

LEGAL EDUCATION IN THE UNITED STATES: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

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The annual meeting of the Research Committee on Sociology of Law of the International Sociological Society, held in San Juan and Mayagüez August 1-4, 2004, brought together scholars, teachers and professors of law and sociology from around the world to discuss a wide range of topics. Several sessions were devoted to the discussion of legal education in different contexts. I had been asked to make a presentation about legal education in the United States and to discuss recent trends and reforms that affected it. What follows is an edited version of my presentation.

I have been asked to speak to you about legal education in the United States. As we have seen in our discussions during the past few days, the phrase “legal education” can have several different meanings. For example, we have discussed the need to educate the public about legal reform. Also, we have talked about education of children about the law and about the education of judges as part of judicial reform. Thus, I find that I have to define the concept, and the context, of the phrase “legal education” as I will be using it today.

I will be using the term to refer only to the formal education of students who want to practice law. In fact, perhaps it is better if I do not use the term “legal education” at all and simply circumscribe my remarks to the more limited topic of “law school education.”

I think we can all agree that the goal of law school education is to prepare students for the practice of law. However, there is no agreement as to what is the best way to achieve this goal; and, as we all know, there

are many different approaches to it throughout the world. My goal today is to give a very quick summary of the development of the American approach to law school education and to assess some changes and trends we have seen in it throughout that history.

The history of American law school education can be divided into three periods characterized by the approach taken to prepare the students for the practice of law. The first approach was based on what can be called an “apprenticeship” model, in which young apprentices would work under the supervision of practicing attorneys in order to acquire the necessary training to practice law. Indeed, as of 1922 not one state required a person to attend a law school to be admitted to practice.¹ In fact, during this period, going to law school was seen by many as an unnecessary delay² and the legal community debated whether academic education could really prepare the students for the actual practice of law.³ It took years for legal educators to convince the legal establishment that lawyers would benefit from a formal education in law schools before practice.

The second period in American law school education was characterized by an attempt to provide a “complete education” rather than just professional training. Based on this view, Roscoe Pound once stated that the content of a good legal education should include solid cultural training and a grasp of the theory and techniques of the social sciences, including history, sociology and philosophy.⁴ Legal education during this period was designed to prepare the student to be a well educated citizen as

well as a competent practicing attorney. As explained by the President of Northwestern University in 1870,

The object of a law department is not precisely and only to educate young men... to be practicing lawyers, though it will be largely used for that purpose. It is to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought.

During this early period of legal education, however, law schools were trying to compete with the more "practical" approach to legal education provided by the apprenticeship model. Thus, in order to attract students, legal educators would have to convince them that by attending a law school they could acquire some knowledge that would be valuable for the practice of law, and that this type of knowledge could not be acquired through an apprenticeship.⁸ Out of this need, the current model of legal education was developed.

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The current model of legal education is characterized by two main

elements: a graduate studies program and the case method of instruction. Unlike in some countries, where a law degree is acquired after five or six years of undergraduate study, in the United States the degree can be obtained after three years of graduate study. This means that law schools' programs are more limited and, thus, it becomes more difficult to provide the "complete education" advocated by the educators of the early twentieth century. It also means that law schools have no control over the undergraduate preparation of the students attending law school. This can operate as an advantage in that students may come to law school with a wide variety of different backgrounds and interests and, thus, constitute a diverse student body. On the other hand, it can also operate as a disadvantage since some of the students do not arrive at law school with those elements of the "complete education" that law school cannot provide once the program is reduced to three years.

The second characteristic element of the current education model is its heavy reliance on the so called "case method" as a teaching technique, the creation of which is usually attributed to Christopher Columbus Langdell, the first dean of Harvard Law School.⁷ Langdell believed that law was a science that consisted of a finite number of doctrines and principles.⁸ The purpose of legal education, according to the Langdellian view, was to expose the student to the doctrines through the study of relatively few carefully selected and arranged cases, which would arguably enable students

to develop the ability to apply the doctrines to factual scenarios.⁹ On the other hand, legal education reformers of the period agreed that legal education should be a combination of theory and practice. The development of new moot court programs, law reviews, debate societies, and the precursors of what are now clinical education programs, were some of the methods

suggested to achieve this end.¹⁰

Eventually, legal education became the norm and the apprenticeship model was abandoned.¹¹ Soon, however, as a result of its reliance on doctrinal analysis, some began to criticize the new legal education based on the "case method." They complained it was too theoretical and ineffective in teaching practical skills.¹² The debate whether legal education should be more "practical" has continued since then.

A few examples of the criticism typical of this debate are illustrative. In 1921, Alfred Reed wrote that "[t]he failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly."¹³ In 1933, Jerome Frank argued that law schools had become too academic and unrelated to practice, and called for the rejection of Langdellian education theory.¹⁴ Twenty years later, in 1953, a report on legal education in the United States was published¹⁵ which concluded that the criticisms of legal education could all be broadly grouped under one heading: that law schools inadequately equip students with the practical skills necessary for the practice of law.¹⁶ Some of the suggestions the report proposed to bridge the gap between law school and practice included the use of clinical education¹⁷ and the development of problem-solving methods of instruction to help students learn fact-finding and problem-solving skills.¹⁸

In response to similar criticism over the years, much has changed since 1953, when the Harno report on legal education was published. In terms of curriculum, for example, we have seen the creation of many new courses to cover new and developing areas of the law. We have also seen the content of many of the courses change, also to keep up with new developments. In terms of teaching methods, we have

seen the development of many different teaching methods, including, for example, methods based on clinical education and problem solving skills. Finally, we have seen the creation of specialty programs, certificate programs [akin to "majors" in undergraduate studies] and graduate and summer programs.

However, in legal education, the more things change, the more they stay the same. Even though there have been some changes in curriculum and teaching methods, the required courses, and teaching methods used are essentially the same as those developed by Langdell from the late 19th century. The first year curriculum for all American law schools is essentially the same (torts, contracts, property, civil procedure, criminal law, and constitutional law), and most of the professors still seem to be using the same old case method of instruction. The common emphasis on doctrinal education has a tendency to minimize discussion of "big picture issues," like the "context" that Roscoe Pound was talking about in 1933, and of issues like professionalism and problems of access to justice and legal representation.

Also, the debate between the "practical/professional" education model and the academic one rages on. In 1979, for example, the Report of the ABA Task Force on Lawyer Competency concluded that law schools were not doing a very good job of training the students in practical skills.¹⁹ More recently, a former president of the American Bar Association wrote: "I can't think of any other profession that operates with so little connection between those who are practicing and those who are the gatekeepers for the profession."²⁰ Elsewhere he argued that by "the case method provides the law student with only an academic view of the law."²¹ Thus, while law schools have moved toward diversity in the curriculum, the profession demands that they do a better job of pre-

paring the students for practice.²²

Traditionally, the legal community in the United States has considered a law school graduate to be qualified to practice in any aspect of the profession as soon as he or she is admitted to practice in a particular jurisdiction. However, it is debatable whether this is true in practice. What has happened is that, even though legal education in the United States has abandoned the required period of apprenticeship, law schools assume that its graduates are going to work in law firms where they will get the training they need to complete their education and be ready to practice law competently.²³ Dean Brest of Stanford Law School, for example, has been cited as saying:

If the student is likely to go into a solo practice, then our graduates would be badly prepared. The assumption underlying our law school is that they are going to work for firms in which they will be apprenticed... In law school, we turn them over to the firms for that training.

Interestingly, therefore, given its reliance on the job training while in summer jobs or after graduation, the American law school system in a way has gone back to the days of the apprenticeship model.²⁵ This reality has led many to suggest the implementation of a two-tier education system like the one followed in the Commonwealth Caribbean and in England,²⁶ or a certification system for certain types of practice.²⁷

The two most recent studies on legal education sponsored by the American Bar Association have recognized this new *de-facto* apprenticeship system, but in the end have not added much to the debate. In the 1990s, an ABA appointed a task force concluded that one of the few ways in which law

school graduates were effectively acquiring practice skills was through the apprenticeship-style, in-house, or on-the-job training programs.²⁸ For this reason, the task force stressed that legal education is a "process" that is not finished during the law school years and that both the academic and practicing bar have complementary duties toward the development of students' skills.²⁹

What is striking, however, is that the conclusions of this report are almost identical to the conclusions reached by Professor Harno in his report on legal education in 1953. Back then, he stated:

We start from the premise that law-school graduates, although they have passed their bar examinations, are not (or should we say, as legal education is now dispensed by the law schools, are not) *ipso facto* qualified to assume the responsibilities of the practice of law. Additional training, at least in the simpler skills of the profession, is essential. If all individuals newly admitted to the bar were required to serve office apprenticeships, or if, in fact, all took positions in offices upon their graduation from law school, the problem would tend to disappear. In a limited number of jurisdictions the standards of admission do, indeed, provide that candidates for the bar must, in addition to studying in a law school, serve office apprenticeships. In most states there is no such requirement. Whose responsibility then is it to see to it that all applicants are qualified in the essential skills of the practice? In considering this question careful thought should be given to the views... that law schools should not undertake what they are not qualified or equipped to do. ... The question before us is one of joint responsibility for the

Profession, the bar examiners, and the schools.

One could use these exact same words to summarize the report of the ABA Task Force written forty years later. It is interesting (and unfortunate), to say the least, to realize that in forty years the legal education establishment has not been able to deal effectively with the same old problems.

In conclusion, law schools must pursue many different goals at the same time. At a minimum, they must provide the students with sufficient knowledge to prepare them for the bar exam and for the practice of law. But, they must do so in a way that keeps the study of law in its proper "context," taking into account social, political, economic considerations. Obviously, the challenge for legal education today is developing a system that meets all of these goals in a very limited period of time. Merely adding courses to the curriculum will not be enough. Legal educators must help students learn to understand the connection between law and social relations, such as race, gender, class, and sexual orientation. This perspective will, of course, enhance the cultural awareness of students, making them better prepared and better educated. Unfortunately, given the limitations imposed by time, curricular needs, and concerns about the bar exam, these new perspectives into legal education will probably be explored not institutionally but by individual professors. Hopefully, as more professors do so, the diversity in their teaching methods, interests and topics will enhance law school education.

Notas:

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¹ ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 172.

² See *Id.*; Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 946-47 (1991), for discussions on the debates surrounding legal education through apprenticeships and through law schools.

³ M. H. Hoeflich, *Plus Ça Change, Plus C'Est La Môme Chose: The Integration of Theory & Practice in Legal Education*, 66 TEMP. L. REV. 123, 124 (1993). By 1850, there were 15 law schools in the United States; by 1860, there were 21; and by 1870, there were 31. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 51 (1953). Twelve of these 31 law schools, in 1870, conducted one-year programs; two required one and a half years, and 17 required two years of study for graduation. *Id.*

⁴ Roscoe Pound is an enigmatic figure in American legal education history, and it has been suggested that by 1936 most people were relieved to see him give up Harvard's deanship. STEVENS, *supra* note 1 at 136. There is no doubt that he advocated reforms in legal education, but he apparently did little to advance his ideas. Because of his personality and actions, he also managed to alienate many who would otherwise have been very influential allies in the movement for reform. *Id.* at 136-37. The quote on the content of legal education is from a speech that Pound gave to the American Bar Association in 1933, as quoted in SARAH ROBBINS, ED., LAW: A TREASURY OF ART AND LITERATURE 302 (1990).

⁵ Stein, *supra* note 2, at 948 (footnote omitted).

⁶ *Id.* at 946-47.

⁷ Stevens, *supra* note 1, at 52. Christopher Columbus Langdell was elected the first dean of Harvard Law School on September 27, 1870 and held the office until 1895. *Id.* at 35-36. Although Langdell did not create the case method, his systematic

use of it gave it notoriety. *Id.*

⁸ CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii-ix (1871), reprinted in Harno, *supra* note 7, at 56-57; see also SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 3 (1993) ("Langdell ... considered the law a science and approached it through rigid doctrinal analysis"); Stevens, *supra* note 1, at 53 ("Langdell never wavered in his view that law was a science and that the center of legal education was the library").

⁹ Harno, *supra* note 3, at 57-58.

¹⁰ Hoeflich, *supra* note 3, at 130.

¹¹ TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 287 (1992) [hereinafter MACCRATE REPORT]. Only Delaware and Vermont presently require law school graduates to serve an apprenticeship. *Id.* California, Virginia, Vermont, and Washington allow for law office study as a substitute for law school graduation. *Id.* at 108. A combination of law school and law office study is a permissible substitute for law school graduation in Maine, New York, and Wyoming. *Id.*

¹² Stevens, *supra* note 1, at 112-23. Two reports prepared during the first two decades of this century under the auspices of the Carnegie Foundation provide good examples of this debate: JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914); ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

¹³ Reed, *supra* note 12, at 281.

¹⁴ Jerome Frank, *Why not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908-12 (1932). Frank wrote that "students trained by the Langdell method are like dog breeders who only see stuffed dogs." *Id.* at 908. Further, he called students to "repudiate the false dogmas of Langdell." Jerome Frank, *What Constitutes a Good Legal Education?*, address before the A.B.A. Section on Legal Education (1933), quoted in Stevens, *supra* note 1, at 157.

¹⁵ Harno, *supra* note 3.

¹⁶ Id. at 137.

¹⁷ Id. at 173.

¹⁸ Id. at 184.

¹⁹ SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

²⁰ Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, A.B.A. J., Sept. 1990, at 52.

²¹ Talbot D'Alemberte, Keynote Address Before Conference on the MacCrate Report, in THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM 4, 7 (Joan S. Howland & William H. Lindberg eds. 1994) (conference proceedings).

²² In a recent study of the Chicago and Missouri Bars, it was found that, although there has been some progress in the teaching of legal skills, there are notable gaps between practice and education. BRYANT G. GARTH & JOANNE MARTIN, LAW SCHOOLS AND THE CONSTRUCTION OF COMPETENCE (American Bar Foundation Working Paper No. 9212, 1992). The study concluded, for example, that most attorneys looking to hire recent law school graduates expect them to have good writing and oral skills, while most law school graduates complained they did not get sufficient training in these areas. Id. at 20-21. On the other hand, there seems to be more accord on legal reasoning and legal research skills. Id. at 21.

²³ Hiring partners in law firms apparently are also operating under this same assumption. Id.

²⁴ GERRY SPENCE, WITH JUSTICE FOR NONE 242 (1989).

²⁵ In fact, the authors of the Chicago and Missouri Bars study suggest that creating an apprenticeship model could be a way to close the gaps between legal education and practice. See Garth & Martin, *supra* note 23, at 49.

²⁶ See Stephen R. Alton, *Mandatory Prelicensure Legal Internship: An Idea Whose Time Has Come Again?*, 41 KAN. L. REV. 137 (1992); Bayless Manning, *Law*

Schools and Lawyer Schools: Two-Tier Legal Education, 26 J. LEGAL EDUC. 379 (1974); Robert S. Redmount, *The Future of Legal Education: Perspective and Prescription*, 30 N.Y.L. SCH. L. REV. 561 (1985).

²⁷ See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973). Interestingly, the Chief Justice's proposal to remedy the situation was reminiscent of the apprenticeship system that dominated legal education during the 18th century. He advocated a reduction of "formal" legal education to two years, to be followed by a period of "specialization" (or practical training) under the guidance of practitioners in cooperation with professors. Id. at 232. In turn, this would be followed by a "pupilage period" with experienced attorneys. Id.

²⁸ MACCRATE REPORT, *supra* note 11 at 299-301, 314-16.

²⁸ Id. at 3.

³⁰ Harno, *supra* note 3, at 154-55.

