

## THE STRUGGLE FOR LEGAL PHILOSOPHY (*VIS-À-VIS* LEGAL EDUCATION): METHODS AND PROBLEMS\*

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**ABSTRACT:** *The article challenges the empirical claim that suggests that the legal skills needed to successfully practice law are not—and cannot be—learned at law schools, and contrasts it with the conceptual claim that indicates that the legal tasks needed for practicing law presuppose a legal theory—or at least requires a link between theory and practice. Hence, the dual claim—empirical and conceptual—is that legal philosophy is an important part of a legal curriculum and necessary to bridge, rather than to deepen, the existing gap between theory and practice.*

**KEY WORDS:** *Jurisprudence, legal education, legal philosophy, problematic turn, theory and practice.*

**RESUMEN:** *El autor cuestiona la pretensión empírica que sugiere que las habilidades jurídicas necesarias para ejercer exitosamente el derecho no son—ni pueden ser—enseñadas en las facultades de derecho, y la contrasta con la pretensión conceptual que indica que las herramientas legales necesarias para ejercer el derecho presuponen una teoría jurídica—o al menos requieren un vínculo entre teoría y práctica. Por tanto, su pretensión doble—empírica, por un lado, y conceptual, por el otro—es que la filosofía jurídica es una parte importante del*

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*currículo y necesaria para establecer un puente entre teoría y práctica, en lugar de profundizar la brecha entre ellas.*

PALABRAS CLAVE: *Ciencia del derecho, educación jurídica, filosofía jurídica, giro problemático, teoría y práctica.*

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*Resistance to injustice, the resistance to wrong in the domain of law, is a duty of all who have legal rights, to themselves —for it is a commandment of moral self-preservation— a duty to the commonwealth; —for this resistance must, in order that the law may assert itself, be universal.*

RUDOLF VON JHERING, *Der Kampf ums Recht*  
(1872)

#### I. INTRODUCTION: UNCHAINING PROMETHEUS

Liberating legal philosophy from the chains of both traditional legal education, which tends to demote it to just another *informative* subject to be memorized and repeated for the final exam like a variation of black-letter and doctrinal law, and the corresponding legal profession that relegates it to a mere peripheral role that is completely meaningless, useless and worthless for a legal operator or practitioner —like an advocate, a judge and even a legislator—, implies readdressing it as a necessary and important *formative* part of the legal curriculum and that is entirely meaningful, useful and worthwhile.<sup>1</sup>

<sup>1</sup> See Imer B. Flores, *Algunas reflexiones sobre la enseñanza del derecho: Enseñar a pensar y a repensar el derecho*, 5-7 CAUCES. EXPRESIÓN DE LOS ESTUDIANTES DE LA FACULTAD DE DERECHO 30 (2003). *Langdell v. Holmes: On Legal Education—and the Legal Profession*, 3 DE LEGIBUS. REVIEW OF THE HARVARD LAW SCHOOL ASSOCIATION OF MEXICO 13 (2004) (Published electronically in: 4 MEXICAN

In that sense, it is imperative to teach law and legal philosophy not only from a theoretical perspective, but also from a practical one, by privileging critical thinking, dialectical and dialogical inquiry, as well as problem orientation over mere memorization.<sup>2</sup>

As a result, it is necessary to discuss proper methods for teaching legal philosophy beyond the lecture and case systems; and shift from merely teaching abstract and general *informative* theories to be learned and memorized to more concrete and particular *formative* problems to be argued, discussed and solved (dissolved and resolved). In this sense the struggle for legal philosophy is analogous to the one Rudolf von Jhering foresaw when he published *Der Kampf ums Recht* [The Struggle for Law] in 1872, and the one Herman Kantorowicz —under the *nom de plume* of Gnaeus Flavius— foretold when he published *Der Kampf um die Rechtswissenschaft* [The Struggle for Legal Science aka The Battle for the Liberation of Legal Science] in 1906.<sup>3</sup>

Departing from the *Begriffssjurisprudenz*,<sup>4</sup> Jhering denied that law consists of rules derived from abstract concepts and declared that the life of the law is a struggle —a struggle of nations, of State power, of classes, of individuals. As the circumstances of life change, people demand changes in the law, but these changes usually come about only after a bitter struggle of acceptance and resistance, of obedience and disobedience, of recognition and rejection. Individuals who feel they have suffered wrongdoing demand legal redress, and their demands, if successful, lead to the establishment of new legal rights. Jhering's agenda is a stimulus to make law —and legal philosophy—a means for achieving social change.

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LAW REVIEW (2005): <http://info8.juridicas.unam.mx/cont/mlawr/4/arc/arc2.htm>). *Prometeo (des)encadenado: La enseñanza del derecho y los estudios de posgrado*, 14-15 CULTURA Y DERECHO 93 (2004) (There is revised version: *Prometeo (des)encadenado: La enseñanza del derecho en México*, 7 ACADEMIA. REVISTA SOBRE ENSEÑANZA DEL DERECHO 51 (2006). *Protágoras vis-à-vis Sócrates: Los métodos de enseñanza-aprendizaje del derecho*, in METODOLOGÍA DEL DERECHO COMPARADO. MEMORIA DEL CONGRESO INTERNACIONAL DE CULTURAS Y SISTEMAS JURÍDICOS COMPARADOS 125 (José María Serna de la Garza ed., UNAM-IIJ, 2005).

<sup>2</sup> Cf. BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 3 (3rd ed., Sweet & Maxwell, 2003): “Part of the purpose in writing this book [i.e. *Jurisprudence: Theory and Context*] was to counter a tendency to treat jurisprudence as just another exercise in rote memorization. It is often tempting for jurisprudence students [...] to treat the major writers in the area as just a variation on black-letter, doctrinal law: that is, as points, positions and arguments to be memorized, in order that they can later be repeated on the final examination.”

<sup>3</sup> See RUDOLF VON JHERING, THE STRUGGLE FOR LAW (trans. John Lalor, The Law Book Exchange Ltd., 1997) (Published originally in English: 1915) (There is a Spanish version: LA LUCHA POR EL DERECHO (trans. Adolfo Posada y Biseca, Librería General de Victoriano Suárez, 1921); and a reprinted version: Porrúa, 1982). Hermann Kantorowicz, *La lucha por la ciencia del derecho*, in FRIEDRICH KARL VON SAVIGNY *et al.*, LA CIENCIA DEL DERECHO 323 (trans. Werner Goldschmidt, Losada, 1949).

<sup>4</sup> On the *Begriffssjurisprudenz* or Conceptual Jurisprudence, see EDGAR BODENHEIMER, JURISPRUDENCE. THE PHILOSOPHY AND METHOD OF LAW 70-4 (Harvard University Press, 1962).

Meanwhile, endorsing the *Freirechtsbewegung*,<sup>5</sup> Kantorowicz enrolled new combatants to the cause of liberating legal science from its dogmatic assumption of being capable of solving any present or future problem, something no other science either theoretical or practical presumes or can presume. Kantorowicz's manifesto is an invitation not only to leave behind such dogmatism and the presumption of having inferred all the answers to complex questions beforehand, but also to look forward for the solutions of both the theoretical and practical problems of legal science—and of legal philosophy.

In this article, I will challenge the empirical claim that suggests that the legal skills needed to successfully practice law are not—and cannot be—learned at law schools, and compare it with the conceptual claim that indicates that the legal tasks needed for practicing law presuppose a legal theory—or at least requires a link between theory and practice. Hence, my dual claim—empirical, on the one hand, and conceptual, on the other hand—is that legal philosophy is an important part of legal curriculum and necessary to bridge, rather than to deepen, the existing gap between theory and practice. In this sense, in order to emphasize the importance of legal philosophy in legal education, in the following two sections, I intend to appraise:

- 1) The interconnection between theory and practice to differentiate two sets of methods, accentuating the aims of theoretical scholars, as embodied by Dean Christopher Columbus Langdell,<sup>6</sup> and the objectives of practical practitioners, as identified with Justice Oliver Wendell Holmes,<sup>7</sup> but nothing precludes these methods from being integrated into a single one; and,
- 2) The interrelation between these methods not only to distinguish two types of problems, one which emphasizes the objectives of legal philosophy as a science, as held by Socrates, and the other that sees applied legal philosophy as an art, as instructed by Protagoras, but also to disseminate what I consider a “problematic turn”.

Finally, in the last section, on a more personal note, I assess alternative methods in the education of philosophy of law, by sharing my own integrated model for legal education and for teaching-learning legal philosophy thorough lectures and seminars, readings and materials, including cases and problems, as well as examples borrowed from the so-called law & literature movement, which integrates not only theoretical and practical methods, but also theoretical and practical problems.

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<sup>5</sup> On the *Freirechtsbewegung* or Free Law Movement, see BODENHEIMER, *supra* note 4, at 109.

<sup>6</sup> See, for example, C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871) (There is 2nd ed., 1877).

<sup>7</sup> See, for instance, Oliver Wendell Holmes Jr., *Book Notices*, 14 AMERICAN LAW REVIEW 234 (1880).

*It is obvious that no matter how complete the theory may be, a middle term is required between theory and practice, providing a link and a transition from one to the other.*

Immanuel Kant, *Über den Gemeinspruch: 'Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis'* (1793)

## II. METHODS: LANGDELL ET HOLMES

Keep in mind that Justice Felix Frankfurter —former student and professor at Harvard Law School— once suggested: “In the last analysis, the law is what lawyers are. And the law and the lawyers are what the law schools make them.”<sup>8</sup> However, it is commonly said that (higher) education is in crisis because of an increasing gap between what theory supplies and practice demands. It is also said that this crisis reaches all vanguard and rearguard countries, public and private institutions, natural and social sciences, alike. Accordingly, legal education in Mexico —and elsewhere— appears to be in crisis: law schools and lawyers, as well as other legal practitioners and theoreticians, seem to be divorced —or at least look as if they are in the process of getting a divorce.

To prove my point of how opportunity and possibility, instead of fatality and necessity, arise from calamity and emergency, let me call your attention to the fact that nobody could foretell the synergy Judge Harry T. Edwards set in motion in the United States of America when in the early 1990s he expressed his deep concern about “the growing disjunction between legal education and the legal profession,” in an article with the same title and two postscripts for a couple of symposiums.<sup>9</sup>

Notwithstanding the striking differences, the status of the gap between legal education and the legal profession in most of the countries is very similar, not only in terms of the divorce between theory and practice, but also the lack of ethical practice —to the extent that law no longer appears to be a liberal profession. For example, Elena Kagan —then Dean at Harvard Law School, later Solicitor General and now Justice of the Supreme Court— did

<sup>8</sup> Letter from Felix Frankfurter (Professor, Harvard Law School) to Mr. Rosenwald (May 13, 1927), quoted in Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICHIGAN LAW REVIEW 34 (1992).

<sup>9</sup> See Edwards, *supra* note 8, at 34; *The Growing Disjunction between Legal Education and the Legal Profession: A Postscript*, 91 MICHIGAN LAW REVIEW 2191 (1993); and, Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction between Legal Education and the Legal Profession"*, 69 WASHINGTON LAW REVIEW 561 (1994). See also Flores, *Langdell v. Holmes...*, *supra* note 1, at 13-20; *Symposium: Legal Education*, 91 MICHIGAN LAW REVIEW 1921 (1993); and *Symposium: The 21<sup>st</sup> Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASHINGTON LAW REVIEW 505 (1994).

steer her deanship into such an enterprise.<sup>10</sup> Nonetheless, a word of caution is in order: for Professor James Boyd White, “the relevant line is not between the ‘theoretical’ and ‘practical’ [...] but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not.” To put it in a few words, he argues: “The opposition between ‘theoretical’ and ‘practical’ is [...] misleading.”<sup>11</sup>

He is absolutely right in that we must be suspicious of anyone who disregards theory or practice because since they are linked together, the denigration of the one is the derision of the other and *vice versa*. Instead, we must insist on mutual interest and respect for what lawyers, judges and other legal practitioners achieve, on one side, and for what scholars, students and other legal theoreticians accomplish, on the other. At the end of the day, it is clear that there already is a bridge connecting the two sides: to the extent that one can be on one side or on the other —as in the “revolving door” metaphor.<sup>12</sup>

The problem is that sometimes the bridge seems to be falling apart —or the revolving door seems to get stuck— leaving the “impractical” scholar and the “atheoretical” practitioner *incommunicado*. It is imperative to restore the link between law schools and legal arenas or playing fields; or, in slightly different terms, re-tying the knot between theory and practice, scholars and practitioners, to the extent that the “practical scholar” and the “theoretical practitioner” will be reconnected again.

In this sense, let me now turn to legal education, where theory and practice really do meet. At any law school, we can find the future judge, lawyer, legislator, and legal official or practitioner in any student, and the past —or even the present— judge, lawyer, legislator, and legal official or practitioner in any scholar.<sup>13</sup> In analyzing, legal education in general and legal philosophy in particular, there are three different but interconnected questions worth asking: 1) *what* to teach-learn; 2) *how* to teach-learn; and 3) *why* teach-learn?<sup>14</sup>

I take it for granted that the issues of *where* and *when* to teach-learn have been settled in favor of professional law schools —not merely technical ones— and permanent/continuous/on-going legal education —not tempo-

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<sup>10</sup> Cf. Elena Kagan, *Connecting to Practice*, HARVARD LAW BULLETIN: “MANAGING THE PROFESSION. THE WORLD OF LAW SCHOOL AND THE WORLD OF PRACTICE ARE ABOUT TO GET CLOSER” 2 (Fall 2006).

<sup>11</sup> James Boyd White, *Law Teachers’ Writing*, 91 MICHIGAN LAW REVIEW 1970 (1993).

<sup>12</sup> The “revolving door metaphor” has several applications but it usually suggests that it is neither clear nor precise when someone is in or out or where something begins or ends. In that sense: when someone is a theoretician or a practitioner, as well as where theory and practice begins or ends.

<sup>13</sup> White, *supra* note 11, at 1970: “[T]he main mission of law school, where practice and teaching really do meet: the education of future lawyers.”

<sup>14</sup> I have addressed these questions elsewhere *a propos* of law in general, and will address them in the following part of this article focusing on legal philosophy, in particular. See Flores, *Langdell v. Holmes...*, *supra* note 1, at 20-39.

rary studies—whereas the queries on *what*, *how to* and *why* teach-learn are not established, as they are in constant flux, shaping one another. Moreover, the “world wide web” or the “Internet” has certainly increased the possibilities and potential of where and when to teach-learn law in general and legal philosophy in particular: *anywhere* and *anytime*.<sup>15</sup>

### 1. *Why Teach-Learn?*

The question of *why* teach-learn can be easily rephrased as *what* for or for *what* purpose? The obvious short answer is to train the legal practitioners and legal theoreticians, *i.e.* professors and researchers, our modern complex global society needs. However in recent times, the legal profession—which by definition has been traditionally considered a liberal one—has had to reinforce its commitment with society at large by emphasizing its public and social role: *pro bono*.<sup>16</sup>

As education implies receiving information and also formation, it enables future legal practitioners and theoreticians to apply their knowledge analytically and critically to solve the problems of their profession and its corresponding science. However, there are two main paths, each of which corresponds to a distinct role of logic: 1) *practical*, leaning to the fulfillment of the aims of the legal profession and the assessment of the correctness of legal premises and conclusions; and 2) *theoretical*, slanting towards the realization of the aims of legal science and the evaluation of legal propositions (on law). For the purposes of this paper, I will refer to Holmes and Langdell to accentuate these two distinct kinds of legal methods, as they embody the *legal profession* and *legal science*, in that order, and exemplify the *theoretical practitioner* and the *practical scholar*, respectively.<sup>17</sup>

To put it in Karl N. Llewellyn’s terms: “Technical skill is not *a* foundation only. It is *the necessary* foundation.”<sup>18</sup> Moreover, as law schools are professional schools and not merely technical ones, they also have to focus on theoretical

<sup>15</sup> In the teach-learn dichotomy, the later element—as the defining and stronger one—has a lexical priority: the important part is learning regardless of the teaching or even without it. See Flores, *Algunas reflexiones sobre la enseñanza del derecho...*, *supra* note 1, at 31-2; and, Flores, *Protágoras vis-à-vis Sócrates...*, *supra* note 1, at 28.

<sup>16</sup> See Harold Lasswell and Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE LAW JOURNAL 203 (1943); and TEACHING FOR SOCIAL JUSTICE. A *DEMOCRACY AND EDUCATION* READER (William Ayers, Jean Ann Hunt & Therese Quinn eds., The New Press and Teachers College Press, 1998).

<sup>17</sup> I have identified the former with Protagoras—or even Cicero—and the latter with Socrates elsewhere. For the purposes of this paper, I will use them to emphasize two diverse kinds of problems to law: scientific or theoretical, on one side, and, technical or practical, on the other. See Flores, *Protágoras vis-à-vis Sócrates...*, *supra* note 1, at 136.

<sup>18</sup> KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 367 (The University of Chicago Press, 1962).

knowledge. As we have already pointed out, they cannot focus exclusively on the scientific or theoretical aims of the science or on the technical or practical ends of the profession; they must simultaneously combine practical and theoretical interests, particular and general objectives, and technical and scientific goals, among other things.<sup>19</sup> In this sense, it is necessary to teach-learn legal philosophy as the link and transition between them.

## 2. *How to Teach-Learn?*

The traditional method of teaching-learning law, including legal philosophy courses, in Mexico—and presumably in most Latin American and civil law countries—is mainly based on a system of *lectures*, which is characterized as the exposition of a topic—or series of topics—by the professor in the classroom and students' passive reception of the information. Students' duties are limited to reading—or more precisely following—a textbook and taking notes of the professor's “luminous/radiant/resplendent” exposition, while the professor has the prerogative—which ought to be a duty—of answering students' questions and doubts.

Among the criticism of the traditional method, I would like to point out that knowledge seems to belong exclusively to the professor and as a result the teaching-learning process is a mere monologue and not a true dialogue. Furthermore, there is a strong myth that law schools should limit themselves to teaching theory and not practice. The belief is that law school professors are unable and unfit to teach experience because experience is—and only can be—taught by “real” life. However, as we have argued, it is important, as Dean Roscoe Pound suggested, to teach both “law in books” and “law in action”.<sup>20</sup>

Acting as the devil's advocate, let me say that despite the shortage of professional legal scholars in Mexico, especially “practical scholars”, law schools are fortunately full of legal practitioners, specifically “theoretical practitioners”, who can teach not just law in books, but law in action as well. However, they tend to teach law only from a scientific and theoretical perspective, instead of complementing it with a technical and practical one.

In this sense, it is necessary to teach-learn law from the perspective of both the theorist and the practitioner. In most civil law countries, like Mexico, the first thing that comes to mind—to complement and not substitute the traditional lecture method—is to adopt and adapt the case method—to reinforce the problem-solving nature of lawyers and legal professionals—but it is also necessary to avoid focusing solely on practice and cast off the phantom of formalism, *i.e.* excessive trust in syllogism and deduction. It is worth mention-

<sup>19</sup> See CHARLES EISENMANN, *LAW. THE UNIVERSITY TEACHING OF SOCIAL SCIENCES 17-55* (UNESCO, 1973).

<sup>20</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AMERICAN LAW REVIEW 12 (1910).

ing that in the United States of America, where the case system is still the general rule for teaching most legal courses, the lecture is the exception for teaching certain subjects, such as legal philosophy. Although the case method is not normally used to teach-learn legal philosophy, it may be used to stress some of its contents. What is more, nothing precludes the quest for a balance between these and other methods, such as those used in England, where lectures are used along with the case system and tutorials.<sup>21</sup>

### 3. *What to Teach-Learn?*<sup>2</sup>

In terms of *what* to teach-learn, we must teach-learn not only the law that “is”, but also the law that “must” be. In this sense, it is necessary not to discard any possibility, *i.e.* the law that “ought to be”, “can”, “could”, “may”, “might” or “should” be. In other words, it is neither possible nor desirable to reduce legal education to teaching-learning positive legal rules as something that is merely formal and valid from a merely descriptive perspective based on legal formalism and positivism. On the contrary, we must teach-learn law in its widest scope, assessing its content critically, including evaluative and normative-prescriptive points of view along with the different alternative and non-traditional perceptions—and constructions—of law.<sup>22</sup>

The main objection is aimed against the excessive trust given to the analytical, deductive-inductive, formal and rational logic by focusing on the apparent mechanic application and neutrality of the syllogism. In the United States of America, Holmes was the first to open fire against legal formalism and his target was no other than Langdell. However, in his famous essay “American Jurisprudence through English Eyes: The Nightmare and the Noble Dream”, H.L.A. Hart said:<sup>23</sup>

Holmes certainly never went to these extremes [represented by Llewellyn and Frank]. Though he proclaimed that judges do and must legislate at certain points, he conceded that a vast area of statutory law and many firmly established doctrines of the common law [...] were sufficiently determinate to make it absurd to represent the judge as primarily a law-maker. So for Holmes the judge’s law making function was ‘interstitial’. Holmes’s theory was not a philosophy of ‘full steam ahead and damn the syllogisms.’

<sup>21</sup> See Jerome Hall, *Teaching Law by Case Method and Lecture* (paper presented at the annual meeting of the Society of Public Teachers of Law in Edinburgh, July 15, 1955). See also EISENMANN, *supra* note 19, at 144-152.

<sup>22</sup> See Imer B. Flores, *La concepción del derecho en las corrientes de la filosofía jurídica* [*The Concept of Law in the Theories of Legal Philosophy*], 90 BOLETÍN MEXICANO DE DERECHO COMPARADO 1001 (1997); and *El porvenir de la ciencia jurídica. Reflexión sobre la ciencia y el derecho*, in *LA CIENCIA DEL DERECHO DURANTE EL SIGLO XX*, 999 (Instituto de Investigaciones Jurídicas, UNAM, 1998).

<sup>23</sup> H.L.A. Hart, *American Jurisprudence through English Eyes: the Nightmare and the Noble Dream*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 128 (Oxford University Press, 1983).

And Hart even suggested:<sup>24</sup>

Perhaps the most misused quotation from any American jurist is Holmes's observation of 1884 (*sic*) '[t]he life of the law has not been logic: it has been experience.' This in its context was a protest against the rationalist superstition (as Holmes thought it) that the historical development of the law by the courts could be explained as the unfolding of the consequences logically contained in the law in its earlier phases. Judicial change and development of the law were, Holmes insisted, the expression of judges' 'instinctive preferences and inarticulate convictions' in response, as he said, to the 'felt necessities' of his time.

Although Hart tries to minimize Holmes' frontal attack against "logic", or at least against the "excessive use and extreme confidence in logic", everybody knows that Holmes' multi-cited quote "[t]he life of the law has not been logic: it has been experience" has become more than an anthem.<sup>25</sup> However, not everybody knows that it originated prior to the publication of *The Common Law* in 1881. As it appeared for the first time in January 1880, in a Book Notice to the Second Edition of *A Selection of Cases of the Law of Contracts with a Summary of the Topics covered by the Cases* by C.C. Langdell:<sup>26</sup>

Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is perhaps the greatest living theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together [...] so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which actually shaped the substance of the law. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.

At this point it is imperative to tone down the phrase to modulate its force. I believe it is really a frontal assault against the traditional, openly analytical, deductive-inductive, formal and rational logic, but in no way it is intended to abolish its use or that of non-traditional, overtly dialectical, adductive-subtractive, informal and reasonable logic. Let me call to your attention to the following lines of the book, in which Holmes explains: "[t]he object of

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<sup>24</sup> *Id.* at 33.

<sup>25</sup> OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (Dover, 1991) (Published originally: 1881).

<sup>26</sup> Holmes, *supra* note 7, at 234.

this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all.” And, in the subsequent lines, he adds:<sup>27</sup>

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

In fact, in his seminal “The Path of Law” of 1897, Holmes denounced: “The fallacy [...] that the only force at work in the development of the law is logic.”<sup>28</sup> Hence, even though he recognizes the important place and role of traditional logic, he cynically argues that it is not everything:<sup>29</sup>

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

Similarly, in his “Law in Science and Science in Law” address, Holmes stated:<sup>30</sup>

I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary

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<sup>27</sup> HOLMES, *supra* note 25, at 3.

<sup>28</sup> Oliver Wendell Holmes Jr., *The Path of the Law*, 110 HARVARD LAW REVIEW 997 (1997) (Published originally: 1897).

<sup>29</sup> *Id.* at 998.

<sup>30</sup> Oliver Wendell Holmes Jr., *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 238 (Constable and Co., 1920).

that those who make and develop the law should have those ends articulately in their minds.

Indeed, as Julius Cohen suggests, Holmes' critical assessment of the imbalance between "logic" and "experience" does not "support the view that logic has *no* place in the development of the law [...] The error would, accordingly, be in viewing law *solely* as an exercise in deductive logic [...] [In fact, m]uch of Holmes's notable contributions to legal thought have been a function of keen *logical* analysis of legal doctrines."<sup>31</sup>

Actually, Holmes also disapproved of the other extreme, *i.e.* the fallacy that the only force at work in the development of the law is history-tradition: "Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôle [sic] of history more important than it is."<sup>32</sup> Appropriately, he recommended:

The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is, and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

This idea of complementariness is also explicit in Pound's *Law Finding through Experience and Reason*, in which, in his opening remark, he recalls that more than three centuries before, in the early 17<sup>th</sup> century, Sir Edward Coke, Chief Justice of the Court of Common Pleas, first, and of the King's Bench, later, and archenemy of Sir Francis Bacon, argued that "Reason is the life of the law, nay the common law itself is nothing else but reason," and concluded that "law is an artificial reason;" "an artificial perfection of reason, gotten by long study, observation, and experience, and not of everyone's natural reason; for *nemo nascitur artifex*."<sup>33</sup> In the *Centennial History of the Harvard Law School*, in a section probably written by Pound himself, it is said:<sup>34</sup>

It has, however, become evident in recent years [...] that the scope of legal study must extend beyond printed books, certainly beyond law books. Since law is not a water-tight compartment of knowledge but a system of rules for the

<sup>31</sup> Julius Cohen, *Justice Brennan's "Passion"*, 10 CARDOZO LAW REVIEW 193 (1998).

<sup>32</sup> Holmes, *supra* note 28, at 1003.

<sup>33</sup> Edward Coke quoted in ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 45 (University of Georgia Press, 1960). See Imer B. Flores, *The Quest for Legisprudence: Constitutionalism v. Legalism*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS ON LEGISPRUDENCE 43-4 (Luc J. Wintgens ed., Aldershot, Ashgate, 2005).

<sup>34</sup> Roscoe Pound quoted in Erwin N. Griswold, *Intellect and Spirit*, 81 HARVARD LAW REVIEW 295 (1967).

regulation of human life, the truth of those rules must be tested by many facts outside the past proceedings of courts and legislatures.

*Unless the jurist is at the same time a philosopher, at any rate in moral matters, he is under the greatest temptation to do this, for his business is merely applying existing laws, and not to enquire whether they are in need of improvement.*

IMMANUEL KANT, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795)

### III. PROBLEMS: SOCRATES RE PROTAGORAS

In contrast to the traditional approach denounced by both Jhering and Kantorowicz which tends to privilege *systematic* knowledge, as well as the creation and completion of a system from which to derive or infer all the answers even to the more complex questions both theoretical and practical, we can shift to a more *problematic* one. In a few words, it is counterintuitive to focus on a general system to solve a specific problem or set of problems and not to center on the particular problem or set of problems. It is worth noting the problematic turn can be traced both in philosophy in general, and to legal philosophy in particular, back to 1911, when Paul Nartop published his *Philosophie. Ihr Problem und ihre Probleme* prior to his posthumous *Philosophische Systematik* (1958) and Hans Kelsen presented his *Habilitationsschrift* entitled *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze*.<sup>35</sup>

<sup>35</sup> Keep in mind that the problematic approach was popularized by Nicolai Hartmann in his *Zum Problem der Realitätsgegebenheit* (1931), *Das Problem des geistigen Seins. Untersuchungen zur Grunlegung der Geschichtsphilosophie und der Geisteswissenschaften* (1933), “Das Problem des Apriorismus in der Platonischen Philosophie” (1935) and “Aristoteles und das Problem des Begriffs” (1939), all prior to his *Systematische Philosophie* (1942), and by Philipp Heck in his *Das Problem der Rechtsgewinnung* (1912), as well as by Kelsen himself, not only in his *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920) and *Das Problem des Parlamentarismus* (1925), but also in the first edition of his *Reine Rechtslehre* under the subtitle of *Einleitung in die rechtswissenschaftliche Problematik* (1934) and even in its second edition under the subtitle of *Mit einem Anhang: Das Problem der Gerechtigkeit* (1960), and by Erik Wolf in his *Das Problem der Naturrechtslehre* (1955). In Latin America, the pioneers of this approach were Carlos Cossío in Argentina, and Eduardo García Márquez in Mexico; and their followers include: Juan Llambías de Azevedo in Uruguay; Luis E. Nieto Arteta in Colombia; and also Luis Recasens Siches in Mexico. On one side, Cossío published *La reforma universitaria o el problema de la nueva generación* (1927), *La coordinación de las normas jurídicas y el problema de la causa en el derecho* (1948), his exchange with Kelsen as *Problemas escogidos de la teoría pura del derecho. Teoría egológica y teoría pura* (1952), and as a clear allusion to Nartop’s landmark, *La teoría egológica del derecho: su problema y sus problemas* (1963). On the other, following Hartmann, his professor, García Márquez published “El problema del fundamento filosófico-jurídico de la validez del derecho” (1933), “El problema de la libertad moral en la ética de Hartmann” (1943), “El problema de la definición del derecho”

The list of legal philosophers emphasizing problems rather than systems—or at least before completing them and/or for proving them—includes Chaïm Perelman, who published his “Le problème du bon choix” (1948) before concluding with Lucie Olbrechts-Tyteca, one decade after, the *Traité de l’argumentation: La nouvelle rhétorique* (1958),<sup>36</sup> and on his own a collection of articles in English which were published precisely as *The Idea of Justice and the Problem of Argument* with an “Introduction” by Hart.<sup>37</sup> Furthermore, in the process of testing their systems, authors like Joseph Raz had to highlight concrete problems such as the nature of law and its normativity.<sup>38</sup>

Although only some contemporary authors like Bix,<sup>39</sup> Anthony T. Kronman<sup>40</sup> and Brian Leiter<sup>41</sup> explicitly do address problems, the vast majority have been tackling them at least implicitly in following the so-called Hart-Dworkin debate. Hart’s *The Concept of Law* is an archetype of the problematic turn. In the “Preface” of this text, Hart analyzes and identifies three persistent questions or recurrent issues (“How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from and how is it

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(1954), “Algunas consideraciones sobre el problema de las antinomias en el campo jurídico” (1963), and *El problema de la objetividad de los valores* (1969). See. IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ (1908-1993). VIDA Y OBRA 153 (Instituto de Investigaciones Jurídicas, UNAM, 2007). A couple of these texts have been translated into English and one was published originally in German. See. Eduardo García Mányez, *The Philosophical-Juridical Problem of the Validity of Law*, in LATIN-AMERICAN LEGAL PHILOSOPHY 459 (trans. Milton R. Konvitz & Miguel A. de Capriles, Harvard University Press, 1948); *Das Problem der Definition des Rechts*, 3 ÖSTERR. ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 307 (1951); and *Some Considerations on the Problem of the Antinomies of Law*, 49 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 1 (1963).

<sup>36</sup> See CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (trans. J. Wilkinson & P. Weaver, University of Notre Dame Press, 1969).

<sup>37</sup> See CHAÏM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (Routledge & Kegan Paul, 1963).

<sup>38</sup> See Joseph Raz, *The Problem about the Nature of Law*, 3 CONTEMPORARY PHILOSOPHY: A NEW SURVEY 107 (1983); and 21 UNIVERSITY OF WESTERN ONTARIO LAW REVIEW 203 (1983), reprinted in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN. ESSAYS IN THE MORALITY OF LAW AND POLITICS* 195 (Oxford University Press, 1994). See also JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 170 (2nd ed., Oxford University Press, 1990): “The problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situations.”

<sup>39</sup> See Brian H. Bix, *Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?*, 16 RATIO JURIS 281 (2003); and, *Problem: Conceptual Analysis* (on file with the author). See also IRA M. ELLMAN, ELIZABETH SCOTT, PAUL KURTZ, LOIS A. WEITHORN, AND BRIAN BIX, *FAMILY LAW: CASES, TEXT, PROBLEMS* (4th ed., LexisNexis, 2004).

<sup>40</sup> See Anthony T. Kronman, *The Problem of Judicial Discretion*, 36 JOURNAL OF LEGAL EDUCATION 481 (1986).

<sup>41</sup> See Brian Leiter, *Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence*, 48 AMERICAN JOURNAL OF JURISPRUDENCE 17 (2003), reprinted with minor changes in BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (Oxford University Press, 2007).

related to moral obligation? What are rules and to what extent is law an affair of rules?”) to “show later why they come together in the form of a request for a definition of law or an answer to the question ‘What is law?’ or in more obscurely framed questions such as ‘What is the nature (or the essence) of law?’”<sup>42</sup>

What is more, the best contemporary schematic depiction of the problems of legal philosophy available is the one presented by Hart himself in his “Problems of the Philosophy of Law”, which was originally published in 1967 as part of Paul Edward’s *Encyclopedia of Philosophy*, and republished in 1983 in his collection entitled *Essays in Jurisprudence and Philosophy*, also known as “the brown book”.<sup>43</sup> The original version was divided into two sections: the first dealt with “Problems of Definition and Analysis” and the second, with “Problems of the Criticism of Law”, while the revised version added a third group between the two original ones called “Problems of Legal Reasoning”. According to the last version:

- 1) “Problems of Definition and Analysis” comprises problems of defining law; of the structure of law, such as the relationship between law, coercion and morality; and of analysis, mainly conceptual analysis;
- 2) “Problems of Legal Reasoning” embraces problems of fixity and flexibility; of creation-legislation and application-adjudication; of certainty and predictability; of choice and discretion both about facts and norms; of *the* only correct answer/decision; and of (interstitial) judicial legislation; and
- 3) “Problems of the Criticism of Law” includes problems of evaluating the aims and purposes of the law; problems related to substantive law (to its content) and “procedural law” (its principles); problems related to justice and other values, such as equality, liberty and utility/usefulness; and problems deriving from the obligation to obey the law.

To stress the fact that the problematic turn combines a merely theoretical approach with a more practical one, it should be noted that, for instance, the problems of fixity and flexibility are problems not only of legal philosophy, but also of applied legal philosophy. In Hart’s own words:<sup>44</sup>

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<sup>42</sup> See H.L.A. HART, THE CONCEPT OF LAW 1-17 (Oxford University Press, 1961) (There is 2nd ed., with *Postscript*: 1994). See also Ronald Dworkin, *The Model of Rules*, 35 UNIVERSITY OF CHICAGO LAW REVIEW 14 (1967), reprinted as *Is Law a System of Rules?* in ESSAYS IN LEGAL PHILOSOPHY 25 (Robert S. Summers ed., Basil Blackwell, 1968); and as *The Model of Rules I* in TAKING RIGHTS SERIOUSLY 14 (Harvard University Press and Duckworth, 1977) (There is 2nd ed. with *Appendix: Reply to Critics*: 1978).

<sup>43</sup> See H.L.A. Hart, *Problems of the Philosophy of Law* in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 23, at 88-119.

<sup>44</sup> HART, *supra* note 42, at 127 (130-1).

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for latter settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide. Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape this oscillation between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this indeterminacy, varies in degree in different fields of conduct, and that legal systems cater for this inability by a corresponding variety of techniques.

The interrelation between the two needs and their corresponding methods or techniques was envisioned four decades before by Justice Benjamin N. Cardozo in *The Growth of the Law*, the sequel to his *The Nature of the Judicial Process*:

The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.<sup>45</sup>

Whereas legal philosophy and the logic of *certainty* may be enough for the first need as a merely theoretical one, to satisfy a more practical need the second one requires applied legal philosophy and the logic of *probability*. In Cardozo's own voice:<sup>46</sup>

If you ask what degree of assurance must attach to a principle or a rule or a standard not yet embodied in a judgment before the name of law may be properly be affixed to it, I can only fall back upon a thought which I shall have occasion to develop farther, the thought that law, like other branches of social science, must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty.

<sup>45</sup> BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 1 (Yale University Press, 1924). See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale University Press, 1921).

<sup>46</sup> CARDOZO, THE GROWTH OF THE LAW, *supra* note 45, at 33. See Holmes, *supra* note 28, at 1001: "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."

*Jurisprudence must rip the fading parts of the law, and ripen the flourishing ones.*

HERMANN KANTOROWICZ, *Der Kampf um die Rechtswissenschaft* (1906).

**IV. CONCLUSION: TOWARDS AN INTEGRATED MODEL  
(FOR LEGAL EDUCATION AND) FOR TEACHING-LEARNING  
LEGAL PHILOSOPHY**

So far our claim has been that it is not merely possible, but necessary, to integrate 1) theoretical knowledge and practical knowledge; 2) the traditional method —whether lectures or case studies— and non-traditional methods like problems; and 3) legal formalism and positivism and other alternative approaches in a model for legal education in general, and for teaching-learning legal philosophy in particular.

Ultimately, in order to close the gap between legal education and the legal profession, it is necessary to re-construct the bridge—or to fix the revolving door—to establish a rapport between the practical scholar and the theoretical practitioner by combining theoretical knowledge with practical knowledge, traditional methods —whether lectures or case studies— with non-traditional methods, and legal formalism and positivism with other alternative approaches, to encompass most of the problems legal practitioners and theoreticians face.

Consequently, following “something like” this path and inspired by Lon L. Fuller’s manual *The Problems of Jurisprudence*,<sup>47</sup> which includes six chapters: I. Justice; II. Positive Law; III. The Growth of Law; IV. Utilitarianism; V. Legal Analysis; and, VI. The Principles of Order, I have managed —or at least tried— to teach several courses on Jurisprudence, mainly Legal Argumentation, Legal Philosophy and Legal Theory, for more than fifteen years both to undergraduate and graduate students, including judges and legislators, as well as other legal officials, operators and practitioners, with a theoretical and practical problem-solution orientation and hope to consolidate this approach more firmly in the future.<sup>48</sup>

Departing from the tendency of using a single textbook as encouraged by the systematic approach and subscribing Hart’s anti-textbook pedagogical philosophy endorsed by the problematic approach, I require (mandatory)

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<sup>47</sup> LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* (The Foundation Press, 1949).

<sup>48</sup> Legal Argumentation can be taught with a more practical approach in comparison with Legal Philosophy and Legal Theory, but any professor might be tempted to teach these courses exactly the same way. My resistance to teaching Legal Argumentation with a solely theoretical approach has led me to firmly believe that we can also teach Legal Philosophy and Legal Theory with an integrated approach that is both theoretical and practical. See STEPHEN E. GOTTLIEB ET AL., *JURISPRUDENCE. CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS* (2nd ed., LexisNexis, 2006).

readings and (obligatory) reports so as to promote the appraisal of the relevant material and assessment of its contents that tends to privilege specific problems. In Hart's own terms:<sup>49</sup>

I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it is held by those who read, the educational value of the subject must remain very small.

I also promote open discussion of both factual and hypothetical cases, which I consider stimulating since they help make people think and re-think the issues when they are assigned to a certain role or stance—even one opposite their initial intuitions. In the past, I have extensively used Fuller's "The Case of the Speluncean Explorers"<sup>50</sup> and Recaséns Siches' "The Case of Ida White (or The Vanished Legacy)"<sup>51</sup> for the purpose of not only demonstrating how one's interpretation of the law to be applied to a case at hand is related to (limited and restricted by) one's perception of the law, but also teaching-learning substantive parts of law, such as criminal law and civil law, respectively.

I try to finish each session—or at least one, some or most of them—with a seminar in which I expect my students to do a little more criticism and research on a topic that is usually posed as a problem or set of problems. In a still theoretical mode, in my Legal Philosophy course, for example, I often emphasize the problem of the epistemological and scientific nature of jurisprudence; the problem of the different methodologies and theories of law; the problem of defining law; the problem of analysis and critique of distinct legal concepts; the problem of the relationship between law, coercion and morality; the problem of the scope and the limits of legislation and adjudication; and other specific problems, depending on the topic that might be of interest at that time, such as abortion, death penalty, electoral reform, euthanasia, freedom of expression or speech, pornography, same-sex marriages/unions, and so on.

Furthermore, regarding the materials and readings used to address these and other problems, I present cases (and appeals) that have or will be decided not only by the Mexican Supreme Court of Justice, but also by other na-

<sup>49</sup> HART, *supra* note 42, at vii.

<sup>50</sup> Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 HARVARD LAW REVIEW 1858 (1999) (Published originally in: 1949, and republished in: THE CASE OF THE SPELUNCEAN EXPLORERS. NINE NEW OPINIONS (Peter Suber ed., Routledge, 1998)).

<sup>51</sup> LUIS RECASÉNS SICHES, NUEVA FILOSOFÍA DE LA INTERPRETACIÓN DEL DERECHO 256-269 (Fondo de Cultura Económica, 1956); and TRATADO GENERAL DE FILOSOFÍA DEL DERECHO 647-654 (Porrúa, 1959). See Fred L. Gross, *The Vanished Legacy*, in FRED L. GROSS, WHAT IS THE VERDICT? 115 (Macmillan, 1944).

tions' constitutional and supreme courts, as well as by international and regional courts like those for human rights. With this, I expect students to learn the ropes of legal reasoning by immersing themselves in the cases and gain awareness of their own perception of the law.

Following Jhering's lead in *Scherz und Ernst in der Jurisprudenz* (1884),<sup>52</sup> I also put forward readings—and other materials—that are both humorous and serious. These include manuscripts of legal, moral and political philosophers and theorists, and transcripts of deliberations and discussions between legal officials, operators and practitioners, as well as passages from the classics, historians, literary authors and critics, and even films, to illustrate a specific problem or set of problems.

I have found humor is an effective way of dealing with complex issues and difficult situations. For instance, following both Niceto Alcalá Zamora y Torres and Niceto Alcalá Zamora y Castillo, father and son, who have analyzed the golden age of Spanish literature and its relationship to law to a great extent and having Miguel de Cervantes's *Don Quixote* at hand, I have drawn examples related chiefly to principles of justice and fairness, as well as procedural law.<sup>53</sup> Similarly, I have found very good exemplifications of several legal problems in William Shakespeare's plays, including his comedies, histories and tragedies, such as "Coriolanus" (1608), "King Henry V" (1597-1599), "King Lear" (1605-1606), "King Richard II" (1595-1597), "King Richard III" (1594-1597), "Macbeth" (1606) and "The Merchant of Venice" (1596-1597), among others.<sup>54</sup>

In terms of the duty/obligation to obey the law or (dis)obedience to the law/legislation, I have contrasted Sophocles' *Antigone* and Plato's *Apology of Socrates* and/or *Crito*.<sup>55</sup> On the relationship between language and law, I have

<sup>52</sup> See Rudolf von Jhering, *Jurisprudencia en broma y en serio* (trans. Román Riaza, Revista de Derecho Privado, 1933). There is an English version with selections of the essay *Im Juristischen Begriffshimmel [In the Heaven of Legal Concepts]*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678 (Morris R. Cohen and Felix S. Cohen eds., Prentice-Hall, 1951). See also Felix S. Cohen, *Trascendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809 (1935). H.L.A. HART, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence* in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 23, at 265.

<sup>53</sup> See Imer B. Flores, *Niceto Alcalá-Zamora y Castillo (1906-1985): Estampas del derecho en broma y en serio*, in LOS MAESTROS DEL EXILIO ESPAÑOL EN LA FACULTAD DE DERECHO 1 (Fernando Serrano Migallón ed., Porrúa and Facultad de Derecho, UNAM, 2003); and *Derecho y literatura: Finas estampas procesales en la obra de Niceto Alcalá-Zamora y Castillo*, in XII CONGRESO MUNDIAL DE DERECHO PROCESAL, VOL. I: OBTENCIÓN DE INFORMACIÓN Y DE ASUNCIÓN PROBATORIA, PROCESOS SUMARIOS Y FAMILIARES 3 (Marcel Storme and Cipriano Gómez Lara eds., Instituto de Investigaciones Jurídicas, UNAM, 2005). See also MIGUEL DE CERVANTES, *DON QUIXOTE DE LA MANCHA* (trans. Charles Jarvis, Oxford University Press, 1992) (Part I was originally published in 1605; and, Part II was originally published in 1615).

<sup>54</sup> See WILLIAM SHAKESPEARE, THE COMPLETE WORKS OF WILLIAM SHAKESPEARE (Avenel Books, 1975).

<sup>55</sup> See SOPHOCLES, *ANTIGONE* (Dover, 1993); and PLATO, *The Apology* and *The Crito*, in THE

used Alf Ross's "Tû-Tû";<sup>56</sup> and on the open-texture of language and to some extent of law—the (in)determinacy of law/legislation and its relationship to purpose—both Hart's (including Fuller's reply) "No vehicles in the park"<sup>57</sup> and Gustav Radbruch's "No dogs in the subway/train station" (via Recaséns Siches) examples.<sup>58</sup> On the role of principles (even moral ones) in legal reasoning, I have used those quoted by Ronald Dworkin in his criticism of Hart, such as *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors Inc.*, as well as his imaginary, but still reality-based and much more recent "The Case of Mrs. Sorensen".<sup>59</sup>

On the argumentation not of rules but of facts regarding evidence and proof, I have used King Solomon's split-the-baby-decision and Governor Sancho Panza's judgments, among others.

On the one hand, one day two women came to King Solomon claiming both to be the mother of a live baby:<sup>60</sup>

They argued back and forth in front of Solomon, until finally he said, "Both of you say this live baby is yours. Someone bring me a sword."

A sword was brought, and Solomon ordered, "Cut the baby in half! That way each of you can have part of him."

"Please don't kill my son," the baby's mother screamed. "Your Majesty, I love him very much, but give him to her. Just don't kill him."

The other woman shouted, "Go ahead and cut him in half. Then neither of us will have the baby."

Solomon said, "Don't kill the baby." Then he pointed to the first woman, "She is his real mother. Give the baby to her."

On the other hand, one day a woman, keeping fast hold of a herdsman and claiming that she had been forced to have sex with him, came to at the time governor Sancho Panza, who ordered him to pay twenty ducats in a leather purse to her and he did so trembling. She was scarcely gone out, when the governor said to him:<sup>61</sup>

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DIALOGUES OF PLATO 79-104 and 117-129 (Vol. 1, trans. R.E. Allen, Yale University Press, 1984).

<sup>56</sup> See Alf Ross, *Tû-Tû*, 70 HARVARD LAW REVIEW 812 (1957).

<sup>57</sup> See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593 (1958). Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630 (1958). See also HART, *supra* note 42, at 121-50 (124-54).

<sup>58</sup> See RECASÉNS SICHES, TRATADO GENERAL DE FILOSOFÍA DEL DERECHO, *supra* note 51, at 645-7

<sup>59</sup> See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 42, at 23; and *JUSTICE IN ROBES* 7-9 (Harvard University Press, 2006).

<sup>60</sup> 1 Kings 3: 16-28, in THE BIBLE. CONTEMPORARY ENGLISH VERSION (CEV) (American Bible Society, 1995).

<sup>61</sup> MIGUEL DE CERVANTES, DON QUIXOTE DE LA MANCHA, *supra* note 53, at 758-9 (Part II, Chapter 45). There is a slightly different version in: Miguel de Cervantes, *The Cases Judged by*

“Honest man, follow that woman, and take away the purse from her, whether she will or no, and come back hither with it”.

This was not said to the deaf or the stupid; for instantly he flew after her like lightning, and went about what he was bid. All present were in great suspense, expecting the issue of the suit; and presently after came in the man and the woman, clinging together closer than the first time, she with her petticoat tucked up, and the purse lapped up in it, and the man struggling to take it from her, but in vain, so tightly she defended it, crying out:

“Justice from God and the world! see, my lord governor the impudence, and want to fear of this varlet, who, in the midst of the town, and of the street, would take from me the purse your worship commanded to be given me.”

“And has he got it?” demanded the governor.

“Got it?” answered the woman, “I would sooner let him take away my life than my purse. A pretty baby I should be, indeed: other-guise cats must claw my beard, and not such pitiful, sneaking tools: pincers and hammers, crows and chisels, shall not get it out of my clutches, nor even the paws of a lion; my soul and body shall sooner part.”

“She is in the right”, quoth the man, “and I yield myself worsted and spent, and confess I have not strength to take it from her”.

And so he left her. Then said the governor to the woman:

“Give me that purse, virtuous virago.”

She presently delivered it, and the governor returned it to the man, and said to the forceful, but not forced damsel:

“Sister of mine, had you shown the same, or but half as much courage and resolution in defending your chastity, as you have done in defending your purse, the strength of Hercules could not have forced you. Begone, in God’s name, and in an ill hour, an be not found in all this island, nor in six leagues round about it, upon pain of two hundred stripes: begone instantly, I say, thou prating, shameless, cheating hussy!”

The woman was confounded, and went away, hanging down her head, and discontented; and the governor said to the man:

“Honest man, go home, in the name of God, with your money, and from henceforward, unless you have a mind to lose it, take care not to yoke with anybody.”

Similarly, there is a real but very strange case ruled by a lower judge in Navolato, Sinaloa (Mexico).<sup>62</sup> This was an apparently counterintuitive decision as it imposed different burdens on the owners of female and male donkeys that while mating happened to break goods at a market shop. The owners were each required to pay for not half of the damage but two thirds and one third, due to the different degree of (ir)responsibility.

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*Sancho Panza*, in THE WORLD OF LAW. I. THE LAW IN LITERATURE 9-15 (Ephraim London ed., Simon and Schuster, 1960).

<sup>62</sup> See JUSTICIA CON SENTIDO COMÚN. BELEM TORRES Y SUS ANÉCDOTAS 37-38 (Héctor Torres Beltrán, ed.).

On the relationship between the abduction and subtraction made by detectives and the legal reasoning used by judges and lawyers, following Manuel Atienza's example,<sup>63</sup> I have referred not only to Edgar Allan Poe's *The Purloined Letter* and his hero Auguste Dupin, but also to Sir Arthur Conan Doyle's *The Adventures of Sherlock Holmes* and Agatha Christie's *The Labours of Hercules (Poirot)*. Some terms ago, I added some cinema, that is, one of Blake Edwards' *The Pink Panther* films, namely *A Shot in the Dark*,<sup>64</sup> to demonstrate that if there is a lack of certainty about the historic truth, the legal truth is sometimes nothing but a shot in the dark—especially if Inspector Jacques Clousseau is the (anti)hero.

On the legal rationality of judges and legislators, as well as government officials, politicians and citizens, I have used Duncan Kennedy's *Freedom and Constraint in Adjudication*<sup>65</sup> and Richard Parker's *Here the People Rule*, which is drawn from Thomas Mann's novel "Mario and the Magician".<sup>66</sup> Similarly, I have used the movie *Advice and Consent*,<sup>67</sup> based on Allen Drury's novel of the same name, which introduced "The Washington Novel" genre and was inspired by McCarthyism's persecution of Alger Hiss, to portray not what political animals are like in Washington—or elsewhere—but what politics does to human animals.<sup>68</sup> I have also used other movies, such as *12 Angry Men*<sup>69</sup> and *Mr. Smith Goes to Washington*,<sup>70</sup> to prove analogous points.

Although I have so far tried to actually teach students *how* to solve not only theoretical problems but also practical ones, I suppose we need to go one step further in the future to give students more tools by teaching-learning: 1) more philosophy courses in general, such as logic, including the traditional logic (analytical logic or logic, for short) alongside non-traditional logic (dialectical logic, also known as topic and rhetoric), philology, and even esthetics (for the symbolism of law), as well as legal philosophy courses, in particular;<sup>71</sup> 2) more

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<sup>63</sup> See MANUEL ATIENZA, LAS RAZONES DEL DERECHO. TEORÍAS DE LA ARGUMENTACIÓN JURÍDICA 26-39 (Centro de Estudios Constitucionales, 1997). (There is another edition: Instituto de Investigaciones Jurídicas, UNAM, 2003).

<sup>64</sup> A SHOT IN THE DARK (MGM, 1964).

<sup>65</sup> See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 JOURNAL OF LEGAL EDUCATION 518 (1986).

<sup>66</sup> See RICHARD D. PARKER, "HERE, THE PEOPLE RULE". A CONSTITUTIONAL POPULIST MANIFESTO (Harvard University Press, 1994). Cf. Thomas Mann, *Mario and the Magician*, in THOMAS MANN, DEATH IN VENICE. AND SEVEN OTHER STORIES 135-181 (trans. H.T. Lowe-Porter, Vintage Books, 1930).

<sup>67</sup> ADVICE AND CONSENT (Otto Preminger Films, 1962).

<sup>68</sup> Cf. Roger Kaplan, *Allen Drury and the Washington Novel*, 97 POLICY REVIEW (1999): "Drury was able to depict not what political animals are like in Washington, but what politics does to the human animal."

<sup>69</sup> 12 ANGRY MEN (Orion-Nova Productions, 1957; MGM, 1997).

<sup>70</sup> MR. SMITH GOES TO WASHINGTON (Columbia Pictures, 1939).

<sup>71</sup> I have suggested elsewhere that despite a strong legal philosophy component, the UNAM's graduate and undergraduate programs for studying law requires reinforcement both

interdisciplinary studies not only on ethics and politics, but also on anthropology, sociology and psychology in order to apply them to subjects like administrative law, constitutional law, criminal law, and so on; and 3) as a result, more problems to be solved both theoretically and practically.

Finally, treating jurisprudence as a branch of philosophy and thus part of practical philosophy in conjunction with moral and political philosophy requires (re)integrating both legal philosophy and applied legal philosophy to the heart of jurisprudence. However, two points need further clarification. On the one hand, I argue for the need to harmonize the theoretical component of legal philosophy with the practical one (applied legal philosophy). It is usually the theoretical work that takes practice seriously and proves to be of great importance. On the other hand, by not taking a merely theoretical approach but a more practical one, I advise to subordinate neither general jurisprudence to particular jurisprudence nor the necessary philosophical and theoretical parts to a contingent of sociological and pragmatic ones. It is usually general jurisprudence that takes these particularities seriously, proving to be of great purport.<sup>72</sup> In Professor James Boyd White's words:<sup>73</sup>

It is often the most theoretical work that will prove of surprising practical value, often the immersion in practical particularities that will stimulate the most valuable thought of a general kind. Much of the life of the law in fact lies in the constant interaction it requires between the particular and the general, between the practical and the theoretical.

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in qualitative and quantitative terms, See Flores, *Prometeo (des)encadenado...*, *supra* note 1, at 100-103 (57-60).

<sup>72</sup> See Imer B. Flores, *La cama o el lecho de Procrustes: Hacia una jurisprudencia comparada e integrada*, in BOLETÍN MEXICANO DE DERECHO COMPARADO 273 (2008).

<sup>73</sup> White, *Law Teachers' Writing*, *supra* note 11, at 1970.  
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