work along these lines has most recently been published by Duncan Kennedy: its inevitable conclusion is the indeterminacy of legal argument.

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121. *Id.* at Abstract for the course "Bargain, Liability and Exchange."

122. *Id.* at 1. After reading the entire course abstract, I believe Peller's minimalization of the property overlap results from the fact that he gives less emphasis to "new property" concepts (such as rights to government "largesse") than Alumbaugh and I gave them in the previous article.

123. *Id.*


125. *Georgetown University Law Center*, *supra* note 22, app. 1-2.

126. Thus, though there are patterns in the thrust and counter-thrust of legal argument, legal argument ultimately reaches no predictable results. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); see also Kennedy, *supra* note 56.
While I have no particular quarrel with including Hohfeldian analysis, I think this should be done within a framework such as that outlined in the first article. First, the traditional doctrine should be analyzed not in the old ways, but within the set of functional organizing principles such as those I have propounded. These are, it seems to me, loosely enough constructed to allow students to manipulate legal argument while at the same time providing some degree of structure to this manipulation—a structure that is at once more realistic than, and avoids much of the redundancy of, the old. Thus, my hope is that such a course would not proceed as if the study of law were totally inductive; it should recognize the interplay of inductive and deductive reasoning even in learning's initial stages.

VI. Politics of Curricular Change

A. In General

I think we have seen in the case of the Georgetown experiment very careful attention to the politics of making what is, at least on the surface, a sweeping change in first-year legal education. While the result of all this "base-touching" may be less than theoretically "pure," the program is under way, appears to have adequate support and funding, and exhibits capacity for growth and change. Could any more realistically be done?

The long life of Langdell's construct seems to be a function of its coherent (if ultimately unrealistic) structure. As I have argued, lawyers will ultimately demand some degree of structure in what replaces Langdellianism. While the Georgetown experiment offers some hope that such a construct will emerge, I will now examine whether, given the political problems to which I have already alluded, a more structured reform of first-year education is presently possible.

B. Difficulties at Existing Institutions

Most reform attempts will necessarily take place at existing institutions in which "constraints on curriculum design are even greater" than at new schools like Queens.127 As Professor Robert G. Gorman sees it:

[F]aculty members are accustomed to teaching in a certain style, using certain materials, and in a time frame that will accommodate their commitment to scholarship; the student population [already has

127. Gorman, supra note 23, at 469.
a tradition of preoccupation] with the imperatives of job placement, and thus by the assumed predilections of bar examiners and law firms; and alumni [exist, a group identifying] their priorities in a manner quite inconsistent with those of a law school . . . .

At any institution, however, designing a progressive curriculum will involve, at the outset, "tradeoffs between faculty [desires] and curriculum." Likewise, it will involve tradeoffs between curriculum and administrative convenience, student demands, and those of the bar. Despite these constraints, it should still be possible to "[b]uild bridges and foster interrelationships among the traditional first-year courses . . . ."

The process of curriculum reform in this direction involves at least the following five steps: (1) selection of the curriculum committee; (2) generation of a proposal; (3) consideration by the committee; (4) approval by the law faculty; and (5) implementation by the faculty and administration. In his careful analysis of these steps, Professor Neil Cohen of the University of Tennessee stresses that the key to successful approval and implementation is the building of "consensus." Using as a base his experience at Tennessee, Professor Cohen recommends the following steps to achieve such consensus:

(1) Careful selection of the curriculum committee and its chair, which includes selecting representatives of various factions who are willing to compromise and of a chair who is a respected as a "doer," and is widely perceived to be "fair";

(2) Education of the faculty about what faculty members at other law schools are proposing and implementing;

(3) Solicitation of input from the faculty as a whole and the making of tradeoffs, where reasonable, between differing points of view. This requires knowledge of the various "players" on the faculty—who will be affected by various changes and who are likely to support or oppose them;

(4) Recognition and alleviation of real concerns of the faculty by, e.g., seeking internal or external funding to support faculty development of new materials or to reduce teaching loads of participants; and

128. Id. at 469-70.
129. Id.
130. Fox, supra note 23, at 483.
131. Id. at 484.
133. Id. at 536.
(5) Acceptance of incremental, as opposed to systemic change. One must assume that the dean is behind such reforms and is willing to implement the consensus-building strategies mentioned above. Even so, Cohen’s strategy seems unlikely to achieve truly meaningful change. One important reason for this is the lack of any coherent theoretical base for the changes proposed. Langdell had one, and it has lasted, despite a considerable degree of unhappiness among Harvard students and faculty when Langdell implemented it. This is why I propose a broad conceptual apparatus such as the functional approach as an underpinning. While building consensus is important, the dean must be willing to take the lead and not allow reform to wander outside a conceptual framework developed by the faculty members, or little will be really accomplished. Indeed, Harvard’s 1980s experiment was criticized as mere “tinkering” even by those on its faculty most committed to change.

Curtis Berger takes a cautious approach like Cohen’s in describing the lessons of Columbia’s own attempt to reform first-year legal education:

The overarching lesson of curricular reform is to be aware that the best is often the enemy of the better. To seek “perfection” is to guarantee failure; one must design a process through which a strong—if not ideal—set of reforms can gain approval. Success requires, as a minimum, the selection of a truly broad-based and representative committee that includes the dean; an unhurried period of fact finding and committee discussion; informal and relaxed interchange with the faculty; and above all, the resolution of all internal differences so as to enable the committee to present a united front when it seeks formal faculty approval. This process worked at Columbia, and I am confident that it can be happily emulated elsewhere.

While there is much to be said for such pragmatism, what it tends to produce is merely the addition of cross-cutting perspective-type courses to the already existing curriculum. Such courses tend to be marginalized by the students themselves, who still feel Contracts,

134. See id. at 536-43.
135. See, e.g., STEVENS, supra note 25, at 56, 66 n.15 (citing, e.g., GILMORE, supra note 27, 41-48).
136. See, e.g., Duncan Kennedy, Dissent from the Report of the Committee on Educational Planning and Development to the Harvard Law School Faculty (Apr. 5, 1982); see also Separate Statement of Student Member of the Committee Molly Burke ’82, to the Harvard Law School Faculty (Oct. 14, 1982) (on file with author).
137. Berger, supra note 19, at 553.
Torts, et cetera, are the real "stuff" of the law. This of course is precisely not the intention of the reformers.

Quite typically, by using this cautious approach, all Columbia could achieve, despite a major effort, was a cutting of the credit hours in the traditional courses and the addition of courses and course segments on Law and Economics, Foundations of a Regulatory State, and Perspectives on Legal Thought.138 Tennessee achieved even less.139

Jay Feinman, a progressive teacher at Rutgers-Camden, offers some valuable insight on such piecemeal reforms:

Often the degree of change in the life of the institution or in the real learning of its students is not as great as the glorious language of the documents promoting change would suggest. Innovation, like sameness, can have a routine quality that suggests detachment and formula rather than engagement . . . . Change is hard because of the law of inertia. Once things have been done one way, it requires energy to get them going in a different direction.140

This is why Feinman states, in a sentiment I would echo, "Reforms like these will be most successful when they embody the intense personal involvement of the participants in the change."141 If this is present, institutionalization of the change becomes possible. Institutionalization, Feinman points out, is difficult in part because of hubris: "We law professors have a high opinion of ourselves."142 On the other hand, institutionalization of changes is made easier because inertia is a property of a body in motion as well as of a body at rest. "Once a change has been instituted and repeated once or twice it [itself] acquires momentum."143 The surest way to make this occur, in my view, is to propose an exciting paradigm-shift in law that engages the dean and crucial members of the faculty, and provides them with the innovative spirit and staying power necessary to implement and institutionalize such a change.

139. Tennessee added a five-and-one-half day Introductory Period before the first year begins and a six-credit, two-semester course in Legal Process. See University of Tennessee College of Law, Curriculum Revision Project (Summary) 2-5 (1987) (unpublished manuscript) (on file with author); see also University of Tennessee College of Law, 1991-92 Bulletin (1991).
141. Id. at 510.
142. Id. at 511.
143. Id.
While not the chief focus of this Article, curriculum in the second and third years of law school could be expected to shift in response to functional integration of the first-year curriculum. I believe a tracking system, such as that which is being systematically tried at George Mason University, would make the most sense. While George Mason begins its various functional career tracks in the first year, I see no reason not to delay this until the second and third years. This would give every student a common conceptual first-year core such as that I have suggested. The tracks currently existing in George Mason’s curriculum are “Banking and Financial Services,” “Corporate and Securities Law,” “Patent Law,” and the “Standard Program.” Under development are “International Trade Law” and “Real Estate Law” tracks. Other possible tracks readily come to mind such as “Public Service Law” and “Financial and Estate Planning.” The point is that the law student participating in a curriculum thus arranged will not only receive the common conceptual core I have suggested for the first year, but can become familiar with all the subjects necessary to practice in a specific area of law.

Of particular importance in designing such an upper-level curriculum is the functional integration of doctrine in each of its constituent courses. For example in the “Financial and Estate Planning” track I have suggested, tax and regulatory aspects of estates and trusts law should be interrelated with traditional common law aspects. This has been tried off and on at various schools. One successful example was Professor James Casner’s Estate Planning course at Harvard, which taught tax and regulation alongside common law doctrine. This course, however, died along with Professor Casner, and the Harvard curriculum has returned to the more common separation of “Wills, Estates, and Trusts” from “Estate and Gift Tax” and “Estate Planning.”

One reason for this return to old ways was suggested in a letter to me from Professor Lawrence Waggoner of Michigan. Trying to functionalize Estates and Trusts law in an otherwise standard curriculum at Michigan provoked student protest, leading to eventual aban-

145. Id.
146. See id. at 2-3.
148. See, e.g., Harvard Law School, 1990-91 Catalog (1990). The catalog shows only a two-credit Estate Planning course, but does not even list a basic Trusts and Estates course. Id. at 113.
149. See Letter from Lawrence W. Waggoner, Professor of Law, University of Michigan, to the author (Dec. 1991) (on file with author).
donment of the experiment. The key, of course, is to make such functionally-integrated courses the norm rather than the exception in a curriculum. An excellent way to do this would, it seems to me, be to institute a tracking system for all students. They would then expect a particular course within a given track to treat all the elements necessary for a lawyer to deal with that subject, rather than to make an artificial separation of common law doctrine from the rest of what he or she needed to know.

VIII. CONCLUSION

Functionalizing legal doctrine should be a primary goal in any substantial revision of the first-year curriculum. Because many rules and doctrines presently discussed in one first-year course serve the same or a similar function as those in another such course, basic conceptual training in the first year should be organized according to the unifying principles these underlying functions reveal. Using such cross-cutting principles, the present courses of Torts, Contracts, and Property could be taught under the rubric "Civil Obligation." Since many of these principles reappear in Criminal Law, it might well be possible to teach the substance of this course in addition to the other three, under the more general heading of "Legal Obligation." Also, Criminal and Civil Procedure, when functionalized, could appear merely as "Procedure."

The benefits of such changes would include the elimination of redundancy and the de-mystification of legal doctrine itself. Not only would students be better able to connect the pieces of their learning, but they would be taught to approach problems in ways closer to those employed by experienced practitioners. Time would also be freed up in the first year to deal with statutes and regulations in the Obligation and Procedure courses, and perhaps to add courses like Administrative Law, in which statutory and regulatory law are already treated as paramount. As students move into upper-level courses, functionalization of doctrine would give way to functionalization by task. This could be accomplished in courses like New England's team-taught "Practicing Business Law," which ideally would be placed within a tracking system, giving students different majors, as does the program at George Mason.

As I have noted here and in the previous article, there have already been several notable attempts to make such a paradigm-shift in the ways students learn law. Earliest and most far-reaching was the failed attempt of Laswell and McDougal at Yale during World War II to transform law school training into policy science. Another sweeping change was the functionalized curriculum initiated by the new law school at CUNY-Queens during the 1980s. This curriculum, as I
noted, has recently been modified due to low bar pass rates and "publish-or-perish" pressures.

A much less ambitious attempt at Harvard during the 1980s to provide bridges between traditional first-year courses collapsed in 1991 after almost a decade of experimentation. However, the venture was picked up and greatly expanded by Georgetown, whose fall 1991 curriculum contained an experimental first-year section completely devoid of courses with traditional names such as Contracts and Torts.

The Georgetown experiment now appears to be the most promising vehicle for practical application of the sort of changes I propose. For the most part, Georgetown has tried to be politically careful in both the planning and implementation of its experimental program.

I have outlined these and other political steps that schools which attempt major changes in curriculum should follow. While I recognize the need for pragmatism such as Georgetown has employed, I also believe that even Georgetown's program may lack the "glue" that a set of organizing principles like mine would provide. With the backing of such principles, an experiment such as Georgetown's can be given greater focus and permanence.