God, Evolution, Legal Education and Law

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EVOLUTION, CASES AND LEGAL EDUCATION

The year 1870 was a watershed year in American law. Christopher Columbus Langdell became dean of the Harvard Law School and introduced the "case method" of teaching law. The year following he described this new approach to law study in a preface to CASES ON CONTRACTS, the first law "casebook" ever published:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.[1]

Beginning with this casebook and with these brief remarks Langdell's case method, after a brief flurry of initial opposition, revolutionized the study of law in the United States.[2]

What was revolutionary about Langdell's new "case method"? It was not that Langdell believed that law was a science. That idea had been popular at least since the late 18th century when Sir William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND had became a staple item in the diet of the American lawyer and law student. Nor was it that Langdell introduced to the study of law the systematic reading of cases. For decades prior to 1870, law students had been encouraged to read the cases cited in various legal treatises and commentaries that set forth the foundational principles and doctrines of American law.[3]

How then did Langdell's "case method" revolutionize the study of law? First, Dean Langdell believed that the basic principles and doctrines of law were the products of a growth process extending over many years. Second, he believed that this evolution of legal doctrine and principle was taking place in the opinions written by certain judges in cases brought before them. Before Langdell, the law was taught primarily by practicing lawyers in law offices throughout the country. After all, the prevailing opinion then among lawyers was that the principles and doctrines of the law were unchanging; all the student had to learn was to apply those legal principles and doctrines. Beginning with Langdell, law study shifted to the classroom so that the Student would learn the principles and doctrines of the law as they were being developed in the appellate courts across America.

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1. This preface is often quoted by Langdell's admirers as the best statement of the principles of the "case method" of legal education that Langdell introduced at Harvard. See Brandeis, L.O., "The Harvard Law School," 1 The Green Bag 10, 19-23 (1889); Schofield, W., "Christopher Columbus Langdell," 55 (O.S.) Amer. L Reg. 273, 278-79 (1907); Sutherland, A., THE LAW AT HARVARD 174-175 (1967).

2. For an early account of this revolution at Harvard see Charles Warren's summary in 2 Warren, HISTORY OF THE HARVARD LAW SCHOOL 354-460 (1907).

3. Sutherland, THE LAW AT HARVARD, supra note 1, at 18-31.

For nearly 100 years Langdell's "case method" has dominated legal education. While many have challenged Langdell's assumption that the evolution of law is best traced in appellate opinions, "the appellate cases are still the main raw materials of legal education."[4] While others have challenged Langdell's assumption that law is best learned in the classroom, the classroom, not the lawyer's office or the courtroom, is still where nearly 100 percent of a law student's learning takes place.[5]

Not only has the Langdell legacy of the appellate case and the law school classroom survived virtually unchanged for 100 years, his presuppositions about how law is to be taught and about what law is has rarely been questioned. Langdell maintained that law was a science. What did he mean by that? He meant that law was a system of principles and doctrines that evolved, that changed, that grew over the centuries as judges resolved the human conflicts brought before them. Therefore, the law was to be learned by a process of inductive reasoning after study of the raw material of the appellate cases in the law-school library laboratory.[6] The casebook, itself, was a miniature laboratory designed by its author to help the student to learn these legal rules and to learn the principles of legal reasoning. Only by this empirical effort could the student ever master the law, its processes, and its rules.

Today's law schools throughout America have, without exception, adopted Langdell's idea about law and his method of teaching. As the 1977-78 Yale Law Bulletin has explained it:

> When the case method was introduced in American law schools by Langdell at Harvard ... its advocates hoped to base the study of law upon real cases rather than concepts. By close reasoning upon a series of appellate decisions ... the student would be encouraged to search for a "truer" rule of law than could be found in the treatises. Concreteness and particularly were to be emphasized in contrast to the rather loose generalization of the older textbooks. The case method was regarded as a better way to teach legal rules, as well as a way to learn how the rules had been derived.

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4. The 1977-78 Yale Law School Bulletin 18. Even at Yale, where opposition to Langdell's system has been consistently the most vigorous, the appellate cases dominate. Under the leadership of Professors Myres S. McDougal and Harold Lasswell, a major effort was made at Yale to push beyond the appellate cases to the raw materials of all fields of human knowledge: the humanities, the social sciences, the sciences. In short, they viewed the law school task as one to teach law as a "policy science." McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community," 56 YALE L. J. 1345 (1947). While modern casebooks include a wide variety of selections from other fields and, thus, reflect the impact of McDougal and Lasswell, they still focus on the cases. Even though today's law school catalogs contain courses such as Law and Economics, Law and Social Science, and Law and Medicine, those courses are elective and are chosen by few students. The bread-and-butter law courses that were introduced in Langdell's day remain relatively intact.

5. Judge Jerome Frank, a United States Circuit Judge and a leader of the "legal realist" movement of the 1930's and 1940's, complained that the law was not to be found only in books in "hush and quiet of a library" but Is to be discovered in "the all-too-human clashes of personalities In law office and courtroom." Frank, "A Plea For Lawyer-Schools," 56 YALE L. J. 1303, 1304 (1947). While Frank's efforts did not bring about a wholesale reorientation of law schools to the real world of the practitioner, his efforts did spark the beginning of the efforts to introduce clinical education into the law school curricula of the 1960's and 1970's. *See, e.g.*, Vetri, "Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education," 50 OR. L. REV. 57, 59 (1970). Nevertheless, the law school classroom, not the lawyer's office, has remained the center of the law student's experience.

6. Sutherland, THE LAW AT HARVARD, supra note 1, at 175.

Thus, today's law student has been admonished to do the same thing that the Harvard law student in Langdell's first classes was urged to do: "to patch together a fabric of law, torn and riddled as it may be, by tracing the experience reflected in appellate cases."[7]

GOD, NATURE AND LAW

What did this notion of law and this system of law teaching replace? From the time of the War for American Independence to the time of the Civil War the dominant legal scholar in America was an Englishman, Sir William Blackstone. He published his COMMENTARIES ON THE LAW OF ENGLAND in the 1760's. By the 1770's Blackstone's COMMENTARIES had sold as many copies in America as in England. So influential was Blackstone that many American legal scholars, including Joseph Story of Harvard and Thomas M. Cooley of Michigan, updated and revised the COMMENTARIES to make it more useful to the American practitioner. In 1824, Chancellor James Kent's COMMENTARIES ON AMERICAN LAW was added to the diet of young men studying law in the law offices of the nation. For generations, American lawyers were "nourished" by these two books.[8]

Blackstone believed that the principles and doctrines underlying the common law of England were unchanging. In his section on the "nature of law" Blackstone explained why he believed this to be true:

> Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being ... [C]onsequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will.
>
> This will of the Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained...
>
> This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority ... from this original.[9]

Blackstone's view of God and nature, man and law was not one that he had arrived at by his "unaided reason." Rather, he explicitly rested his case upon the truths contained in the Holy Bible. First, he disclaimed man's reason as the source of the law:

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7. The 1977-78 Yale Law School Bulletin, supra note 5, at 18-19.

8. Sutherland, THE LAW AT HARVARD, supra note 1, at 30.

9. 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 39, 40 (Wendell's Ed. 1847), hereinafter referred to as BLACKSTONE'S COMMENTARIES.

> [l]t is ... necessary to have recourse to reason, whose office it is to discover ... what the law of nature directs in every circumstance of life ... And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide than this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.[10]

Second, Blackstone acknowledged that God, after man's fall, mercifully revealed the "law of nature" in the holy scriptures:

> These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hidden from the wisdom of ages.[11]

As a result of these observations, Blackstone concluded that "no human laws should be suffered to contradict the laws of nature and the law of revelation."[12]

Blackstone's faith, a faith that served as the foundation of law in America for a century and a quarter after its birth as a nation, rested upon God's revelation of law in the Holy Bible. He believed that the principles and doctrines of the law were unchanging. Moreover, he believed that the judge's opinions in appellate cases were not the sources of law, but merely "evidence" of law. Judges did not make law, they uncovered and applied it.[13]

Chancellor James Kent, author of the equally influential COMMENTARIES ON AMERICAN LAW, shared Blackstone's faith. In discussing the "foundation of the law of nations" Kent, while acknowledging that some of international law was based upon customs and usage, maintained that "every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature ... [is] necessary ... because nations are bound by the law of nature to observe it ..."[14] This law of nature Kent considered to be "equally binding in every age, and upon all mankind."[15] This law of nature Kent also considered to be "identical with the will of God, and that will is ascertained ... either by consulting Divine revelation, where that is declaratory, or by application of human reason, where revelation is silent."[16]

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10. *Id.* at 41.
11. *Id.* at 42.
12. *Ibid.*
13. *Id.* at 70-71.
14. 1 Kent, COMMENTARIES ON AMERICAN LAW 2 (10th Ed. 1860), hereinafter KENT'S COMMENTARIES.
15. *Id.* at 3.
16. *Id.* at 4.

Other early American legal scholars shared this faith. Jesse Root, a Connecticut lawyer who made the first systematic compilation of Connecticut cases, wrote that the "common law was derived from the law of nature and of revelation - those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things ..."[17] Joseph Story echoed Root's opinion, when in his 1829 inaugural address as Dane Professor of Law at Harvard, he remarked: "There never has been a period, in which the Common Law did not recognize Christianity as lying at its foundation."[18]

In 1884, Thomas Cooley, Jay Professor of Law at the University of Michigan and a noted scholar of constitutional law, wrote in his introduction to a new edition of Blackstone's COMMENTARIES:

> We must discard alike the divine origin for government, and the theoretical social compact, and acknowledge rightful authority in the physical power of the stronger to subject the weaker to his will, before we can accede to the doctrine that the greater number of voters is necessarily to hold absolute sway, or that the voice of the people is always to be accepted as the voice of Deity. Even when convened to consider what shall be the terms of their compact of government the people are not without law, and are not at liberty to regard themselves as under no restraints. The law of God precedes their action; the immutable principles of right and justice are over and about them, and cannot rightfully be ignored; the life and the liberty of the individual ... are not more sacred after they have been declared by a written law to be inviolable than they were before; and the legitimate province of constitutions is to furnish them with one and adequate protection instead of providing a means whereby the individual may be robbed by the organized society he enters.[19]

Under Blackstone and these representative early American legal scholars, students were encouraged to read cases not as "original sources" of legal doctrines and principles but as training to enable them as lawyers to guide the judge to the applicable and governing principle of law and to call the judge's attention to the legally relevant facts of the case. The judges, as Chief Justice John Marshall implied in *Marbury v. Madison*, 1 Cranch. 137, 177 (1803), did not create law; they applied, expounded, and interpreted the law.

These early legal scholars and judges held this view because they believed in the Mosaic account of the origin of the world found in the Book of Genesis of the Holy Bible. Blackstone explicitly endorsed this faith when he introduced his reader to the nature of law:

> Law ... signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational ... Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be ... If we farther advance, from mere inactive matter to vegetable and animal life, we shall

17. P. Miller, ad., THE LEGAL MIND IN AMERICA 33 (Cornell: 1962).

18. *Id.* at 178.

19. 1 BLACKSTONE'S COMMENTARIES ix-x (Cooley Ed. 1884)

> find them still governed by laws, more numerous indeed, but equally fixed and invariable ... Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.[20]

Thus Blackstone believed that man's law was dependent on God's law and God's revelation. That was his faith, a faith endorsed by scholars and practitioners and one that dominated legal education and law up to the beginning of the 20th century.

EVOLUTION, MAN AND LAW

In 1870, Langdell introduced not just a new method of learning law, but a new faith about law. He believed that man, led by the ablest scholars and judges, could determine the laws governing human affairs. Langdell dropped God out of the legal equation, not by default, but by design. He had embraced the new faith that had swept into the academic world - the faith embodied in Charles Darwin's 1859 book, THE ORIGIN OF THE SPECIES.[21]

First of all, Langdell believed that the science of law contained doctrines and principles that had been developed over centuries by a slow process of growth. Those doctrines and principles had not been immutably cast at the beginning of the history of man. In like manner, Darwin believed that the species of life, the subject of the science of biology, had evolved over centuries by a slow process of growth through variation and natural selection. He rejected any notion that each living species had been created specially and separately at some definite point of time.

Second, Langdell believed that the growth of these legal principles and doctrines could be traced only by a careful empirical study of the cases decided by judges. Later, Langdell included all "printed books" as "the ultimate sources of all legal knowledge." Thus, he told an 1886 audience that:

> The library is the proper workshop of professor and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all the botanical garden is to the botanists.[22]

Darwin believed that the origin and growth of the species of life could be found only by empirical study of the natural world around him. As Darwin had rejected God's revelation of the creation account of life and of the governing physical laws of the universe, so Langdell rejected God's revelation of law and of the governing moral laws of the universe.

Both of these beliefs - the belief in evolution and not creation and the belief in man and not God - have dominated the teaching and practice of law since the early part of the 20th century. Since Roscoe Pound, dean at Harvard Law School from 1916 to 1936, gave a series of lectures on the

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20. 1 BLACKSTONE'S COMMENTARIES, supra note 10, at 38-39.

21. The impact of Darwinism on the American intellectual has been documented by many. *See, e.g.*, Hofstadter, SOCIAL DARWINISM IN AMERICAN THOUGHT 13-30 (New York: 1959). As for Harvard, generally, see Buck, P., SOCIAL SCIENCES AT HARVARD 1860, 1920 (Cambridge: 1965).

22. Sutherland, THE LAW AT HARVARD, supra note 1, at 175.

philosophy of law at Yale in 1921-22, few, if any, legal philosophers have believed that God has anything to do with law. Yet neither Dean Pound nor any other legal philosopher has proved the irrelevance of God. Rather, they have simply assumed that society has evolved to a place where man can no longer accept divine revelation as a justification for law. Pound saw clearly the consequences of that assumption:

> From the time when lawgivers gave over the attempt to maintain the general security by belief that particular bodies of human law had been divinely dictated or divinely revealed or divinely sanctioned, they have had to wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires.[23]

Despite the existence of this contradiction - that law must be both fixed and certain and, at the same time, be both changing and indefinite - Pound never once questioned his assumption that man, without God, would be able to develop fixed and certain principles of law.

This same dilemma has haunted the law teacher since the introduction of the case-method approach into the law-school classroom. Langdell maintained that a true lawyer was the one who mastered the legal principles and doctrines so as "to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs." At the same time Langdell maintained that these principles and doctrines were a product of a "growth" ... to be traced ... through a series of cases." The law professor, therefore, has been required by the case method to teach the student both certainty and change. How did Langdell, himself, accomplish this? He vacillated.

In order to teach certainty in his course on equity pleading he ignored the current American case law and concentrated on obsolete English cases that had no living American counterpart in the actual practice of law. Professor Langdell explained that he did not include a single American case in his casebook and his supplementary textbook summarizing equity pleading because "his object was to present the principles of the sciences of equity pleading as such, as it was at the end of the chancellorship of Lord Eldon."[24] Lord Eldon ceased to be chancellor in 1827; Langdell first published his text in 1877. In Lord Eldon's day, parties to a law case were not entitled to appear as witnesses on their own behalf and could not be required to appear to give evidence favorable to the other side. Equity bills of discovery were invented to secure admissions of one party that were favorable to the other. But in no American jurisdiction were parties disqualified as witnesses. And there had developed in the latter half of the 19th century a statutory process for discovery in many of those jurisdictions. Langdell preferred to ignore these modern American developments in order to achieve the certainty that he claimed would follow him from the introduction of the case method of teaching law.

When Langdell chose to grapple with current case law, he had to face the truth. It is reported, for example, that he changed "his opinion in regard to a case three times in the course of one week, each

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23. Pound, R., INTRODUCTION TO THE PHILOSOPHY OF LAW 3 (Yale 1954).

24. Schofield, W., "Christopher Columbus Langdell," 5 (O.S.) AMER. L. REG., supra note 1, at 284.

time advancing with positiveness a new doctrine."[25] Is it any wonder that the Socratic dialog - the questioning professor and the answering student - was introduced along with the new case method? In order to save themselves from the embarrassment of not knowing the true principle of law in an evolving legal environment, Langdell's more ardent disciples have asked the student to commit himself to a statement of the rule of law of a case.

Even in Langdell's day the promise of the new case method of teaching was elusive. How can there be certainty in legal principle or doctrine if the law was constantly changing? Today's law professor must face the same dilemma as did Langdell. Thus, his teaching has vacillated between Socratic dialog and lecture, between change and certainty. More significantly, today's law school has papered over the 1 00-year-old promise that the true lawyer is the one who has mastered legal principles and doctrines in such a way that he is able to apply them with "facility and certainty." The most recent law-school catalogs have almost completely dropped any promise that the student will learn the law after 3 years of study:

> The case method ... introduces the student to the analytical techniques which lawyers use to sort the relevant from the irrelevant, separate reasoning from rationalization, and distinguish solid principle from speculation (1970/71 Harvard Law School catalog.)
>
> [T]he School's educational program emphasizes less the static law of the time and more the dynamics of the law and the legal process; emphasizes less the learning of legal rules and more the enquiry into why particular rules exist and how they might be improved; emphasizes less the accumulation of a body of existing knowledge and more the development of a framework of analysis; emphasizes less the development of answers to particular current problems and more the development of the style of problem-solving that characterizes the first-class lawyer. (1977/78 Stanford Law School Bulletin.)

In an article comparing legal education in England and America, Erwin N. Griswold, then Harvard Law School dean, summarized the consensus among legal educators today. After having quoted an Englishman as having stated "that the objectives in this school was 'to teach law and not how to think,"' Dean Griswold remarked:

> Now we would think that this is impossible. In the United States, the average law teacher regards it as far more important that his students be taught how to think than that they be taught any specific rules or system of law.[26]

When a law student has entered the practice of law, he has quickly discovered his need to know specific rules of law. When a lawyer has become a judge, he inevitably has discovered that "thinking like a lawyer" cannot resolve the issues before him. He must apply a rule or principle of law. But the model of legal training has not been the lawyer or the judge; it has been the law teacher and scholar. What has been the test of the good teacher and scholar? Under Langdell's case method, it has not been whether he has been right or wrong about the law, but how well he has

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25. *Id.* at 21e-2n.

26. Griswold, "English and American legal Education," 10 J. legal Ed. 429, 43334 (1958).

played the game. From the beginning Langdell earned the respect and confidence of his students because he was sincere, hardworking, original, and open-minded. Just because he changed "his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine," did not lower him in the student's eyes:

That [Langdell could change his mind on a case three times in one week] ... without losing the respect or confidence of his students shows the esteem in which he has held. They well knew that he was a teacher of originality and great industry, with no object but to discover and state truly the principles of the law. To lose confidence in him for changing his position upon a legal proposition would be as absurd as to lose confidence in Charles Darwin if he withdrew a tentative conclusion found to be false after more extended investigation.[27]

Today's law students have placed a high value on a law teacher who exhibits a permissive attitude toward beliefs or practices differing from or conflicting with his own. Why? Because that teacher and most of his students have given up the promise of certainty - of truth - in law and have committed themselves to an unquestioning faith in change.

In a speech given to the 1977 midyear graduating class at the University of Michigan School of Law, Professor L. Hart Wright summarized today's conventional law-school wisdom:

> Legally inspired change - a constant over your life - in our rights and duties ... is and will continue to be an evolutionary process which will continue to change our lives in an evolutionary manner ... And these evolutionary changes in our lives will, in turn, cause change in our legal rights and duties.[28]

Because of this "endless variety and change" in the "factual" and "legal" terrains, Wright told the listening law graduates that their education had been aimed:

> to help you sharpen your analytical skills so that hereafter you could help society determine how the variations in our constantly changing terrain should affect the substantive and procedural rights and duties of people.[29]

EVOLUTION, RELIGION AND LEGAL EDUCATION

As Roger Cramton, dean of the law school at Cornell, has recently put it: there is an "ordinary religion of the law-school classroom." In a paper delivered in 1977 for a symposium in Theology and Law sponsored by the Council on Religion and Law at Cambridge, Mass., Dean Cramton summarized the features of the value system taught in the ordinary law-school classroom:

> 1. A skeptical attitude towards generalizations, principles, and received wisdom - all values are relative.

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27. Schofield, W., "Christopher Columbus Langdell," 5 (O.S.) Amer. L. Reg., supra note 1, at 276-77.

28. 22 Law Quadrangle Notes 11-13 (Spring 1978).

29. *Id.* at 12.

> 2. An instrumental approach to law and lawyering - law is an instrument for achieving social goals and nothing else.
>
> 3. Two models of professional behavior - the "hired gun" or the "social engineer" - trained as technicians for the dispassionate use of legal skills for the instrumental purposes of those they serve.
>
> 4. A faith that man, by the application of his reason and the use of the democratic processes, can make the world better.[30]

Moral relativism and amoral pragmatism have been the inevitable byproducts of legal educators' commitment to keeping the students' minds open to change so that the natural evolutionary process may bring about new legal principles and doctrines to fit constantly changing circumstances.

But should legal education remain committed to the evolutionary theories of Darwin and his successors? Ever since the Scopes trial in 1925 when Clarence Darrow defeated William Jennings Bryan, evolution has been almost universally accepted by the educated public as an established fact of modern science. In the 140 years since Darwin published The Origin of the Species, evolution has become the article of faith of educators and parents, historians and futurists, environmentalists and businessmen, and lawyers and their clients. Evolutionary theory has become the foundation stone of law teaching and life in America today. Yet the modern scientific theory of evolution has proved to be neither modern, nor scientific, nor the only reasonable hypothesis for law or life.

> Then the Lord God formed man of dust from the ground, and breathed into his nostrils the breath of life, and man became a living being ... And the Lord God fashioned into a woman the rib which He had taken from the man.[31]

Today, most educated persons and almost all scientists have rejected as unhistorical this account of the origin of man and women found in Genesis. To them, Adam and Eve have been dismissed as mythical characters in a primitive story about the earth's origins written by a Hebrew man named Moses who was ignorant of the truths that have been recently discovered in a modern scientific age. Darwin's evolutionary speculations about the origin of life and of man have been accepted because they are a product of modern science. But evolutionary thinking did not come to light for the first time in the mid 19th-century work of Darwin. Rather, the theory of evolution has roots deep in the history of man.

"Natural selection" and "survival of the fittest" have been given modern scientific meanings, but they parallel ancient evolutionary speculations. The ancient Chinese, for example, believed that man had evolved from primordial germ by the interaction of impersonal forces.[32] In the first century

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30. Cramton, R., "The Ordinary Religion of the Law School Classroom," 2 NICM Journ. 72 (1977) reprinted in The Christian Lawyer 12 (1978).

31. Genesis 2:7, 22 (New American Standard).

32. Veith, I., "Creation and Evolution in the Far East," in ISSUES IN EVOLUTION, ed. Sol Tax 1, 2, and 7 (Chicago, University of Chicago 1960).

before Christ, Roman poet Lucretius believed in the survival of the fittest: "of all things which you see breathing the breath of life, either *craft* or *courage* or else *speed* has from the beginning of its existence protected and preserved each particular race." (Emphasis added.)[33] Lucretius also formulated a surprisingly sophisticated "big bang" theory to explain the origin of the universe and the earth. He denied, as do modern scientists today, that the universe was created by a creative intelligent spirit. Rather, the stars, the sun, the moon, the galaxies, and planets came out of a vast blob of matter after a sudden explosion that occurred ages before man appeared on the earth.[34] Today, most modern astronomers believe that the universe came into being roughly 20 billion years ago after an occurrence resembling "the explosion of a cosmic hydrogen bomb."[35]

Today we have accepted as a modern scientific discovery that the earth is billions of years old. In ancient India, philosophers and religious gurus believed that the earth was extremely old, perhaps infinite in age. In fact, almost every ancient culture subscribed to the belief in evolution and in the great antiquity of the earth. In light of these truths the creation account that Moses wrote in Genesis was a radical, new concept - a concept of a special, recent creation of all things "by an infinite personal spiritual Being."[36] It was this world view, popularized in the West by Christians, that gave birth to modern science. In 1925, Alfred North Whitehead, a widely respected mathematician and philosopher, named Christianity the mother of science because the early scientists believed that the universe had been created by a rational God and, because of this belief, they had confidence that by reason they could discover the truth about nature and the universe.[37] Darwin's theory of evolution has marked a turning away from that foundation for modern science and a turning towards the ancient religious and philosophical traditions of the primitive cultures of the East and the Mideast. The popularly held notion that evolution is a modern world view is, therefore, not true.

Another myth about evolution is that it is a scientific theory. It is not. Rather it is a religion, a statement of faith. Darwin, himself, had not viewed his evidence for evolution from a neutral position. At the time he wrote the ORIGIN OF THE SPECIES he was a vigorous opponent of orthodox Christian belief and he called the doctrine of special creation "a curious illustration of the blindness of preconceived opinion."[38] But Darwin and his evolutionist colleagues were, themselves, blinded by their own preconceived opinion that the origin of life and of the universe rested upon the workings of natural impersonal forces. More than a century and a half of Western philosophical, religious, and scientific speculations about evolution preceded Darwin's work. Darwin, himself, was much influenced by these theories. In particular, Darwin has explained in his AUTOBIOGRAPHY that he was supplied with his theories of "natural selection" and "survival of the fittest" as

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33. Lucretius, "On the Nature of Things" in MAN AND THE UNIVERSE: THE PHILOSOPHERS OF SCIENCE 25 (Random House, New York 1947).

34. *Id.* at 14.

35. Jastrow, R., "Have Astronomers Found God?" New York Times Magazine 19 (June 25, 1978).

36. Morris, H., THE TROUBLED WATERS OF EVOLUTION 68-69 (8an Diego 1974).

37. Schaeffer, F., HOW SHOULD WE THEN LIVE? 130-143 (Revell: N.J. 1976).

38. The statements beginning here and ending with footnote 41 are based upon the following article: Bahnsen, G., "Worshipping the Creature Rather than the Creator," 1 JOURN. OF CHRISTIAN RECONSTRUCTION 61-127 (1974).

explanations of specie origins after reading T. R. Malthus's works on population. So, Darwin did not arrive at his theory of evolution after examining the facts, but he set out to examine the facts in order to support a theory that he already believed.[39] Nowhere is this more clearly demonstrated than in his own admission that, in order to explain how natural selection actually worked, he begged the "permission (of his reader} to give one or two imaginary illustrations."[40] In summary, Darwin had no hard biological evidence to support his evolutionary theory.

> The fact is that Darwinism, despite its boast of scientific proof, is a theory erected upon a speculative supposition and supported by imaginary evidence; it does not establish historical factuality but merely gives us a "way of looking" at the world.[41]

In the 140 years since Darwin, scientists still approach the subject of biology with religious presuppositions. Dr. Francis Crick, winner of the 1962 Nobel Prize in Physiology and Medicine for his work in breaking the DNA code, has explained that he has not been moved to study biology because he wants to know if evolution is objectively true. Rather, he has closed his mind to any other hypothesis and has made every effort to build a new culture as if evolution has been conclusively proved. For example, in his book, OF MOLECULES AND MEN, Crick outlines his views as follows:

> Once one has become adjusted to the idea that we are here because we have evolved from simple chemical compounds by a process of natural selection, it is remarkable how many of the problems of the modern world would take on a completely new light. It is for this reason that it is important that science in general, and natural selection in particular, should become the basis on which we are to build a new culture ... The old culture ..., which was based originally on Christian values, is clearly dying, whereas the new culture ... based on scientific values ... is growing with great rapidity.[42]

SCIENCE, ORIGINS AND LAW

In his book, CHANCE AND NECESSITY, published in 1971, the Nobel Prize-winning French biologist, Jacques Monad, openly acknowledged that the "*premise* of the scientific method is that nature is *objective* and *not projective*." (Emphasis added.) In other words, the modern scientific faith is that a river or a rock has "been molded by the free play of physical forces to which we cannot attribute any design, any 'project' or purpose."[43] But that is the question. Were the earth and life created by impersonal forces without design - by necessity and chance - or were the earth and life created by a personal Being for a specific purpose? Evolutionary scientists like Crick and Monad have begged that question because the scientific method cannot be used to prove or disprove "evolution" or "creation."

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39. *Id.* at 97-107.
40. *Id.* at102.
41. *Ibid.*
42. Crick, F., OF MOLECULES AND MEN 93 (Univ. of Wash.: 1966).
43. Monod, J., CHANCE AND NECESSITY 3 (Vintage 1972).

Dr. Henry M. Morris, Director of the Institute for Creation Research, has observed that "neither evolution nor creation is accessible to the scientific method, since they deal with origins and history, not with presently observable and repeatable events."[44] If the question of origins is not one open to a scientific answer, then are we left with only religious or scientific prejudices about which we can only agree or disagree, but not discuss? Not at all. "Evolution" and "creation" can be discussed as "scientific models or frameworks" by comparing their relative worths in the prediction and the correlation of the raw data of nature. Is the evolutionary model the only reasonable explanation of the fossil record, the geologic structure of the earth, adaptation and change in biological species, etc.? Or is the Genesis account more consistent with the facts?[45]

Since the publication of Darwin's book on THE ORIGIN OF THE SPECIES, scientists have debated whether the evolutionary or the creation model better accounts for the natural phenomenon and its governing laws. Today most people behave as if this debate is for scientists only because of their lack of expertise or is of little concern to them because of their assumption that the evidence in favor of evolution is overwhelming. But the question of origins is, first of all, too important to be left to the experts and, second, is far from settled.

If the Francis Cricks of the world have their way, we would be ruled by a scientific elite with a cradle-to-grave program featuring genetic engineering, educational brainwashing, and therapeutic euthanasia. Lest the reader think this is an overstatement consider the following excerpts taken from a Crick article entitled, "Why I Study Biology":

> You must realize that much of the political thinking of this country is very difficult to justify biologically. It was valid to say, in the period of the American revolution, when people were oppressed by priests and kings, that all men were created equal. But it doesn't have biological validity ... It's not only biologically not true, it's also biologically undesirable. If you had a population in which everybody was the same, any biologist would say that it was a very bad situation."

Therefore, Crick suggests that "some group of people should decide that some people should have more children and some people should have fewer."[46]

Crick's opposition to political equality is coupled with his opposition to medical research which he regards as "aiming for the moment ... to make the world safe for senility." But he has a program - a program to educate all people that his beliefs in "natural selection" are true to the exclusion of any other belief system. In fact, Crick believes that people who believe in Christianity, astrology, or other "scientific nonsense" ought not to be allowed to attend, much less teach at, a university.[47]

Is Francis Crick an oddity? Is it fair to use him as representative of the scientific community? On

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44. Morris, H., SCIENTIFIC CREATIONISM 4-8 (Creation-Life: 1974).

45. *Id.* at 8-16.

46. Crick, "Why I Study Biology," Washington University Magazine (Spring 1971).

47. See Francis Schaeffer's discussion in HOW SHOULD WE THEN LIVE? 230-235 (Revell: 1976).

the issue of creation and evolution he is typical. For example, in 1966 at a symposium entitled "Mathematical Challenges to the Nee-Darwinian Interpretation of Evolution" and held at the Wistar Institute of Anatomy and Biology in Philadelphia, several scientists expressed dissatisfaction with the accepted evolutionary theory. Many contended that serious gaps exist in present-day evolutionary theory. Some suggested that "it is fundamentally and mathematically unsound to attempt to explain the incredibly orderly systems of-the biological world solely in terms of random mutations and natural selection."[48]

Others suggested that the problem of "extracting order from randomness" cannot be resolved "by assuming the availability of huge time spans during which random processes could maneuver themselves toward direction and order."[49] Contrary to the assumption that an enormous span of time of 500 million years makes it more likely that highly improbable events will occur, mathematicians have suggested that the greater the time elapsed the greater should be the approach to equilibrium, not to increasing complexity that leads to life. Yet how did the scientific community receive these critiques of Nee-Darwinian theory at the 1966 symposium? One observer remarked:

> ... [I]t became rather obvious during the course of some of the proceedings that certain other scientists, notably older-generation biologists, were determined to treat with impatience, scorn and even ridicule, certain young men who voiced views conflicting with those of the present biological establishment.[50]

Today a minority of scientists believe that "true science supports the man who believes in a supramaterialistic view of life, the universe and its future" - the man who believes that human life did arise with Adam and Eve - rather than from pools of interbreeding genes.[51] Is it not ironic that today's scientific establishment would treat these scientists in the same way as the 19th-century evolutionist claimed to have been treated by the fundamentalist Christian?

EVOLUTION, LEGAL EDUCATION AND LAW

But what have these questions about evolution to do with legal education and law? Everything, says British scientist A. E. Wilder Smith, who has made the following rather penetrating comments:

> Why have law and order deteriorated so rapidly in the United States? Simply because for many years it has been commonly taught that life is a random, accidental phenomenon with no meaning except the purely materialistic one. Laws are merely a matter of human expediency. Since humans are allegedly accidents, so are their laws. No wonder that the result of such teaching is a contempt for the courts and for all due order. The older supernatural views taught that life was a plan and a code, which needed for its government a plan of supernaturally given codes or laws.

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48. Wilder Smith, A. E., THE CREATION OF LIFE 39 (1974).

49. *Id.* at 40-41.

50. *Id.* at 38.

51. *Id.* at 19.

> The change of emphasis has been working in the institutions of higher education for over one hundred years. Now we are seeing its fruits on a worldwide scale in the unprecedented breakdown of law and order. The incredible fact is that today's political leaders have to set up commissions to inquire into the reasons for the running tide toward anarchy, when the real reason seems so simple, once we see it in historical perspective. We have taught that the very origin of life, together with its maintenance, is due to "anarchy" (randomness, lack of law and codes). Naturally, after the doctrine has been planted and has taken root, it will bear its fruit.[52]

What fruit has the evolutionary faith of American law teachers, scholars, and practitioners produced? From many examples, two law reform movements stand out: the juvenile justice system and the no-fault divorce system.

At the end of the last century juvenile court reformers began a movement that soon swept all of the states and the District of Columbia. They persuaded state legislatures to remove children from the jurisdiction of the adult criminal courts and to place them under the protective arm of the state. As Justice Abe Fortas observed in the famous Gault case, these reformers

> believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "what is he, how has he become what he is and what had best be done in his interest and in the interest of the state to save him from a downward career." The child - essentially good, as they saw it - was to be made "to feel that he is the object of [the state's] care and solicitude." ... The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated."[53]

These views are unmistakably those of an evolutionist. Not only is man perfectible, a denial of the account of fallen man in Genesis, but man is a product of his environment. Hence, he cannot be blamed for what he has done; he must be understood so that steps can be taken to eliminate the adverse behavioral effects of a bad home environment or, if necessary, to remove him from that environment. These ideas about criminal responsibility have seeped into the adult criminal justice system in the adoption of an expanded insanity defense and in the efforts of penologists to rehabilitate convicted criminals via work release, school release, and psychological therapy.

If the evolutionists had their way they would brand all criminals sick and do away entirely with moral responsibility.[54] Clarence Darrow, the famous early 20th-century American trial lawyer, delivered a speech to that effect in 1902 to the prisoners in the Cook County jail:

> There is no such thing as crime as the word is generally understood. I do not believe there is any sort of distinction between the real moral conditions of the people in and out of jail. One is just as good as the other. The people here can no more help being here than the people outside can avoid being outside. I do not believe that people are in jail because

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52. *Id.* at 17.

53. *In Re Gault*, 387 U.S. 1, 15-16, 87 S.Ct. 1428, 18 L.Ed. 2d 257 (1967).

54. *See, e.g.*, Menninger, K., THE CRIME OF PUNISHMENT (Viking, N.Y.: 1969).

> they deserve to be. They are in jail simply because they cannot avoid it on account of circumstances which are entirely beyond their control and for which they are in no way responsible.[55]

Darrow put this philosophy in operation in the courtroom when he made his closing plea that saved teenagers Nathan Leopold and Richard Loeb from the electric chair for having killed a 14-year-old boy:

> Why did they kill little Bobby Franks? Not for money, not for spite, not for hate. They killed him as they might kill a spider or a fly, for the experience. They killed him because they were made that way. Because somewhere in the infinite processes that go to the making up of the boy or the man something slipped, and those unfortunate lads sit here hated, despised, outcasts, with the community shouting for their blood.[56]

If the Clarence Darrows of the world prevail, then we would not only see the erosion of individual responsibility but we would see an accompanying erosion of individual liberty, as had occurred prior to *Gault* in the juvenile justice system. If man is only a product of his genes and his environment then there is no room for free choice. If there is no room for choice and responsibility, then there is no room for choice and liberty. In the world of the evolutionist it is the task of the state to see that man's behavior is changed, not to see that justice is done. As C.S. Lewis observed in a 1950 essay on the "Humanitarian Theory of Punishment":

> [T]he concept of desert is the only connecting link between punishment and justice ... Thus when we cease to consider what the criminal deserves and consider only what will cure him ... we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, "a case."[57]

The no-fault divorce movement is of more recent origin and, yet, may have even a greater impact on freedom and responsibility than has the juvenile justice system. At the root of this so-called reform movement is the assumption that as values about marriage and sex change, so must the law change in order that it not be branded as hypocritical.[58] But values about family life change only if one subscribes to the belief that there are no absolute unchanging values governing family life. Should the law change because a majority of the people violate it? Is law no more and no less than a reflection of the prejudices, desires, and wants expressed by a majority of people in a Gallop or Harris poll? Or is law to be left to an informed scientific elite who know what is best for the rest of us?

The evolutionary theory of life and law places man in a quandary-whether to follow the polls or to submit to scientific technology. In no-fault divorce there is a little bit of both. The law has been

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55. Weinberg, ed., ATTORNEY FOR THE DAMNED 3-4 (S & S N.Y.: 1957).

56. *Id.* at 35.

57. Lewis, C.S., GOD IN THE DOCK 288 (Eerdmans, Grand Rapids: 197).

58. Bodenheimer, "Reflections on the Future of Grounds for Divorce," 8 J. FAM. LAW 179, 182-193 (1968). See, generally, Traynor, "Law and Social Change in a Democratic Society," 1956 U.H.L.F. 230, 232, 236, 239-240.

changed because so many married people do not want to stay married any more. In the now-famous case of *Marvin v. Marvin*, the California Supreme Court recently endorsed the claim for property division and support by an unmarried woman against the man with whom she had been living. This recognition was given, in part, because the court believed:

> that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. (18 Cal. 3d, 660, 134 Cal. Rptr. 815, 557 P. 2d 106, 122.)

Is it not safe to predict even further changes as more people become bolder in the assertion of legal rights arising out of a variety of sexual relationships, including polygamy, homosexuality, and the like?

Many experts have endorsed a variety of sexual unions because they maintain that man is evolving beyond the monogamous system of family life to a more perfect pluralistic system in which persons will have more freedom of choice. But is the nuclear family obsolete? As the monogamous family unit has broken down there has been an increase, not a decrease, in juvenile delinquency. Equally important, there has been an increase, not a decrease, in the power and authority of the state to control the lives of persons. State-operated day-care centers may free a mother to work outside the home, but they increase the power of the state to indoctrinate young minds. Free and easy divorce places the economic, parental, and child-rearing family decisions into the hands of the state with increasing frequency. The appeal for children's rights - the right to abortions, sexual information, medical treatment without parental consent - merely substitutes public health, the public school, or other state authority and influence for the parents'.

In the history of man one does not see a steady evolutionary progression from a tribal anarchic polygamous family through a domestic monogamous family to an individually oriented loose-knit family structure. Rather, all three basic types have existed at different times in varying degrees in different societies.[59] The reason for the dominance of the traditional monogamous domestic type in our society is simple: it was based upon the belief that God created a man and a woman to be united in marriage for life for better or for worse and that God permitted divorce only upon proof of fault, such as adultery or desertion.

While these standards are being attacked today as an unreasonable infringement upon individual choice, a strong monogamous family unit is, in truth, a necessary safeguard for individual freedom. The family serves as a buffer between the state and the individual. While the old divorce and other family law did interfere with individual choices, it limited the state's jurisdiction over family life, and thus, it protected individual freedom. The protective umbrella of the family cemented by God's covenant of fidelity can not be transferred to today's married and unmarried relationships based upon a covenant of selfish love.

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59. C. Zimmerman, FAMILY AND CIVILIZATION (N.Y.: Harper & Bros. 1947).

CONCLUSION

At stake, then, in the choice between God's created order revealed in the Holy Bible and the impersonal chance evolutionary world of the scientist are responsibility and freedom. Without the biblical base there is no firm foundation for moral responsibility. Without moral responsibility there is no basis for individual freedom. Evolution calls either for anarchy or totalitarianism. Only God and His created order can preserve the balance between freedom and responsibility, between individual and state that we have enjoyed in America for more than 300 years.

In 1803, Chief Justice John Marshall wrote in *Marbury v. Madison* that these United States were a government of law, not of men. Without absolute values revealed by the true God to man and by which all human rules are to be measured, there can be no law. Legal educators can no longer ignore 100 years of American law by hiding behind the pseudoscientific theory of evolution. God and God's law-word must be reckoned with if freedom and justice are to survive in America.

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