

# The Evolution of Legal Education in the United States and the United Kingdom: How one system became more faculty-oriented while the other became more consumer-oriented.

A story of British military failure, Jacksonian Democracy, elitism, snobbism, Thatcherism, bigotry, political intrigue, the Great Depression, World War II, and, most of all, the Germans.

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## Introduction

Who benefits from legal education? In most British Commonwealth countries, law schools could reasonably claim that the beneficiaries of their services are their students and, to some extent, the legal profession. A law school education provides a basis for learning to be a lawyer, but the profession is responsible for preparing law graduates for practice. Even the vocational programs run by organizations of practicing lawyers do not shoulder the full responsibility for practice preparation because no law graduate is allowed to practice law without serving a period of time working under the supervision of an experienced lawyer. As a general matter, the public has reason to believe that new lawyers are adequately prepared to provide legal services.

In the United States, law schools bear the entire burden of preparing students for practice, therefore, they should be striving to serve the interests of their students, their students' future employers, their students' future clients, and the public in general. In short, everybody who may be affected by the work of lawyers. Unfortunately, the educational goals and methods of most law schools in the United States are not designed to prepare students for practice, other than with large firms or governmental agencies that have the resources to complete their education and training. Consequently, newly admitted lawyers in the United States are ill-prepared to represent common people who have common legal problems. Although law schools in the United States are not adequately meeting the needs of their students or most other constituencies, the members of law faculties are quite happy with the structure of legal education. It serves their personal needs quite well.

From common roots, the United States and the United Kingdom developed very different systems for preparing lawyers for practice. Around the time when we took different paths in the late 1800s,

James Bryce wrote, "I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education."<sup>1</sup> If Bryce's evaluation was ever valid, he would likely change his opinion today.

This paper explores how our approaches to preparing lawyers for practice became so different. It traces the evolution of the systems for preparing lawyers for practice in the United Kingdom and the United States, and it examines the relative merits of our current situations. Part I describes the key differences in our systems. Part II recounts major events in the histories of legal education in the United States and the United Kingdom. Part III describes new initiatives in the United Kingdom and the United States that may improve legal education.

## **Part I: The Processes for Becoming a Lawyer in the United Kingdom and the United States<sup>2</sup>**

This section highlights the most dramatic differences between the processes for educating and training lawyers in the U.K. and the U.S. The descriptions are purposefully oversimplified to avoid burying the reader in details.<sup>3</sup>

### **the undergraduate stage**

In the United Kingdom and the United States, a prospective lawyer begins the process of becoming a lawyer around the age of eighteen years by entering college and receiving a degree three or four

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1 James Bryce, *THE AMERICAN COMMONWEALTH*, Vol. II, 503 (2nd ed. McMillan & Co. 1891).

2 Rather than including repetitive, lengthy citations, I am listing here my primary sources for the information in this section. My source of information about the education of United States lawyers is my personal knowledge acquired during thirty years of law teaching and accreditation work. For English and Welsh solicitors: Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911 (2004); Nigel Savage, *The System in England and Wales*, 43 S. TEX. L. REV. 597 (2002); the website of the Law Society of England and Wales, *Qualifying as a Solicitor*, <http://lawsoc.org.uk/dcs/> (last visited June, 2004). For Scottish solicitors: Paul Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947 (2004); the website of the Law Society of Scotland, *How to Become a Scottish Solicitor*, [http://www.lawsoc.org.uk/edu\\_train/NEW\\_howtobecome.html](http://www.lawsoc.org.uk/edu_train/NEW_howtobecome.html) (last visited June, 2004). For Irish and Northern Irish solicitors: Paul A. O'Connor, *Legal Education in Ireland*, 80 MICH. B. J. 78 (2001); the website of the Institute of Professional Legal Education at Queens University Belfast, [www.qub.ac.uk/ipls/AboutUs.htm](http://www.qub.ac.uk/ipls/AboutUs.htm); the website of the Law Society of Ireland, [www.lawsociety.ie](http://www.lawsociety.ie). For English barristers: Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911 (2004); Nigel Savage, *The System in England and*

*Wales*, 43 S. TEX. L. REV. 597 (2002); the website of the General Council of the Bar, *Legal Education*, <http://www.legaleducation.org.uk/> (last visited June, 2004). For Scottish advocates: Paul Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947 (2004); the website of the Faculty of Advocates, *Entrance Requirements and Education and Training* <http://www.advocates.org.uk/web/t&ed.htm> (last visited June, 2004). For Irish and Northern Irish barristers: Paul A. O'Connor, *Legal Education in Ireland*, 80 MICH. B. J. 78 (2001); the website of the Institute of Professional Legal Education at Queens University Belfast, [www.qub.ac.uk/ipls/AboutUs.htm](http://www.qub.ac.uk/ipls/AboutUs.htm); the website of the Bar Council for Ireland, [www://barcouncil.ie](http://www.barcouncil.ie). Slightly less current sources: Alexander J. Black, *Separated by a Common Law: American and Scottish Legal Education*, 4 IND. INT'L & COMP. L. REV. 15 (1993); Sandra R. Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMP. L. J. 601 (1991); Paul A. O'Connor, *Legal Education in Ireland*, 80 MICH. B. J. 78 (2001); Clive Walker, *Legal Education in England and Wales*, 72 OR. L. REV. 943 (1993).

3 Despite my intentional oversimplification, I am concerned about clarity and accuracy. The materials I used were sometimes incomplete or vague about details. Therefore, I invite you to let me know where I have failed to present this information clearly and accurately. My email address is: [Roy@law.law.sc.edu](mailto:Roy@law.law.sc.edu).

years later.<sup>4</sup> In the United States, there is no prescribed college course of study. A prospective U.S. lawyer can spend his or her college years studying any subject that leads to a degree including, for example, physical education, forestry, or culinary arts.

There has never been a serious effort to mandate a prelaw course of study for undergraduate students in the United States. A mandatory prelaw program would be difficult to impose because each of the fifty states sets its own bar admission rules and different states would be likely to enact different prelaw requirements. Therefore, students who attended college in one state might have difficulty qualifying for admission to law school in another state.

The issue of prelaw requirements has come up from time to time in the United States. In 1909, a committee of the Association of American Law Schools (AALS) concluded that the AALS should not prescribe certain courses or extra curricular activities for prospective law students most importantly, according to the committee, because “any attempt to prescribe a single course of preparatory work would be invalidated by the fact that the quality of instruction necessarily varies among subject matter areas and among schools.”<sup>5</sup>

Alfred Reed argued in 1921 that law students should have a general liberal education before law school, even if it is not a necessary pre-requisite for them to succeed in law school. He rather eloquently explained his preference:

[T]he late war [World War I] has fortified in this country the English tradition that education which conduces in no way, that human calculation can foresee, to the efficient discharge of our particular duties, whether as citizens or as individuals, may nevertheless have a value of its own, by widening our sympathies, teaching us toleration of another's point of view, freeing us from the temptation to subordinate humanitarian impulses to the demands of ruthless logic.”<sup>6</sup>

Reed blamed the absence of a general education requirement first on lawyers who “have not realized how much American law has suffered from losing contact with education as a whole” and secondly on “advocates of general education, who have not stated the argument for it as effectively as they might.”<sup>7</sup>

In the late 1940's, the AALS issued a statement that the “education of students for a full life is far more important than mere education for later professional training and practice.”<sup>8</sup> In 1950 a report on prelaw education following an expansive survey “showed marked agreement against any required courses for prelegal education.”<sup>9</sup> A 1972 Carnegie Foundation report<sup>10</sup> endorsed the value of law students having a general education, but it stopped short of suggesting that a particular course of study be mandated. “A basic ability to read, write, and speak the English

4 In the United States, the norm is four years. In England, the LL.B. is awarded in three years. In Scotland students can obtain an Ordinary degree in three years and an Honours degree in four years.

5 Susan K. Boyd, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 60–61 (ABA 1993), quoting Samuel Thurman, “To What Extent Should Pre-law Education be Prescribed?,” a speech before a joint session of the ABA Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners (NCBE), August 25, 1959.

6 Alfred Z. Reed, *Training for the Public Profession of the Law: 1921*, in Herbert L. Packer and Thomas Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION* 163, 188–189 (Kate Wallach, ed. McGraw-Hill 1972).

7 *Id.* at 188.

8 Boyd, *supra* note 5, at 60–61.

9 *Id.* at 57–58.

10 Herbert L. Packer and Thomas Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION* 78 (McGraw-Hill 1972).

language is, we think, the principal preparation that law students require. Francis Bacon was right about the qualities that attend these activities. We additionally recommend some study of economics (which is the social science most directly applicable to law), history (for its liberating perspective), and a “hard” science (for its example of how scientific knowledge is pursued).<sup>11</sup>

In the United Kingdom, most college students who want to become lawyers major in law and receive an LL.B. degree which is recognized as a Qualifying Law Degree if the content of the program of study was approved by the relevant solicitors’ and barrister/advocates’ organizations.<sup>12</sup> The approved “core” subjects deal with basic substantive law topics.<sup>13</sup>

### **the post graduate stage**

After college, prospective lawyers in the United Kingdom must decide whether to pursue careers as general lawyers (“solicitors”) or as trial specialists (“barristers” in England and Ireland and “advocates” in Scotland). The great majority choose to become solicitors.

Law school graduates who want to become solicitors or barristers/advocates are required to attend vocational courses that last about a year.<sup>14</sup> Though some of these courses are offered at law schools, they are controlled by the professional organizations and much of the instruction comes from practicing lawyers. The vocational courses include substantive law and practice skills components, and they are increasingly linking instruction to the competencies that lawyers need at the point of admission.

At the time when lawyers in the United Kingdom are entering the vocational phase of their legal education, a college graduate who wants to become a lawyer in the United States is entering law school. U.S. law students earn law degrees (J.D.) after three years full-time or four years part-time. Almost all U.S. law graduates enter the legal profession whereas fewer than half of U.K. law school graduates become practicing lawyers.

Most U.S. law schools are accredited by the American Bar Association, but the accreditation

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11 *Id.*

12 A significant percentage of new lawyers major in disciplines other than law. In order to qualify for the vocational stage, they must take additional undergraduate courses. In England, students with degrees in other disciplines can take a year long course, the Post Graduate Diploma, leading to the Common Professional Entrance. In Scotland, students with other degrees can obtain an Ordinary degree in two years instead of three. It is also possible to become a lawyer without attending college at all, if one can pass the Common Professional Exam, but this has become a less frequent path.

13 In England, the “foundations of legal education” include seven substantive courses in addition to legal research: Criminal Law, Equity and Trusts, Law of the European Union, Obligations I (contract); Obligations II (tort), Property Law, and Public Law. In Ireland, there are eight core courses similar to those in England, except they include Company Law and replace Public Law with Constitutional Law. In Scotland, there are eight “qualifying subjects”: Public Law and the Legal System, Scots Private Law, Scots Criminal Law, Scots Commercial Law, Conveyancing, Evidence, Taxation, and European Community Law.

14 In England prospective solicitors take the year long Legal Practice Course; Scottish law graduates who want to become solicitors or advocates take a similar 27 week course, the Diploma in Legal Practice; prospective solicitors and barristers in Northern Ireland attend a year long course leading to the award of the Certificate in Professional Legal Studies. Prospective barristers in England must first be accepted into an Inn of Court, then take a year long Bar Vocational Course run by the General Council of the Bar. To become a barrister in Ireland, a student must take a year long course at the King’s Inns to receive the Degree of Barrister-at-Law. Things are somewhat different for prospective solicitors in Ireland who begin the process by taking the First Irish Examination, a written and oral examination in the Irish language administered by the Law Society of Ireland. They must also pass the Final Examination to earn a Diploma in Legal Studies. Students spend varying periods of time preparing for the Final Examination, for example, the Dublin School of Law offers a ten week course to prepare students for the examination and the Dublin Institute of Technology offers a one year course. Passage of the Final Examination qualifies a student to begin a two year period of apprenticeship.

standards do not mandate very much of the content of legal studies. However, the curriculums of most U.S. law schools are very similar and tend to focus on teaching substantive law. All students receive training in legal analysis and research but, although a wide range of professional skills courses are offered by most law schools, few schools provide broad-based skills instruction to all students. Very few U.S. law schools have outcomes-focused programs of instruction, whereas all stages of legal education in the U.K. are becoming increasingly outcomes-focused.

### the supervised practice stage

After finishing the vocational course, solicitors in the United Kingdom enter into learning contracts with approved solicitors for two year traineeships during which they have additional course work.<sup>15</sup> Even after completing articles, English solicitors must begin practice as assistant solicitors because they are not allowed to establish their own practices until three years after completing their formal training.

After finishing the Bar Vocational course, prospective barristers in England work under the supervision of experienced barristers for one year ("pupillage") during which they take three training courses. They shadow their pupil masters for six months then, with their master's permission and supervision, they can provide legal services and exercise a right of audience. They also "keep terms" which involves eating and socializing at their Inn's dining hall. In Ireland, students must serve one year as a pupil. In Northern Ireland, once they are admitted by the Honorable Society of the Inn of Court of Northern Ireland, prospective barristers receive two years of education and training administered by the Society to earn a Barrister-at-Law degree.

After the Diploma in Practice course, prospective Scottish advocates who are accepted as Intrants by the Faculty of Advocates begin working for lawyers. They also take a seven week Foundations Course in advocacy skills training and receive additional specialist education in the Supplementary Course. A prospective advocate must serve a period of "devilng," first for twenty-one months in a solicitor's office then nine more months with a member of the Bar.

In the United States, a law school graduate who passes a state's written bar examination becomes fully authorized to practice law in that state without supervision, including trial practice in all courts. No supervised practice is required, except in two states.<sup>16</sup> Admission to practice and

15 While "serving articles", solicitors in England take a 72 hour Professional Skills Course. In Ireland they attend Professional Course I and Professional Course II and must pass the Second Irish Examination. In Scotland, they take a two week Professional Competence Course. Scottish solicitors return briefly to the Law Society to complete the professional course after finishing articles.

16 Delaware and Vermont are the only U.S. jurisdictions that require apprenticeships today. The Supreme Court of Delaware requires newly admitted lawyers to serve "a clerkship in the State of Delaware aggregating substantially full-time service for at least 5 months duration." Delaware Sup. Ct. Rule 52 (a)(8). See also Memorandum dated June 2, 2004, from the Chair of the Board of Bar Examiners to all preceptors describing "Preceptor Duties and Clerkship Requirements" (copy on file with the author), and Rule 9, Duty to Obtain Preceptor, and Rule 10, Qualifications and Duties of

Preceptors, Rules of the Board of Bar Examiners of the Delaware Supreme Court at <http://courts.state.de.us/bbe> (accessed August 9, 2004). During the clerkship, the clerk must complete 30 specified activities, such as attending a variety of judicial and administrative proceedings and completing a title search under supervision. The supervising "preceptor" can be a judge or a lawyer with at least ten years of practice experience and must attend a preceptor training program. At the end of the clerkship, the preceptor must certify that the clerk has complied with the Rule, but the preceptor is not required to certify that the clerk is adequately prepared for law practice. The Supreme Court of Vermont requires law school graduates to pursue the study of law in the office of a judge or practicing lawyer with at least three years experience for a period of six months, sometime after the first year of law school and within two years of passing the bar examination. Vermont R. Admis. § 6(i).

discipline is governed by the highest court of each state. There is virtually no oversight of legal education or law practice by the federal government.

Thus, it takes roughly seven years to become licensed to practice law in the United States and the United Kingdom, but in the United States only three of those years are spent studying law and learning how to be a lawyer.

## **Part II: Histories of Legal Education in the United Kingdom and the United States**

### **Section 1: Common Roots**

Legal education in the United States is directly linked to the long tradition of legal education in the British Isles. When the American colonies were established, English law, professional customs, and lawyers were part of the package. For example, when the Puritans arrived in Massachusetts on June 12, 1630, “[a]mong the 1,005 settlers aboard the flotilla of 17 tiny ships were ten legally trained Puritans, products of the Inns of Court and English legal practice. John Winthrop, himself, the first Governor, was a member of Gray’s Inn and Inner Temple.”<sup>17</sup>

Professional lawyers were recognized in England as early as 1187, and by 1292 the royal courts in England were training lawyers for trial practice. These lawyers became known as “barristers,” because they could plead at the “bar” of the court, although the word “barrister” did not appear until 1455.<sup>18</sup> Irishmen went to London to study law at least as far back as the 13th century.<sup>19</sup> By 1488 in Scotland there was a well-established class of professional lawyers referred to as “advocates,” “procurators,” or “forespeakers.”<sup>20</sup>

In early modern England, there was a wide variety of titles associated with jobs involving legal and quasi-legal work, and legal practice was by no means restricted to those who held some recognised professional qualification.<sup>21</sup> The lawyers who would eventually become known as “barristers” and “solicitors”<sup>22</sup> were separated as much by social origins and status as by job function until the mid-1600’s. The “barrister” class reflected a social aristocracy, while solicitors became a symbol of middle class achievement. “Younger sons disinherited by primogeniture needed a way to make a living, but trade was beneath them. The ‘honorable’ professions were three: the Church, the Army, and the Bar, to which was later added colonial governance.”<sup>23</sup> “[C]ivilian advocates and

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17 Daniel R. Coquillette, *THE ANGLO-AMERICAN LEGAL HERITAGE* 368 (Carolina Academic Press 1999). In fact, another lawyer was already in Massachusetts when the Puritans arrived, the notorious Thomas Morton who claimed to be a “gentleman of Cliffords Inn,” an Inn of Chancery. “[W]hat he did in the New World was to trade guns and liquor to the Indians [sic] for furs and sex. He even had erected a Maypole on Merry Mount, and had huge, drunken parties. . . . The Puritans sent Morton back to England.” *Id.*

18 *Id.* at 266.

19 Colum Kenny, *KING’S INNS AND THE KINGDOM OF IRELAND* 1 (Irish Academic Press 1992).

20 David M. Walker, *A LEGAL HISTORY OF SCOTLAND. VOLUME III: THE SIXTEENTH CENTURY* 381 (T. & T. Clark 1995).

21 Wilfred Prest, ed., *THE PROFESSIONS IN EARLY MODERN ENGLAND* 64–67 (Croom Helm 1987).

22 It was not until about 1800 that legal practitioners in England began abandoning the title “attorney” and exclusively using “solicitor”. David Sugarman, *Bourgeois Collectivism, Professional Power and the Boundaries of the State. The Private and Public Life of the Law Society, 1825 to 1914*, 3 *INT’L. J. LEG. PROF.* 81, 91–92 (March 1996).

23 Walker, *supra* note 20, at 381.

common-law barristers claimed and were accorded the courtesy title of esquire, whereas the attorney, proctor, or solicitor was at best a mere 'gent.'"<sup>24</sup> These class distinctions persist to some degree today.

In the mid-1600s, the vocational distinctions between barristers and solicitors became more clearly defined. Over a period of time, the barristers relinquished general counseling and conveyancing to concentrate on trial advocacy, leaving the management of clients' day to day affairs to attorneys.<sup>25</sup> The solicitors came to dominate the provision of legal services at the grass roots by setting up practices in the provinces, especially the cities and market towns, whereas the barristers tended to cluster in and around London where the courts were located.<sup>26</sup> A significant factor in the barristers' decision to concentrate on trial advocacy was the huge inflation of fees for trial work from the 1650s onward at a time when the general consumer price level remained virtually stagnant.<sup>27</sup> In short, they did it for money. From that time forward, no client could employ a barrister directly, but only through a solicitor. This 'bifurcated' legal profession, split between barristers and solicitors, still exists in the United Kingdom and other commonwealth countries.<sup>28</sup>

The education and training of barristers and solicitors was another source of differentiation. The typical solicitor did not have a college degree or any other formal legal training because there was a consensus for centuries that solicitors' mechanical vocational skills could be gained best from practical experience as apprentices rather than book learning.<sup>29</sup> On the other hand, the barristers cultivated their professional image as elevated, intellectual, and even non-mercenary.<sup>30</sup>

The barristers established an early tradition of formal training at the Inns of Court which were located between the law courts at Westminster and the commercial districts of the city proper.<sup>31</sup> The Inns of Court were centers of legal education that combined the characteristics of a powerful trade guild with that of a university. All common law barristers and judges were graduates and members of an Inn.<sup>32</sup>

While the early history of the Inns is somewhat murky, it is clear that by 1400, four "inns" were establishing a dominant position.

Two were named from nobles who either owned or sponsored the original houses: "Gray's Inn", a house of the Lords Grey, and "Lincoln's Inn," which either was named for Henry de Lacy, Earl of Lincoln, or Thomas de Lincoln, a prominent serjeant at law.<sup>33</sup> Two others were founded in the defunct London premises of the powerful Knights Templar, and became known as "Middle Temple" and "Inner Temple." By 1450, these four "inns" were professional schools, with the exclusive right to train common law barristers and serjeants, and the Inns of Chancery – of which there were nine or more – became "feeders," or schools for young students who wished to enter one of the four Inns of Court. Finally, for the very elite who became serjeants, there were two "Serjeant's Inns," although these were more like small clubs than educational institutions. Over time, the Inns of Chancery diminished and disappeared, and the Serjeant's Inns died with that

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24 *Prest, supra note 21, at 67.*

25 *Id. at 81.*

26 *Id. at 81–82.*

27 *Id. at 82.*

28 *Coquillette, supra note 17, at 267.*

29 *Prest, supra note 21, at 67.*

30 *Id. at 32.*

31 *Coquillette, supra note 17, at 268.*

32 *Id.*

33 *Author's note: "Serjeants at law" were an older class above the barristers. They not only represented private clients, but took on royal commissions as assize judges when there was a shortage of judicial labor. Until the sixteenth century, serjeants at law were the exclusive source of new royal judges. Id. at 267.*



order at the end of the 19th century. The four Inns of Court, however, not only remain, but are among the wealthiest and most powerful institutions in London. Although they have now coordinated their educational and regulatory functions into the Consolidated Inns of Court, they are still four separate entities, with magnificent libraries, gardens, dining halls, and common rooms. Three . . . also house the “chambers,” or offices, of most practicing London barristers.<sup>34</sup>

In the sixteenth century, a prospective barrister of fifteen years of age or less would either go directly into an Inn of Chancery or spend a few years at Oxford or Cambridge before enrolling. Two or three years later, the student would enter one of the four Inns of Court. After four years, “the student would be admitted as an ‘utter barrister,’ and by six or seven years, at about age twenty-two or twenty-three, could be ‘called to the bar.’”<sup>35</sup>

The faculty were practicing barristers who were graduates of the Inns. Providing instruction was seen as a duty of barristers who wished to become judges. Students at the Inns were required to participate in “moots”, public speaking exercises, and “bolts,” private speaking exercises. “These combined learning by rote and ‘learning by doing,’ under close personal supervision. The moots and bolts encouraged ‘thinking on your feet’ and the kind of quick ingenuity that was the essence of the pleader’s skill.”<sup>36</sup>

From their beginnings through today, the Inns have been compulsory societies where students, faculty, and other members are required to dine and socialize together.<sup>37</sup> Through such interactions, the Inns of Court aim to build a sense of professional identity and value.

In the early history of the Inns, barristers and solicitors shared the socialization functions of the Inns of Court, though only barristers enjoyed the opportunity of a formal education at the Inns.<sup>38</sup> In the mid-sixteenth century, however, the judges and benchers who controlled the Inns of Court began expelling practicing attorneys and solicitors from the Inns and prohibiting barristers from practicing as attorneys or solicitors.<sup>39</sup> From that time forward, the Inns of Court in England have been the exclusive domain of barristers.<sup>40</sup>

In Ireland, the King’s Inns provided similar socialization functions, but they did not provide any legal training until 1870. Beginning in 1542, young Irishmen who wanted to become lawyers were required to spend a period in residence at one of the Inns of Court in London. This was mandated by a provision in the Statute of Jeofailles enacted by the Irish parliament sitting in Limerick. It is not entirely clear what prompted the mandate, since studying in London was already the common practice at the time. Most likely, since the Statute of Jeofailles was enacted six months after a group of lawyers and judges announced that they had formed a King’s Inn in Dublin, the mandate was intended as a check on the new King’s Inn and to reform the education of lawyers in Ireland.<sup>41</sup> The Statute of Jeofailles was not repealed until 1885.<sup>42</sup>

Although they did not serve a formal educational function, the King’s Inns provided “a meeting-place and a common dining-hall for those whose lives revolved around the work of the courts. Sharing the enjoyment of food and wine and engaging in professional gossip have been the most

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34 Coquillette, *supra* note 17, at 269.

35 *Id.* at 270.

36 *Id.*

37 *Id.* at 269–270.

38 Sugarman, *supra* note 22, at 85.

39 *Id.*

40 The exclusion of solicitors from the Inns of Court contributed to the organization of the Society of Gentlemen Practisers around 1739 and the creation of the Law Society in 1825. *Id.* at 88.

41 Kenny, *supra* note 19, at 40–48.

42 *Id.* at 1, 2, 263.

enduring features of life at the King's Inns."<sup>43</sup> In contrast to the English Inns of Court, not only barristers, but also solicitors and judges participated in the King's Inns. When the society of Kings' Inns built its library at the Inn on Constitution Hill in Dublin and began providing formal education around 1870, the solicitors left to establish their own association.<sup>44</sup>

There were no inns of court in Scotland, nor any other formal educational system. "Young lawyers learned by attaching themselves to men in practice, watching how they did it and imitating, but not learning in an organized way."<sup>45</sup> Although the University of Edinburgh appointed a chair of civil law in 1732,<sup>46</sup> "[a]ll the teaching and study of law was however part-time and generally regarded as ancillary to legal practice and apprenticeship. There were moreover no degrees in law, apart from occasional honorary LL.Ds, and no curricula leading to graduation."<sup>47</sup>

The Inns of Court began declining gradually sometime in the middle of the sixteenth century, and they stopped functioning as teaching institutions around 1650.<sup>48</sup> One important factor was the introduction of printing. Students and teachers came to believe that students could now learn everything they needed to learn by reading; lectures were no longer needed.<sup>49</sup> Another disruptive factor was the English Civil War (1642–1648). Efforts to reestablish legal education in the Inns were hindered by the reluctance of the government to challenge the authority of the Bar, although the governing bodies of the Inns at the time found their educational and disciplinary duties distasteful.<sup>50</sup> Thus, the Inns "ceased altogether to teach young lawyers, though they retained monopolistic control over admission to the Bar."<sup>51</sup> The Inns were not to resume educating barristers until the middle of the nineteenth century.

Blackstone, among others, became convinced that the universities should take over the lapsed educational function of the Inns of Court.<sup>52</sup> Roman Law was taught at the Universities of Oxford and Cambridge as early as 1149, but the common law of the royal courts was not a subject for university study due to the existence of the Inns of Court.<sup>53</sup> Blackstone, the first holder of the Vinerian Chair at Oxford (1758–1766), advocated the merits of a university education for

43 *Id.* at 3–4.

44 *Id.* at 263. Thus, it appears that the King's Inns began offering formal education before the repeal of the Statute of Jeofailles.

45 David M. Walker, *A LEGAL HISTORY OF SCOTLAND. VOLUME V: THE EIGHTEENTH CENTURY* 374 (T. & T. Clark 1999). This is not to say, however, that education was not valued by lawyers in Scotland. In 1610, the advocates were charged by the Lords to determine the best means of remedying perceived shortcomings in professional behavior, because of which "the name and estimation of advocate had become vile and had lost its former beauty." The advocates' remedy was for the Lords to refuse to admit anyone to the calling of advocacy "except those who after they had passed their course of philosophy had been brought up in some university as students to the laws by the space of two years or thereby and who before their admission should give proof of their qualification." Alternatively, a person could apply to be an advocate who "had been brought up with some old learned lawyers or advocates by the

space of seven years." *Id.* at 381–382.

46 David M. Walker, *A LEGAL HISTORY OF SCOTLAND. VOLUME IV: THE SEVENTEENTH CENTURY* 377 (T. & T. Clark 1995).

47 David M. Walker, *A LEGAL HISTORY OF SCOTLAND. VOLUME VI: THE NINETEENTH CENTURY* 266 (Butterworth's 2001).

48 W. Holdsworth, *A HISTORY OF ENGLISH LAW VOL. VI* 490 (Methuen & Co. Ltd. 1965).

49 *Id.* at 482–486.

50 *Id.* at 486–490.

51 Calvin Woodward, *The Limits of Legal Realism: An Historical Perspective*, in Herbert L. Packer and Thomas Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION* 329, 349 (McGraw-Hill 1972).

52 Sugarman, *supra* note 22, at 86.

53 Coquillette, *supra* note 16, at 268.

barristers.<sup>54</sup> He tried to establish the study of English Law as a university subject, but, although his lectures were well-received, he failed to persuade the University of Oxford to establish a law school devoted to the study of English Law.<sup>55</sup> Similar efforts to establish legal education as part of the university curriculum at Cambridge in 1800 and University College, London in 1826 were also short-lived.<sup>56</sup>

Wealthy Americans sent their children to study at the Inns of Court in London until the American Revolutionary War began in 1775.<sup>57</sup> Unfortunately, the years during which Americans from the colonies went to London to study law coincided with the period when the formal educational function of the Inns was in decline. One can assume that American students benefitted from the socialization and networking functions of the Inns and learned about law and law practice from experienced lawyers, even if they did not receive formal legal education at the Inns. By the time the Inns returned to strength, students from the United States were no longer interested in studying in London. The most common route to becoming a lawyer in America was to serve a period of apprenticeship with an experienced lawyer followed by a formal examination, the same path followed by solicitors in the United Kingdom.<sup>58</sup>

American lawyers were influenced by the writings of Blackstone. The first American edition of his *Commentaries* appeared in 1771. Along with Coke's *Second Institutes* these were the repository of the law in colonial America.<sup>59</sup> "In receiving Blackstone, the American legal profession received a vision of legal education that was at once integrated and broadly liberal. Either prior to or concurrent with the scientific study of law, the prospective barrister was to acquire a general university education embracing a knowledge of the classics, logic, mathematics, empirical philosophy ('the law of nature, the best and most authentic foundation of human laws'), and Roman law."<sup>60</sup>

Training for the profession in the United States was initially true to this grand vision. Though no university degree was required for admission to the bar, many of those who came to study law were broadly educated, and their law office training was not always limited to technical legal matters.

The typical apprentice-trained or self-read lawyer of the earlier nineteenth century had a narrowly technical training out of a few ill-sorted books. But there had been a time when the best legal instruction – under a Wythe or a Tucker or some learned leader of the bar – recognized that breadth of study was no matter of ornament, but an essential for a professional grasp of the law. The course assigned John Quincy Adams for his study in the office of Theophilus Parsons in 1788 embraced Robertson's *History of Charles V*, Vattel's *Law of Nature and Nations*, Gibbon's *Rome*, and Hume's *England*; then, closer to the immediacies of the practice, Sullivan's *Lectures*, Wright's *Tenures*, *Coke on Litigation*, Wood's *Institutes*, Gilbert's *Evidence*, Foster's and Hawkin's *Pleas of the Crown*, Bacon's *Pleas and Pleadings*, Buller's *Nisi Prius*, and Barrington's *Observations on the Statutes*; finally returning to the broad canvas, the *Institutes of Justinian*. The titles ring with some quaintness in our ears, but the underlying principle was one with revived efforts of one hundred and fifty years later, to inform the study of law with closer understanding of main currents in the enviroing society.<sup>61</sup>

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54 William Twining, *BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 1* (Stevens and Sons/Sweet and Maxwell 1994).

55 *Id.*

56 *Id.* at 24–25.

57 Martha Rice Martini, *MARX NOT MADISON: THE CRISIS OF AMERICAN LEGAL EDUCATION 41* (University Press of America

1997).

58 Robert Stevens, *LEGAL EDUCATION IN AMERICA: FROM THE 1850'S TO THE 1980'S 1* (University of North Carolina Press 1983).

59 Martini, *supra* note 57, at 44.

60 James W Hurst, *THE GROWTH OF AMERICAN LAW 266* (Little, Brown 1950).

61 *Id.*

The Revolutionary War of 1775–1783 severed access by Americans to the Inns of Court. This led to the immediate disappearance in southern states of the separation of the legal profession along the lines of the solicitor-barrister model, though the bifurcated system persisted for some period in the north. Thus, the failure of the British military to hold onto the American colonies was the first reason why our systems of legal education diverged. This is also our first opportunity to blame the Germans for the system of legal education in the United States, for the British forces in the colonies relied heavily on Hessian mercenaries to fight the rebels.

The quality of the legal profession in the United States began declining after the Revolutionary War with the disappearance of the “priest-like replicas of the English legal profession.”<sup>62</sup> The problems became even more pronounced under the influence of Jacksonian Democracy following the ascendancy of President Andrew Jackson and the Democratic party after the election of 1828. Jacksonian Democracy alludes to an entire range of democratic reforms that occurred during the late 1820s through the mid 1850s.<sup>63</sup> Jacksonian Democracy’s origins actually “stretch back to the democratic stirrings of the American Revolution, the Antifederalists of the 1780s and 1790s, and the Jeffersonian Democratic Republicans;” however, more directly it arose out of the “social and economic changes taking place in the early 19th century.”<sup>64</sup> In broadest terms the movement attacked various citadels of privilege, “aristocracy”, and monopoly, and sought to broaden opportunities for white males who lacked property.<sup>65</sup> For example, prior to 1815 in the United States, in order to vote one had to be a white, male property owner, tax payer, and church member in good standing. By 1828, a growing number of states had reduced the requirements to simply being a white male.<sup>66</sup>

Essentially, Jacksonian Democracy promoted a social vision in which any white male would have an opportunity to “secure his economic independence, would be free to live as he saw fit, under a system of laws and representative government utterly cleansed of privilege.”<sup>67</sup> The Jacksonians’ basic policy thrust was to rid government of class biases and dismantle the “top-down, credit driven engines of the market revolution.”<sup>68</sup> In the Northeast and the old Northwest, transportation improvements and immigration led to the collapse of the older yeoman and artisan economy and its subsequent replacement with cash crop agriculture and manufacturing. In the South, the growth of cotton revived a lagging slave economy, and in the West, the seizing of land from Native Americans and Hispanics opened up new areas of white settlement, cultivation... and speculation.<sup>69</sup>

The targets of the Jacksonian movement included the expectation that a person needed some education or supervised experience before practicing a profession, including the legal profession. As one lawyer explained the logic of the times:

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62 Stevens, *supra* note 58, at 10.

63 Sean Wilentz, *Jacksonian Democracy*, in Eric Foner, ed., *THE READER’S COMPANION TO AMERICAN HISTORY 582–586* (Houghton Mifflin 1991), available at [http://college.hmco.com/history/readerscomp/rcah/html/ah\\_jacksoniande.htm](http://college.hmco.com/history/readerscomp/rcah/html/ah_jacksoniande.htm) (accessed 8/2/2004).

64 *Id.* at 582.

65 Encyclopedia – Jackson, Andrew (*Jacksonian Democracy*), *THE COLUMBIA ELECTRONIC ENCYCLOPEDIA* (6th ed., 2004), available at <http://www.factmonster.com/ce6/people/A0858962.html>.

66 *The Rise of Jacksonian Democracy*, (accessed 8/2/2004), available at <http://www.historybytes.net/webnotes/chp15html>; and “MSN-Encarta-United States (History),” (accessed 8/2/2004), available at [http://encarta.msn.com/encyclopedia\\_1741500823\\_8/United\\_States\\_\(History\).html](http://encarta.msn.com/encyclopedia_1741500823_8/United_States_(History).html).

67 Wilentz, *supra* note 63, at 584.

68 *Id.* at 583.

69 *Id.* at 582.

I am tired of the clamor against lawyers, and of being told that we have exclusive privileges, without being able to reply – you are a lawyer, too, sir. The lawyer and advocate under the Roman commonwealth needed no special license to practice his profession. Open the door wide to free competition; and integrity, learning and ability, will be a sufficient certificate, and without such certificate, a man will have but a poor practice.”<sup>70</sup>

In other words, the governing philosophy of the times was to give a man a chance to do anything he wanted then let market forces determine whether he succeeded or failed. As a consequence, for a period of time in the United States anyone could practice law without studying the law, taking a bar examination, or serving an apprenticeship.

Before continuing, it should be noted that, although there was no institutionalized system of legal education in the United Kingdom or the United States for roughly two hundred years, the period “produced some of the most civilized and learned lawyers ever to grace the Bar in England and [the United States]. Indeed, rather paradoxically, the law’s claim to be a learned profession dates in many ways from the period 1650 to 1850.”<sup>71</sup>

Efforts to improve the quality of the legal professions in the United States and the United Kingdom eventually took shape. The Law Society of England and Wales was created in 1825 to distinguish its members from unprofessional elements of the profession and to encourage its members to practice at a high level of competence and character. The Law Society was created to be a public institution whose members “are to be composed only of the most respectful and leading in the Profession (it being intended carefully to exclude all disreputable characters) will serve to impress the Public with a higher opinion than it at present entertains of the weight and respectability of the profession at large.”<sup>72</sup> The Law Society’s Hall at 113 Chancery Lane was formally opened in 1832.

[T]he hall symbolized the hopes and aspirations of the profession’s elite. It was a significant act of conspicuous consumption, self-definition and social exclusion, testifying to the construction of a new collective identity, designed to attract people of “character” who saw themselves as serious, cultured, learned, responsible and, above all, respectable.<sup>73</sup>

A Royal Commission on the Universities of Scotland was appointed in 1826 and issued its report in 1831. It adopted the principle that “in law, medicine, and divinity professional training should follow a full liberal education, i.e. an Arts degree; law should be studied as a ‘liberal and enlightened science’ rather than be merely a course of practical training.”<sup>74</sup> It would be some years later, however, before this principle was fully realized in the training of lawyers in Scotland.

In Ireland, Tristram Kennedy’s unsuccessful attempt to open a law school in Dublin in 1839 stimulated the academic study of English law at universities in Britain and Ireland and hastened the introduction of qualifying examinations for both branches of the profession.<sup>75</sup>

An Act passed in England in 1843 reenacted the provisions for service with a practising attorney

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70 Stevens, *supra* note 58, at 9, n. 70, quoting John B. Niles as reported in James J. Robinson. *Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850–1851*, 1 *INDIANA L. J.* 209, 211–212 (1926).

71 Woodward, *supra* note 51, at 350–351.

72 Sugarman, *supra* note 22, at 91 quoting Birks,

*GENTLEMEN OF THE LAW* 156.

73 *Id.*

74 Walker (Vol. VI), *supra* note 47, at 266.

75 Colum Kenny, *TRISTRAM KENNEDY AND THE REVIVAL OF IRISH LEGAL TRAINING 1835–1885* 10–11 (Irish Academic Press, 1996).

or solicitor under articles: “five years – reduced to three years for persons who had taken a degree at Oxford, Cambridge, London, Durham, or Dublin, one of which years could be spent with the attorney’s or solicitor’s London agent.”<sup>76</sup> All admitted attorneys and solicitors were required to register. “The office of registration was entrusted to the Incorporated Law Society, which was thus enabled to exercise an effectual supervision over every practitioner during the whole of his professional career.”<sup>77</sup>

The most significant development, however, was the appointment in 1846 of a Select Committee of the House of Commons to “enquire into the state of legal education in England and Ireland.”<sup>78</sup> The committee issued its report the same year, concluding that “[n]o legal education worthy of the name, is at this moment to be had in either England or Ireland.”<sup>79</sup> It recommended that “the universities should undertake the teaching of law – Roman law and English law and that they should give degrees in the law. The legal training by the universities should be comparative and philosophical in nature.”<sup>80</sup>

The Select Committee also recommended that the ultimate preparation of lawyers for practice should be the responsibility of the profession, not the universities. It called on the Inns of Court “to appoint professors to teach the principal branches of law, and it would be well if they made provision also for the teaching of legal history and jurisprudence. These lectures should be combined with a system of class teaching and with examinations; and no one should be called to the bar unless he had attended lectures and passed the examination. Moreover, there should be a preliminary examination to test the general education of an intending student. The Inns of Court thus acting in combination would form a law college controlled and guided by the benchers and judges.”<sup>81</sup> The Select Committee also called on the Incorporated Law Society to institute an appropriate educational scheme for the professional qualification of solicitors.<sup>82</sup>

“The governing principle which underlay the recommendations of the committee was a tripartite division of legal education between the Inns of Court, the Incorporated Law Society, and the Universities. The adoption of this principle, and the acceptance of some of the other recommendations of the committee have . . . affected the whole future history of the legal education in this country.”<sup>83</sup>

The Inns of Court responded immediately and soon decided to combine forces to establish a system of lectures and examinations. In 1852, the Inns of Court established the Council of Legal Education.<sup>84</sup>

Before long, the universities accepted their assigned role of giving a more philosophical and theoretical training in legal principles than the Inns of Court or the Law Society, and they introduced subjects into their curriculums such as Roman law, jurisprudence, international law, legal history, and constitutional law.<sup>85</sup>

76 Sir William Holdsworth, *A HISTORY OF ENGLISH LAW VOLUME XV* 224 (Methuen & Co. Ltd. 1965).

77 *Id.*, citing H. Gibson, *Centenary Address to the Law Society*, 19.

78 *Id.* at 234.

79 Twining, *supra* note 54, at 25, quoting Report from the [House of Commons] Select Committee on Legal

Education, no. 686 (1846) B.P.P. Vol. X.

80 Holdsworth (Vol. XV), *supra* note 76, at 235.

81 *Id.* at 236.

82 *Id.* at 236–237.

83 *Id.* at 237.

84 *Id.*

85 *Id.* at 241.

In 1856 in Scotland, lawyers were required to “have a general education, evidenced by a university degree or by passing examinations in certain subjects which were the core of a Scottish MA, Latin, Greek, ethical and metaphysical philosophy and logic or mathematics. It was left open whether two modern languages might be substituted for Greek. This should be followed by a short university course of legal study, one session on Civil Law, one on Scots Law, and during either year or in a third year, another session on Civil or Scots law or one on conveyancing, and one on medical jurisprudence.”<sup>86</sup>

From that time on, university education was the norm in Scotland.<sup>87</sup> In 1862, the University of Edinburgh was authorised to offer the degree of LL.B., “open only to graduates in Arts and required attendance over three sessions at six courses, three (Civil Law, Scots Law and Conveyancing) of at least eighty lectures and three (Public Law, Constitutional Law and History, and Medical Jurisprudence) each of at least forty lectures. The degree was to be considered ‘a mark of academical and not of professional distinction . . . .’”<sup>88</sup>

In 1860 legislation provided that in England and Ireland “a person who had served as a clerk to an attorney or solicitor for ten years could be admitted after three years service under articles.”<sup>89</sup> Other modes of entering the legal profession, other than service under articles, were gradually abolished around the same time.<sup>90</sup>

“In 1871 another joint committee of the four Inns resolved that there should be a compulsory examination for call to the bar. It also rejected a proposal for the joint education of articled clerks to solicitors and students for the bar. . . . This reformed Council instituted the system of legal education for the bar which, in its main outlines, still exists.”

The Law of Agents Act of 1873 in Scotland required uniform sets of three examinations for entry into law practice. These were a preliminary examination in basic knowledge, an intermediate examination of general educational achievement, and a final examination in professional competence. “A graduate of a university, or one who had attended for three full years, was excused from the first two sets. Therefore, those who presented themselves for admission as apprentices on the basis of having passed the examinations were those who had not attended a university.”<sup>91</sup>

Thus, by the mid-1870’s, significant efforts had been made to improve the quality of legal education in the United Kingdom. Legal education was “more marked in academic training than apprenticeship, particularly by developments in the university curriculum, by a more academic faculty, and by national standards of professional competence tested by examination.”<sup>92</sup> The general process for becoming a lawyer that exists today was in place, although the details are still being worked out.

For most aspiring lawyers, however, full-time formal legal education would not become the primary route into the profession for many years. “As late as 1913–14, when there were 236 law students at Glasgow, only thirteen graduated LLB and seven BL. The vast majority of students attended only Scots Law and Conveyancing and sat the profession’s examinations.”<sup>93</sup> Prospective lawyers considered law courses as ancillary to apprenticeship, legal studies were organized part-time, and law courses were too frequently of indifferent quality.<sup>94</sup> “The Law Faculties of the

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86 *Walker (Vol. VI), supra note 47, at 280.*

87 *Id.* at 281.

88 *Id.* at 266, citing *General Report of Commissioners under the 1858 Act*, xxxvi (1863).

89 *Holdsworth (Vol. XV), supra note 76, at 225.*

90 *Id.*

91 *LAW, LITIGANTS, AND THE LEGAL PROFESSION* 160 (E.W. Ives and A.H. Manchester, eds., Swift Printers 1983).

92 *Id.* at 161.

93 *Walker (Vol. VI), supra note 47, at 268–269.*

94 *Id.*

universities were simply the profession's training schools."<sup>95</sup>

It does not appear that very much changed in legal education in the United Kingdom until rapid expansion of enrollment in law schools following World War II refocused attention on the preparation of lawyers for practice. The story was just the opposite in the United States.

Unlike countries in the United Kingdom, there was no centralized, national body in the United States with the authority to reform or regulate legal education in the 1800s nor, for that matter, is there today. Qualification for admission to the bar was, and remains, controlled by the highest judicial authority in each of the fifty states. Thus, it is difficult to accomplish significant changes to legal education in the United States, and the process is confounded by local political and economic considerations.

After the American Civil War ended in 1865, industry and finance grew rapidly and the structure of corporate business and investment took on new complexities. These events "created pressures for more thorough and rigorous intellectual training in the law."<sup>96</sup> The emergence of the corporate lawyer led to the birth of the law firm,<sup>97</sup> and "[b]usiness leaders needed skilled and effective lawyers to maximize their opportunities and manage their interests."<sup>98</sup>

As mentioned earlier, although a few law schools existed, most jurisdictions did not require any formal education or training to become a lawyer. The chief method of legal education well into the second half of the nineteenth century was the apprenticeship, but the typical apprenticeship in the 1800s was not very effective at producing highly skilled lawyers. "At its best, apprenticeship at that time was all that clinical legal education is claimed to be today: close supervision of a student by his principal in real-life encounters. Yet few apprenticeships worked out that way. Indeed, even when principals were diligent, the chances of any one office offering a good all-around training were small."<sup>99</sup>

The student read law in an older lawyer's office; he did much of the hand copying of legal instruments that had to be done before the day of the typewriter; and he did many small services in and about the office, including service of process. Sometimes the older man might take these incidental services as his pay for his preceptorship. But stiff fees were paid for the privilege of reading in the office of many a leader of the bar. Legal biography amply witnesses that such training was of widely varying thoroughness and quality; that it was typically not of great length of time; and that much of it, as in the interminable copying of documents, was of a rote character.<sup>100</sup>

As more law schools began appearing in the mid-1860s, many aspiring lawyers and leaders of the profession came to view the systematic, academic educational experience promised by law schools as a beneficial supplement to the somewhat happenstance education acquired through apprenticeships. Enrollment in law schools increased dramatically in the second half of the nineteenth century.<sup>101</sup> However, "[n]o one at that time was suggesting that all three years of training should be spent in law school. The leadership of the bar was fighting for something much more fundamental: a generalized requirement of apprenticeship, part of which might be 'served' in law school, and an effective bar examination."<sup>102</sup>

95 *Id.* 132 (2001).

96 *Hurst, supra note 60, at 260-261.*

97 *Boyd, supra note 5, at 3.*

98 *Philip Gaines, The "True Lawyer" in America: Discursive Construction of the Legal Profession in the Nineteenth Century, 45 AM. J. LEGAL HIST. 132,*

99 *Stevens, supra note 58, at 24.*

100 *Hurst, supra note 60, at 256.*

101 *Stevens, supra note 58, at 24-25.*

102 *Id. at 25.*



Between 1870 and 1890, many licensing authorities reinstated mandatory apprenticeships or formal study requirements, and the written bar examination became the norm.<sup>103</sup> Thus, into the late 1800s the preparation of most lawyers for practice in the United States was similar to that in the United Kingdom.

## **Section 2. The Traditions Diverge**

Two developments in the second half of the nineteenth century were responsible for the United States developing a very different approach to legal education than the United Kingdom.

The first development was the introduction of the case method at Harvard Law School which not only became the exclusive method of law school instruction but also came to be accepted as an adequate substitute for apprenticeships. The case method changed the content and nature of legal study, creating deficiencies in the education of American lawyers that persist today.

The late nineteenth century also marked the beginning of efforts to increase the regulation of legal education and admission to the legal profession. The story of how law teachers and “elite” lawyers accomplished this, sometimes working together and sometimes opposing each other, is essential to understanding the system of legal education in the United States today – and who controls it.

### **The Case Method Makes Its Appearance**

A law school class in the mid-1800s involved a law teacher, usually a retired judge with long experience at the bar, lecturing about “the law.” Lectures usually consisted of a series of rules that students transcribed and memorized.<sup>104</sup> “The result of rule-teaching law can be readily surmised; it produced lawyers who regarded the law as a body of rules, a bar that argued cases in terms of rules, and courts that decided cases on the basis of rules.”<sup>105</sup> “The presumed omniscience of the lecturer as a source of authoritative rules, together with learning by rote, produced something of a priestly class of lawyers with a priestly attitude toward the law.”<sup>106</sup>

A radical change in the method and content of legal education was on the way. Many American educators studied in German Universities during the mid-1800s, and they returned touting the advantages of Germany’s system of higher education. The Germans emphasized research and the production of new scholarship over the transmission of known wisdom, and they stressed scientific investigation over instruction in moral or cultural traditions.<sup>107</sup> American educators began implementing the German vision of university instruction in American universities, and it dominated the thinking of most American colleges by the beginning of the twentieth century.<sup>108</sup>

Charles Eliot, a professor of analytic chemistry at MIT who became president of Harvard University in 1869, was one of the educators influenced by German universities.<sup>109</sup> When Eliot appointed Christopher Columbus Langdell as Dean of the Harvard Law School in 1870, Langdell

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103 *Id.*

104 Woodward, *supra* note 51, at 352.

105 *Id.* at 353.

106 *Id.* at 354.

107 Mark Bartholomew, *Legal Separation: The*

*Relationship Between the Law School and the Central University in the Late Nineteenth Century*, 53 *J. LEG. EDUC.* 368, 377 (AALS 2003).

108 *Id.* at 374.

109 *Id.* at 377; and Martini, *supra* note 57, at 57.

decided to bring German educational philosophies into the legal lecture hall.<sup>110</sup>

Langdell's "primary fame lay in the introduction of case method to the teaching of law. . . . In Langdell's opinion, '[t]he principles of law are 'embodied' in cases, as gold in ore. The shortest and best way, surely, and maybe the only way of discovering these principles is by studying the cases in which they appear. Cases, that is to say, the opinions of judges comprise the matter of the science of law.'"<sup>111</sup> Langdell articulated a vision of the law as an organic science with several guiding principles rather than as a series of facts and rules to be memorized. It was the law professor's job to mine the language of appellate cases for general principles of law.<sup>112</sup>

Although they supported structured legal education, the leaders of the legal profession were not natural allies of the case method nor of legal education limited solely to the study of legal rules.<sup>113</sup> "The fashionability of the case method was in many ways ironic, for that was the period when the leadership of the profession was passing from courtroom lawyers to the office lawyers who sought to avoid litigation. Meanwhile, the law schools were favoring a system that appeared designed to produce litigators," something the new breed of corporate lawyers viewed with increasing disdain and dislike.<sup>114</sup> These corporate lawyers were "attracted to English procedure, which, with its system of costs, discouraged litigation. Although the case law schools were training lawyers for the emerging corporate law firms, those very firms believed the case method to be a Trojan Horse in their midst."<sup>115</sup>

As it turns out, Langdell was wrong both about the usefulness of the case method for discovering the basic principles of law and about the similarities of his approach to German scientific inquiry. "Later academics, like William Keener, were more sophisticated and saw the law as more complex, with an infinite variety of principles."<sup>116</sup> It became "clear to a rising generation of young academics that the Langdellian claims that all law could be found in the books and that law was a series of logically interwoven objective principles were, at most, useful myths."<sup>117</sup> "This led Keener and others to place less emphasis on the genius of the case method as a means of teaching the substantive principles of law, but to stress more strongly the case method's unique ability to instill a sense of legal process in the student's mind. In other words, the main claim for the case method increasingly became its ability to teach the skill of thinking like a lawyer. Methodology rather than substance became the nub of the system."<sup>118</sup> The avowed primary purpose of law school in the United States henceforth was not to teach the law but how to think like a lawyer<sup>119</sup> though that claim, too, proved to be a myth.

When properly used, the case method can be an effective tool for achieving limited educational benefits, however, it is impossible to prepare students for the practice of law by relying exclusively or even primarily on the case method.

All criticism [of the case method] traced to one radical defect. The case method isolated the study of law from the living context of the society. The student of law needed to be aware of the pressure of politics, the strands of class, religious, racial and national attitudes woven into

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110 *Bartholomew, supra note 107, at 378. Langdell served as Harvard's Dean until 1895. Stevens, supra note 58, at 37.*

111 *Martini, supra note 57, at 58.*

112 *Bartholomew, supra note 107, at 378.*

113 *Stevens, supra note 58, at 57.*

114 *Id. at 57-58.*

115 *Id. at 58.*

116 *Id. at 55.*

117 *Id. at 134.*

118 *Id. at 55.*

119 *Martini, supra note 57, at 59.*

the values and patterns of behavior with which law dealt; he needed some appreciation of the balance of power within the community, the clash of interests, and the contriving of economic institutions, as all these influenced and were influenced by the effort to order the society under law. But of all this, so far as the law school was concerned, the student was made aware only incidentally – as he glimpsed the social context through recitals of fact and appraisal, of widely varying accuracy and imagination, in the reported opinions of appellate courts.<sup>120</sup>

In no respect was the case-method curriculum more narrow than in ignoring the bulk of the lawyer's special skills. A lawyer must draft documents; he must untangle complicated tangles of raw fact (and not merely handle the predigested "facts" stated in reported opinions of courts); he must weigh facts for the formulation of policy in counseling clients; and know how to choose and employ legal tools as positive instruments of policy. But of all these things, the student learned under the case method only as neglected by-products of reading the assigned opinions, or from passing classroom references drawn from his instructor's experience. The new law curriculum put a firm intellectual discipline in place of lax apprenticeship; but it offered no substitute for other aspects of training that had been a valuable part of the better office education.<sup>121</sup>

The most amazing claim for the case method was not that it was a superior method for teaching law but that it was an adequate substitute for supervised law practice. Langdell claimed that the case method was a practical way to legal competence.<sup>122</sup> His claim was based on the combination of the case method with the question-and-answer technique that law teachers were using to lead students through their analysis of appellate cases. The technique was similar in purpose and form to the traditional law school "quiz," and it "rather pretentiously came to be known as the Socratic method."<sup>123</sup> Keener argued that, by participating in classes involving the use of the case method and Socratic dialog, "the student is practically doing, under the guidance of an instructor, what he will be required to do without guidance as a lawyer. While the student's reasoning powers are thus being constantly developed, and while he is gaining the power of analysis and synthesis, he is gaining knowledge of what the law actually is."<sup>124</sup>

The assertion that the case method and Socratic dialog sufficiently replicated the experience of working in a lawyer's office was, of course, just plain wrong. Supervised law practice plays important symbolic and functional roles in the preparation of lawyers that are quite different from any role played by the case method or Socratic dialog. While supervised practice is an ineffective method for imparting information about the law or legal processes, supervised practice is more effective than classroom instruction at teaching the standards and values of the legal profession and instilling in students a commitment to professionalism. This is why most countries in the world, including those in the United Kingdom, require lawyers to engage in a period of supervised practice before allowing them to be fully licensed. In explaining why English solicitors and barristers have always highly valued articles and pupillage, Michael Burrage wrote:

By forcing clerks and pupils to submit to a period of hardship, drudgery and semi-

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<sup>120</sup> Hurst, *supra* note 60, at 266.

<sup>121</sup> *Id.* at 270.

<sup>122</sup> *Id.*

<sup>123</sup> Stevens, *supra* note 58, at 53.

<sup>124</sup> *Id.* at 56–57, citing William A. Keener, A

SELECTION OF CASES ON THE LAW OF QUASI CONTRACTS. Cambridge, Mass., 1888–89, iv; and William A. Keener, *The Inductive Method in Legal Education*, 17 REPORTS OF THE AMERICAN BAR ASSOCIATION 473, 482 (1894).

servitude, it necessarily conveyed a due appreciation of the value of membership in the profession. It also instilled respect for one's elders, for their experience, for their manners, conventions and ethics and for their sense of corporate honour. Articles and pupillage could, therefore, provide cast iron guarantees about the attitudes, demeanor and commitment of those who were to enter the profession.' A university degree, by contrast, guaranteed only the acquisition of legal knowledge of uncertain relevance to the actual practice of law.

. . . They were forms of moral training, of initiation into networks that linked every past and present member of the profession, by ties of obligation, loyalty, and possibly affection, that enabled to [sic] newcomer to belong, to empathize with its aspirations and concerns and to share its sense of honour.<sup>125</sup>

In the United States, however, enough people were eventually convinced that Harvard's "practicality" claim for the case method was valid, and they accepted law school education as an adequate substitute for apprenticeships or any other form of supervised practice.

Some segments of the legal profession recognized early on that law schools using the case method were not adequately preparing students for law practice and that the case method was not, in fact, an adequate substitute for apprenticeships.

In 1882, the American Bar Association's Standing Committee on Legal Education called on law schools to implement "a method of study directed to the development of basic lawyer skills. Students should 'learn the abstract framework first, then learn how the courts apply it.' The Committee said that a change was needed because students were learning 'a mass of rules but not how to use them.' In furtherance of this goal, it recommended that law schools should encourage apprenticeships in law offices."<sup>126</sup>

An 1891 report of the ABA Committee on Legal Education attacked the case method as "unscientific." "The report argued that the ideal work of the lawyer was to be done by knowing the rules and keeping clients out of court. Teaching decisions without systematically instilling rules led to the "great evil" manifested by young lawyers who were all too willing to litigate, did not restrain their clients, cited cases on both sides in their briefs, and left all responsibility to the court."<sup>127</sup> The Standing Committee recommended that practice courts should be established in every law school. "The student cannot practice by simply listening to a teacher expound principles of practice, but opportunity must be afforded him for doing himself the things which he will have to do in case of actual litigation."<sup>128</sup>

The committee was just as vigorous in its assaults on the case method at the 1892 annual meeting of the ABA. "The result of this elaborate study of actual disputes, and ignoring of settled doctrines that have grown out of past ones, is a class of graduates admirably calculated to argue any side of any controversy, or to make briefs for those who do so, but quite unable to advise a client when he is safe from litigation. . . . The student should not be so trained as to think he is to be a mere hired gladiator.' This was praise for the English model . . . ."<sup>129</sup>

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125 Michael Burrage, *From a gentlemen's to a public profession: status and politics in the history of English solicitors*, 3 INT'L J. LEG. PROF. 45, 54 (March 1996).

126 Boyd, *supra* note 5, at 6.

127 Stevens, *supra* note 58, at 58.

128 Boyd, *supra* note 5, at 10.

129 Stevens, *supra* note 58, at 59, quoting "Report of Committee on Legal Education," 15 ABA Proceedings 317, 340-341 (1892).

In the end, the ABA's vision of the appropriate direction for legal education was not the vision that law schools in the United States would follow. "As it turned out, the ABA meetings of 1891 and 1892 were the last serious doubts the legal establishment expressed about the case method. By the 1893 annual meeting, the Harvard and Keener forces were much more in control and, although there was criticism of the case method, it was relatively muted."<sup>130</sup>

Once the case method was entrenched and the apprenticeship requirement was abandoned, it proved very difficult to reinstate apprenticeships, though efforts to reinstate them continued into the twentieth century.<sup>131</sup>

At the 1909 ABA Meeting, Franklin Danakher of the New York Board of Examiners said his state had made a "grievous error" in allowing students to take the bar examination without serving some time in a clerkship. In 1910 the American Bar Association recommended that, after three years of law school, students have a mandatory one-year clerkship, and the Association of American Law Schools was urged to support the recommendation. In 1913, the ABA formally asked the Association of American Law Schools to accept the rule, but, led by Henry Rogers, the academics balked. To them it was abundantly clear that the case method was practical; the obtuseness of practitioners seemed to know no bounds."<sup>132</sup>

The case method was subjected to systematic, critical analysis for the first time in *The Common Law and the Case Method*, a report prepared by Josef Redlich, an Austrian observer for the Carnegie Foundation, that was published in 1914. Redlich described the strengths and shortcomings of the case method, and he concluded that the case method was essentially geared to teaching common law rules and that "for teaching statutory and other materials, different methods of instruction would be more appropriate."<sup>133</sup> Redlich also noted the absence of a practical side to law school. Although the leading academics of the day assimilated clinical studies in medical school to the study of appellate cases, Redlich was unconvinced by their arguments.<sup>134</sup>

Redlich's analysis, however, did not stem the tide of university law schools that were following Harvard's lead and adopting the case method.<sup>135</sup> "By 1900 a remarkable uniformity was apparent in legal curricula across the land. With respect to core curriculum virtually all schools had accepted the Harvard model by 1920. In fifty years one school had intellectually, socially, and numerically overwhelmed all others."<sup>136</sup> One can only speculate about the content and structure of legal education in the U.S. today if Eliot and Langdell had admired the English method of education rather than Germany's.

The most famous reaction to Langdell's approach, the so-called Realist movement, occurred in the 1930's. The Realist movement cultivated the idea that one should view the law whole or, alternatively, to see the law as it is.<sup>137</sup> The most influential scholars in the Realist movement were Roscoe Pound, Leon Green, Karl Llewellyn, Jerome Frank, and Oliver Wendell Holmes, Jr., "the

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<sup>130</sup> *Id.*

<sup>131</sup> *Delaware and Vermont are the only U.S. jurisdictions that require apprenticeships today. For more information see supra note 16.*

<sup>132</sup> *Stevens, supra note 58, at 119–120.*

<sup>133</sup> *Id. at 117.*

<sup>134</sup> *Id. at 119–120.*

<sup>135</sup> *Bartholomew, supra note 107, at 378.*

<sup>136</sup> *Robert Stevens, Two Cheers for 1870: The American Law School, in LAW IN AMERICAN HISTORY 405, 434–435 (Donald Fleming and Bernard Bailyn, eds., Little, Brown 1971).*

<sup>137</sup> *Martini, supra note 57, at 60.*

most famous of all Realists, surely the most influential.”<sup>138</sup>

Jerome Frank’s pleas for ‘lawyer schools’ were an attack on the heart of the Langdellian assumption that the case method was both practical and in the intellectual tradition of German scientism. Frank argued that law schools had become too academic and too unrelated to practice:

The Law Student should learn, while in law school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell – but to include – the methods of learning law by work in the lawyer’s office and attendance at the proceedings of courts of justice. . . . They must repudiate the absurd notion that the heart of a law school is its library.<sup>139</sup>

“The major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based on the objectivity of black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be considered value-free.”<sup>140</sup> “After Holmes, the structure of Langdell’s pedagogy remained intact but its heart had been torn to shreds.”<sup>141</sup>

In light of such strong and well-founded criticisms of the case method, one might reasonably ask why the case method survived and flourished. In the end, the persistent preeminence of the case method in American legal education has much less to do with its usefulness for preparing lawyers for practice, either by transmitting knowledge or teaching analytical skills, than it has to do with the economics of legal education and the political power of law professors.

[T]he case-method system . . . held a trump card – finance. The vast success of Langdell’s method enabled the establishment of the large-size class. Although numbers fluctuated, Langdell in general managed Harvard with one professor for every seventy-five students; the case method combined with the Socratic method enabled classes to expand to the size of the largest lecture hall. . . . The case method was thus both cheaper as well as more exciting for both teacher and student. Such was the prestige of Harvard that law schools emulating its teaching method could scarcely ask for a “better” faculty-student ratio. Any educational program or innovation that allowed one man to teach even more students was not unwelcome to university administrators. The “Harvard method of instruction” meant that law schools could be self-supporting.<sup>142</sup>

In other words, the case method’s success had a lot to do with money. Law schools in the United States were accepted into the universities in part because they could be self-supporting – or actually produce a cash surplus. The expectation that law schools would be self-supporting, however, has made it difficult to introduce alternatives to the case method. “Even the leading law schools had always had faculty-student ratios that would have been unheard of in any marginally acceptable college and unthinkable in any other graduate or other professional school. This underfunding of legal education was almost certainly attributable to the Langdellian model, for the

138 *Id.*

139 Stevens, *supra* note 58, at 156–157, quoting Jerome Frank, “What Constitutes a Good Legal Education?,” a speech to the Section of Legal Education in 1933, as cited in Edward T. Lee, *THE STUDY OF LAW AND PROPER PREPARATION* (Chicago 1935).

140 *Id.* at 156.

141 Martini, *supra* note 57, at 66. Even Harvard’s

students criticized the case method. During a curriculum study in 1935, Harvard students attacked the case method and the overall blandness of the curriculum. They thought the case method lost its value after the first year, and they wanted the faculty to replace it with lectures and discussions. Stevens, *supra* note 58, at 137 & 161.

142 Stevens, *supra* note 58, at 63 (citations omitted).

case method seemed to work as well with two hundred students as it did with twenty . . . .”<sup>143</sup>

The other reason for the survival of the case method is the political power of law teachers which has its roots in Langdell’s appointment of James Barr Ames as an assistant professor in 1873. Until then, most law professors were current or former practicing lawyers or judges. Ames had graduated from the Harvard law school a year earlier and had no experience in practice.<sup>144</sup> Ames’ appointment reflected Harvard’s embrace of another German educational practice – appointing former students with little practical experience but with research potential.<sup>145</sup> As Langdell explained, “What qualifies a person . . . to teach law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes – not experience, in short, in using law, but experience in learning law . . . .”<sup>146</sup>

Ames’ appointment arguably had a more significant impact on legal education than any other innovation by Langdell because it began a process that separated the interests of the academic community of law teachers from those of practicing lawyers. Ames’ appointment “created, for the first time, a division in the legal profession between the ‘academics’ and the ‘practitioners,’ a separation that would not only logically lead to the creation of the Association of American Law Schools (AALS) in 1900 as an entity separate from the ABA, but would also cause increased confusion and controversy in the disputes over standards in the early twentieth-century.”<sup>147</sup>

“Law teachers liked the German model of higher education because it conferred prestige on their profession. Use of German educational methods allowed law professors to compare themselves with other academics; they were advancing the boundaries of knowledge, not merely instructing students on how to ply a trade.”<sup>148</sup> “When the law school became a separate school and instituted a four-year program of study, one Berkeley professor commented approvingly that this was an attempt to structure the law school along the lines of the German university, where pure scholarship and research mattered most.”<sup>149</sup>

“No doubt part of the method’s popularity was snobbism; once elite law schools had decided to approve of the system, those aspiring to be considered elite rapidly followed. Such elitism, however, may have been not only on the part of the institutions but also on the part of the individuals within them. Law professors undoubtedly relished their increasing power and influence in the classroom and happily made the change from treatise-reading clerk to flamboyant actor in a drama.”<sup>150</sup>

Today, many law professors in the United States use a wide variety of teaching methods, but the case method remains entrenched as the primary method of instruction during all three years of law school.

## **The Struggles Over Regulating Legal Education and Admission to the Profession**

In the 1870s, as mentioned earlier, many lawyers were concerned about the quality of the legal profession – with good reason. They wanted to impose restrictions on access to the legal profession, contrary to the principles of Jacksonian Democracy. They were also concerned about the diploma privilege, the practice by which graduates of some law schools could be admitted to law practice in certain states without taking a bar examination. The lawyers felt it took control of

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<sup>143</sup> *Id.* at 268.

<sup>144</sup> *Hurst, supra note 60, at 264.*

<sup>145</sup> *Bartholomew, supra note 107, at 378.*

<sup>146</sup> *Hurst, supra note 60, at 263.*

<sup>147</sup> *Stevens, supra note 58, at 38–39.*

<sup>148</sup> *Bartholomew, supra note 107, at 379.*

<sup>149</sup> *Id.*

<sup>150</sup> *Stevens, supra note 58, at 63.*

entry into the profession away from practitioners and gave it to legal educators.<sup>151</sup>

Leaders of the legal profession decided to try to establish some control over legal education and admission to practice. Their effort began at the American Social Science Association meeting in Saratoga, Florida, in 1876. This was six years after Langdell arrived at Harvard and three years after he appointed Ames to the faculty. The president of the Social Science Association was Lewis Delafield, the leading opponent of the diploma privilege. Delafield attacked the Jacksonian “notion among laymen, which is shared by many professional men and has found expression from certain judges, that the gates to the bar should be wide open, and easy admission allowed to all applicants.”<sup>152</sup> Delafield called for higher standards that would ensure that lawyers had character and learning. At the next meeting of the American Social Science Association in 1877, the organization urged the formation of a national lawyers’ group, and the American Bar Association (ABA) was created in 1878.<sup>153</sup>

Although the ABA controls the accreditation of law schools throughout the United States today, its primary function in its initial years was to recommend courses of study that state and local bar associations should require for admission to the practice of law.<sup>154</sup> The ABA created a Standing Committee on Legal Education as one of the ABA’s first subgroups.

As it turned out, the Committee on Legal Education was frequently more or less in the hands of what Alfred Reed would later call “the schoolmen,” that is, “those who were connected with or believed in legal education in law schools rather than in law offices.”<sup>155</sup> This meant that the Committee’s views about how to improve the quality of the legal profession were not always in line with those of the overall membership of the association. For example, the Standing Committee recommended in 1879 that a law school diploma should be an essential qualification for admission to the bar. “The Association rejected that declaration and several like it in later years despite frequent dilution.”<sup>156</sup>

Apparently still under the control of schoolmen in 1881, the Committee recommended that the course of study in law school should include “an ambitious, three-year course of study for all lawyers to include: moral and political philosophy, law of England (feudal, municipal, and origin of the common law), law of real rights and remedies, law of personal rights and remedies, law of equity, the *Lex Mercatoria* (Law Merchant), law of crimes, law of nations, admiralty law, Roman law, Constitution and laws of the United States, including federal jurisdiction, state constitution and laws, and political economy.”<sup>157</sup>

Only one year later, however, the composition of the Committee seems to have changed for it proposed “‘a new Practical Course of Study’ that included real property, personal property, torts, contracts, procedure, and testamentary law. It stated that legal education must prepare the working lawyer for his job as a lawyer and therefore should teach practical common law, not diplomacy, history, political economy, or other social sciences.”<sup>158</sup>

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151 *Id.* at 26.

152 *Id.* at 27.

153 *Id.*

154 *Boyd, supra note 5, at 3.*

155 *Preble Stoltz, Training for the Public Profession of the Law (1921): A Contemporary Review, in Packer &*

*Ehrlich, supra note 10, at 227, 233. Packer and Ehrlich define “schoolmen” as “the leaders of legal education and the ‘elite’ members of the bar.” Packer & Ehrlich, supra note 10, at 26.*

156 *Id.*

157 *Boyd, supra note 5, at 6.*

158 *Id.*



In 1891 the Committee opposed another attempt to require college study before law school.<sup>159</sup> The Committee's position on the issue did not matter in the end because Harvard began requiring a college degree for prospective law students by 1896, and most other university-related law schools followed Harvard's lead fairly quickly.<sup>160</sup>

The political tide shifted back in favor of the schoolmen when the Section on Legal Education and Admissions to the Bar was formed in 1893. It was the first section created by the American Bar Association.<sup>161</sup> Whereas membership on the Committee on Legal Education was by appointment only, the Section was open to any member of the ABA who wanted to participate. To the leaders of the Section "[l]egal education meant law school education and the focus was on ways of improving law schools."<sup>162</sup> It naturally developed that members of the Committee on Legal Education and the broader association frequently had somewhat different opinions about legal education than members of the Section of Legal Education and Admissions to the Bar. For example, the Section passed a resolution in favor of lengthening the period of law study to three years in 1895, but, although the ABA membership passed a similar resolution in 1897, it left out the words "in law school."<sup>163</sup>

Although law professors and practicing lawyers were to continue wrestling over control of legal education throughout the twentieth century, they were united at the end of the nineteenth century in their desire to raise the standards for admission to the legal profession. "The elite lawyer in the 1890s headed for the newly emerging law firms in Wall Street might well graduate from Yale College and the Harvard Law School and then spend his first few years working for the firm learning practical skills. The typical lawyer, however, in almost any state, might begin practice on his own without any institutional training, perhaps without even a high school diploma, and often with no or only minimal office training."<sup>164</sup> "No state required attendance at law school, and the majority of lawyers in the 1890s saw the inside neither of a college nor of a law school. Several states did not even require graduation from high school for admission to the bar. It was galling to the leaders of the bar that there had been a dramatic revival in formal training for divinity and medicine but, at best, a desultory revival in law."<sup>165</sup>

Although there were good reasons to be concerned about the quality of legal services, the elite lawyers and the law teachers also had less altruistic motives for wanting to raise the standards for admission to the legal profession. The law teachers wanted to protect and enhance the exalted status that their use of case method produced for them in the university systems. The elite lawyers wanted to make it more difficult for immigrants, or at least those who were not Caucasian and Christian, to become lawyers. The Anglo-Saxon Protestants who dominated the top levels of the legal profession were concerned about the rising number of second generation immigrants who were entering the legal profession. America had changed from its days as a collection of colonies on the east coast that were populated by immigrants from one country who shared common ideals and traditions. It had become a large country serving as a melting pot of diverse peoples from all over the world, as well as thousands of former slaves who were set free by the civil war.

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<sup>159</sup> *Id.* at 10.

<sup>160</sup> *Bartholomew, supra note 107, at 388. Yale held out until 1912. Michigan did not require a college degree until 1928. Id. at 391.*

<sup>161</sup> *Stoltz, supra note 155.*

<sup>162</sup> *Id.* at 233.

<sup>163</sup> *Id.*

<sup>164</sup> *Stevens, supra note 58, at 96.*

<sup>165</sup> *Id.* at 95–96.

It is difficult to determine how much of the interest in “improving the profession” was for *bona fide* reasons and how much was not. Some people claimed that the efforts to raise standards were primarily concerned with keeping out Jews, blacks, and immigrants.<sup>166</sup> Yet others concluded that “it would be wrong to view the issue solely from such limited points of view; the motives behind raising standards were numerous. The overall thrust of the movement to raise standards was part of a far larger movement of institutionalization, and, whatever motivated the leaders of the bar, they were committed to an ethical, educated bar.”<sup>167</sup>

One should keep in mind that the admission and regulation of lawyers was controlled on a state by state basis and, consequently, the standards for admission to the legal profession were quite varied. The American Bar Association did not have any power to control the standards for law school or bar admission. All it could do was to make recommendations and try to persuade schools and states to implement them. It did not have much success in its early years.

In the meantime, a new political force was in the making. The new profession of “academic lawyers” initiated by Ames’ appointment at Harvard did not have an organization of its own, and the academics were unhappy that the ABA was not devoting more time to legal education and that it had dared to criticize the case method. “In 1899, the ABA, under pressure from the new breed of academic lawyer, called for the establishment of an organization of ‘reputable’ law schools, which came into being in 1900, with twenty-five members, as the Association of American Law Schools.”<sup>168</sup>

Despite their differences on some issues, the ABA and the AALS quickly joined forces against part-time, evening law schools that catered to less affluent members of society, and their efforts to “improve” or destroy these schools continued from the beginning to the middle of the twentieth century. “Although the academic lawyers often argued the need to rid society of the night schools to insure competent, public-spirited, and ethical lawyers as the basis for exclusionary moves, ABA leaders were more blunt. World War I made matters worse. Legal politicians found that the legal profession was a means by which Jews, immigrants, and city-dwellers might undermine the American way of life.”<sup>169</sup>

[T]he attack on night and part-time schools that opened the twentieth century seems to have been a confusing mixture of public interest, economic opportunism, and ethnic prejudice. Another factor, related to all of these, yet somewhat different, was “professional pride.” It had its roots in the “culture of professionalism” of the late nineteenth century. Lawyers and law professors had recently founded their professional organizations; they jealously guarded these institutions from any who might be considered interlopers. “Science” and the orthodoxy of the case method had given them a solid basis for their pride, and anyone who did not follow the new religious creed was robbing them of their solidarity and standing.<sup>170</sup>

Various proposals were initiated during the early part of the twentieth century to “improve” the legal profession. These included regulation of admission by the supreme court of each state, disapproval of the diploma privilege, candidates must be U.S. citizens, two years of college before law school, preliminary inquiry into a student’s character and fitness when he entered law school, candidates must speak English, submission of affidavits of character from attorneys personally known to members of the admissions committee (or a letter from a teacher or minister), passing a

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166 *Id.* at 100.

167 *Id.*

168 *Id.* at 96.

169 *Id.* at 100–101.

170 *Id.* at 101.

college entrance exam, three years of law school study (four for part-time).<sup>171</sup>

Most of these proposals were implemented by the middle of the century and remain in place today. At the beginning of the twentieth century, however, they were quite controversial because, collectively, they made it more difficult to establish law schools and more difficult to enter the legal profession. They also tended to make legal education and the legal profession more homogeneous and less diverse.

In his report for the Carnegie Foundation in 1914, *The Common Law and the Case Method*, Josef Redlich noted that students from all classes of the population were found in each of the law schools in the United States and that the schools were serving at least two markets. He discovered that the proprietary schools “supply the needs primarily of those social strata whose sons are not thinking of university education in either the American or continental sense. They consider the legal profession as a trade, like any other, and regard legal education in the same light as commercial education in a commercial school.”<sup>172</sup> Thus, Redlich identified two issues that the legal profession in the United States has still not satisfactorily confronted. One is the reality that most lawyers are in business to make money, not necessarily to provide a public service. The other issue is that the graduates of some law schools enter different practice settings than graduates of other law schools. Seven years after Redlich’s report, Alfred Reed would more fully consider the ramifications of the fact that the United States has a *de facto* stratified bar with diverse educational and training needs.

At its 1917 meeting, under pressure from the AALS which wanted to streamline the structure of regulating law schools, the ABA established a Council on Legal Education to replace the Committee on Legal Education.<sup>173</sup> The AALS’ plan was to “pattern the Council after the Council on Legal Education in England, where 20 judges and barristers appointed by the four Inns of Court supervised the subjects, the teachers, and the examinations of those desiring to be called to the bar.”<sup>174</sup> The ABA made the Council less powerful than the AALS had hoped in order “to prevent control of the section [of legal education] from passing into the hands of . . . the Law School Association.”<sup>175</sup> “To placate the AALS, the ABA staffed the Council with the pillars of the academic legal establishment – the deans of Harvard, Wisconsin, Minnesota, Columbia, and Northwestern.”<sup>176</sup> “[T]he ‘schoolmen’ forces thought they were riding high and were in control of what the ABA was likely to do with respect to legal education.”<sup>177</sup>

In the next year, 1919, the schoolmen suffered a reversal of fortune. The Executive Committee of the ABA refused to give any financial support to the Council on Legal Education for reasons that are unclear.<sup>178</sup> Furthermore, in a general reorganization of the ABA, the Executive Committee made the Council subject to the control of the Section.<sup>179</sup> The leading law schools fought the change. A resolution from the AALS to preserve the Council was debated at the ABA meeting, but it was defeated 63 to 123.<sup>180</sup> The AALS was displeased, and it developed “a strategy to take over

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171 Boyd, *supra* note 5, at 19–20.

172 Josef Redlich, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 70 (University Microfilms International 1979).

173 Stevens, *supra* note 58, at 114.

174 Boyd, *supra* note 5, at 22.

175 Stevens, *supra* note 58, at 114, quoting Alfred Z.

Reed. *PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 39 (1928).

176 *Id.* at 115.

177 Stoltz, *supra* note 155, at 236.

178 *Id.* at 237.

179 *Id.* at 236.

180 *Id.* at 237.

the ABA Section of Legal Education through the simple expedient of attending meetings in force, since the ABA, unlike the AALS, was based on individual membership.”<sup>181</sup>

“The AALS plan worked; professors packed the 1920 meeting of the ABA Section of Legal Education and Admissions to the Bar and were able to ensure that established law teachers had a strong say in section policy.”<sup>182</sup> Some people were concerned “that the AALS would take over the Section and that the Standards would not represent the opinion of the profession or even of the ABA.”<sup>183</sup> A committee, chaired by Elijah Root, was appointed under pressure from law teachers to report on how to “improve the efficiency of persons to be admitted to the practice of law.”<sup>184</sup>

While the Root Committee was meeting, Alfred Z. Reed was preparing a report on legal education for the Carnegie Foundation. In *Training for the Legal Profession*, Reed, a nonlawyer, pointed out that law, like medicine, is a public profession because lawyers do more than provide a social service. They are part of the governing mechanism of the state because “private individuals cannot secure justice without the aid of a special professional order to represent and to advise them.”<sup>185</sup> Unlike the leaders of the profession, however, Reed did not view the public functions of lawyers as a justification for raising standards. Rather, “[h]e saw the America of the 1920s as a pluralistic society being presented with a theoretically unitary bar.<sup>186</sup> He concluded that there had been improvements in the quality of the leaders of the profession due to the development of law schools, but the other end of the profession was progressively worsening.<sup>187</sup>

Reed believed that a unitary bar was doomed to failure. “He opposed the establishment of those universal standards – either through bar examinations or through accreditation – designed to drive out the intellectually less fashionable schools. In the long run, he saw the need for lawyers of differing skills and qualifications serving different purposes and different elements in society.”<sup>188</sup> He recommended that part-time law schools redirect their goals “to graduate men competent to perform the relatively routine tasks within the confines of a single jurisdiction. They would be well-trained to do that and no more.”<sup>189</sup>

“As Reed saw it, the issue was whether to improve the quality of the profession by forcing everyone into the mold of the Harvard graduate (undergraduate college followed by full-time legal education) or to improve the quality by building a differentiated bar with some members trained to do some things and some trained to do others, with competence enforced by civil-service-type examinations for the various tracks.”<sup>190</sup>

The Root Committee had advance copies of Reed’s report but chose to ignore his recommendations. Instead, the Root Committee recommended requiring at least two years of college before law school<sup>191</sup> and three years of full-time or four of part-time study in law school. In other words, it wanted schools to follow the Harvard model. The committee also endorsed abolishing the diploma privilege and requiring applicants for bar admission to be examined by public authority. Another recommendation was to revive the Council on Legal Education and

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181 *Stevens, supra note 58, at 115.*

182 *Id.*

183 *Boyd, supra note 5, at 23.*

184 *Id. at 24.*

185 *Stevens, supra note 48, at 113.*

186 *Id.*

187 *Id. at 114.*

188 *Id.*

189 *Boyd, supra note 5, at 26.*

190 *Packer & Ehrlich, supra note 10, at 26.*

191 *In 1921, no state required law school training “for admission to its legally privileged bar.” Reed (1921), supra note 6, at 213.*

invest it with the power to accredit law schools.<sup>192</sup>

The Root Committee's proposals were presented at the 1921 ABA meeting. Reed's report was still two months away from publication, and two delegates proposed withholding action on the Root Committee's recommendations to see how consistent Reed's views were with the committee's. "Root answered that argument with the bland statement that the Report had been available to the Committee (which was true), and that 'the recommendations of the committee were based upon their study of the report.'"<sup>193</sup> The ABA adopted the Root Committee's recommendations at the 1921 meeting without considering Reed's report.

The ABA's action in 1921 set a pattern that still defines legal education in the United States. "Reed felt that legal education should not be exclusively patterned on the Harvard mold; the schoolmen disagreed, and it was they who successfully maneuvered the 1921 meeting."<sup>194</sup> The rejection of Reed's idea of a differentiated bar ended any real chance that a state's admissions authority might try to create a system of legal education that prepared some lawyers to provide specialized, limited legal services in order to improve access to legal education and the legal system by poor and underprivileged members of society<sup>195</sup>

In 1927, the ABA appointed its first full-time advisor on legal education, Claude Horack, who was at that time also the secretary to the AALS. "His primary assignment was to raise the standards of law schools and bar admissions. In keeping with this goal, the two associations continued to press on relentlessly with heightening requirements."<sup>196</sup> This "significant reproachment between the two associations"<sup>197</sup> further solidified the law teachers' control over legal education.<sup>198</sup>

Alfred Reed's second report, *Present-Day Law Schools*, appeared in 1928 in an atmosphere of rising standards and increasing conformity. Although a handful of states still had no requirements for any law training, almost every jurisdiction had a compulsory bar examination, some states required attendance at law school and, in almost every other state, law school and law office training had become alternatives. Only four states still insisted on some office training for all students.<sup>199</sup> Reed was particularly concerned about the rapidly accelerating homogenization of law schools, which pressures from the ABA and the AALS were promoting. Reed feared that eventually the standards would be applied to all schools, even those catering to the least affluent sections of the population. He was right, but his concerns went unheeded.

The conflicts between university-based and unaccredited law schools became increasingly heated as the 1920s ended. The meeting of the ABA Section of Legal Education in 1929 was "probably one of the most unpleasant on record."<sup>200</sup> This was the meeting at which the recommendations of the Root Committee became part of the accreditation standards, although some people complained that the approval of the Root report at the 1921 meeting was unfair because it had been packed

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192 Boyd, *supra* note 5, at 24 .

193 Stoltz, *supra* note 155, at 239.

194 Packer & Ehrlich, *supra* note 10, at 28.

195 Stoltz, *supra* note 155, at 249.

196 Stevens, *supra* note 58, at 173.

197 *Id.*

198 The ABA's practice of hiring a person from academia as its advisor on legal education is a tradition that continues today, although current title for the advisor is

"Consultant on Legal Education to the ABA." Because the Consultant is responsible for administering the law school accreditation process, this is one of the most influential positions in the United States regarding legal education.

199 Stevens, *supra* note 58, at 174.

200 *Id.* at 175, citing Edward T. Lee's "In re The Selection of Legal Education and the American Bar Association: Is the Association to be Controlled by a Bloc?"

with AALS representatives.<sup>201</sup> Among other incidents during the 1929 meeting, Edward T. Lee, the dean of a part-time evening law school in Chicago, accused the elite law schools of using the ABA Section of Legal Education and Admissions to the Bar to further the interests of the AALS. “A group of educational racketeers – deans and professors in certain endowed and university law schools of the country – have used the American Bar Association as an annex to the Association of American Law Schools, a close corporation of ‘case law’ schools, entirely irresponsible to the American Bar Association . . . . They have been boring from within our Association in the interest of their own . . . .”<sup>202</sup> It would still take until the eve of World War II, however, before most states required two years of college before attending law school.<sup>203</sup>

In the end, the unaccredited law schools and the proponents of differentiated standards for law schools in the United States were defeated by two events that had nothing to do with the merits of the debate: the Great Depression and World War II. During the Great Depression, which began in 1929 and continued until the United States entered World War II in 1942, marginal law schools found it economically difficult to survive. The ABA also continued to adopt increasingly stringent accreditation standards. “By 1937, the ABA’s standards required two years of college study, and three years of full-time or four years of part-time study at a law school that had a library of at least 7,500 volumes, a minimum of three full-time professors, and a student-faculty ratio of no more than one hundred to one.”<sup>204</sup> Although it is impossible to determine accurately how much the decline of unaccredited law schools in the 1930s was due to the Depression or how much was due to the continued raising of standards, “one clearly fed on the other.”<sup>205</sup>

“World War II merely accelerated the directions taken in the 1930s. Even before the outbreak of the war, the numbers of law students fell rapidly because of the selective service law.”<sup>206</sup> By 1943, enrollment in law schools was 1/6 of what it was in 1938.<sup>207</sup> By September, 1944, law school enrollment had decreased 83% since 1936.<sup>208</sup>

“Several unaccredited schools closed, never to reopen. What the ABA and the depression had begun, Hitler helped to complete. [The German influence again.] Moreover, although, for the most part standards were waived for the emergency, the ABA established library standards for approved schools for the first time in 1942 and in 1944 moved to inspect all schools. The postwar path was clear. Law was supposed to be an ‘intellectual’ profession. To the leaders of the profession, it also was evident that law schools were training for a homogeneous profession rather than providing a gateway qualification for diverse careers.”<sup>209</sup>

At the end of World War II, the G.I. Bill made legal education affordable to many, and the majority chose to exercise this opportunity at accredited law schools. Many unaccredited schools went out of business.<sup>210</sup> “The phenomenal influx of students into accredited schools after the war rapidly restored the confidence of the ABA and the AALS. In the years after 1945, standards leaped and structures hardened.”<sup>211</sup>

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201 Boyd, *supra* note 5, at 35–36.

202 Stevens, *supra* note 58, at 175.

203 Stoltz, *supra* note 155, at 242.

204 *Id.* at 179.

205 *Id.* at 177–178.

206 *Id.* at 198.

207 Boyd, *supra* note 5, at 47.

208 *Id.* at 48.

209 Stevens, *supra* note 58, at 199.

210 *Id.* at 205.

211 *Id.* at 207.

In hindsight, one of the curious things about the movement to raise the standards for law schools and entry into the profession is that there was never any evaluation of the relationship between law school accreditation standards and the quality of legal services. “The contention that the public might be adequately protected by bar examinations alone was apparently not mooted; only accreditation of law schools was acceptable. That the new scheme might make it more difficult for minority groups to obtain a legal education, or might hold back those wishing to specialize, was immaterial. The American bar, as everyone knew, was unitary. ‘Higher’ standards meant ‘better’ lawyers; the public must be protected at all costs, and that protection was clearly best arranged by the existing members of the profession.”<sup>212</sup>

## The Modern Era of Legal Education in the United States

The normal route into the legal profession became three years at an ABA-accredited law school following four years of college.<sup>213</sup>

By 1950, three years of college became the norm, and by the 1960s, four years of college. The two-year law school had long since evaporated; in its place were three-year full-time schools and four-year part-time schools. The ABA-AALS minimum standards had rolled ever on, requiring increasing numbers of volumes in libraries and even fuller full-time faculties. The clerkship route to the bar had become a rarity. The success of the campaign had taken a long time, but the movement had had the effect desired by its leaders. A law student of 1970, thoroughly indoctrinated in the unyielding standards of his time, would probably have difficulty believing that it was not until roughly 1950 that the number of lawyers who had been to college exceeded the number of those who had not.<sup>214</sup>

In describing the goals of legal education in 1950, Arthur Vanderbilt wrote that “[t]he keynote we should strike is that all education in the last analysis is self-education . . . that in law schools we are only going to attend to two things, giving them the art of legal reasoning and some of the main principles of law.”<sup>215</sup>

Vanderbilt’s analysis of the objectives of law schools in 1950 was probably accurate, and it demonstrated the gap between the objectives of law schools and the needs of their graduates to be prepared for law practice. Ever since legal apprenticeships first fell into disfavor, the failure of the law school to teach legal skills, other than purely analytic ones, had been criticized.<sup>216</sup>

The first organized attempt to try to articulate the rationales underlying legal education was a 1944 report issued by the AALS Curriculum Committee, written primarily by Karl Llewellyn. “The report noted, first of all, that with the increasing complexity of the law the regular case course was no longer, except for the best students, an adequate vehicle for indirect conveyance of the basic legal skills – ‘current case-instruction is somehow failing to do the job of producing *reliable professional competence* on the byproduct side *in half or more of the end product*, our graduates.”<sup>217</sup>

In the 1950s and 1960s, [d]iscussion of curricular reform increasingly centered on skills such as negotiation, drafting, and counseling – legal skills that had had no place in the Langdellian scheme of things.”<sup>218</sup> Leaders of the legal profession began increasingly to express concerns that law

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<sup>212</sup> *Id.* at 206–207 (citations omitted).

<sup>213</sup> *Id.* at 206.

<sup>214</sup> *Id.* at 209.

<sup>215</sup> *Boyd*, *supra* note 5, at 59.

<sup>216</sup> *Stevens*, *supra* note 58, at 214.

<sup>217</sup> *Id.* citing *AALS Proceedings (1944)* 168 (emphasis included in original text).

<sup>218</sup> *Id.* at 212.

schools were not living up to their expectations.<sup>219</sup> The bar was irritated by an apparent reluctance on the part of leading schools to be concerned with those skills that the profession regarded as important; leaders of the profession also felt that the broadening of legal education had gone too far. By the 1960s at most schools, the second and third years had become largely elective, and the course titles bore little resemblance to the courses taken by leading lawyers when they had been in law school. The implications of this were to come to the fore in the friction between practitioners and academics during the 1970s.<sup>220</sup>

The confusion of U.S. law teachers about what they were doing and why they were doing it was apparent in 1971 when Paul Carrington made the following remarks at the AALS Annual Meeting.

While most law teachers would assert that they are teaching much beside legal doctrine, few are eager to say precisely what. Some have been content to describe their work as teaching students 'to think like lawyers,' although that phrase is so circular that it is essentially meaningless. Perhaps the reluctance to be more specific is borne in part by a distaste for platitudes. Or perhaps it reflects the instinct of lawyers (shared by others who are experienced in human conflict) that it is more difficult to secure approval of goals than means. This reluctance should be overcome, partly to try to help students get a better sense of direction, but also in order to direct attention to the "hidden curriculum" which serve to transmit professional traits and values by the process of subliminal inculturation.<sup>221</sup>

In 1972, a Carnegie Commission report concluded that U.S. "[l]aw teachers often are confused about legal education and the form that it has been forced to take by the interplay of bar admission requirements, professional organization, and the law schools. They are unclear about the goals of the second and third years of legal education. They are often frustrated in their scholarship and uncertain about their professional and academic roles. Increasingly disappointed and impatient students interact with increasingly frustrated and confused teachers and emerge with a patchwork professional education and an ambivalent view of themselves as professionals."<sup>222</sup>

By the 1970s, law schools had effectively become the only portal to entry to the profession.<sup>223</sup> The case method was still the predominant method of instruction in law schools, though no one had an adequate explanation of why.

[T]he case method continues to dominate legal education in three ways. First the notion of "fundamental" courses, those making up the first year and upon which everything else depends, stems directly from Langdell's scientific conception of the law. Secondly, the body of knowledge (law school law) that students are required to master is still found in "casebooks." And thirdly, classes are still conducted in some variation of the Socratic method, as if the prime aim of the teacher were to teach the student to extract principles from cases scientifically.

Each of these features of legal education, I must reiterate yet again, has become part of legal education only since 1870 as an adjunct to Langdell's case method. This is not to say that

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219 *Id.* at 238.

220 *Id.*

221 Carrington, *Training for the Public Professions of the Law: 1971, Part One, Section II, Proceedings, Association of American Law Schools, 1971 Annual Meeting (Carrington Report)* reprinted in Herbert L.

Packer and Thomas Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION* 93, 129 (McGraw-Hill 1972).

222 Packer & Ehrlich, *supra* note 10, at 33-34.

223 Stevens, *supra* note 58, at 238.



since Langdell and his disciples introduced these ideas to they must be replaced by something else. It is, however, to say that the rationale for these three ideas – the “fundamental” first year courses, casebooks, and classes conducted along socratic lines – was first provided by the case method, and insofar as that rationale is no longer valid I should think these adjuncts would likewise be suspect, unless they are valid for some other reason than that given by Langdell. They may well be, but I nonetheless suspect that much of the present unrest in law schools stems from the fact that no satisfactory justification for the continuance of this extremely stylized form of legal education has been given to the ever growing number of social science-conscious lawyers.<sup>224</sup>

“Langdell’s first year is our first year; his method – briefing cases, analyzing holdings, socratic probing – is our method. In other words, legal education remains in form a kind of Procrustean bed in which all learning for lawyers is forced to lie. I think I know why Langdell and his colleagues made it so. Frankly, I do not know why we do, unless it is pure inertia. For the above reasons, I conclude that though we have more or less thoroughly rejected the philosophy of the case method, like Maitland’s forms of actions, it still rules us from the grave.”<sup>225</sup>

In 1973, U.S. Supreme Court Chief Justice Warren Burger complained that traditional law school education was not providing adequate advocacy skills to law graduates. “[H]e suggested that a two-year program of basic legal education be followed by specialized training under the guidance of practitioners along with professional teachers.”<sup>226</sup> His concerns about the quality of advocacy in the federal courts were symptomatic of the profession’s unhappiness with the quality of preparation of lawyers for practice.<sup>227</sup>

The Clare Committee was appointed by the U.S. Court of Appeals for the Second Circuit following Burger’s remarks “to develop minimum educational requirements for lawyers appearing before the courts of that circuit. The Clare Committee proposed the successful completion of courses in five subject-matter areas: evidence, criminal law and procedure, professional responsibility, trial advocacy, and civil procedure, including federal jurisdiction, practice, and procedure. Both the Section and the AALS opposed the Clare proposals, which were not implemented.”<sup>228</sup>

Other structural changes to legal education were advocated in the 1970s. In 1971, the AALS Curriculum Committee, chaired by Paul Carrington of Michigan, issued its report, *Training for the Public Professions of the Law: 1971* (the Carrington Report). The Carrington Report called for a basic standard two-year J.D. degree, followed by a series of post-J.D. alternatives designed to respond to the different types of legal practice. The report denigrated the assumption that acquiring a store of information is the principal value of legal education. The committee viewed the present reliance on the case method as “a precious elaboration of details of little value to the generalist.”<sup>229</sup> The report suggested changing the goals of the first year of law study to focus on macroissues, as opposed to microissues, of doctrine.<sup>230</sup> A 1972 Carnegie Commission report<sup>231</sup> endorsed the Carrington Committee’s recommendations, including the proposed two-year model, again as part of an overall freeing up of the alternative structures of legal education.<sup>232</sup>

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224 Woodward, *supra* note 51, at 366–367.

225 *Id.* at 372.

226 Boyd, *supra* note 5, at 115.

227 Stevens, *supra* note 58, at 238.

228 Boyd, *supra* note 5, at 115.

229 Packer & Ehrlich, *supra* note 10, at 51–52.

230 *Id.* at 50–51.

231 *Id.*

232 Stevens, *supra* note 58, at 242.

No one knows for sure why Harvard in the 1800s or the Root Committee in 1921 decided that law students should attend law school for three years. "Unfortunately, no very good explanation can be given for the third year requirement because it was a totally noncontroversial part of the Root resolution. It was noncontroversial because what the A.B.A. decreed in 1921 simply reflected what was then the practice of all but a few law schools. It had not, however, been standard for very long . . . ." <sup>233</sup>

The sum of the matter is that there never was a well-articulated basis for requiring three years of law school; perhaps the most persuasive reason is that English custom requires a prospective barrister to dine at an Inn of Court for three years before he can be called to the bar. The Root Committee departed from its task of defining *minimum* standards when it required three years of law school. At the time the Root Committee spoke, three years had been standard for no more than a decade and it is hard to believe that there were not other combinations of more college and less law school that they would have regarded as minimally satisfactory. <sup>234</sup>

For a while, the two-year law school option seemed close to being accepted as an alternative early in the new decade. <sup>235</sup> In fact, the "ABA Section of Legal Education and Admissions to the Bar recommended to the mid-year meeting of the ABA in 1972 that Rule 307 of the law school standards be modified to allow the two-year law school. Many assumed the change would go through. They could not have been more wrong." <sup>236</sup>

The deans of Harvard, Columbia, Yale, and Pennsylvania opposed the idea, only the dean of Stanford supported it. "Dean Abraham Goldstein of Yale, emphasizing that lawyers had to be trained as generalists, opposed shortening law school at the very moment that law was becoming more complex and students needed to be trained in history, philosophy, and the social sciences." <sup>237</sup>

Although the ABA proposal was defeated, the debate about the lockstep of seven years of higher education continued. "Justin Stanley, president of the ABA in 1975-76, continued to argue for a two-year law school, and once again the profession's heightened interest in professional competence kept the pressure on. In 1978, Chief Justice Burger called for a two year conventional law school followed by a year of clinical work. Again, the law school establishment was not amused. The two-year law school movement, which had seemed so vigorous in 1970, seemed virtually dead by 1980." <sup>238</sup>

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233 Stoltz, *supra* note 155, at 259.

234 *Id.* at 260.

235 Stevens, *supra* note 58, at 242.

236 *Id.*

237 *Id.* Of course, the subjects listed by Dean Goldstein were never added to the curriculums of most U.S. law schools.

238 *Id.* at 242-243.

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Prestigious groups of academics, lawyers, and judges have continued calling for reforms in legal education in the United States consistently from the 1970s to today.<sup>239</sup> Not much has changed, however.

At the beginning of the 21st century the goals and methods of legal education in the United States remain much as they were at the end of the 19th century. The primary educational goals of U.S. law schools are to teach legal doctrine and analysis. The case method/Socratic dialog continues to be the primary method of instruction through all three years of law school. A recent survey of U.S. law school curriculums surprisingly concluded that “[i]t has been a decade of dynamism in legal education.”<sup>240</sup> The report shows that law schools are giving more emphasis to skills and professionalism and have added more second and third year electives. The report also documents, however, that the content of the first year curriculum has not changed significantly. Although simulated and live-client clinical courses have grown in number and sophistication, the survey found that only 24% of responding schools require students to take any of these courses.

Although the curriculum survey did not investigate this topic, very few U.S. law schools have made a serious effort to integrate the teaching of knowledge, skills, and values or to provide sequenced, progressive programs for teaching and learning professional skills. Instruction about the values of the legal profession is not wide-spread or pervasively taught. Ethics instruction is mostly limited to instruction about the mandatory rules of conduct in a single course on professional responsibility.

Law teachers are firmly in charge of legal education in the United States, not the legal profession, the judiciary, or the government, and they would strongly resist any efforts to reduce their power over legal education. They have too much to lose collectively and individually. Consider the comments of historian Robert Stevens about the status and circumstances of law professors in the United States.

To foreign lawyers, especially the professorate, the American law school is frequently a subject of admiration as well as envy. The leading American law schools appear to have an

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239 The most recent call for change is the Conference of Chief Justices' NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (ABA 1999) (Chief Justices' Action Plan) (available at <http://www.ncsc.dni.us/ccj/natlplan.htm>). Other important reports include *Legal Education and Professional Development – An Educational Continuum*, *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Robert MacCrate, ed.) (ABA Section of Legal Education and Admissions to the Bar 1992) [the MacCrate Report] (reporting on the status of legal education and promoting more attention to teaching professional skills and values); *TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS* (ABA American Bar Association Section of Legal Education and Admissions to the Bar Professionalism Committee and the Standing Committee on Professionalism and Lawyer Competence of the ABA Center for Professional Responsibility 1997) (reporting proceedings of Symposium on Teaching and Learning Professionalism, October 2–4, 1996); *Report of the Professionalism Committee, TEACHING AND LEARNING PROFESSIONALISM* (ABA Section of Legal Education and Admissions to the Bar 1996) (calling on law schools to place more emphasis on teaching professionalism); Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 *J. LEGAL EDUC.* 336 (1982) (concluding that law school curriculum does not adequately prepare students to become successful attorneys); *Special Committee for a Study of Legal Education of the American Bar Association, LAW SCHOOLS AND PROFESSIONAL EDUCATION* (ABA 1980) (examining the inadequacy of legal education in preparing students for a legal career and recommending changes to improve and correct perceived problems); *American Bar Association Section of Legal Education and Admissions to the Bar, REPORT & RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* (ABA 1979) (stating that improvement in legal education is an important part to increasing future lawyer competence).

240 *A Survey of Law School Curricula 1992–2002, Executive Summary* (Curriculum Committee of the ABA Section of Legal Education and Admissions to the Bar 2004).

entrenched position of power in the profession, in American life, and, indeed, in the country at large, a position that is frequently denied to the academic branches of the profession in other industrialized societies. Students from American law schools go out into a profession that appears to wield far greater power in politics, business, labor, and even in social reform than in other common-law countries. Law professors within the university appear to live something of a charmed life and, within the profession, to have a profound impact on thinking about law, procedure, and institutions.<sup>241</sup>

A charmed life indeed. Law teachers in the United States are well-paid, they have virtually complete control of which courses are offered at their schools, and within their assigned areas they teach what they want and how they want (there is limited peer review of teaching before tenure, none afterwards). U.S. law teachers have light teaching loads (9 to 12 credit hours a year), have little contact with students outside of class, grade on the basis of one final exam a semester (an exam that individual teachers prepare and grade with no oversight), and have their summers off, often with stipends to write law review articles. After U.S. law teachers receive tenure (in six years or less), most engage in research and publication, though relatively few produce noteworthy scholarship. If a tenured law teacher chooses not to publish anything else after receiving tenure, not much happens. Though many U.S. law teachers supplement their salaries lucratively by “consulting” or actively practicing law, there is no requirement that they share their outside earnings with their institutions (as teaching physicians in U.S. medical schools must), nor do they involve students in their outside work. Some schools require law teachers to report their outside activities, but there is virtually no oversight or accountability.

Although no one could dispute Stevens’ point that the organization and structure of legal education in the United States is good for the professorate in U.S. law schools, one might reasonably inquire as to whether legal education in the United States is as good for its intended beneficiaries as in other countries, specifically British Commonwealth countries.

## The Modern Era of Legal Education in the United Kingdom

The relatively uneventful period in the history of legal education in the United Kingdom came to an end soon after World War II. “The modern English law school is in most important respects a post Second World War creation.”<sup>242</sup>

A significant expansion of legal education occurred between 1945 and 1960. Enrollment in law school effectively doubled, as it did in other undergraduate schools. Although law schools were not highly regarded by the universities or the profession, law schools gradually became the primary route into the legal profession.<sup>243</sup> During the 1960’s, law school enrollment doubled again,<sup>244</sup> and for the first time the majority of new solicitors were entering the profession after obtaining a law degree.

Legal education in the United Kingdom began to change in the mid-1960s. Dissatisfaction about law schools and the system of professional training and qualification, especially apprenticeship, increased.<sup>245</sup> In 1963, Gerald Gardiner Q.C. and Andrew Martin published *LAW REFORM NOW* in which they called for a thorough overhaul of the legal system, including legal education.<sup>246</sup>

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241 Stevens, *supra* note 58, at xiii (emphasis added).

244 *Id.* at 32.

242 Twining, *supra* note 54, at 26.

245 *Id.*

243 *Id.* at 28–31.

246 *Id.* at 33.

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Gardiner became Lord Chancellor<sup>247</sup> in 1964 and appointed the Law Commission in 1965. “Lord Gardiner also appointed a committee chaired by Mr. Justice Ormrod to conduct the first major review of legal education since the Aiken Committee of 1934 – or, as that had been rather feeble, one might say the first since 1846.”<sup>248</sup>

The Ormrod Committee presented its report in 1971.<sup>249</sup> Although the report eventually had a significant impact on legal education in England, the committee did not achieve its primary objective of creating an integrated and unified system of legal education and training.<sup>250</sup> In the face of the three main interest groups’ refusal to cooperate, the committee could do little about the bifurcated system other than to clarify the lines of responsibility: the academic phase would be the responsibility of the universities and polytechnics; the Bar and the Law Society would be responsible for professional and continuing education, although they did not agree on a joint professional qualification. Instead, they insisted on conducting separate courses and examinations for the vocational stage in their own privately funded schools.<sup>251</sup>

Some recommendations of the Ormrod Report were never implemented and others took many years to become practice. However, the report marked a turning point in the history of legal education in England by making legal education an important topic of discussion, establishing patterns and stability, and articulating a philosophy about legal education that continues to influence decision-makers today.<sup>252</sup>

The Ormrod Report also marks the modern starting-point for defining a “core” of undergraduate legal education in England. The committee set five “basic core subjects” as satisfying the “academic stage” of professional formation: Constitutional Law, Contract, Tort, Land Law, and Criminal Law. English Legal System was assumed to be a part of the core curriculum. Some additional requirements were imposed after the Ormrod Report.<sup>253</sup>

The academics “fought attempts to prescribe the detailed content of core subjects and their methods of assessment, with mixed success.”<sup>254</sup> “By 1994, the *de facto* ‘core’ effectively filled nearly two thirds of many curriculums and most students chose vocationally ‘important’ options.”<sup>255</sup> “[T]here seems to be a fairly regular divergence between the conceptions of teachers, students and employers about what is ‘vocationally relevant’ at undergraduate level. Academic lawyers, no doubt with varying degrees of conviction and credibility, may echo Karl Llewellyn’s claim that the best practical training, as well as the best human training, that a law school can give

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247 *The office of Lord High Chancellor of Great Britain, or Lord Chancellor, is one of the oldest offices of state in the United Kingdom, and the second Great Officer of the State, ranking only after the Lord High Steward. Among other significant responsibilities, the Lord Chancellor is the Cabinet member who heads the department responsible for the administration of the courts* ([http://en.wikipedia.org/wiki/Lord\\_Chancellor](http://en.wikipedia.org/wiki/Lord_Chancellor) (last visited June 16, 2004)). In 2003 the Lord Chancellor’s Department was renamed the Department of Constitutional Affairs, which claims on its website that it is “responsible for upholding justice, rights and democracy.” (<http://www.dca.gov.uk/> (last visited June 16, 2004)). Also in 2003 the Prime Minister announced his intention to abolish the office of Lord Chancellor to create a separate supreme court and a separate

*speakership for the House of Lords, but it is not clear whether the House of Lords will implement these changes* (<http://www.dca.gov.uk/> (last visited on June 16, 2004)).

248 Twining, *supra* note 54, at 33.

249 *Report of the Committee on Legal Education (Ormrod Report) (1971) Cmnd. 4594.*

250 Twining, *supra* note 54, at 35.

251 *Id.*

252 *Id.* at 36.

253 *Id.* at 162–163.

254 *Id.* at 165.

255 *Id.* at 162–163.

is the study of law as a liberal art. Students, however, tend to think that courses in areas like commercial law, procedure and evidence are 'practical' and subjects like jurisprudence, legal history and even human rights are 'theoretical.'<sup>256</sup>

Defining the core curriculum in undergraduate and vocational courses continues to be a subject of debate in the United Kingdom, but the consistent trend has been to move away from a knowledge-based core and toward an outcomes-based curriculum.<sup>257</sup>

Legal education in England began moving toward a vocational education built around skills in the 1970s. The public became increasingly dissatisfied with the legal profession and began questioning the benefits offered by lawyers to clients as consumers and the wider society. The public came to view lawyers as being more interested in their own power, privilege, and wealth than in the public good. Governmental agencies became increasingly interested in regulating the provision of legal services during the 1970s and 1980s. Ultimately, "the staff of the National Board for Prices and Incomes, the Monopolies and Mergers Commission of the Office of Fair Trading had not only redefined the professions as vested interests but also, with consumer groups, redefined their clients as customers."<sup>258</sup>

"The undermining of the profession's public image prepared the ground for the political onslaught on the profession's jurisdiction by the Thatcher governments of the 1980s."<sup>259</sup> The Thatcher government was encouraged to take on the legal profession by the popular support for a successful bill to end the solicitors' conveyancing monopoly. In the Green Papers of 1989, Mrs. Thatcher "outlined her new vision of state-profession relationships" and made it clear that "the legal practice was to be regulated, like any other industry by the state and the market."<sup>260</sup>

One result of governmental intervention was the demise of the five-year articles route into the legal profession. There was also a growing challenge to two assumptions: first, that professional expertise was found and transmitted only within the body of the profession and, second, that a rigid distinction between academic and professional programmes was inevitable.<sup>261</sup>

Pressures increased on both the universities and the professional organizations to modify their programs of instruction to place more emphasis on teaching generic skills, to "learn how to learn," to communicate effectively, and to work in teams, in accord with other common law jurisdictions and trends in higher education.<sup>262</sup>

The barristers responded first. The Bar Vocational Course that began in 1989, "represented a radical switch from emphasis on knowledge to emphasis on skills. The selected skills are developed largely through practical exercises, which as far as is feasible simulate the kind of work that young barristers can expect to do in the early years of practice. This represented a genuinely sharp break from the past in objectives, methods, and spirit."<sup>263</sup>

In 1990 the Law Society proposed changes to the Legal Practice Course which moved in a similar direction, although it claimed to maintain "more of a balance between knowledge and skills than

256 *Id.* at 84.

257 *Id.* at 166.

258 *Burrage, supra note 125*, at 68.

259 *Andrew Boon, History is Past Politics: A Critique of the Legal Skills Movement in England and Wales, TRANSFORMATIVE VISIONS OF LEGAL*

*EDUCATION 155 (Blackwell 1998), published simultaneously in 25 J. LAW & SOC. 151 (1998).*

260 *Burrage, supra note 125*, at 69.

261 *Boon, supra note 259*, at 156.

262 *Id.* at 156-157.

263 *Twining supra note 54*, at 166-167.

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the Bar Vocational Course.”<sup>264</sup> “Trainee contracts” were introduced at the same time, making articles “more like normal employer-employee relationships.”<sup>265</sup> The Law Society also encouraged the universities to give more attention to skills instruction at the undergraduate stage, including legal research, problem solving, oral and written communications, initiative, leadership, and teamwork, particularly where this can be done in a legal context.<sup>266</sup>

The Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC) was created in April 1991 under the Courts and Legal Services Act 1990<sup>267</sup> to assist “in the maintenance and development of standards in the education, training, and conduct of those offering legal services.”<sup>268</sup> The Act gave the Committee statutory powers over barristers and solicitors, including the power to determine what role, if any, they were to play in educating or disciplining lawyers.<sup>269</sup> The Committee initiated “a series of reforms designed to convert legal practice into a more efficient, competitive and market-oriented industry.”<sup>270</sup>

The ACLEC commenced a major review of legal education in England and Wales in 1992 and produced its “First report on legal education and training” in 1996.<sup>271</sup> The report encouraged a partnership between the universities and the professional bodies, and it called for an end to the rigid demarcation of responsibilities. It recommended that “the degree course should stand as an independent liberal education in the discipline of law, not tied to any specific vocation.”<sup>272</sup> It also recommended that all teaching institutions should consider the adoption of active learning methods.”<sup>273</sup>

The Report also called for “a clear set of guidelines on minimum standards in respect of such matters as: . . . internal quality assurance mechanisms.”<sup>274</sup> These would be set by a “new audit and assessment body”<sup>275</sup> that should “assess law schools in terms of the subject outcomes proposed in

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264 *Id.* at 166–167. The new Legal Practice Course was implemented in 1993.

265 Burrage, *supra* note 125, at 67.

266 Twining *supra* note 54 at 160, citing Law Society Training Committee, *Training Tomorrow’s Solicitors: Proposals for Changes to the Education and Training of Solicitors* (1990) para 4.1 and para 5.1.

267 News Release of the Lord Chancellor’s Department, 22 April 1996, at [www://www.newsrelease-archive.net/coi/depts/GLC/coi7764b.ok](http://www.newsrelease-archive.net/coi/depts/GLC/coi7764b.ok) (last visited on June 16, 2004). The Lord Chancellor’s Advisory Committee on Legal Education and Conduct was abolished in the Access to Justice Act 1999 and replaced by a Legal Services Consultative Panel appointed by the Lord Chancellor (Access to Justice Act 1999, part III, section 35 (1) and 18A (1), <http://www.hms.gov.uk/acts/acts1999/90022-c.htm> (last visited on June 16, 2004)). The Consultative Panel assists in the “maintenance and development of standards in the education, training, and conduct of persons offering legal services.” (Access to Justice Act 1999, part III, section 18A (3), <http://www.hms.gov.uk/acts/acts1999/90022-c.htm> (last visited on June 16, 2004)). A “Standing Conference on Legal Education” including representatives from the profession and academia also exists to provide a forum in which “those responsible

for the provision of legal education could discuss matters of common concern” and to provide a mechanism for communication between the world of legal education and the Lord Chancellor’s Advisory Committee on Legal Education and Conduct. (The Institute of Advanced Legal Studies website, <http://www.ials.sas.ac.uk/library/archives/scle.htm> (last visited on June 16, 2004). See also the Department of Constitutional Affairs website, <http://dca.gov.uk/dept/legeduc/standcomf.htm> (last visited on June 16, 2004)).

268 Courts and Legal Services Act 1990, part III, section 20 (1), [http://www.hms.gov.uk/acts/acts1990/Ukpga\\_19900041\\_en\\_3.htm](http://www.hms.gov.uk/acts/acts1990/Ukpga_19900041_en_3.htm) (last visited on June 16, 2004).

269 Burrage, *supra* note 125, at 69.

270 *Id.*

271 UK Centre on Legal Education website, <http://www.ukcle.ac.uk/resources/aclec.html> (last visited on June 16, 2004).

272 Lord Chancellor’s Advisory Committee on Legal Education, *First Report on Legal Education and Training* (April, 1996), R. 4.1.

273 *Id.* at R. 4.3.

274 *Id.* at R. 7.1.

275 *Id.* at R. 7.2.

this Report, the guidelines on minimum standards, and the law school's own mission statement."<sup>276</sup>

The ACLEC report concluded that "[e]ducation and training leading up to the point of initial qualification can no longer be considered as providing a sufficient base of knowledge and skill for the whole of one's career . . . [but] the function of the prequalification stages of legal education and training . . . must be to lay the broad foundations in legal knowledge and skill which practitioners will be able to use throughout their careers."<sup>277</sup>

The Dearing Report in 1997 added support to the movement toward skills instruction in undergraduate education by encouraging educational institutions to help all university students to develop key generic and specific subject skills in part by involving students in experiential learning and encouraging them to reflect on their experiences.<sup>278</sup>

The institutionalization of skills instruction in undergraduate law schools was probably assured in 1997 when the Quality Assurance Agency for Higher Education (QAA) was created to "provide an integrated quality assurance service for UK higher education."<sup>279</sup> The QAA helps schools to define clear and explicit standards including frameworks for higher education qualifications and subject benchmark statements that set out expectations about the standards of degrees in a range of subject areas, including law.<sup>280</sup> The QAA also conducts audits to determine if schools are providing education of an acceptable quality and at an appropriate academic standard.<sup>281</sup>

In 1999, the QAA developed benchmark standards for law schools that set levels of various abilities and skills that a student should demonstrate before being awarded a degree in law.<sup>282</sup> These are minimum standards that apply to all law schools. Each school is free to set higher benchmarks for its students.

The Law Society of Scotland launched a new Diploma in Legal Practice program in 1999 designed to help law school graduates convert their existing knowledge of the law into action on behalf of their future clients. The curriculum is outcomes-focused. At the Glasgow Graduate School of Law, for example, the program and each course in it emphasizes the integration of skills and knowledge, effective communication, and transactional learning.<sup>283</sup> Skills including negotiation, interviewing, legal drafting and writing skills, advocacy skills, and legal research skills are taught within the contexts of subject matter specific courses such as criminal law, tax law, and conveyancing.<sup>284</sup> Each course has specific learning objectives that are described in terms of the competencies that

276 *Id.* at R. 7.2 (3).

277 ACLE 1996 Report.

278 Boon, *supra* note 259, at 154–155, citing *Higher Education in the Learning Society: Report of the National Committee (1997)* ch. 9 (Dearing Report).

279 QAA website, <http://www.qaa.ac.uk/> (last visited June 16, 2004).

280 *Id.*

281 *Id.*

282 The benchmarks are on-line at <http://www.qaa.ac.uk/crntwork/benchmark/bencheval/law.html> (last visited June 18, 2004). "Commentary for Law Schools" about the benchmarks is on-line at <http://webjcli.ncl.ac.uk/1999/issue2/aclec7c.html> (last visited June 18, 2004).

283 *Glasgow Graduate School of Law, Diploma in Legal Practice 2003–2004 Course Handbook 16* (copy on file with author).

284 To obtain a Degree in Legal Practice, students must receive passes in Conveyancing, Law and the Legal Process, Constitutional Law and History (Public Law I), Scottish Private Law I (Contract and Delict), Scottish Private Law II (Family Law and Property Law), Criminal Law, Mercantile Law, Tax Law, and Evidence. Although it is not required for the Degree, a pass in European Law is required for admission to The Law Society of Scotland and the Faculty of Advocates. *Glasgow Graduate School of Law, Diploma in Legal Practice 2003–2004 Course Handbook 5* (copy on file with author).



students should develop during the course and which will be assessed by various means. For example, by the end of the Company and Commercial course, students should be able to “prepare and draft appropriate documentation in connection with the incorporation of a company, including basic articles of association,” “advise on the more commonly encountered duties and responsibilities of directors and secretaries,” and perform thirteen other tasks.<sup>285</sup>

### **Part III. New Initiatives in the United Kingdom and the United States**

#### **New Initiatives in the United Kingdom**

In 2003, the Training and Framework Review Group of the Law Society of England and Wales proposed a new training framework for solicitors.<sup>286</sup> One motivation for developing a new framework is that, under the Disability Discrimination Act, the Law Society “will shortly be under a new duty to demonstrate objective justification for all of its competence requirements. It will need to be able to demonstrate that any competence requirements that will be hard (or impossible) for some disabled solicitors to achieve are essential for the qualification of a solicitor; that they are an integral attribute required of all solicitors in practice.”<sup>287</sup>

The Review Group recommended that the Law Society should develop a new qualification scheme that includes the following, and more, “essential features:” a new framework based on what solicitors must know, understand and be able to do and the attributes they should be able to demonstrate at the point at which they qualify, that is, an outcomes-based framework. The compulsory outcomes should focus only on the essential knowledge, skills, and attributes that all solicitors should have at the point of qualification. Proposed descriptions of the compulsory outcomes are delineated in some detail by the Review Group. The Law Society expects to finalize its descriptions of compulsory outcomes sometime in the fall of 2004 and to implement new programs for achieving them by the fall of 2006.

The Review Group also called for a final, verifiable, and objective confirmation of an individual’s readiness for practice, with a particular focus on the person’s understanding of and commitment to professional responsibilities, ethics, and client care. This assessment is to take place “only in the light of significant experience in practice.”<sup>288</sup>

The Review Group is also urging the Law Society to encourage innovation in developing a broader range of pathways into the profession. If the training framework is valid and accurate assessment tools are developed to measure whether a solicitor is adequately prepared for practice, theoretically it should not matter how a person achieves those outcomes. However, the Review Group recommended that all pathways should include the following key features: completion of an honours (undergraduate) degree or equivalent; learning of law and law practice to at least an honours degree level; a rigorous assessment strategy; a period of work-based learning; successful completion of a course and assessment covering professional responsibilities, ethics, and client care; and completion of a learning record and formal confirmation of an individual’s readiness to practice.<sup>289</sup>

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285 *Diploma in Legal Practice 2003–2004 Course Handbook*, *supra* note 283, at 24–25.

286 *Training and Framework Review Group of the Law Society of England and Wales, Second consultation on a new training framework for solicitors (2003)*. The

document is posted on the Law Society’s website, <http://www.lawsociety.org.uk/> (last visited May 2004).

287 *Id.* at ¶ 30.

288 *Id.* at ¶ 43.

289 *Id.* at ¶ 58.

In June, 2004, the Law Society of Scotland released a working draft of "A Foundation Document" for the future development of professional legal training in Scotland. (The Foundation Document was available on-line at <http://www.lawscot.org.uk/public/home.html> on November 10, 2004.) The document sets out the principle goals and specific objectives of the Law Society of Scotland in relation to the education and training of those intending to become Scottish solicitors. It describes the fundamental values of the legal profession and the fundamental principles of professional legal education, taking as its core educational concept the benchmark of competence in legal practice. The document defines competence in professional legal practice as "the distinguishing but minimum performance standards characteristic of the performance of a novice legal professional," and it also describes the characteristics of competence more specifically. The Law Society is in the process of developing a common benchmark set of skills and knowledge for entry into the profession.

The Scottish Foundation Document recognizes that the ongoing revolution in business practice and communication create the prospect of continuously changing requirements for law practice. Thus, it aims to identify how best to prepare lawyers to cope with and manage all the changes which they will encounter during their careers. The document endorses the concept of "deep learning" that is designed to foster understanding, creativity, and an ability to analyse material critically. It challenges the philosophy of "coverage" which asserts that new lawyers should not be permitted to practise unless and until they have demonstrated knowledge of the key provisions of numerous branches of Scottish law. It views the 'coverage' philosophy as encouraging passive, unreflective learning, while discouraging analysis, reasoned argument, or independent research. In addition to continuing its emphasis on skills training in the three years between the granting of a law degree and the grant of a full Practising Certificate, the Society joins the Joint Standing Committee on Legal Education in Scotland and the Quality Assurance Agency in calling on undergraduate law programs to increase their emphasis on teaching generic, transferable skills such as communication, reasoning and analysis, problem-solving, teamwork and information technology.

There are ongoing debates in the United Kingdom about the movement toward outcomes-focused instruction and increased governmental regulation of legal education and the profession. Some people believe that the lack of close coordination between the professional organizations and the universities and among the universities, creates inconsistencies in the preparation of law graduates for the vocational courses and fails to provide a sufficiently strong theoretical foundation for skills development.<sup>290</sup> Others point out that little attention is being paid by either the universities or the professional organizations to teaching values.<sup>291</sup> Another complaint is that the trend is too much toward vocational education instead of liberal education.<sup>292</sup> And neither academics nor practitioners have conclusively determined what knowledge, skills, and values are the most important for lawyers to have before they begin practice.

Finally, some are worried that, although "[t]here is no reason to suppose that the more formally educated and certified new solicitors profession in England and Wales will merely provide a re-run of [the] American experience," the cumulative effect of the changes will erode professionalism and

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290 *Boon, supra note 259, citing Higher Education in the Learning Society: Report of the National Committee (1997) ch. 9 (Dearing Report).*

291 *Julian Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education,*

*TRANSFORMATIVE VISIONS OF LEGAL EDUCATION* 134, 135 (Blackwell 1998), published simultaneously in 25 *J. LAW & SOC.* 134 (1998).

292 *Id.* at 136; and *Boon, supra note 259, at 151.*

make new lawyers in England and Wales “less inclined to defer to, or respect, collective customs and rules than the gentlemen’s profession, less inclined to think that their collective honour matters.”<sup>293</sup>

Despite the concerns, uncertainties, and practical implementation problems being encountered in the United Kingdom, at least lawyers and law teachers are making an effort to consider and debate how best to prepare lawyers for practice and to implement necessary changes. There has never been a serious, broad-based discussion about the preparation of lawyers for practice in the United States. Hopefully, that will change.

## New Initiatives in the United States

A variety of organizations have the ability to influence legal education in the United States. The highest appellate court in each state is typically responsible for regulating the legal profession, including setting the criteria for admission to practice. Although there is a federal court system that could establish its own standards, admission to practice in the federal courts is presumptive for lawyers who are admitted to practice in any state. In addition to the state supreme courts, four independent bodies have significant influence on legal education. The Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (the Council) is recognized by the federal government as the official accrediting body for law schools. The Council establishes and monitors compliance with accreditation standards. The Association of American Law Schools (AALS) sets additional standards for member schools of the Association, and most law schools are members of the AALS, or aspire to be. The Law School Admissions Council (LSAC) prepares and administers the Law School Admissions Test (LSAT) for prospective law students. The National Conference of Bar Examiners (NCBE) develops components of the examinations for bar admission that each state administers, and it facilitates dialog among bar examiners throughout the country.

Pressures to reform the processes for preparing lawyers for practice are coming from a variety of sources, and the Council, AALS, LSAC, and NCBE are reexamining, in one form or another, the validity of their tests and standards.

Although judicial challenges to the validity of bar examinations have failed, so far,<sup>294</sup> it is evident that bar examinations in the United States do not measure a person’s ability to practice law competently.<sup>295</sup> The Society of American Law Teachers (SALT) issued a report in 2002 concluding that the current bar examination “inaccurately measures professional competence to practice law” and “has a negative impact on law school curricular development and the law school admission process.”<sup>296</sup> SALT urged states to consider alternative ways to measure professional competence and license new lawyers.

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293 *Burrage, supra note 125, at 72.*

294 *See Cecil Hunt, Guests in Another’s House: An Analysis of Racially Disparate Bar Performance, 23 FLA. ST. U. L. REV. 721, 733–763 (1996) (criticizing judicial decisions involving challenges to the validity of bar examinations).*

295 *See Id. and Andrea Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 NEB. L. REV. 363 (2002).*

296 *Society of American Law Teachers Statement on the Bar Exam, July 2002, 52 J. LEG. ED. 446 (AALS 2002) (also available at <http://saltlaw.org/positiononbarexam.htm>).*

The appellate courts, acting through the Conference of Chief Justices, are encouraging reforms. In the late 1990s, the Conference of Chief Justices developed an action plan to improve the professionalism of lawyers in the United States.<sup>297</sup> Among its recommendations are that “the subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers” and “[t]he format of the bar examination should be modified to increase the emphasis on the applicants’ knowledge of applied practical skills, including office management skills.”<sup>298</sup>

The ABA Section, the AALS, the NCBE, and the National Conference of Chief Justices formed a Joint Working Group on Legal Education and Bar Admission in 2003.<sup>299</sup> The Working Group organized a conference focusing on bar examinations and law school assessment methods, however, the Working Group has not yet formulated any recommendations.

The LSAC is supporting a project to identify predictors of success in law school and in law practice. One objective is to identify job-related competencies of effective lawyers. The idea is that, if such competencies can be identified, perhaps the Law School Admissions Test can be modified to determine if law school applicants possess or can acquire those competencies. In phase I which took two years, the project identified 26 factors that seem to constitute lawyering effectiveness and developed items for multiple behavioral rating scales for those factors to help appraise lawyers’ performance.<sup>300</sup> In phase II, which expected to continue until July 1, 2006, the project is developing tests that might predict competency on those factors.<sup>301</sup>

It appears that the Council may finally be ready to require law schools to improve the preparation of students for practice. Important changes to the accreditation standards were approved by the Council at its meeting on August 7, 2004. An effort to derail the changes, led by law school deans, was defeated by a 9 to 8 vote. The proposed changes would require ABA-approved law schools to provide each student with substantial instruction in legal analysis and reasoning, legal research, problem solving, oral communication, writing in a legal context, and “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”<sup>302</sup> An interpretation of the standard explains that “other professional skills” include trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting. The revised standard also requires law schools to provide substantial opportunities for live-client or real-life practice experiences “appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence.”

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297 CONFERENCE OF CHIEF JUSTICES NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (ABA 1999). Included in the same document is REGULATORY AUTHORITY OVER THE LEGAL PROFESSION AND THE JUDICIARY: THE RESPONSIBILITY OF STATE SUPREME COURTS: A REPORT OF THE CONFERENCE PROCEEDINGS, RANCHO BERNARDO, CALIFORNIA, MARCH 1997.

298 *Id.* at 32.

299 Erica Moser, *President’s Page*, THE BAR EXAMINER 4 (February 2003).

300 A preliminary list of competencies identified by the LSAC project are currently posted on-line in an appendix of CLEA’s Best Practices Project’s work product, at [www://professionalism.law.sc.edu](http://www://professionalism.law.sc.edu) (look in the “news” section on the main page).

301 Email from Marjorie Shultz on September 13, 2004 (on file with the author).

302 Proposed Standard 302(a), ABA Standards for Approval of Law Schools.

If the proposed changes are approved by the ABA House of Delegates in February or August, 2005, each law school will decide on its own how to comply with the amended standard. The Council will eventually determine whether schools are in compliance through its reaccreditation process (the Council sends an inspection team to each law school every seven years). If a school is not in compliance, the Council will report this and direct the school to comply, but the Council is unlikely to revoke the accreditation of a school that is not in compliance. Thus, any real changes produced by the amended standard are likely to take a significant period of time to become evident.

The Carnegie Foundation undertook a major study of legal education in 1999 to engage faculty, national organizations, and members of the legal profession in active dialog about how educational programs can be made better. Intensive field work was conducted at a cross section of 16 American and Canadian law schools during the 1999–2000 academic year, and data analysis and writing has been underway since then under the leadership of Senior Carnegie Scholar Judith Wegner, a former dean and current professor of law at the University of North Carolina. More details about the project are available on-line at <http://carnegiefoundation.org/PPP/legalstudy/index.htm>.

Independent of the other initiatives, the Clinical Legal Education Association (CLEA) undertook a project in 2001 to describe best practices for preparing lawyers for practice in the United States. The author of this article chairs the steering committee. Although the project was initiated by and is operating under the auspices of the CLEA, it is proceeding in an open manner to provide a national forum for academics, lawyers, judges, bar admissions authorities, and others to engage collaboratively in a search for better ways to educate new lawyers. The most current draft of the project's work product is posted on-line at <http://http://professionalism.law.sc.edu> (look in the "news" section on the main page). CLEA invites comments from anyone who is interested in improving the practice of law in the United States. CLEA also seeks opportunities to discuss the project at conferences and other forums. It plans to host a national conference about the Best Practices Project during the spring of 2005 and to complete the document shortly thereafter.

The Best Practices Project is focusing on three aspects of legal education: setting educational goals, delivering instruction, and evaluating the effectiveness of programs of instruction. For the moment, at least, the project is focusing on how law schools can do a better job. It is not presently considering how the entire process for becoming a lawyer might be improved. The steering committee assumes that changing the entire process in fifty jurisdictions would be even more difficult to accomplish than reforming law schools. As much as one might prefer significant changes to the entire process, the state chief justices who regulate admission to practice have not given any sign that they are interested in restructuring the qualification process.

There are two things that make the Best Practices Project different from previous efforts to reform legal education in the United States. First, the project is grounding its work as much as possible on recognized sound educational theories and accepted standards of good educational practices. The second difference is that the work product should be useful as a tool for measuring the quality and effectiveness of a law school's program of instruction.

The most interesting aspect of the project is its consideration of the goals of legal education. One does not have to ask many questions to discover that legal educators in the United States do not have a clear vision of what law schools, or even specific courses in law schools, should be trying to accomplish. There is a lot of talk about teaching students how to think like lawyers, but the

curriculums and examinations are largely focused on teaching and assessing doctrinal knowledge, not whether students know how to think like lawyers. Even with respect to doctrinal knowledge, there is little agreement about what students should learn in law school. The ABA accreditation standards do not even describe what the core curriculum of a law school should include.

One of the key elements of the Best Practices Project is its recommendation that U.S. law schools should switch from knowledge-based curriculums to outcomes-focused curriculums. It did not take much work to figure out the good sense of moving in that direction. In light of the ongoing work on outcomes-focused instruction in the United Kingdom and other jurisdictions, the Best Practices Project is recommending that law schools in the United States adopt the descriptions of outcomes that were proposed by the Law Society of England and Wales in 2003. The descriptions seem to fit the needs of students in the United States as well as those in England and Wales for the most part, and legal educators in the United States will be able to observe the Law Society's programs for achieving and measuring those outcomes. Law schools in the U.S. should also develop detailed descriptions of outcomes for each course in their curriculums, and the Best Practice Project provides examples from the Diploma in Legal Practice program at the Glasgow Graduate School of Law.

The Best Practices Project is also encouraging U.S. law schools to reduce their reliance on the case method of instruction and to utilize other active learning techniques such as discussion, problems, simulations, and experiential learning. Many U.S. law teachers already use techniques other than the case method, but the majority do not seem to be inclined to change. This is in part because the case method is how they were taught, it is the only technique they have ever used, and they are familiar with the materials. In other words, it would take a bit of time and effort for case method teachers to change what they teach and how they teach it. Hopefully, the Best Practices Project will succeed in convincing some people that there are good reasons to change, and others will find ways to motivate the remaining teachers to come along.

The biggest challenge facing legal educators in the United States is to find ways to provide new lawyers enough supervised practice experience to protect their initial clients. As mentioned earlier, only two jurisdictions in the United States requires a new lawyer to spend any time working under the supervision of an experienced lawyer before becoming fully licensed. It is difficult to defend this practice. Clinical teachers supervise third year law students who represent their first clients, and they see that very few are capable of performing competently without supervision. The U.S. system of legal education simply does not prepare students for practice.

The Steering Committee for the Best Practices Project easily concluded that it is absolutely essential for every law student to have some exposure to actual law practice during law school. There is no such requirement now. The project will also encourage law schools to expand opportunities for students to participate in clinical programs in which students actually provide legal services. It is still debating how to determine how much supervised practice it takes to protect new lawyers' initial clients sufficiently. Even if every law school provides every law student with a meaningful clinical experience, would this be enough? Probably not. Then, how can we protect our graduates' initial clients, their employers, and the public in general?

There seem to be two primary options. The first option is to limit the services that new lawyers can perform without supervision to those competencies that law schools agree to teach and bar examiners agree to assess. They could not become licensed to perform other tasks without supervision until they demonstrated their abilities through assessment.

The second option is to require all new graduates to associate with an experienced lawyer or a law firm for some period of time after finishing law school, that is, they should “serve articles” until they demonstrate, through assessment, an acceptable level of competence to practice without supervision. This may not sound very radical in the United Kingdom, but it is a radical proposal to U.S. audiences.

## **Conclusion**

In considering the common and divergent histories of legal education in the United States and the United Kingdom, we have seen that many decisions about legal education were made that had nothing to do with the merits of the most important question, “How should a democratic society prepare its lawyers for practice?” Historical events, politics, world and local economic factors, greed, self-interests, prejudices, and personalities all played roles in shaping the very different systems we have today.

There is no doubt that James Bryce would change his opinion about of the relative merits of our systems of legal education. The United Kingdom’s system is superior for a number of reasons, but especially because countries in the United Kingdom do not allow new lawyers to ply their trade without gaining some practice experience under the supervision of experienced lawyers. Despite the quality control issues associated with articling and pupillage/devilling, at least those traditions perform socialization functions that are absent in the United States except for law school graduates who join firms that take their mentoring responsibilities seriously.

There are probably some new lawyers in the United Kingdom who do not have the requisite knowledge, skills, and values to represent common people with common problems effectively and responsibly, but it is almost guaranteed that most lawyers who are admitted to law practice in the United States are not well-prepared to represent common people with common problems. They may be ready to begin law practice in large law firms or governmental agencies that have the time and resources to finish preparing them for practice, but they are not ready to undertake professional responsibility for individual clients’ legal problems.

The United Kingdom is moving even farther ahead of the United States today as it creates outcomes-focused programs of instruction that aim to develop the competencies that new lawyers need when they begin practice.

Our systems for educating and training lawyers have moved so far apart, can they ever be alike again? One would like to hope so. The most unlikely change in the U.S. would be to require college students to major in law. What is more likely is that U.S. schools will eventually adopt outcomes-focused programs of instruction. It makes sense to do this, others are showing us how to do it, and there are growing pressures on law schools to become more accountable. This change will not come easily or quickly, but I think it will come.

We should also end our practice of giving new lawyers unrestricted licenses to practice law. There are viable alternatives that would provide more protection to consumers. It is puzzling why licensing authorities continue this harmful practice. Perhaps in the near future governmental and consumer protection groups will focus on this issue and provide sufficient incentives for change.

The major impediment to reforming legal education in the United States is the long-standing resistance of law teachers to reexamine legal education periodically and implement appropriate

reforms. Unfortunately, the legal profession, the judiciary, and state and federal governments have ceded control of legal education to the law teachers for all practical purposes. Most law teachers are highly intelligent, well-meaning people, but they have are few incentives to change the content or structure of legal education. There are several entities that could provide those incentives, but so far none has shown a commitment to do so.

Hopefully, someone with the power to change legal education in the United States will develop a commitment to take action to protect the interests of students, clients, employers, and society in general, even if doing so would not serve the self-interests of law teachers.