What We Share

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WHAT WE SHARE

Thomas D. Eisele*

A chief function of any society, human or subhuman, is education. Sir Arthur Keith once described education as the first industry of any species; should the industry fail, the species will become extinct. Few higher primates center their social life on the family. And so, with their slow-growing young, education is mostly accomplished through the traditions of the entire troop. The young learn from their elders what the elders when young learned from theirs; and so, whatever the wisdom gained from experience the troop may possess, it is handed down from generation to generation. Man may have the immense advantage of the oral or written word. But the process is the same.

—Robert Ardrey

Anyone involved in legal education today may wonder where we are, and what we are doing, in our task of teaching. While I am no better placed than anyone else to be able to offer anything approaching a synoptic view of legal education, I can still offer a few thoughts on teaching law. These thoughts are meant neither as a dire warning nor as a call to action. They are published, rather, out of a desire to share some ideas I have culled from the experience of teaching these past twenty years in law school. Teachers and students who find themselves implicated in my claims and characterizations may wish to try out further in their own ways whatever they find profitable in my remarks.

I. HOLMES’S TEACHING

More than a century ago, Mr. Justice Holmes, searching for a way to tell students at Boston University Law School how they might best study and learn the law, came up with some stern advice. In his typically tough-minded way, Holmes told the law students: “When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court.” This is hard-headed advice that portrays the law as a set of knowable materials

* Professor of Law, University of Cincinnati. I would like to take this opportunity to single out Bob Lloyd, Joe Cook, and Dick Wirtz, former colleagues of mine at the University of Tennessee College of Law, and Weldon Patterson, Marshall Peterson, and Mark Jendrek, former students of mine at the same school—all of whom have taught me much about what it is to teach law, what it is to learn law, and what it is to live the law. My thanks to them for sharing my continuing legal education.


that we lawyers use to achieve the results we seek for our clients. We are studying in law school "what we shall want" in order for us to appear before courts or in order for us to counsel our clients in ways to avoid appearing in courts.  

It is in accord with this view of the law, then, that Holmes goes on to say that in the practice and profession of law, we study "the prediction of the incidence of the public force through the instrumentality of the courts."  

This public force or sanction is "[t]he object of our study" because it is what we, or our clients, want to avoid. The "incidence"—the application or withholding of the application—of the force that the government wields is what the "[p]eople want to know." They want to avoid its infliction upon themselves, if at all possible; and, so, they wish to know "under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves."  

Who knows such things? Lawyers do; lawyers make it their business to know such things. Thus, Holmes says, "it becomes a business to find out when this danger [of the threatened application of the state's power] is to be feared [by a peace-loving citizen of the state]." And this is what lawyers get paid to know; this knowledge is "[t]he reason why it is a profession, why people will pay lawyers to argue for them or to advise them."  

Where does this knowledge that lawyers possess come from? What materials do we study to inform ourselves about such things as the possible application of the state's monopoly on the public force? Holmes says:

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law.

The cases we study in the common law tradition, according to Holmes, gather together the experience of the past in predicting when and where the power of the state will be imposed; they comprise, that is, the past's

3. *Id.*  
4. *Id.*  
5. *Id.*  
6. *Id.*  
7. *Id.*  
8. *Id.*  
9. *Id.*  
10. *Id.*
"scattered prophecies" as to "the cases in which the axe will fall." And we, studying these cases and the past experience with predicting when and where the state's power actually has been invoked, or withheld, we the present generation can come to a better appreciation, a finer apperception, of the likelihood today of the same application or withholding of the state's sanctions. At least, that is the hope, the faith, we repose in legal study and scholarship: "Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system." Thus, Holmes goes on to claim:

It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. Legal scholarship leads, perhaps, to greater precision in our thought about these prophecies, and legal teaching hopefully makes these prophecies "easier to be remembered and to be understood." But these scholarly activities remain based upon "nothing but prophecies" about the incidence of state force being applied to private citizens.

It is from this view of legal education that two of Holmes's most famous statements about the law derive. In emphasizing the need to acquire a thoroughly business-like knowledge of the law, Holmes opines:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

If one wishes to acquire a business-like knowledge of the law, one must look solely for "the material consequences" of the law. All we care about, as lawyers, is acquiring the ability, eventually, to predict those material consequences. (Undergirding this Holmesian claim is, I suppose, the assumption that all of our clients—good and bad—will share, at a minimum, the desire to know when they are threatened with

11. Id.
12. Id. at 457-58.
13. Id. at 458.
14. Id.
15. Id.
16. Id. at 459.
17. Id.
the application of the state’s force. So this knowledge of the material consequences of the law is the sine qua non required of us lawyers on every occasion, since it is the one minimal or irreducible interest shared by all of our potential clients.)

As students of the law, then, we turn ourselves into amateur social scientists, predicting where and when the state’s courts will apply or withhold the power of the state. (That Holmes wishes us students of the law to become social scientists of a kind seems fairly inferable from his later remark: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”) Thus, on Holmes’s view of the matter, the law consists in our professional predictions of the courts’ actions and decisions. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

This is one of the most famous, and least accepted, statements concerning the nature of law. It is not difficult to realize that there is something wrong with it; and it is not unusual to consider Holmes’s conception of the law to be a failure. And, yet, it can be very difficult to say why Holmes is wrong here, or in what ways his definition or theory of law fails. But, if we try, perhaps we shall discover that, in the attempt to dispute it, there is much that Holmes’s vision of the law can teach us.

II. JUDGMENT, NOT PREDICTION

One way to express my discomfort with Holmes’s advice to these law students is that his words put us in what I consider to be a false relation with the law. In one respect, Holmes’s view of law makes the law more certain or substantial (i.e., more scientifically accessible) than I think it is. But, in another way, Holmes’s view makes the study of law less specific than I think it is. Let me see if I can make either claim clear.

18. Id. at 469.
19. Id. at 461.
20. In speaking of the “failure” of Holmes’s theory or definition, I hope I am understood as claiming only that I think Holmes fails as a lecturer, a theorist of the law, in presenting his advice to law students as to how they should study the law to their best advantage. In this respect only, I consider The Path of the Law a failure. It remains the most brilliant and provocative American statement of jurisprudence to be found, which is one reason why it is still assigned and read in jurisprudence classes throughout the U.S. today, including in my own classes. Holmes’s lecture never fails to provoke comment, because it is unfailingly rich and unquestionably diverse, almost too much so. A wonderful sketch of its richness and diversity can be found in Thomas C. Grey, Plotting the Path of the Law, 63 BROOK. L. REV. 19 (1997). And, for evidence that Holmes the jurist is a better teacher of the law than Holmes the jurisprude, please see James Boyd White, Legal Knowledge, 115 HARV. L. REV. 1396, 1411-24 (2002); see also generally RICHARD POSNER, What is Law, and Why Ask?, in THE PROBLEMS OF JURISPRUDENCE 220, 221-28 (1990).
There is a sense in which Holmes’s advice puts any student of the law in an impossible position with respect to the law. In his hard-headed advice that we students of the law all need to develop a “business-like” knowledge of the law, or appreciation for the law, Holmes seems to imagine the law to be a kind of object that is knowable by us, accessible by us. And I am not sure that the law is knowable or accessible in the way in which Holmes seems to imagine the law to be.

It is not that I think Holmes credits the law with more solidity than it has, for Holmes’s maxim that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” is a notion obviously meant not to attribute any solidity to the law, not to be claiming more solidity for the law than it in fact has. What could be more fluid, less solid, than mere predictions? Nothing more “pretentious” than human predictions of court action is what Holmes wishes to call, “the law.” It is hard to see where Holmes goes wrong here.

In addition, Holmes’s idea that we lawyers are engaged in an activity of “predicting” the outcomes or decisions of court cases is, if wrong, not far wrong. Holmes’s idea certainly seems to capture at least a part of our experience of the practice of law. It often feels as though, as lawyers, we are being asked to predict or estimate the outcome of cases we are arguing or preparing to argue. (I must admit that many times it felt this way to me when I practiced law in Chicago back in the 1970s.) So what is wrong with Holmes’s conception of law, with his characterization?

Holmes’s lecture seems to me to partake equally of his penchant for science (empiricism) and of his skeptical bent, both of which stand against certain currents then prevalent in nineteenth century Anglo-American legal culture. In his emphasis on science and empiricism, with their receptivity to the experiential aspects in life and law, Holmes confronts the tradition of mechanical jurisprudence which, vaguely put, located the essence of law in the rigor of logic or deductive reasoning. In this respect, Holmes’s gesture is a rejection of the comforting rigidity of logic, and the apparent clarity of deductive reasoning, in favor of the more flexible (but less predictable) process of approaching life and law through the inductive tools of empirical science. Similarly, in Holmes’s skeptical disdain for the claims that law must be related to logic or to morality in order for the law to be valid, we gain a glimpse of a far less tidy, far more uncertain, legal universe. It is a reduced legal universe,

21. Holmes, supra note 2, at 461.
22. Id.
23. Id.
where what counts is nothing more than the material consequences of our actions, as measured by the application or withholding of the state's monopoly on sanctioned force.

Holmes's desire to emphasize the uncertainty of the law—which he does by reducing the rights and duties spoken about in the law as nothing but predictions concerning the application of the state's force—is something most of us probably share with Holmes. In the view from the twentieth or twenty-first century, certainties of any kind (legal or otherwise) are hard to find. This awareness of uncertainty lends plausibility to Holmes's claims about the law and its basis in predictions. Yet, when one thinks about it, it seems unlikely that legal officials (judges, legislators, members of the executive branch) are expressing mere predictions when they make legal assertions, or when they describe or discuss the law. Most often, I think, legal officials are declaring the law, saying what the law is. Similarly, lawyers and legal academics writing and speaking about the law seem to me to be making normative claims—claims which, even if they run contrary to the observable results of a case or a statute, are not thereby refuted or disconfirmed by that fact. Predictions (if we lawyers or legal officials were speaking predictively) would be refuted or disconfirmed by contrary case results. But normative expressions—judgments, declarations, claims, assertions, characterizations—can be maintained without inconsistency or contradiction, even in the face of untoward results.

Holmes does not give enough play to the fact that what we are dealing with in the law is not a predictive science, but rather a rhetorical and practical art, one that is based on the fact that we make judgments in the law, not predictions. His claim that we can gain precision and more accurate generalizations (or general propositions of law) by studying the law and organizing its "prophecies" more systematically, suggests an image of the study of law as a social science.24 It also suggests that law itself is sufficiently stable or inert to permit or invite such scientific study. But social scientists (according to one model of scientific methodology) collect data, run experiments, and generally limit their professional efforts to making scientific predictions about the observable phenomena. Do lawyers act this way? I do not think that they do.

Holmes's view of law promises us a kind of knowledge of the law that we cannot achieve. Holmes makes it sound as though we relate to the law as a body or set of objects, a set of rules, perhaps, or a compendium of cases and statutes, from which we scientifically (and, thus, induc-

24. Id.
generate certain predictions, which we then attempt to confirm or disconfirm, in the best fashion of scientific method. This educational philosophy conceives of the law as something approachable and knowable as we approach and know natural objects in the world, as though the law were a kind of object, or a set of objects—a thing in the world—to be studied as scientists study the world. But this seems to me to be a fantasy of law and its possibilities, although it is one that we often entertain.25

Lawyers have a different relationship with the law than the one suggested by Holmes, I believe, because lawyers are engaged in a different sort of activity, one that relies upon the exercise of our judgment, and not any predictive abilities. Where does our legal judgment come from? It comes from the fact, for example, that we learn law as a language, learning its terms and its ways of projecting those terms into new contexts and cases, learning its ways of making sense and making claims, learning to argue within the resources allowed us by the language of the law. But we also become initiates of the law as a craft, an art, and we become members of the craft as we internalize its many norms and ideals, its skills and ways of crafting an opinion, a memorandum, a rule of law, a case’s holding, and as we learn to distinguish dicta, learn to state the facts of a case, and so on. These skills are the methods, the means, we gain from a given form of craft or art, and they are passed down to us by our teachers and our mentors, the people with whom we serve our apprenticeships. So, too, learning the law is a matter of acquiring a practice, of absorbing and assimilating the experience of a professional group, by traditional means, by adopting and inheriting a tradition, making it our own by inhabiting it as a way of life, a form of life.

Holmes gives no credit to the side of the law that is a performative human craft, a normative profession.26 Nor does he acknowledge its study as being one of the humanities, which for me means, above all, that law is a discipline based upon the use and criticism of words, of language, and that it is a discipline that consists essentially in acts of criticism practiced on previous acts of criticism or professional expressions made within the language of the law.


26. This would be the place where it would be useful to develop the fact that Tony Kronman has characterized the central virtue of the common law lawyer as a kind of practical reason, or “practical wisdom,” although Kronman fully recognizes that his use of this term will be seen as old-fashioned. See Anthony Kronman, The Lost Lawyer 2-3 (1993).
I do not say that any of this is obvious, or that mine is an uncontroversial description of the life of the law in these United States; I only say that this is how it seems to me. Accordingly, I find more accurate a characterization of the common law that combines three different sides or aspects of its complicated phenomena. First, as I said above, law is itself a kind of language, one requiring imagination in claiming meaning for one’s experiences and for legal events or actions. Nowhere has this vision of law been made out better than in the writings of James Boyd White. Second, the common law is a craft or an art, which entails all of the steadying factors and balancing elements (these are norms, not scientific or natural laws) we find in crafts or artistic media, as set out with depth and detail in Karl Llewellyn’s late, magisterial work. And, third, the common law is a kind of customary or traditional law, which means that it is taught and taken up (taken over) in certain specific ways, as suggested in the work of Brian Simpson, among others. I want to look at this third aspect of the common law in a bit more detail here, because it plays most directly a role in helping to show what is wrong with Holmes’s portrait of the law.

In an essay first published in 1973, but now reprinted several times, Brian Simpson has suggested that the common law cannot be understood or studied scientifically, or positivistically, as some legal positivists have proposed doing. Simpson says the common law cannot be so studied for the simple reason that the common law does not exist in the form that legal positivism supposes or imagines law to exist: as a set of rules. “Indeed in an important sense it is in general the case that one cannot say what the common law is, if its existence is conceived of as consisting of a set of rules, and if saying what the law is means reporting what rules are to be found in the catalogue.” Why this is true can be difficult to say, but the gist of Simpson’s pitch is that the common law is not a system of law laid down or posited by anyone, or by any one authority. Thus, contrary to the claims of a variety of legal positivists, the common law is not a code or codification of rules. The common law is a system, and a system of law at that, but its systematic nature is more linguistic and normative (as language is similarly systematic, or as a

tradition is systematic) than it is rule-laden or rule-bound. The positivists, Simpson argues,

share . . . the claim that the law—and this includes the common law—consists of a set of rules, a sort of code, which satisfies tests of validity prescribed by other rules. Such theories [of law] suffer from defects which have their source in the confusion of ideals with reality. . . . [T]he reality of the matter is that it is all much more chaotic than that.31

What in Simpson's view makes the common law "chaotic"? It is inherently unsettled in that the common law has no dispositive form or formulation.

[It] is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is inherently impossible to state so much as a single rule in what Pollock called "any authentic [authoritative?] form of words". How can it be said that the common law exists as a system of general rules, when it is impossible to say what they are?32

Simpson then adds the following characterization to his description, seemingly to exacerbate the chaos of the common law:

Nor does the common law system admit the possibility of a court, however elevated, reaching a final, authoritative statement of what the law is in a general abstract sense. It is as if the system placed particular value upon dissension, obscurity, and the tentative character of judicial utterances. As a system of legal thought the common law then is inherently vague; it is a feature of the system that uniquely authentic statements of the rules which, so positivists tell us, comprise the common law, cannot be made.33

The chaos and uncertainty of the common law lead Simpson to emphasize that the common law is customary law; as such, the common law grows up, as customs grow up among people, and the law is shared among these people, as customs are. Accordingly, the common law is not a set of rules posited or laid down by a sovereign; rather, "it consists of a body of practices observed and ideas received by a caste of lawyers."34 Simpson goes on to say:

These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices

31. Id. at 86.
32. Id. at 89.
33. Id. at 90.
34. Id. at 94.
may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes. The ideas and practices which comprise the common law are customary in that their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning.  

Simpson pictures the Anglo-American common law system as a body of law both developed or grown through tradition and passed along by tradition. This means that what counts as law is a function of what we, the members of the professional community, count as law, within the norms and the ideas and the forms that we learn and earn from the tradition into which we have been initiated and in which we have grown and flourished. Not just anything counts as law, and what counts as law cannot be settled by mere whim. Nor is it the case, however, that what counts as law is fixed once and for all, forever. There is resiliency in the law; there also is consistency in the law. There is flexibility; there also is stability. It is a delicate balance, as is achieved in the projection and correction of any word or concept used within any living natural language. Stanley Cavell calls this “the simultaneous tolerance and intolerance of words,” of language.

I appealed earlier to the idea that law is a normative profession, and I mentioned in passing that Tony Kronman has called our attention to “practical wisdom” (or, Aristotelian practical reasoning) as the central virtue of common law lawyers. It seems to me that Simpson’s characterization of the nature of the common law tradition highlights why and how this faculty of judgment is central to common law lawyering.

35. Id. Simpson does acknowledge the fact that we are apt to be very unhappy with such a description of the common law and its bases or foundations; his description makes the law sound so flimsy, so chimerical. The law depends only on us? Simpson says: It is no doubt impossible in principle to attach precision to such notions as acceptance and reception within the caste of lawyers, and the definition of membership of this group is essentially imprecise. Nevertheless it seems to me . . . that the relative value of formulated propositions of the common law depends upon the degree to which such propositions are accepted as accurate statements of received ideas or practice, and one must add the degree to which practice is consistent with them. Now a customary system of law can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy.

Id. at 95.

36. STANLEY CAVELL, THE CLAIM OF REASON 186 (1979); see also id. at 182.
Simpson says that the rules we formulate for expressing or stating the common law "are supported by reason and not authority." And then he immediately adds:

And nobody, I think, would claim that rationality in the common law can be reduced to rules. These familiar facts form the background to the [positivistic] notion of tests of validity [for legal rules], which involves a claim that legal reasoning and justification is governed by rules to an extent which it is not; legal life is far too untidy.

The kind of reasoning that takes place in the common law, and the kind of status or authority that formulations of legal rules have in the common law, are made out by Simpson in a number of statements drawn from his essay. First, there is his general claim: "[C]ommon law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception." This is a reception, I take it, by the caste of professionals who are initiates of the common law system, and who thus are its inheritors. Similarly, for common law judges,

the views they express in their opinions . . . create precedents, but creating a precedent is not the same thing as laying down the law [legislatively]. The opinions they express possess in varying and uncertain degree authority, as do opinions expressed by learned writers, but to express an authoritative opinion is not the same thing as to legislate. There exists no context in which a judicial statement to the effect that this or that is the law confers the status of law on the words uttered, and it is merely misleading to speak of judicial legislation.

In the common law, Simpson says, our rules are akin to grammatical rules; they are normative.

Formulations of the common law are to be conceived of as similar to grammarians' rules, which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes.

37. Simpson, supra note 29, at 87.
38. Id.
39. Id. at 85-86.
40. Id.
42. Simpson, supra note 29, at 94. Earlier, Simpson had made his point in a slightly different way:
The rules of law are inherently corrigible, and these rules depend upon the members of the relevant system of law to serve as their critics and correctors. This does not mean that we are simply dealing with conventions, or with what happens to be convenient for or acceptable to the community. For the craft, the tradition, of the common law has values inherent to it, which values regulate both the craft or practice itself and its members or initiates—not that it is easy to explain or to describe how and why this symbiotic relationship works. "Settled doctrines, principles, and rules of the common law are settled because, for complex reasons, they happen to be matters upon which agreement exists, not, I suspect, because they satisfy [positivistic] tests [of legal validity]. The tests are attempts to explain the consensus, not the reason for it."\(^43\) But, if such agreement is not the result of applying these jurisprudential tests of legal validity to the various rules of law, then what is the reason, or the explanation, for our consensus in the common law system? Simpson does not know. (Nor does any one of us know the answer to this question.) Simpson simply says: "In such a system of law as the common law the explanation for the degree of consensus which exists at any one time will be very complex, and no general explanation will be possible, and this remains true today."\(^44\)

Faced with this uncertainty, and with this limit to our knowledge, what are we to do? In the common law, we carry on as best we can. "We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law."\(^45\) We are left with the language of the law and its resources, the methods and skills of the craft we have mastered, and the norms and ideals and ambiguities and defects of the tradition we have inherited; from these, we go on, we persevere, with the life of the law. In doing so, we inevitably make judgments, some of which are right, and some of which are wrong. We hope, we try, to tell one from the other. But we have no guarantee, no assurance, that what we do will be the right thing to do within these materials and methods. All we know is that, as professional members of the legal system, we are both members of the craft and critics of the craft.

\[^43\] Id. at 97.
\[^44\] Id. at 96.
\[^45\] Id. at 99.
To argue that this or that is the correct view, as academics, judges, and counsel do, is to participate in the system, not simply to study it scientifically. For the purposes of action the judge or legal advisor must of course choose between incompatible views, selecting one or other as the law, and the fiction that the common law provides a unique solution is only a way of expressing this necessity [of making a judgment].

III. EDUCATION AS INHERITANCE, AND AS ENGAGEMENT

If I am right in preferring Simpson’s characterization of law to Holmes’s description, how is it that as acute an observer of the law as Holmes, a true master of the common law system, can have missed these features of the law? In truth, he did not miss them; he merely slights them in his account, giving them less emphasis and assigning them less importance than I do. But Holmes certainly was aware of the common law as a legal system based upon tradition; in fact, he complains about that very characteristic of the common law.

First, he notes that the “development of our law” has been a gradual evolution of the legal system through time, through history,

like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, . . . . Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best.

Life would not be possible, according to Holmes, if we did not imitate the past, and in particular the past actions of our ancestors. This is why, as Holmes goes on to point out, “in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition.”

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46. Id. at 97; see also KARL Llewellyn, supra note 28, at 213 (footnote omitted):
[A] hard-eyed description of all the things which an authority ought correctly be made to mean, i.e., a laying out of the huge range of doctrine, any single aspect of which could in posse prove to be its “true” meaning, this seemed with reference to our appellate judging to be a revelation, an exposure, an unmasking, of vagrant uncertainty; . . . . The whole set of such misconceptions rooted in part in the illusion of dogmatist that there should be, must be, can be only one single right answer, that a multiplicity of answers is wrong, is contra-nature, and as applied to a part of law-government, is practically subversive.

47. Holmes, supra note 2, at 468.

48. Id. at 469; see also id. at 472: “Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the role of history more important than it is.”
But, while Holmes acknowledges the role played by history and tradition in the past development of the law, he also thinks that there is a better way, a more rational way, to order and systematize our laws: he seeks a change in the way we think about and deal with the law. Holmes says, for example, "that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."\(^{49}\) This rationalized ordering of the law is what Holmes calls "the order of reason,"\(^{50}\) and it is the path which he wants the future development of the law to take. Thus, he heartily recommends to us, or, to the B.U. law students, the following principle of action: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."\(^{51}\) Holmes says that we must, or should, do better, even if we manage to do better only in our little corner of the legal world. "[E]ach of us [might] try to set some corner of his world in the order of reason, or . . . all of us collectively should . . . aspire to carry reason as far as it will go through the whole domain [of the law]."\(^{52}\)

This recommendation of the further rationalization of the law, of the additional rational ordering and systematizing of the chaotic and unsystematic common law, leads Holmes, at the very end of his lecture to the B.U. law students, to suggest that, ultimately, we need the help of jurisprudence if we are to get the most out of our studies of law.

There is another study which sometimes is under valued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions.\(^{53}\)

Although I too am partial to jurisprudential studies, this is where I think Holmes goes wrong, for he conceives of jurisprudence as a study in abstractions and generalizations about the law, the broader the better. "Theory is the most important part of the dogma of the law, as the

\(^{49}\) Id. at 469.
\(^{50}\) Id. at 468.
\(^{51}\) Id. at 469.
\(^{52}\) Id. at 468.
\(^{53}\) Id. at 474.
architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory.”Just this move toward abstraction and generalization betrays Holmes. Holmes is aware, surely, of the law as, somehow, being a matter of tradition, or what Simpson calls “custom,” but Holmes does not value this aspect of the common law; he does not respect it. Nor does he see that, as a tradition, the law gets taught and passed along in certain specific ways. (This was my reason for saying, at the beginning of Section II of this Essay, that Holmes’s view of the law “makes the study of law less specific than I think it is.”) And this blindness to the utter specificity and complexity of the law’s teaching, of its being passed along as a tradition of knowledge and learning and understanding, is what permits Holmes to speak as disparagingly as he does about the mere tools, the mere techniques, of teaching law:

“I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection—textbooks and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode.”

“Theory is my subject, not practical details.” But theory without the details is empty. Worse, theory without details is valueless, for it sacrifices just the sort of immediacy and relevance that may, in the best of professional hands, and Holmes must certainly be counted among that group, redeem the otherwise “good deal of pretty poor stuff [that] goes under the name [of jurisprudence].”

Is there an alternative to Holmes’s suggested path of studying the law? I think there is, and this alternative educational route has been described in considerable detail in the work of Michael Oakeshott, one of our most provocative philosophers of education. Teaching, Oakeshott says, involves a personal transaction (he calls it an “engagement”) between a teacher and a student. It is this personal transaction, this engagement between individual human beings, that is the heart and soul of human education. So, for example, Oakeshott says that “the idea [of a] ‘School’ is that of a personal transaction between a ‘teacher’ and a

54. Id. at 477.
55. Id.
56. Id.
57. Id.
A teacher is one in whom some part or aspect or passage of this inheritance is alive. He has something of which he is a master to impart (an ignorant teacher is a contradiction) and he has deliberated its worth and the manner in which he is to impart it to a learner whom he knows. He is himself the custodian of that “practice” in which an inheritance of human understanding survives and is perpetually renewed in being imparted to newcomers.59

Five aspects of Oakeshott’s description of the teaching relation attract my attention. First, a teacher is normally someone who passes along, who makes possible, an “inheritance.”60 So learning, on Oakeshott’s view, is tied up with inheriting something. Inheriting what? A practice of some sort, apparently, because, second, a teacher “is a master” who “impart[s]” this practice “to a learner.”61 Third, the student is “a learner whom [the teacher] knows.”62 So, the educational relationship is somehow based upon a knowledge of one another; the two participants are not anonymous to one another. So this will require disclosure, of each to the other. (Is this self-disclosure not a prime condition of the Socratic method, where each person puts questions to the other, as a way of examining each other?) As Oakeshott emphasizes again and again in his essay, teaching is, in this respect, a “personal transaction” between a teacher and a learner.63 Fourth, the teacher serves as “the custodian of that ‘practice’ in which an inheritance of human understanding survives.”64 We teachers pass along a practice that survives because we pass it along; its continued existence is not guaranteed because its continued inheritance is not guaranteed. Our custodianship of the subject taught, of the practice, is required for its survival. And, fifth, the practice or tradition being passed along remains vital because it “is perpetually renewed in being imparted to newcomers”—the activity of passing the practice along sustains and renews that practice.65

Most inheritances simply mark the passing of property from one generation to another; these inheritances in this respect require nothing more active on the part of the heirs than their acceptance of their

59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
inheritance. Nonetheless, what seems right about calling the passing down or passing along of an education, or a tradition, an "inheritance" is that, like any inheritance, it is given to the heirs as a gift. It is something that we elders hand over, or hand on, to the youngsters in our midst, and we do so willingly, happily, prodigally. It is what, in a sense, we bequeath them. We want to offer this inheritance to them—we desire it—and we make this offer generally without reservation or hesitation. This is a gift, a donation, not a sale or a purchase.

Yet the inheritance of an education costs the learners much; it requires them to take it over, to accept it, actively. Even though our heirs in education do not, and cannot, buy their scholastic inheritance, this is not to say that they give nothing or expend nothing in the course of acquiring their inheritance. Nor is it to say that their inheritance costs them nothing. Just the opposite is true: their inheritance comes with all sorts of strings attached. But an inheritance can have conditions attached to it and still be an inheritance. The inheritance of education, or of a tradition, is, I think, essentially conditional; it is based on conditions being met on both sides.

What are some of these conditions of educational inheritance? Oakeshott says:

If this inheritance were composed of natural "things" or artefacts [sic], then its transmission would be hardly more than a mechanical formality, a handing over of physical objects. But it is not. It is composed of human activities, aspirations, sentiments, images, opinions, beliefs, modes of understanding, customs, and practices; in short, states of mind which may be entered into only in a procedure of learning.66

These "states of mind," Oakeshott goes on to say, "because they constitute understandings, can be enjoyed only by virtue of their being themselves understood."67 Accordingly, "initiation into this condition can be only in an engagement in which the newcomer learns to understand."68

How does one "learn to understand"?69 This question broaches what is, perhaps, the crux of the matter in education. At a minimum, this type of learning seems to require the active participation of both teacher and student in the teaching/learning engagement. Oakeshott says:

66. Id. at 22.
67. Id.
68. Id.
69. Id.
To teach is to bring it about that, somehow, something of worth intended by a teacher is learned, understood and remembered by a learner. Thus, teaching is a variegated activity which may include hinting, suggesting, urging, coaxing, encouraging, guiding, pointing out, conversing, instructing, informing, narrating, lecturing, demonstrating, exercising, testing, examining, criticizing, correcting, tutoring, drilling and so on—everything, indeed, which does not belie the engagement to impart an understanding. And learning may be looking, listening, overhearing, reading, receiving suggestions, submitting to guidance, committing to memory, asking questions, discussing, experimenting, practising, taking notes, recording, re-expressing and so on—anything which does not belie the engagement to think and to understand. 70

This catalogue of activities is not meant by Oakeshott to be exhaustive or exclusive. Rather, it seems meant to remind us, on the one hand, of the multiplicity of efforts that are made on both sides of the teaching/learning relationship; and, on the other, of the fact that both teacher and learner must actively engage if learning is to occur. These joint efforts aim to use the teacher’s experience and perceptiveness as guides to the student’s acquisition of a similar ability to apprehend and comprehend the world and what we are doing in it.

That teaching is active, I take to be undeniable. There are occasions, of course, when a teacher must be silent, must be patient and wait for something to happen from the student’s side of the table. This still amounts, I think, to active listening. And it has been a long time now since I argued that teachers must be, indeed, they inevitably are, models for their students. We teach what we enact in front of our students; they learn what they see performed in front of them everyday in the classroom. 71 In this respect, Oakeshott remarks: “A human life is composed of performances, and each performance is a disclosure of a man’s [or woman’s] beliefs about himself [or herself] and the world and an exploit in self-enactment.” 72

I have, in past writing, spoken of this element of teaching and learning as embodying or displaying “performative knowledge,” not propositional knowledge. 73 In teaching the law, for example, there are

70. Id. at 25-26.
72. Oakeshott, supra note 58, at 20; see also id. at 21:
A human life is composed of performances, choices to do this rather than that in relation to imagined and wished-for outcomes and governed by beliefs, opinions, understandings, practices, procedures, rules and recognitions of desirabilities and undesirabilities, impossible to engage in merely in virtue of a genetic equipment and without learning to do so.
73. See Eisele, supra note 71, at 500-01.
certain things that we do not and cannot communicate in words; rather, we express them through our actions, our performances. Similarly, there are certain things about law that our students must understand performatively—they show their understanding by performing or through their performances, which is why we ask our students to perform certain actions, either in our classes or on their exams.

I find two parallel recognitions in the later philosophy of Wittgenstein, which is a philosophy tied inextricably with teaching, learning, and education. One such recognition occurs in his discussion of our acquisition and employment of language, when Wittgenstein observes that in “a large class of cases—though not for all—... the meaning of a word is its use in the language.” 74 This remark emphasizes, simultaneously, not only that we need to use a word, to act, in order to generate meaning, but also that our activity has meaning only within a wider context or form of life (here, language; but also, in our case, law).

The second recognition comes in Wittgenstein’s emphasis on the moment when a student, a learner, demonstrates his or her knowledge of something, their possession of their inheritance, by performing. Wittgenstein calls this “knowing how to go on.” 75 It is this capacity or capability that, for Wittgenstein, signals that we now understand, that we now have inherited our language, and that we now can inhabit it by using it.

The grammar of the word “knows” is evidently closely related to that of “can,” “is able to.” But also closely related to that of “understands.” (“Mastery” of a technique.)

But there is also this use of the word “to know”: we say “Now I know!”—and similarly “Now I can do it!” and “Now I understand!”

Let us imagine the following example: A writes a series of numbers down; B watches him and tries to find a law for the sequence of numbers. If he succeeds he exclaims: “Now I can go on!”—So this capacity, this understanding, is something that makes its appearance in a moment. So let us try and see what it is that makes its appearance here.—A has written down the numbers 1, 5, 11, 19, 29; at this point B says he knows how to go on. What happened here? 76

When we know how to go on, in Wittgenstein’s parlance, we are at home in the language-game in question and we can proceed as a native speaker would—which is what we have become. We now know how to

75. See, e.g., id. §§ 151, 154, 155.
76. Id. §§ 150, 151 (paras. 1-2).
use the resources of the tradition that we have inherited. As Cavell puts it,

[Wittgenstein] uses the picture of "continuing a series" as a kind of figure of speech for an idea of the meaning of a word, or rather an idea of the possession of a concept: to know the meaning of a word, to have the concept titled by the word, is to be able to go on with it into new contexts—ones we accept as correct for it; and you can do this without knowing, so to speak, the formula which determines the fresh occurrence, i.e., without being able to articulate the criteria in terms of which it is applied.\footnote{CAVEU., supra note 36, at 122. Cavell goes on to remark that "the examples of 'knowing how to continue' give ... a simple or magnified view of teaching and learning, of the transmission of language and hence of culture." \textit{Id.} And, I would add, hence, of law.}

This lack of articulate or explicit knowledge betrays no failure on our part. It is a mark of what I am calling "performative knowledge," and it is an essential part of teaching and learning law.

Without such performative knowledge of the law and lawyering, our students cannot become lawyers; they cannot participate in the form of life of the common law. Knowledge of the law, of a certain kind, requires or entails the knower's (the learner's) participation in the ideas and procedures and activities (and, yes, rules) of the law. Or so I believe; and I think so too does Oakeshott.

Being human is recognizing oneself to be related to others, not as parts of an organism are related, nor as members of a single, all-inclusive "society", but in virtue of participation in multiple understood relationships and in the enjoyment of understood, historic languages of feelings, sentiments, imaginings, fancies, desires, recognitions, moral and religious beliefs, intellectual and practical enterprises, customs, conventions, procedures and practices; canons, maxims and principles of conduct, rules which denote obligations and offices which specify duties. These languages are continuously invented by those who share them; using them is adding to their resources. They do not impose demands to think or to "behave" in a certain manner; they are not sets of ready-made formulae of self-disclosure and self-enactment; they reach those who share them as various invitations to understand, to admire, to approve or to disapprove; and they come only in being learned.\footnote{Oakeshott, supra note 58, at 20-21.}

While good teaching requires the ability to be exemplary on the part of the teacher, and requires that the learner be able to follow the teacher and what the teacher does, teaching is not so much imitation as it is initiation. The "initiated" are, of course, the learners who inherit the
practice; but also, in a paradoxical way, what is initiated is the very practice that the learners inherit. The practice itself is revived or resuscitated, it begins again—it is initialized, in the act of being taught, being passed along and, hence, in being inherited and received by others, by newcomers, persons newly initiated to the practice.

IV. SHARING TOOLS AND TECHNIQUES OF TEACHING

In theory, this description of teaching and learning may sound good; but how does it work in practice? There is no secret about it: teaching and learning of the kind that I have been describing are based on the little things we do in school every day, every class, every discussion. As noted above, Oakeshott includes as teaching activities "hinting, suggesting, urging, coaxing, encouraging, guiding, pointing out, conversing, instructing, informing, narrating, lecturing, demonstrating, exercising, testing, examining, criticizing, correcting, tutoring, drilling and so on—everything, indeed, which does not belie the engagement to impart an understanding."79 Similarly, learning activities include looking, listening, overhearing, reading, receiving suggestions, submitting to guidance, committing to memory, asking questions, discussing, experimenting, practising, taking notes, recording, re-expressing and so on—anything which does not belie the engagement to think and to understand.80

Fair enough. But this catalogue assumes that the teacher is guiding or pointing out or instructing with respect to something; and similarly that the learner is looking, listening, reading in relation to something. What are these things that teachers and students share, in relation to which their teaching and learning take place?

They are the modest details which Holmes ignores in his lecture to the law students in Boston. "I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection—text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details."81 Yes, I know some teachers who share this disdain for the details of teaching. But, without the details, nothing gets taught, nothing learned. The details are essential, as Simpson recognizes in his description of the transmission of the common law: "Now a customary

79. Id. at 25-26.
80. Id.
81. Holmes, supra note 2, at 477.
system of law can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy. Holmes calls them the “machinery” of teaching or education, and Simpson calls them “mechanisms”; we might just settle on the more innocuous terms, “tools and techniques.” These implements and these ways of teaching are the means by which we teachers teach and our students learn the law.

I mean this last claim quite literally. The tools and techniques that we law teachers use in teaching the law, are (among) our students’ means of access to the law. They are the ways in which the law is presented, made accessible, to our students; they represent or characterize the law in our classrooms. These tools and techniques—the casebooks we use, the way we analyze and demonstrate the application of a legal rule, the way we read and parse cases in front of our students, the techniques for reading statutes that we offer—are how our students gain knowledge of the law. How we teach law in our classes shows what we law teachers think the law is.

If I teach nothing but black-letter law in my classes, then the law to my students is black-letter. If I pay attention only to the letter of the law and not its spirit, or only to the policy enunciated or implied in the law and nothing else, or only the cost-benefit analysis applied to the legal rule in question and nothing else, then the letter of the law, or that policy, or that cost-benefit analysis, is shown to be what I take the law to be. It is what I accept as the law. If I teach that the history or the context of a case, or of a legal rule, is important in coming to understand the meaning or application of that case, or of that rule, then my students learn that the history or context of a case, or of a rule, is an important part of the law—the students learn that it can lead to understanding what the law is, what the law means.

Wittgenstein, in his later philosophy, would call these tools and techniques “criteria” of the law. These tools and techniques are our pedagogical ways of relating ourselves to the law—they are, as I said above, our means of access to the law, to learning what the law is and what the law means. Wittgenstein says that when we study such criteria, we are studying what he calls the “grammar” of the law. Here,

82. Simpson, supra note 29, at 95.
83. Holmes, supra note 2, at 477.
84. Simpson, supra note 29, at 95.
85. I say slightly more about this interpretation of Wittgensteinian criteria and grammar, with some citations to the relevant materials, in my article, Thomas D. Eisele, “Our Real Need,” 3 CAN. J. L. & JURIS. 5, 12-13, 30-31 (July 1990).
"grammar" means something roughly akin to the "logical relations or connections" of the law—if you allow that logic encompasses more than merely deductive and inductive relations and connections.

To learn the law, then, our students must learn to participate in it, and their enactment of their burgeoning performative knowledge becomes possible only to the extent that they are initiated into the law through the tools and techniques of inheriting the law that we, their teachers, make available to them. This is a cultural transmission between the generations, and it is what I think legal education is based upon. So, as Ardrey says in the motto to this essay, "with [our] slow-growing young, education is mostly accomplished through the traditions of the entire troop."\(^{86}\) We elders pass along to the young what we know, what we have learned; and what we know and have learned is mostly a matter or a result of what we learned, what we were taught, by our elders. Thus, as Ardrey puts it: "The young learn from their elders what the elders when young learned from theirs; and so, whatever the wisdom gained from experience the troop may possess, it is handed down from generation to generation."\(^{87}\)

A tradition is a medium, out of which we generate whatever we have the care and skill and wisdom to generate in our continuing engagement with the world, and with each other, including our students, and with ourselves. Here I would like to recall something that G.M. Young once said about the importance or centrality of tradition in our lives. In one of his essays, Young makes this remark:

>[T]he conviction which for a long time has regulated my thinking ... [and] my writing ... [is] the conviction ... that the material which the historian has to observe and the statesman has to direct is in the ultimate analysis neither the individual nor the institution, but the relationship; and that tradition, being grounded on the one relationship which it is impossible for any of us to evade—I mean the relationship between those who are a little older and a little younger; say, between experience and inexperience, learning and ignorance (Shakespeare might have said simplicity and skill)—is the fundamental reality of to-day, out of which to-morrow must be made. When that relationship goes wrong, then mischief comes. When that relationship goes right, all good accrues to the world.\(^{88}\)

Tradition is based upon the relationship between older and younger, or elder and youngster, and it affords us the material by means of which we build from the past into the present for the future. If we ignore this in

\(^{86}\) Ardrey, supra note 1, at 45.
\(^{87}\) Id.
\(^{88}\) G.M. YOUNG, London Addresses, in TODAY AND YESTERDAY 110, 128-29 (1948).
our law teaching, I think we waste a precious resource; and we risk misleading our students about the law and about life.