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## LAW SCHOOLS AND LEGAL EDUCATION, 1879-1979: LECTURES IN HONOR OF 100 YEARS OF VALPARAISO LAW SCHOOL

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### STRUCTURE

When the Northern Indiana Normal School, organized by Mark L. Demotte opened its law department in the fall of 1879, it was in a sense, an integral part of the rebirth of American legal education. It is true that Indiana differed, at least superficially, from other states. Indiana, like New Hampshire, appeared by its constitution to open the legal profession to every voter of good moral character.<sup>1</sup> Yet In-

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1. The Constitution of the State of Indiana declared: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." IND. CONST art. 7, § 21 (1851, repealed 1932). For a history of the passage of this provision at the 1850-51 Constitutional Convention, see Robinson, *Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-1851*, 1 IND. L.J. 209 (1926). In a convention where farmers (sixty-two) outnumbered lawyers (thirty-nine) out of a total of 150, this provision was part of a general effort to de-mystify the law. The convention, however, rejected the attempt to abolish the common law of England.

The general tenor was best expressed by the delegate from Monroe County. "Mr. Foster remarked, that when he came into this state many years ago, no one was permitted to practice medicine, unless a graduate of the university, or who had obtained a license from the medical institute of the State. That law had been repealed, so that now everyone could practice in the medical profession, no matter of what grade, regulars, Homoeopathsists,

diana's admirable urge to curb those whom de Toqueville had seen as the "natural aristocrats"<sup>2</sup> of the new nation had surprisingly little effect.<sup>3</sup> The full century since the founding of Valparaiso has witnessed a continual campaign to assert and reassert elite as opposed to democratic standards of practice and admission to the bar. That campaign, involving a series of battles fought over constantly shifting terrain, shows no signs of abating as we enter the 1980's.

The courts of Indiana and the litigation they heard proved surprisingly similar to the courts and cases found in Ohio and Illinois. The independent tort of negligence was not established; although the doctrine of contributory negligence was already alive.<sup>4</sup> Corpora-

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Thompsonians, or Allopathists. In divinity, it was formerly the custom for students not only to receive an education in divinity, but to reside for some years at a theological Seminary or university. It is different now days. Why should there be an exception made in favor of the law? These were the three liberal professions. In other States, the practice of the law had been thrown open to all persons of good moral character. The members of the bar would not fear competition with those who did not understand their business. Throw the profession open to all, like medicine and divinity; these were his sentiments."

*Id.* at 212.

The section was adopted by a majority vote of 84 to 27. Lawyer members accepted the arguments with resignation. John B. Niles of LaPorte opined:

"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. The law must be a vast and learned science, so long as it affords protection to the varied interests of civilized society. The idea of making every man his own lawyer by simplifying the rules of practice amounts to about as much as the scheme of some one who wrote a book, entitled 'Every man his own washerwoman'."

*Id.* at 211-12.

Even before repeal, the courts required education qualifications. See Gabit, *Legal Education and Admission to the Bar*, 6 IND. L.J. 67 (1930); Gabit, *Indiana's Constitution and the Problem of Admission to the Bar*, 16 A.B.A.J. 595, 743 (1930); Robinson, 1 IND. L.J., *supra*. Two apparently successful efforts to repeal the section at the turn of the century were struck down on technicalities. The provision was finally repealed in 1932 by popular vote and the repeal was upheld in *In re Todd*, 208 Ind. 168, 193 N.E. 865 (1935).

2. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 29 (P. Bradley ed. 1956).

3. Stevens, *Two Cheers for 1870: The American Law School*, LAW IN AMERICAN HISTORY 425 (D. Fleming & B. Bailyn eds. 1971) [hereinafter *Two Cheers*].

4. *Louisville, New Albany & Chicago Ry. Co. v. Richardson*, 66 Ind. 43 (1897) (Although the court recognized the existence of contributory negligence as a defense, it held that the defendant failed to prove it in this case.)

tions were unimportant; constitutional cases almost unheard of;<sup>5</sup> income tax, labor, antitrust and administrative law unknown. On the other hand, the intricacies of special verdicts and the *venire de novo* were litigated vigorously,<sup>6</sup> as was the parol evidence rule.<sup>7</sup> Even the census would find little to distinguish Indiana from its neighboring jurisdictions in terms of the legal population.<sup>8</sup>

All of this is not surprising. Over the past decades anthropologists have taught us that the formalized aspect of social control which we call law is likely to be effective (or to penetrate, as they would say) only if it reflects generally-accepted norms. There was a demand—either from the top or the bottom or perhaps from both—for a legal profession. It may well be true that the graded priest-like replicas of the English legal profession had largely evaporated from the new United States, in that period after 1800 irritatingly and misleadingly named by legal historians the era of Americanization.<sup>9</sup> There is every reason to believe, however, that the change was not as precipitous as once suggested. There was certainly a rapid decline in formal standards for legal education and bar associations certainly disappeared in the heady days of Jacksonian Democracy.<sup>10</sup> As early as the 1850's, however, the pendulum began to swing back, with the refounding of law schools and increased interest in the more organized side of bar life.

The resurgence of interest in the bar—even if coupled with a more instrumental “can-do” Americanized view of law—was part of

5. Nevertheless, in *Taylor v. Stockwell*, 66 Ind. 505 (1879), one justice recognized that “American courts possess the power—a power not conferred upon any other courts of the world—to declare legislation void whenever it violates the constitution, and, in such cases, it is their high duty to exercise the power . . .” *Id.* at 518 (Biddle, J., dissenting).

6. *Locke v. Merchants National Bank*, 66 Ind. 353 (1879).

7. *Procter v. Cole*, 66 Ind. 576 (1879).

8. According to J.H. Benton, in 1894 there was little difference between the statistics for Indiana and its neighboring states as to the ratio of lawyers to the state population and to the number of state legislators. In Indiana, Illinois, Iowa, and Ohio, he found that one in every four legislators was a lawyer. Benton also discovered that in Indiana one in every 348 persons was a lawyer; in Illinois one in every 394; in Iowa one in every 325; and in Ohio the figure was one in 360. See Benton, *Annual Address*, 1 PROC. S.N.H.B ASS'N 227 (1894).

9. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* (1977); W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF THE LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

10. For a more detailed discussion of this era and its effects, see *Two Cheers*, *supra* note 3, at 416-24. See also M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976).

a much wider trend in American life:<sup>11</sup> the trend toward institutionalization in the three decades after the Civil War. Occupational groups felt an urge to professionalize; and, as part of that urge, to stratify. The college movement was accelerating dramatically at roughly the same time.<sup>12</sup> Such changes were the result of the most *laissez-faire* of societies responding to the desires of a growing middle class.

Sixty years after de Toqueville, Bryce noted that: "In a country where there is no titled class, no landed class, no military class, the chief distinction which popular sentiment can lay hold of as raising one set of persons above another is the character of their occupation, the degree of culture it implies, the extent to which it gives them an honorable prominence."<sup>13</sup> Law was to become the most obvious of the professions as a vehicle for upward mobility.<sup>14</sup> It was also to provide another opportunity. Frederick Jackson Turner has become synonymous with the impact of the closing of the "safety valve" of the frontier and we tend to think of this in a geographical sense. The frontier, however, was closing in many senses. A young historian has recently noted the impact of these same forces on the intellectual aspects of the American ideal: "Mid-Victorians were competitive, and the serious contests of the future would be verbal. Americans would probe, joust, and examine each other in a war of words that occurred in the classroom, the courtroom, the salesroom, and the living room."<sup>15</sup> The last quarter of the nineteenth century was to see the growth of spectator sports and collegiate football, not to mention the university and the law schools.<sup>16</sup>

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11. See generally 3 D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* (1965).

12. By 1870 there were more institutions in America awarding bachelor's degrees, more medical schools, and more law schools than in all of Europe. B. BLEDESTEN, *THE CULTURE OF PROFESSIONALISM* 33 (1976).

13. 2 J. BRYCE, *THE AMERICAN COMMONWEALTH* 626 (3d ed. 1895).

14. James Bryce noted that: "[T]he lawyers best deserve to be called the leading class, less powerful in proportion to their numbers than the capitalists, but more powerful as a whole, since more numerous and more locally active." *Id.* at 303.

15. B. BLEDESTEN, *supra* note 12, at 73. "Their [lawyers'] function is to educate opinion from the technical side, and to put things in a telling way before the people. . . . [E]xperience shows that the sifting of evidence and the arguing of points of law tend on the whole to make justice prevail." J. BRYCE, *supra* note 13, at 303.

16. This period also saw the emergence of women in both the professions and the universities. "[E]arly feminism was a conscious revolt against both the Victorian ethos and the far older belief in female inferiority. It appeared first among educated, middle-class women who became involved in the abolitionist movement and then found their participation threatened by current ideas about the appropriate female role." B. HARRIS, *BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY* 85

In 1850 it was estimated there were 23,939 lawyers; in 1870, 40,376; by 1880, 64,137.<sup>17</sup> The law was a boom industry. While the basic practitioner resembled the circuit rider-office lawyer in the mold of Abraham Lincoln or perhaps even a modern western, the unleashing of the industrial might of the country and the growth of the large corporation saw the coming of a new type of law firm. Although the Cravath firm emerged in upstate New York around 1820, its prominence came in New York City after the Civil War, handling banks and railroads.<sup>18</sup> During the Civil War, the illustrious advocate David Dudley Field hired Thomas Shearman as his managing clerk. By 1867 Field made Shearman his partner and hired John W. Sterling from the Columbia Law School. When Field left for Europe in 1873 to devote himself to international arbitration, the

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(1978). The progress of women toward recognition and equality was slow, particularly in the legal profession. Women found it much more difficult to become lawyers than doctors, because the profession was institutionalized and had been granted licensing powers much earlier. *Id.* at 110.

When Myra Bradwell, successful editor of the *Chicago Legal News*, was refused admission to the Bar of Chicago in 1869 she sought relief in the courts. The United States Supreme Court, in upholding the lower court ruling denying relief, held that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. State*, 83 U.S. 130, 131 (1873). In 1878 Bella Lockwood successfully turned to the United States Congress and promoted the passage of a bill into law that permitted women to practice law in federal courts. *See The Legal News*, (Montreal) April 20, 1878, at 184-85.

The first woman to receive a law degree was Ada H. Kepley who earned her degree at Union College of Law in Chicago in 1870. B. HARRIS, *supra*, at 112. Arabella A. Mansfield seems to have been the first woman admitted to a bar. It occurred in Iowa in 1869. Despite these successes most members of the legal profession opposed women's attempts to join them. (For example, the Harvard Law School did not admit a woman until 1950.) In 1872 a Yale alumnus wrote to his alma mater asking: "Are you far advanced enough to admit young women. In theory I am in favor of their studying and practicing law, provided they are *ugly* . . . ." F. HICKS, *YALE LAW SCHOOL, 1869-1894* 72 (1937). As further evidence that women made only very slow progress in entering the legal profession, the Bureau of the Census revealed that in 1870 there were five women lawyers. By 1880 the number had risen to seventy-five. At the turn of the century the number of women lawyers had reached 1010. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF THE CENSUS, *WOMEN IN TRAINFUL OCCUPATIONS 1870-1970* 42 (Census Monograph IX, 1979). Despite this significant, albeit limited, progress, in 1920 only three percent of all lawyers were women. B. HARRIS, *supra* at 112. In 1919 Gleason Archer had no hesitation in repeating his claim of 1908 that "man is naturally sentimental and inclined to gallantries towards the opposite sex. . . . They will watch the shy glances and miss no opportunity to tease the suspected party or parties." G. ARCHER, *BUILDING A SCHOOL* 83 (1919). Although, as Barbara Harris claims, "between 1860 and 1920, women gained a foothold in the profession that they have never relinquished," women still faced an uphill battle. B. HARRIS, *supra* at 119.

17. A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 442 (1921).

18. *See* R. SWAINE, *THE CRAVATH FIRM* (1948). *See also* J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

firm of Shearman and Sterling was born.<sup>19</sup> Six years later, the year that Valparaiso Law school was begun, Sullivan and Cromwell was formed.<sup>20</sup>

Some observers expressed alarm at the prospect of the new American bar growing up under the shadow of the corporation and the trust.<sup>21</sup> They were, however, the few. As the number of law schools revived (there had been fifteen in 1850, but fifty-one by 1880)<sup>22</sup> the leader of the group was Columbia. Benjamin Silliman, a Yale man described Columbia in 1867 as "the very *West Point* of the Profession."<sup>23</sup> In his commencement address he quoted approvingly de Toqueville's praise of lawyers as natural aristocrats<sup>24</sup> and explained that the role of these graduates would not be litigation but working with businessmen.<sup>25</sup> Silliman's eulogy of Wall Street may have been unnecessary as far as John Sterling, one of that year's graduates, was concerned.

Columbia, at the time of the founding of Valparaiso, was still the most important of the law schools, or more accurately, law programs. Columbia had been refounded by Theodore Dwight in 1858 with the cry "principles before practice is the true watchword."<sup>26</sup> With this, Dwight threw down the gauntlet to practitioners, who, insofar as they had required any formal training in the 1840's and 1850's, had demanded apprenticeship in law offices. At its best, apprenticeship was all that clinical legal education has been claimed to be: close supervision of a student by his principal in the real life situation. Yet few apprenticeships worked out that way. Indeed, even where principals were diligent, the chances of any one office offering a good all-around training were small.<sup>27</sup> Dwight sought not to remove

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19. See generally W. EARLE, MR. SHEARMAN AND MR. STERLING AND HOW THEY GREW (1963).

20. See Sullivan and Cromwell, 1879-1979: A Century of Law (1979).

21. See, e.g., 2 J. BRYCE, *supra* note 13, at 628. "[T]he growth of enormously rich and powerful corporations, willing to pay vast sums for questionable services, has seduced the virtue of some counsel whose eminence makes their example important."

22. A. REED, *supra* note 17, at 442.

23. Address by Benjamin D. Silliman before the graduating class of the Law School of Columbia College (May 12, 1867).

24. *Id.*

25. "I believe that no place on earth is daily trodden by more [men] of honor, enterprise, intelligence, generosity, faith, integrity—than that on which the setting sun casts the shadow of the spire of Trinity." *Id.*

26. A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 35 (J. Goebel ed. 1955) [hereinafter GOEBEL].

27. In 1896 J.H. Benton noted that: "Study in an office resolves itself into the reading of text books, with occasional furtive glimpses of the details of cases passing

law training entirely from the law office—his students spent part of each day in such offices—but to make each case occur in an academic setting. This was accomplished by a series of expository lectures, supplemented by examinations, recitations, quizzes and moots. Thus the battle in the 1870's and 1880's was really between apprenticeship and the law school.

Few in the profession—especially its leaders—were prepared to fight such changes as the movement away from apprenticeship and toward law school. By 1870, professional journals were vying with one another in appeals for improving the legal profession.<sup>28</sup> An article published both in the *Albany Law Journal* and the *Western Jurist* wondered why the legal profession “should be so utterly regardless of its own fair fame, and careless of the honors which ought to be connected with the practice of so noble a profession as to admit so readily horde upon horde . . . within its precincts, with scarcely a voucher for the ability or worth, morally or intellectually, of such applicants as choose to present themselves.”<sup>29</sup> In no time at all the urge to provide part of legal training through an institution known as the law school had become associated with the parallel

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through the office.” Benton, *South New Hampshire Bar Association: 1894*, ME. ST. B. ASS'N PROC. 26 (1896).

Records of the proceedings of bar association meetings and of bar association reports in the 1890's show general agreement that apprenticeship alone was not adequate preparation for the legal profession. Close supervision of apprentices was rare and the areas of law studied were often limited in scope and applicable only to local jurisdictions. Another difficulty was that so many law offices were hiring professional clerks (often former law students unable to find employment in the profession) that there was little or no work left for an apprentice in such an office. See *Lawyer-Clerks: Their Duties, Their Pay, and Their Many Discouragements*, 56 ALB. L.J. (1897). Some stressed the difficulties experienced by the practicing lawyer. “In truth there is nothing that a busy lawyer would sooner run from than a young gentleman who would exact an hour of his time every day instructing him in the elementary principles of the law.” Jones *Report of the Committee on Legal Education and Admission to the Bar*, 21 ALA. ST. B. ASS'N PROC. 97, 99 (1898). By the late nineteenth century, the general consensus appeared to be that “while experience in an office is valuable, the student must have the training and the discipline which comes from systematic study in a law school.” Rogers, *Legal Education*, 21 ILL. ST. B. ASS'N PROC. 53, 61 (1897).

28. See, e.g., *An Address to Law Students*, 1 ALB. L.J. 165 (1870), where it was stated: “In every age of civilized man, the lawyers have been an important instrument in the work of elevating and refining the race.” *Id.* For a discussion of the tactics of various journals, see M. BLOOMFIELD, *supra* note 10, at 136-90.

29. *Concerning Examinations for Admission to the Bar*, 1 ALB. L.J. 350 (1870), reprinted in 4 W. JUR. 306 (1870). W.G. Hammond agreed that “the bar is probably more easily accessible than any other profession or trade by which men can make a livelihood.” Hammond, *The Legal Profession—Its Past—Its Present—Its Duty*, 9 W. JUR. 1, 13 (1875).



aspect of institutionalization—the urge to raise standards and so make the bar both more competent and more exclusive.<sup>30</sup>

The vast majority of the legal profession, however, until the turn of the century still had only clinical legal education. What the law schools were offering was a systematic, academic experience. It was also to be up to the law schools to upgrade the intellectual quality of law and lawyers. There had been a “downward tendency” and law had gone from “a liberal science to a mechanical trade.”<sup>31</sup> Yet “the science of law was the science of mankind” and lawyers were being urged to “help solve the moral problems upon which the progress of the law depends.”<sup>32</sup> Some practitioners saw the dangers of too academic a training. The *Albany Law Journal*, for instance, thought that moots were of no more value to law students than counterfeit sickness would be to a medical student;<sup>33</sup> but the dispute was relatively muted, since no one at that time was suggesting that all three years of an apprenticeship 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 secondly a meaningful bar exam.<sup>34</sup> As a substitute for part of the apprenticeship, law school made good sense to most sections of the legal community.

The leaders of the bar were aware that, by calling for a more rigorous training and system of examinations, the portals to the profession would become narrower and more undemocratic. After all, Abe Lincoln had not been to law school and his casual passing of the bar examination (and his casual view as a bar examiner) had become

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30. See, e.g., Hammond, *Legal Education and the Study of Jurisprudence in the West and North West*, 8 J. SOC. SCI. 165 (1876); Hammond, 9 W. JUR. *supra* note 29; *Legal Education and the Present State of the Literature of the Law*, 1 CENT. L.J. 242 (1874).

31. Washburn, *Legal Education: Why?*, 7 W. JUR. 213, 215 (1873).

32. *Id.* at 216.

33. See *Law Apprenticeships*, 5 ALB. L.J. 97 (1872). In fairness, the article admitted that “the time spent by a young man in a law office is, to a great extent, wasted.” *Id.* The article advocated formal apprenticeship to clerkship and contended that some things like code pleading had to be learned in a law office. See also *Law School*, 12 ALB. L.J. 212 (1875).

34.

Not until the bar shall awaken to the necessity of imposing the most stringent requirements for admission to practice, and thus preclude therefrom all such as have not the most undoubted qualifications, will the profession of law be an honor unto itself, or anything but a target for idle and sarcastic remark and ridicule.

4 W. JUR., *supra* note 29, at 308, reprinted from 1 ALB. L.J., *supra* note 29, at 350.

part of the profession's lore.<sup>35</sup> In 1860, a specified period of law study, as a necessary qualification for admission to the bar, was required in only nine of thirty-nine jurisdictions, and even law study had come to be thought of as less an apprenticeship and more a clerkship.<sup>36</sup> The bar examination, while required in all states but Indiana and New Hampshire, was everywhere oral and normally informal. In only nine states was there anything approaching a bar examining committee.<sup>37</sup>

In the period from 1870 and 1890, however, the situation changed dramatically. By 1890, twenty-three of the forty-nine states required a formal period of study or apprenticeship. Meanwhile, states gradually adopted the committee system for examining for the bar and when, in 1878, New Hampshire established a permanent examining committee to be self-financed out of the fees paid by students, the future pattern was set.<sup>38</sup> During this period, the written bar examination, which in 1870 had existed only in New York, was increasingly accepted as the norm.<sup>39</sup>

35. Better known still was the iconoclasm of Abe Lincoln as bar examiner. See HURST, *supra* note 18, at 281-82.

36. A. REED, *supra* note 17, at 87. In the jurisdictions where a period of law study had survived, it had been reduced to two years as in Maryland, North Carolina, and Ohio. Other states, including Connecticut, Rhode Island, Vermont, New Jersey, Pennsylvania, and Delaware, required three years of study.

37. For an interesting account of a black lawyer's successful attempt to pass the bar examination, see M. BLOOMFIELD, *supra* note 10, at 314-16.

38. A. REED, *supra* note 17, at 102-03. Change, however, came slowly. Huey Long's oral bar examination in 1915 is part of Louisiana lore. When asked by George Terriberry, an admiralty practitioner, what he knew about admiralty, Long replied evasively. Terriberry persisted and asked Long how he would handle a particular admiralty problem. Long replied, "I'd associate Mr. Terriberry with me and divide the fee with him." Long passed the bar. T. WILLIAMS, HUEY LONG 77-79 (1969).

39. The minutes of bar association meetings and law journal articles of the 1890's reflect this acceptance. See, e.g., *Examination for Admission to the Bar in Virginia—The Past—The Future*, 2 VA. L. REG. 310 (1896); *Examinations in Law for Admission to the Bar in the State of New York*, 20 PROC. N.Y. ST. B. ASS'N 105 (1897); *Legal Education*, 44 AM. L. REG. 361 (1896); *Report of the Committee on Legal Education*, 2 PA. B. ASS'N REP. 128 (1896). Many of these reports and articles suggested that the written examination be supplemented by an oral examination in cases of questionable results. However, an oral examination as the sole criterion for admission to the bar was condemned by all. "The examinations are oral in almost every instance, by a picked-up committee whose members have no special preparation for their work and who have not given it any thought or attention if otherwise capable." *Report of the Committee on Legal Education and Admission to the Bar*, 17 TEX. B. ASS'N PROC. (1898). In *How Shall Our Bar Examinations be Conducted?*, 3 W. RES. L.J. 129 (1899), questions from the bar examination in Suffolk County, Massachusetts, were published as an example of the proper form of a written examination. The following question was typical:

The belief in the egalitarian aspects of examinations in general—a movement which was encouraging reform of university and civil service in England—was having a parallel effect in this country. The apparent logic of such a utilitarian solution blunted political and social concerns about excluding the poor. The notion that one owed the obligation to society to raise standards was prevalent. As an Illinois lawyer put it the year before Valparaiso was founded, “in a matter as important as that of raising the standard of professional honesty and ability, the convenience of the applicant for admission to the bar, ought not to be consulted or estimated.”<sup>40</sup>

The most effective of the utilitarian vehicles, however, proved to be the American Social Science Association, and its spokesman, Lewis Delafield. Delafield boldly attacked the “prevalent 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.” Such a *laissez-faire* approach, Delafield observed, suggested that law was a trade, whereas, so the argument went, it was a public calling. In return for the grant of a monopoly, the state was entitled to demand character and learning of its lawyers. Delafield attacked the “leveling tendency” and maintained that the “unworthy” had to be “excluded” and “rejected.”<sup>41</sup>

Delafield’s speech was delivered to the Social Science Association at its meeting in Saratoga in 1876. The call met a need. The 1877 meeting of the Association called for a national lawyer’s group. The call was clothed in the rhetoric of utilitarianism. In 1878 the American Bar Association was formed to achieve those very goals Delafield had set out; incidentally meeting at Saratoga for the first

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A was the owner of a stable situated on a public highway, in which he kept several horses. A had placed a sign extending from this stable over the highway, in violation of a city ordinance. Without negligence on A’s part, a horse escaped from the stable and damaged B’s garden. In a severe tempest the sign blew down the fell on C, then lawfully traveling on the highway. Can B recover against A for the injury to his garden? Can C against A for his personal injury?

*Id.* at 133. For other reports recommending or approving the use of written examinations, see Libby, *Legal Education*, 5 ME. ST. B. ASS’N PROC. 7 (1896); Rogers, 21 ILL. ST. B. ASS’N PROC., *supra* note 27.

40. Armstrong, *The Terms of Study of the Law Student*, 10 CHI. LEGAL NEWS 354 (1878). Correspondents pointed out that Armstrong’s solution would exclude the poor, but not necessarily those of low moral or intellectual status. *Id.* at 367.

41. Delafield, *The Conditions of Admissions to the Bar*, 7 PA. MAG. 960 (1876).

years of its existence.<sup>42</sup> It was a tiny organization, having only 750 members in 1888. Early in this century it contained only about one-tenth of the bar. But, the raising of standards of the profession were high on its agenda from the beginning,<sup>43</sup> and it listened very carefully to what Delafield said.

Delafield's call, however, had been tripartite: "The best system would be—to require that all applicants should learn the principles of the law in a school, then apply them for at least one year in an office, and finally pass a public examination by impartial examiners appointed by the courts."<sup>44</sup> Schools like Valparaiso were being founded, office practice was being re-emphasized by periods of apprenticeship and the "impartial examiners" were appearing. But what of the law schools themselves?

To deal with the main theme of these lectures, I must digress, but not too far. Lectures about legal education are wont to begin with the appointment of George Wythe at William and Mary in 1779, James Wilson's lectures at the University of Pennsylvania in the 1790's or the erudite lectures of Chancellor Kent at Columbia at the turn of the nineteenth century; or at least the wisdom of Harvard Corporation in appointing Isaac Parker as Royall Professor in 1816. The truth is that none of these appointments was significant in terms of modern legal education. These early experiments in legal education were not profound. Either the lectures were on an ad hoc basis by adjunct professors who, in the fourth year of undergraduate education gave a few lectures in constitutional law, or the lectures were put on by the universities in an effort to raise money by giving professional lectures to local law clerks. Neither was a success. For instance, we hear a lot about Chancellor Kent and his greatness. Columbia thought it had really hit on a moneymaker in the 1790's when he gave his first lecture. He had 30 students the first year, one the second, and none the third.

Such success as American legal education had before the Civil War was achieved through the proprietary law schools, by far the

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42. The Bar Association of the City of New York had been founded in 1870. See G. MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970* (1970). For an account of the growth of state and local bars during this period, see A. REED, *supra* note 17, at 206.

43. J. ROGERS, *The American Bar Association in Retrospect*, in 1 *LAW: A CENTURY OF PROGRESS, 1835-1935* 172 (1937). See also Smith, *History of the Activity of the American Bar Association in Relation to Legal Education and Admission to the Bar*, 7 *AM. L. SCH. REV.* 1 (1930).

44. Delafield, 7 *PA. MAG.*, *supra* note 41, at 969.

most famous of which was the Litchfield Law School in Connecticut. That school survived from shortly after the Revolution to the 1830's. Moreover, the fact that Story was able to inject some life into the Harvard Law School in the 1830's was largely the result of taking over Ashmun's proprietary school in Northhampton. Similarly, the history of law teaching at Yale before the Civil War was the history of entrepreneurs who carried on a proprietary school franchised with the name of Yale.<sup>45</sup> The story was largely similar elsewhere in the country. While much research still remains to be done, it is clear that the South boasted some fine proprietary schools,<sup>46</sup> although it may also have taken the teaching of law more seriously in its colleges. The general trend, however, was little different from the North. When Tulane wanted to establish a law school in 1847, it acquired the Louisiana Law School run by the Swedish scholar Gustavus Smith, located on Royal Street in the Vieux Carré.<sup>47</sup> Similarly, the antecedents of the University of North Carolina were a distinguished group of proprietary schools.

Such law departments, whether at Harvard or Tulane, were marginal to the main purpose of those institutions—the providing of a four-year, highly-structured, liberal arts education—as it was understood in the nineteenth century.<sup>48</sup> The four-year syllabus, which included all those areas thought appropriate for a young student's education, did allow the president (or in some cases a so-called professor of law who, as I have suggested, was what we would now call an adjunct faculty member) to deliver some thoughts on political economy, international or constitutional law in the fourth year. Yet the Story School at Harvard or the Daggett School at Yale were no part of such elegant training of the mind. They were in competition with the four-year liberal arts curriculum and, as such, blatantly entrepreneurial trade schools.

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45. See *Two Cheers*, *supra* note 3, at 412-16; G. GAWALT, *THE PROMISE OF POWER* 153-54 (1979).

46. For a discussion of some southern proprietary schools, see Coates, *The Story of the Law School at the University of North Carolina*, 47 N.C.L. REV. 1 (1968).

47. Tulane Archives, Special Collection, Howard-Tilden Library, Tulane University. See also J. Banos, *The Early Years of the Tulane Law School* (Paper presented at the Tulane Law School, Spring, 1978); J. Craft, *The Law Department of the University of Louisiana* (Paper presented at the Tulane Law School, Spring, 1978).

48. Colleges were predominantly religious institutions with two functions: to instill faith and to train the mind by teaching the classical curriculum in a rigorous manner. Thus, all subjects, including Greek, Latin, Mathematics, and moral philosophy, were required courses and were taught primarily by the recitation method rather than by lectures. The recitation method amounted to nothing more than a quiz on some designated text.

In comprehending modern American legal education we have to realize that the law school which Christopher Columbus Langdell inherited at Harvard in 1870 was an adjunct of what was to become Harvard University, but had no relation to Harvard College. Students had to choose either law school or college, not both. Some students might transfer to the "school," after one or two years of college, but most came directly from high school and only rarely after a degree at Harvard or elsewhere. The same was true at Yale, Columbia and Pennsylvania. When the Northern Indiana Normal School began its college law course in 1879 this was an undergraduate program, as were the other offerings of the school.<sup>49</sup> Indiana University's law department which closed two years earlier was likewise an undergraduate enterprise.<sup>50</sup>

What is all too often forgotten is that while during the last thirty years of the nineteenth century and first two decades of the twentieth the norm for American legal education moved from one to two to three years, it did so in the context of undergraduate study. It is true that by 1909 Harvard proclaimed that the LL.B. should be a graduate degree,<sup>51</sup> but the law school continued to fight to have the B.A. reduced to three years;<sup>52</sup> and while Harvard had rapidly become the pre-eminent law school after the 1870's, by the coming of

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49. The 1879 catalog of the Northern Indiana Normal School and Business Institute listed no entrance requirements for admission to its newly-founded law school. In 1900 the catalog stated: "All persons of good moral character are entitled to enrollment in any class, at any time, on payment of tuition. . . ." After two years of three terms each, students were awarded a Bachelor of Laws degree.

50. Indiana University initiated attempts to organize a law curriculum in 1835, but achieved no success until the Board of Trustees elected Judge David McDonald, a self-taught man, as Professor of Law in 1842. The 1841-42 catalog of Indiana University contained the first announcement of the establishment of a law school. In 1843 five persons comprised the first graduating class. Classes were often held on a temporary basis and the years 1842 to 1877 saw a rapid succession of short-term faculty appointments and faculty resignations. Despite an enrollment of forty-one students in 1877, the law school was forced to close. Tuition had been free and Indiana University found itself unable to pay salaries sufficient to attract competent professors. In 1889 the school did reopen under the leadership of Judge David D. Banta. See T. WYLIE, *INDIANA UNIVERSITY (1820-90)* 56-90 (1890).

51. *Two Cheers*, *supra* note 3, at 431-32. Harvard had first announced the admissions requirement of a college degree in 1896, but there were exceptions made and the ruling was not really effective until 1909.

52. N. ABBOTT, *THE UNDERGRADUATE STUDY OF LAW 1-7* (1901). When Harvard lengthened the term of law school study to three years in 1877, the Academic Council considered shortening the B.A. curriculum to three years for pre-law students. In 1890 the faculty voted to accept this proposal but it was rejected later by the Board of Overseers. In 1901, however, President Eliot was still urging the shortened degree period.

the First World War only that school and the University of Pennsylvania had established any serious claim to have law treated as a graduate degree.<sup>53</sup> The status of a law school was much closer to the Lawrence Scientific School at Harvard or the Sheffield Scientific School at Yale. Mythology grows quickly, but it is helpful to remember when Hugo Black appeared at the University of Alabama in 1904, he was unable to gain admission to the Academic Department (the College of Arts and Sciences). He was accepted without difficulty at the law school.<sup>54</sup>

There were of course great changes, both structurally and intellectually, in higher education in the years after the Civil War. Until the 1870's there were really no universities in America—only colleges where Greek, Latin, mathematics and moral philosophy were taught through lectures and recitations. Of course there had been exceptions,<sup>55</sup> but the modernizing breezes blew obviously only in the years after 1865. While Yale and Princeton set themselves against the trend, Harvard, under the presidency of Charles Eliot, a scientist appointed in 1869, set out to conquer new worlds. Eliot believed in an aristocracy of talent and declared open season on all subjects, claiming virtually everything as suitable for university study. These decades, 1870-1900, not only saw the endowing of great private universities and the founding of land grant colleges under the Morrill Act,<sup>56</sup> but the emergence of colleges—like Valparaiso—across the nation and, by the 1890's, the beginning of a new species of proprietary school. There were dramatic intellectual changes too. As the new soft sciences appeared, law sued to be among them.

There were several convenient confluences in this period of institutionalization. While an analysis of law's intellectual claims or pretensions must wait for later discussion, the ABA's urge to upgrade the legal profession and the emergence of the modern university closely paralleled one another. Indeed this conscious or

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53. *Two Cheers*, *supra* note 3, at 432. Pennsylvania announced the requirement of a college degree in 1916. The assumption was still, however, that students would continue working in law offices.

54. Black, *Reminiscences*, 18 ALA L. REV. 1, 6-7 (1965).

55. Tichener at Harvard had managed to introduce modern languages, while Silliman at Yale had taught chemistry and geology. Amherst experimented with electives and a modern curriculum, while Jefferson's Virginia sought a more egalitarian university. See generally L. VEYSEY, *EMERGENCE OF THE AMERICAN UNIVERSITY* (1970).

56. 7 U.S.C. § 301 (1976), established land grants for state colleges which were to teach courses primarily in agriculture and the mechanical arts. In 1890 the Morrill Act was amended to provide monetary grants in addition to grants of land.

unconscious parallelism has proved particularly fascinating to social scientists during the last few years. Thus Harry First, in his excellent economic analysis of the law school industry, hypothesized that the law schools turned to university affiliations as a way of avoiding consumer (student) control.<sup>57</sup> In a more Marxist than market vein, Margoli Larson has analyzed this phase of development of the profession as the "epitome of social stratification."<sup>58</sup>

These years up to 1900 were certainly vital ones in the growth of the leading schools.<sup>59</sup> The newly-endowed private and public universities were beginning to give prominence to their law schools: Michigan<sup>60</sup> and Iowa,<sup>61</sup> Northwestern<sup>62</sup> and Stanford<sup>63</sup> date from this period. While, in Iowa, Hammond might wonder how the profession could justly demand a college degree before law school because there were in fact more lawyers than college graduates in America, everyone could agree that there was a need for better law schools to improve the wholly inadequate clerkship.<sup>64</sup>

In 1860, there were twenty-one law schools (eighteen associated with colleges or universities); by 1870, thirty-one; by 1880, fifty-one—all but five of which were associated with colleges. During the 1880's and 1890's, however, the pattern began to change. The natural advantages of the classroom over the clerk's room, and advent of the typewriter and the electric light, the obvious results of the second generation reared under free public education, rising living standards, the teaching of Darwin, Spencer and George and

57. First, *Competition in the Legal Education Industry*, 58 N.Y.U.L. REV. 311, 341 (1978).

58. See M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 166-77 (1977). Ms. Larson views the modern university as one of the major bases from which various modern professional groups are able to gain intellectual, social, and economic prestige.

59. A. SUTHERLAND, *THE LAW AT HARVARD* 162-205 (1967).

60. Eleven years after its founding in 1859, the law school at the University of Michigan had 400 students. By 1900 the number of students had risen to 883.

61. Originally established as an evening school in 1865, the law school at Iowa was transferred to the university in 1868. See Hansen, *The Early History of the College of Law, State University of Iowa, 1865-1884*, 30 IOWA L. REV. 31, 37 (1944). This article effectively describes an early western law school. In 1900 the Iowa School of Law had 258 students. A. REED, *supra* note 17, at 442.

62. Originally founded in 1859, the school had 211 students by 1900. A. REED, *supra* note 17, at 432. See also J. RAHL & K. SCHWENIN, *NORTHWESTERN UNIVERSITY SCHOOL OF LAW—A SHORT HISTORY* (1960).

63. Stanford Law School, founded in 1893, had a partial law course until 1899 when it became a professional law school. A year later it had 145 students. A. REED, *supra* note 17, at 413-14.

64. Hammond, 8 J. SOC. SCI., *supra* note 30, at 165, 170, 176.



simply the old-fashioned marketplace—all no doubt stimulated the rise of the second proprietary school movement. The first of these law schools was Columbian College (George Washington) in Washington, D.C., established in 1865 to serve federal employees whose workday then ended at three in the afternoon. In 1870 new rivals for the same market grew up in the District—Georgetown and National. The movement, moreover, spread. The Northwestern College of Law was established in Portland, Oregon, in 1884. The year 1888 saw the establishment of evening law divisions at Metropolis Law School in New York City (later absorbed by New York University), Chicago College of Law (later Chicago-Kent) and the University of Minnesota. Baltimore University began its part-time program in 1889.<sup>65</sup> By 1890, of sixty-one schools, eleven were unrelated to colleges; ten years later there were no less than 102 law schools, twenty-four unrelated to colleges, and by 1920 those figures swelled to 143 and forty-eight respectively.

Much that the leaders of the ABA appeared to have been fighting for seemed in danger of evaporating. By 1916 there were almost as many students in part-time schools as there were in the day schools so assiduously cultivated by the academic establishment. By 1920 the largest schools were Georgetown, Fordham and Suffolk.<sup>66</sup> The new proprietary school movement had achieved remarkable success.

I do not suggest that battle lines were always clearly drawn. When Harper's new University of Chicago, financed by Rockefeller money, was beginning its law school, there was at first a suggestion that it should absorb Columbian in D.C.,<sup>67</sup> and the District of Columbia "market" itself produced another delightful vignette. Archbishop Sartoli, the Apostolic Delegate, decided in 1894 that the way to build up a law (and medical) faculty quickly at Catholic University would be to transfer the ones currently existing at Jesuit-run Georgetown. Apparently Sartoli cleared the plan with both Pope Leo XIII and the Vicar General of the Society of Jesus, but he omitted to clear it with either Catholic or Georgetown Universities. Indeed, the first intimation that either institution had that such a change might be coming was in a letter the deans of law and medi-

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65. *Two Cheers*, *supra* note 3, at 428.

66. For the story of the founding of Suffolk Law School, see G. ARCHER, *supra* note 16.

67. See F. ELLSWORTH, *LAW ON THE MIDWAY: THE FOUNDING OF THE UNIVERSITY OF CHICAGO LAW SCHOOL*. 31 (1977). Harper made the suggestion in 1890 and the president of Columbian, James C. Wellig, also proposed the takeover in 1893. Harper, however, seemed to have lost interest as his plans became more detailed.

cine at Georgetown received from the apostolate delegate, explaining that the "wish of the Holy Father is that your faculty should aggregate to the Catholic University."<sup>68</sup>

One must bear in mind that papal infallibility was then only two decades old, when the Dean of Georgetown announced that the non-negotiable transfer "cannot be carried into effect by a direct mandate from Pope Leo XIII."<sup>69</sup> The Dean of the medical school was no more amused. Historically, however, perhaps the most intriguing aspect of this story is Bishop Keane's displeasure. As Rector Keane later wrote: "The schools in question were not the kind of schools of Law and Medicine that we hoped to organize; as they were *night-schools*, frequented mostly by young men who were government employees during the day and had only the evening hours to fit themselves for professions, whereas our institution was to have true university-schools, working their students all day long."<sup>70</sup> In short, the Georgetown Law School was not good enough for Catholic University. The Sartoli incident showed just how stratified institutionalized legal education had become by 1894; and the battles had only just begun.

For a normal school to begin a law school was in no way surprising. This was the age of deals—mergers, reorganizations, market opportunities and the rest.<sup>71</sup> North Carolina, which operated a

68. P. AHERN, *THE CATHOLIC UNIVERSITY OF AMERICA: 1887-1896* 98-108 (1949).

69. *Id.* Dean Hamilton continued:

The Law Department of the University of Georgetown was organized by the graduates of the Academic Department, through love for the old and honored institution. The faculty serves not because of monied considerations or salaries, but because of their love for, and interest in, the University of Georgetown; and the proposition of transfer is not only impracticable but borders close upon an offense.

*Id.* at 106.

70. *Id.* Robinson had lofty plans for his school and he had been impressed with the recent past. "Hitherto seen so much as a trade, with the lawyer as the mini agent and servant of his client." Robinson, *A Study of Legal Education*, Catholic University Bulletin (Apr. 1895).

71. The importance that Valparaiso placed on finances was evidenced in the first catalog of the university which included the law school. The cover bore the legend: "Expenses are less here than any other similar institution in the West." Page eighteen of the catalog provided the gentle reminder that "it will be seen that students can enjoy the benefit of a thorough legal course, under competent instructors, for less than half the expense they would necessarily incur at any other similar institution." By 1900 Valparaiso was able to claim that "expenses are less here than at any other school in the land." Under "Expenses" the 1900 catalog noted that one reason its boarding charges were so low was that "one of the principles of the school, who has given the subject of dietary many years of careful study, gives this department his personal attention."

series of well-known proprietary law schools, had a law professor at its State University from the 1840's, but it was not until the 1870's that law students were even regarded as on a par with "real" undergraduates and not until the 1890's that the law professor was paid by salary rather than through student fees.<sup>72</sup> Yale, incidentally, did not adopt this practice until the present century. Yet the state university was soon challenged. Wake Forest began law teaching in 1894 and ten years later could claim that forty percent of the practitioners in the state had attended the school.<sup>73</sup>

Whether the new state universities should finance the training of lawyers was a serious problem in Michigan, Iowa and North Carolina. In California, the reluctance of the State to become involved led a gift by former Chief Justice Hastings to establish what became known as the Hastings School of Law.<sup>74</sup> The grant, made in 1878, established a graduate school and Hastings modestly assumed the deanship, although ten years later the school experienced difficulty enforcing the requirement of a high school diploma.<sup>75</sup> In Southern California, a group of law clerks in offices, who had been meeting to discuss the law, agreed in 1896 to hire a preceptor, and three years later incorporated themselves as the Los Angeles Law School. This school in turn was absorbed by the University of Southern California after it established its law school in 1903.<sup>76</sup>

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72. Coates, 47 N.C.L. REV., *supra* note 46, at 17-23.

73. Dedication of the New Building of the School of Law: Wake Forest College (1957).

74. Hastings had a fascinating career. Born in New York in 1814, he migrated to Indiana and then Iowa. At the age of twenty-four, Hastings was a member of the Iowa Legislature. In 1846 he became a member of the United States Congress representing an Iowa district. By 1848 he was Chief Justice of the Iowa Supreme Court and, following the Gold Rush in 1849, he became Chief Justice of California. He had neither attended college nor law school but had read law while he was the principal of an academy in New York, a post he had occupied at the age of twenty. In 1851 Hastings became Attorney General of California but resigned two years later to engage full time in making money. Hastings College of Law, Golden Jubilee Book 1878-1928 (1928) (Stanford Pamphlet Collection) [hereinafter Golden Jubilee Book].

75. *Id.* at 19-20. A similar reluctance by the State of Montana to provide funds for legal education led to the founding of the school of law through the use of private contributions. They were provided by the widow of William Dixon, the son of a lawyer who had prospered in both New York and Illinois. William Dixon had made his fortune in mining law in the west. THE UNIVERSITY OF MONTANA, DEDICATION AND HISTORY: SCHOOL OF LAW 24 (1961) [hereinafter UNIVERSITY OF MONTANA].

76. In these early years the faculty was paid \$1.12 per hour for teaching and, appropriately enough, the football coach was one of the early teachers at the law school. UNIVERSITY OF SOUTHERN CALIFORNIA, DEDICATION CEREMONIES: SCHOOL OF LAW BUILDING 35 (1926) [hereinafter UNIVERSITY OF SOUTHERN CALIFORNIA].

St. Lawrence University, a liberal arts college in northern New York State, provided a particularly intriguing example of the "can do" period of legal education. Its own law school lasted only two years (1869-71) and for the next thirty years the right to grant law degrees remained dormant. Then in 1903 Norman Hefley, running a highly-successful proprietary business school in Brooklyn, decided to branch out into law.<sup>77</sup> It possessed no power to grant degrees — something it only discovered after it had been running its law school for a year — but the dean of the Brooklyn Law School, William Richardson, saw in the catalog that St. Lawrence had the unexercised power to grant law degrees. St. Lawrence, a liberal arts college catering mainly to WASP farming families in upstate New York, then got together with the Brooklyn Law School, catering to immigrant families, and the law school became a "branch" of the college 360 miles to the north. By 1928, with 3,312 students, Brooklyn was the second largest school in the nation, serving a largely-immigrant student body.<sup>78</sup> As the historian of St. Lawrence coyly noted: "The School also prospered financially; a sizeable surplus was accumulated and the community (i.e., St. Lawrence) was compensated for its sponsorship and educational guidance."<sup>79</sup> In other words, a fashionable upstate liberal arts college was subsidized by the profits from a night law school catering to first and second generation immigrants in Brooklyn.

During this period some law schools renewed themselves. The University of Cincinnati had absorbed Timothy Walker's Law School as early as 1835, but the school was considerably strengthened after William Howard Taft, concurrently federal district judge, became

77. W. Richardson, Dedication of the Brooklyn Law School (St. Lawrence University) (1928) (Stanford Pamphlet Collection II).

78. Until St. John's Law School was founded in 1925, there was no competition on Long Island.

Brooklyn was a fertile field for a professional school not only because of its large and growing population, but also because it was the home of a plain people, the largest center of foreign-born and the children of foreigners in the United States. Perhaps . . . [St. Lawrence] . . . did not fully realize how much it meant to Jewish, Italian, and other peoples struggling for a living to have their sons enter the professional class and secure a university degree. No sacrifice was too great for this.

. . .

The great service of the school was that it offered a professional education for those who would have found it very difficult and often impossible to get it elsewhere.

L. PINK & R. DELMAGE, CANDLE IN THE WILDERNESS: A CENTENNIAL HISTORY OF THE ST. LAWRENCE UNIVERSITY, 1856-1956 241 (1957).

79. *Id.* at 240.

dean in 1895.<sup>80</sup> Other institutions decided to remain above the fray. Princeton, which had had a law school (again through the franchising of a proprietary school) from 1848 to 1852, toyed with the idea of returning to (and thus inevitably improving) legal education. As President Patten noted in 1890: "We have Princeton philosophy, Princeton theology, but we have to go to Harvard and Columbia for our law—that is a shame. Just as soon as I find a man with half a million, I am going to found a law school."<sup>81</sup> In 1891 Princeton considered starting a law school in New York City when Dwight defected from Columbia.<sup>82</sup> Nothing came of all this, although again in 1924 a Trustee Committee at Princeton unanimously reported in favor of the idea.<sup>83</sup> Edward W. Sheldon, one of the trustees, corresponded with Roscoe Pound and noted in the Trustees' copy of the report that the "country is governed by lawyers and Princeton's duty [is] to train for public service."<sup>84</sup> Poor Princeton could never quite work it all out. By 1929 it looked as if the Board might be prepared to move, provided that establishing a law school would not interfere with building a chapel. All that was changed by the fortunes of the stock market in October of that year.

In discussing the elitist worries of Princeton, I have jumped ahead of the relationship between the breakdown of apprenticeship and the growth of law schools. The pattern repeated itself in states throughout the nation. In Wisconsin, for instance, the State University founded in 1848, followed the usual pattern—with four basic undergraduate divisions: academic, education, medicine and law. It took some twenty years to get the law school started and until this century its costs were expected to be borne by student fees. The Madison law school was seen as supplementing office training, although the university did have a diploma privilege.<sup>85</sup> As in the 1890's Wisconsin became Harvardized and grew in national reputa-

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80. Address by William Howard Taft at the dedication of the College of Law, University of Cincinnati (October 28, 1925).

81. T. WERTENBAKER, *PRINCETON 1746-1896* 377 (1946).

82. *Id.* In 1835 Princeton had tried to persuade another Columbia defector, Chancellor Kent, to help start a school of law. Kent replied that "I am too far advanced in life to engage in new enterprises." *Id.* at 229-30.

83. Princeton Archives AM3177. For a record of the discussion of the Trustees, see the minutes of their meeting of April 14, 1924; September 29, 1924; September 29, 1925; April 12, 1926; and September 28, 1926. *Id.* The proponents of establishing a law school also published a pamphlet, *The Princeton Law School* (1926), *id.*

84. Letter from Roscoe Pound to Edward Sheldon (May 4, 1923). *Id.*

85. W. JOHNSON, *SCHOOLED LAWYERS: A STUDY OF THE CLASH OF PROFESSIONAL CULTURES* 78 (1978).

tion, the need for a different type of law school for a different clientele emerged. This led to the founding of Marquette Law School in 1908, which traded in "practicality" and served largely immigrants and the poor. The growth in the number of law students—and increased ethnic sensitivity—were becoming a part of the fabric of the emerging law school.<sup>86</sup>

Many of these issues have now been examined by Jerold Auerbach in his widely-discussed *Unequal Justice*.<sup>87</sup> Some have suggested Auerbach overstated the case in seeing the work of the ABA and, after its founding in 1900, the Association of American Law Schools, as being primarily concerned with keeping out Jews, Blacks and immigrants.<sup>88</sup> Yet, wherever one looks in the literature of the period, there are concerns about the lack of background of those who were alleged to be demeaning the bar. To take only Connecticut and to read the State Bar Association reports, there was little doubt about the prejudices of the establishment. There was growing concern that the professional spirit and feeling characteristic of the training of American lawyers was being undermined by the massive influx of foreigners. Dean Swan, of the Yale Law School, suggested in 1923 that students with foreign parents should be required to remain longer in college before being admitted to law school.<sup>89</sup>

As the bar grew in size from 114,000 in 1910 to 160,000 in 1930, these battles were to rage both at the national and local levels.<sup>90</sup> To look locally first, there were hints—redolent of the battles about welfare—of a distinction between the worthy poor and the unworthy poor. Among the good poor, so it seemed, were those who attended Y.M.C.A. schools. It may come as a surprise to some that the Sir George Williams' evangelical organization should have had such an impact on legal education, but beginning in the 1890's, the Y.M.C.A. went seriously into that form of self-improvement we frequently refer to as education. By the early twenties, the Y.M.C.A. was running 365 schools, covering a multitude of areas, with over

86. *Id.* at 135-42.

87. J. AUERBACH, *UNEQUAL JUSTICE* (1976) [hereinafter AUERBACH].

88. *See, e.g., id.* at 59-67, 99-130, 578-96.

89. H. HALDMAN & C. GOETSCH, *A HISTORY OF THE FIRST ONE HUNDRED YEARS OF THE CONNECTICUT BAR ASSOCIATION, 1875-1975* 11 (1974).

90. Of the 114,704 lawyers in 1910, 431 were black and 558 were women. In 1920 the number of lawyers had risen to 122,519, with 728 Blacks and 1738 women. The pattern remained the same through 1930 when the lawyer population of 160,605 was comprised of 915 Blacks and 3,385 women. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF THE CENSUS, *FIFTEENTH CENSUS OF THE UNITED STATES 1930 IV* (1933).

120,000 students. At least ten of them were law schools; and while the collapse of national funding left these schools to operate locally, their overall impact was intriguing.<sup>91</sup>

Some schools merely used the Y.M.C.A. as a springboard. The Toledo Y.M.C.A. Law School migrated from the "Y" to the University of Toledo one year after its founding in 1908—a fact perhaps not unrelated to the sudden departure of the Y.M.C.A. education secretary after he bounced several checks.<sup>92</sup> In 1908, the Youngstown Y.M.C.A. also got into the law school business, and by 1911 this was regarded as an effective bar cramming course; competing with the other courses offered by the Y.M.C.A.—mechanical drawing, metallurgy, business, stenography, English for new Americans, the employed boys' school, sign writing, shop, mathematics and automobile repair.<sup>93</sup>

The Boston Y.M.C.A. Law School, undoubtedly the most important of all, operated in a much more competitive atmosphere. Yet from the beginning it was looked on with favor by the legal establishment. In 1897, the Lowell Institute began offering its classes through the Y.M.C.A., including elementary electricity, advanced electricity and law. The following year the Y.M.C.A. founded its own Department of Law, with Dean Ames of Harvard Law School on the podium as the first lecture was delivered. As the Y.M.C.A.'s educational work prospered, it was segregated into Northeastern College. The faculty included many leading practitioners; Brandeis, for example, taught in the evenings. By 1917 the Boston Y.M.C.A. Law School had a branch in Worcester and by 1921 branches in Springfield and Providence.<sup>94</sup>

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91. See generally J. Bouseman, *The Pulled Away College: A Study of the Separations of Colleges from the Young Men's Christian Association* (1970) (unpublished Ph.D. dissertation in University of Chicago Library). In this and the following sections I have also made use of the archives of the National Council of Y.M.C.A.'s, New York. See also C. Hopkins, *THE HISTORY OF THE Y.M.C.A. IN NORTH AMERICA* (1951).

In 1919 there were seven Y.M.C.A. law schools. By 1936 there were ten such schools. J. Bouseman, *supra*, at 84. See also R. Hutchins, *Birth and Development of the Salmon P. Chase College School of Law Within the Structural Organization of the Y.M.C.A.* (1960) (unpublished Ph.D. dissertation in University of Ottawa Library).

92. First, *Legal Education and the Law School of the Past: A Single Time Study*, 8 *TOL. L. REV.* 135, 137 (1976). This excellent study concerns itself with the history of the Toledo Law School as a study in economic history.

93. P. Zimmerman, *A History of the Youngstown Law School* (1976) (unpublished paper written in behalf of the committee to write the history of Youngstown University), cited with the permission of the author and the committee.

94. See M. O'Byrne, *A Y.M.C.A. Law School: Northeastern University School of Law 1898-1945* (1976) (unpublished paper presented to the History Department, Yale College); Jackson, *NU Law School: An Untraditional Tradition*, *NORTHEASTERN TODAY*, May, 1976, at 10.

Whereas Northeastern was blessed with an elite faculty,<sup>95</sup> that was not the fate of Gleason Archer's proprietary law school in Boston—the Suffolk Law School. The leaders of the bar saw him encouraging the “bad” poor. Archer, who wrote his first autobiography at age 35 in 1915, saw two main dangers in society—the reds (Communists) and the crimsons (Harvard). He fought to open the law schools to the poor.<sup>96</sup> Beginning in 1906, Suffolk taught a very practical course, mainly by the pedagogical technique of the lecturer dictating notes.<sup>97</sup> Archer battled President Lowell of Harvard and eventually succeeded in gaining a state charter in 1914.<sup>98</sup> After that, expansion was rapid—to 460 students in 1915, 1,512 in 1922 and 2,018 in 1924. By 1928 Archer could still claim that Suffolk was the largest school of law in the world, boasting nearly 4,000 students.

Such claims were not music to the ears of the ABA and the AALS. The ABA had announced in 1879 that: “There is little, if any, dispute now as to the relative merits of education by means of law schools and that to be gotten by mere practice or training in apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.”<sup>99</sup> Suffolk was not what it had meant. Of course the ABA had only really gotten into its stride in its belief in law schools in the 1890's. After all, of the first twelve ABA Presidents, only three had had any law school training. By 1892, however, there was talk of the need of two years of law school and by 1893, the year the Section on Legal Education and Admission to the Bar of the ABA was formed, the case for a three-year law school experience was made. By 1895, this had been coupled with a requirement of graduation from high school.<sup>100</sup> By 1897, the standards were accepted by the ABA.<sup>101</sup> The following year the Section held a conference of State Bar Examiners and, in 1900, thirty-two of the ninety-six law schools became Charter Members of the AALS. And while that body only required a high school education and two years of law school, by

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95. See M. O'Byrne, *supra* note 94, at 22.

96. G. ARCHER, *THE EDUCATIONAL OCTOPUS: A FEARLESS PORTRAYAL OF MEN AND EVENTS IN THE OLD BAY STATE 1906-1915* (1915).

97. *But see* G. ARCHER, *SUFFOLK LAW SCHOOL SYSTEMS AND CASE METHOD OF TEACHING LAW* (1927).

98. See G. ARCHER, *THE IMPOSSIBLE TASK* (1926); Archer, *Fifty Years of Suffolk University* (1956) (Alumni Banquet Booklet, Suffolk Law School Archives).

99. *Committee on Legal Education of the American Bar Association*, 2 REP. A.B.A. 209-36 (1879), *cited in* Sullivan, *The Professional Associations and Legal Education*, 4 J. LEGAL EDUC. 401, 402-03 (1952).

100. A. REED, *supra* note 17, at 22-23.

101. A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES 22-23* (1953).



1905 the standard had been raised to three years. Harry First has, not surprisingly, christened the following years as "Forming the Cartel."<sup>102</sup>

As the number of lawyers increased by 33,000 between 1890 and 1920, and while the number of part-time law schools grew from one to fifty-seven, the attention of the profession was chiefly directed against such schools.<sup>103</sup> The AALS vigorously opposed part-time legal education (although not formally excluding it until 1919), and together with the Section on Legal Education and Admissions to the Bar, hoped that the Reed Report, funded by the Carnegie Foundation, would do for law what Flexner did for medicine—namely, to turn legal training into a scientific, university-based, single, rigorous, academic portal to the legal profession. Josef Redlich in his 1914 report thought that the economic demands of the democratic tradition would continue to provide a graded profession. Alfred Reed, in his 1921 report, while he was certainly offended by correspondence schools and the marginal type of proprietary schools, emphasized the public nature of the legal profession and the need for various portals. He thought, for instance, that part-time schools had to be retained since the privilege of being a member of the bar "carries with it that of admission to our governing class."<sup>104</sup>

Reed wanted the bar to remain pluralistic. The ABA and the AALS, although wanting a monolithic bar, knew they would have to compromise.<sup>105</sup> After all, even in 1920 less than ten percent of lawyers belonged to the ABA.<sup>106</sup> On the other hand, the bar had been surprisingly successful in pushing for upgrading of both bar exams and a formal period of training. By 1917, thirty-seven jurisdictions had formalized and centralized the bar examination structure and thirty-six required a specific period of training before the examination was taken (twenty-eight requiring three years).<sup>107</sup> While

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102. First, 50 N.Y.U. L. REV. *supra* note 57, at 333-69.

103. Fossum, *Law School Accreditation Standards and the Structures of American Legal Education*, 1978 A.B.F. RES. J. 515, 517.

104. A. REED, *supra* note 17, at 56.

105. See J. REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (1914). While admitting that "these more or less commercial schools . . . have not the slightest significance from the point of view of scientific legal instruction," Dr. Redlich argued that the proprietary school "correspond to real requirements of the American people. . . . [T]hey have their warrant in the economic life of the nation, and are firmly rooted in the old democratic view of the legal profession as a practical trade." *Id.* at 70-71.

106. *Id.* at 216.

107. C. GILB, *HIDDEN HIERARCHIES* 63, 90-91, 102-03 (1966).

no state required attendance at law school, with only minor exceptions, all allowed the period at law school to count as part of the formal training. In 1919 the AALS packed the Section meeting of the ABA and a Committee on Legal Education, chaired by Elihu Root, was established.

The Root Committee produced a compromise. It reported that only in law school could one obtain an adequate legal education and that two years of college should be required before admission to law school. At the same time, the night schools got their status legitimated on the condition that they became four-year institutions. The bar examiners were placated by the formal disapproval of the diploma privilege.<sup>108</sup> The ABA was also to invest the Council on Legal Education with power to accredit schools. This report was accepted by the Section and, piloted by Root and Chief Justice Taft,

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108. The emergence of the diploma privilege was vigorously contested. During the nineteenth century, in an attempt to attract more students, certain schools began to advertise that their graduating students would have "diploma privilege"—meaning direct admission to the bar by virtue of their college diploma—without having to pass a bar examination. Alfred Reed saw three basic reasons for its attractiveness:

[S]tudents were relieved of the in terrorem effect that even the weakest examination exercises had upon an immature mind. In many cases some incidental inconvenience and expense would be obviated as well. Above all, the possession by the school of this privilege definitely stamped its work with the seal of approval of the state.

A. REED, *supra* note 17, at 249. This practice was first adopted by Virginia in 1842 when the diploma privilege was extended to all the university or college law schools in the state. Although it was repealed in 1849 at the urging of Professor John B. Minor of the University of Virginia Law School, the practice soon was adopted in other jurisdictions.

By 1870 nine schools were favored with some form of diploma privilege. *Id.* at 248-53. Controversy raged over the privilege in New York State in the early 1870's as Dwight determinedly defended Columbia's diploma privilege. Dwight argued: "All that the legislature, for example, has done for Columbia College Law School is to provide that the certificate of a permanent board of examiners, constituted by the statute itself and being themselves counsellors-at-law, shall by sufficient evidence of intellectual attainments." Dwight, *Education in Law Schools in the City of New York Compared with that Obtained in Law Offices*, 2 COLUM. JUR. 157, 162 (1885). Numerous attacks were leveled against Columbia's diploma privilege. See, e.g., *Admissions to the Bar*, 1 CENT. L.J. 320 (1874); Editorial, *Law Schools—Reform Needed*, 22 THE NATION 90 (1876); *Legal Education*, 12 CAN. L.J. 187 (1876); *Report of the Committee on Admissions to the Bar*, 9 ALB. L.J. 336 (1877). Despite such attacks, the diploma privilege remained very popular. This led the ABA to conduct a sustained assault on the privilege from 1892 through the early twentieth century. By 1919, the year of the Root Report, the diploma privilege had largely disappeared from use. However, even in 1965 Mississippi, Montana, West Virginia, and Wisconsin still had some form of diploma privilege. See *Admission to the Bar by State*, 35 B. EXAMINER 89-90 (1966); Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15 (1977).

was approved at the 1921 ABA convention. At most, however, the ABA could only hope to be persuasive. The Association therefore sponsored a conference of local and state bar associations the following year and persuaded them to give general endorsement to the work of the ABA.<sup>109</sup>

It was into this cauldron that Reed injected his first report, suggesting that the *de facto* stratified bar be accepted *de jure*. If the ABA-endorsed Root Report had in fact been implemented in the 1920's, the unified bar which so clearly attracted the leaders of the profession would have been within sight. From time to time, it is true, writers had toyed with the idea of a graded profession. Langdell in the 1870's sometimes talked of his graduates as "counsellors" and "advocates," rather than as attorneys.<sup>110</sup> W.W. Cook and Wesley Hohfeld at Yale suggested the idea of a differentiated bar during the years when Reed was collecting his material.<sup>111</sup> Reed's suggestion in his first report that the most democratic, egalitarian and American solution would be a differentiated bar, with different types of law schools, nevertheless managed to offend both his ABA and his AALS audiences. That was not the kind of differentiation Langdell had meant.

The ABA represented the most successful practitioners and an elite committed to raising the standards of legal education generally. The AALS consisted of the elite law schools, which dreamed of the day when all but the full-time university-affiliated law schools would have gone the way of the proprietary medical schools. The Root Committee, which saw the Reed Report in draft, opined: "In spite of the diversity of human relations with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same. . . . All require high moral character and substantially the same intellectual preparation."<sup>112</sup> Meanwhile, Arthur Corbin of Yale, in his presidential address to the AALS, spent much of his speech rejecting any concept of a differentiated bar.<sup>113</sup>

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109. For an example of one result of this conference, see Vold, *Improving North Dakota Bar Association Requirements*, 13 Q.J. 59 (1923).

110. A. REED, *supra* note 17, at 92.

111. P. Stolz, Review of Alfred Z. Reed, *Training for the Public Profession of Law*, (unpublished). In New York prior to 1846, a law student seeking admission to the bar was examined first to be an attorney, a position largely mechanical in nature, and secondly as a counsellor. This second examination occurred only after several years of practice.

112. P. Stolz, *supra* note 111, at 29-30.

113. Corbin, *Democracy and Education for the Bar*, in HANDBOOK OF THE AALS 143 (1921). Reform of the bar admission requirements, Corbin noted, cannot properly take the form of dividing the bar into two classes, an

On its surface, the ABA-AALS position looked the more democratic of the two. The idea of reinstating the English concept of a divided bar seemed redolent of the class-conscious colonial period in, say, Virginia. As the medical profession was to discover, however, driving out the worst medical schools might increase the quality of service to the middle class, but it ran the danger of depriving the poor of all medical care. Many of the ills of inadequate medical care in the 1970's can be traced to the success of the Flexner Report in transforming medical education into a scientific, university-based profession.<sup>114</sup> If the ABA-AALS approach had been successful, legal services might have been even more inadequately distributed in this country than they are today. There might also, it is true, have been fewer incompetent lawyers.

The efforts during the 1920's to implement the Root Report encountered heavy going. The 1922 Conference on Legal Education, sponsored by the ABA, with delegates from all the states' bars, proceeded to accept virtually all the resolutions accepted by the ABA in 1921, largely as the result of a persuasive speech by Root.<sup>115</sup> The Conference would not accept, however, the two-year pre-law college requirement, although it did come out in favor of a resolution against commercialism and for the strengthening of ethical influences.<sup>116</sup> Meanwhile the AALS was once again opened to "respec-

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inner and outer bar, the competent and the incompetent, or the sheep and the goats. It would be enough to say of this suggestion that it is quite inconsistent with our history and our accustomed modes of action. . . . No reasonable suggestion has been made as to the principle on which law business can be divided. . . . There is therefore no place for two kinds of legal education in two kinds of law schools for two kinds of lawyers.

*Id.* at 147.

114. R. STEVENS, *AMERICAN MEDICINE AND THE PUBLIC INTEREST* (1974).

115. See, e.g., Vold, 13 Q.J. *supra* note 109, at 60. This article cites as a major reason for conforming with the standards the fear that better-trained incoming practitioners from other states might provide too much competition for locally trained lawyers unless the state conformed to national standards. *Id.* at 60.

116. The fear of keeping the poor out was constantly raised. Chief Justice Taft opined:

The opportunities for College education are not confined to the great eastern endowed universities, or the great state universities now flourishing in every state. The whole country is dotted with collegiate institutions of learning near the home of every young man anxious to come to the Bar, with facilities for supporting himself through his college course if he has the courage and tenacity and self-restraint to avail himself of them. There are thousands of young men doing this now.

Chief Justice William H. Taft in a speech before the Conference of Legal Education, Washington, D.C. (February 18, 1922).

table" part-time schools.<sup>117</sup> The way seemed to be opened for requiring all to go to three years of full-time or four years of part-time law school.

The accreditation of law schools by the ABA began in 1923 and in 1927 a full-time inspector was appointed. Meanwhile each year the AALS announced some new standard that law schools had to reach.<sup>118</sup> The 1920's, however, were boom years. The number of law schools actually rose from 142 in 1921 to 173 in 1928. It is true that by 1929 only four states still required some office training, but by then four others also required some attendance at law school. But what type of law school? There were some articulate opponents of the ABA-AALS model.

The 1929 ABA Section meeting was one of the most unpleasant on record. Gleason Archer attacked the "college monopoly" and the \$15,000 a year it spent to destroy schools like Suffolk.<sup>119</sup> Edward T. Lee, Dean of the John Marshall Law School in Chicago, delivered a blistering document entitled "*In Re* The Section of Legal Education and the American Bar Association: Is the Association to be Controlled by a Bloc?"<sup>120</sup> Yet the modern movement to drive out proprietary

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117. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 158 (1950).

118. See *Two Cheers*, *supra* note 3, at 444-46.

119. Gleason Archer referred to this monopoly as the "Educational Octopus." In 1915 he published a book by this title. See G. ARCHER, *supra* note 96. In 1919 Archer wrote:

The writing of this chronicle of a school for the training of sons of working men, and how it encountered the Educational Octopus that controls all things educational in Massachusetts, has rendered necessary the projection of the personality of the author to a greater degree than would be called forth by the ordinary history. As in the case of the historian of ancient days, I am describing events 'all of which I saw and a part of which I was,' for as the founder and Dean of the School the brunt of things necessarily devolved upon me.

G. ARCHER, *supra* note 16, at 11.

120. Address by Edward T. Lee before the ABA Section on Legal Education (Oct. 10, 1929). Lee stated:

[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, and . . . they have been boring from within our Association in the interest of their own, unmindful of two fundamental objects of our Association, to "uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar."

schools really began in 1929 when the section passed a resolution against "commercial enterprise."<sup>121</sup>

No doubt psychological and other pressures during the twenties had an impact on raising standards. The University of Montana began to require two years college work from students;<sup>122</sup> the University of Southern California began to require three years of college work.<sup>123</sup> The University of North Carolina which moved to a three-year law program in 1919, began requiring one year of college in 1923 and two years of college in 1925.<sup>124</sup> In 1921 Toledo began requiring two years of college before law school, although it went out of business for a while the following year.<sup>125</sup>

In the thirties, however, the pressure on the proprietary schools increased.<sup>126</sup> The ABA's study of the weakest 152 law schools

121. "[N]o more important duty confronts the American Bar Association . . . than . . . to get to the facts, educational and financial, concerning . . . commercialized schools and create a just public demand for their elimination." Address by William D. Lewis before the ABA Section on Legal Education (Oct. 10, 1929).

122. UNIVERSITY OF MONTANA, *supra* note 75, at 46.

123. UNIVERSITY OF SOUTHERN CALIFORNIA, *supra* note 76, at 45.

124. Coates, 47 N.C.L. REV., *supra* note 46, at 38-41.

125. First, 8 TOL. L. REV., *supra* note 92, at 146-47.

126. In 1928 part-time and mixed schools contained sixty-percent of the total number of law students. Kinnane, *Recent Tendencies in Legal Education*, 25 A.B.A.J. 559, 561 (1939). This reflected a steady increase since 1910, when enrollment at full time schools was at a high of over forty-three percent. McGuire, *The Growth and Development of American Law Schools*, 8 ROCKY MTN. L. REV. 91, 101 (1939). The depression years brought only a slight decline to sixty-two percent enrolled in part time schools in 1931. Kinnane, 25 A.B.A.J., *supra*, at 561. California was notorious for its proliferation of law schools. At times there were twenty law schools in existence, only six being accredited by the ABA. *Id.* at 560.

While worrying about standards, the bar was also concerned about overcrowding. Proprietary schools were seen as the major cause of overcrowding. Thus it was argued that raising standards would not only improve the quality of education but decrease the quantity of graduates and those admitted to the bar. Despite objections that the "proposition is undemocratic and tends to create by law a favored class or a professional aristocracy to consist alone of those who have the good luck to be born well off financially, or who have rich friends who will let them have the means to take up these long years of study," the recommendation that only graduates of qualified schools be permitted to take the bar examination flourished. Ethridge, *Unjust Standards for Law Practice*, 2 MISS. L.J. 276, 277 (1929).

It became increasingly difficult for some schools to achieve the standards imposed. In 1937 the ABA required two years of college study, and three years of full time or four years of part time study at a law school which 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. The ABA report on level education in 1937 noted:

Primarily, then, we must answer, not whether some deserving boy may find it more difficult . . . to gain admission to the bar because he must first secure some college education, but rather whether the public will be

concluded that "until something is done either to improve these schools or eliminate them, there seems little hope of attaining the goal of a better bar in this country."<sup>127</sup> How much the decline in the number of unaccredited schools during the thirties was due to the changed standards and how much to the depression is unclear. The number of schools actually increased to 195 in 1935. The bar spent these years discussing overcrowding<sup>128</sup> and trying to find an "acceptable" way of limiting numbers. By 1939, under ABA pressure and partly to help avoid competition, the AALS let in more part-time schools.<sup>129</sup> In the meantime the ABA worked to justify higher standards<sup>130</sup> and to convince state bar examiners that—as far as possible—they should set exam questions that looked like exam questions in the "better" law schools.<sup>131</sup>

In the years after 1945 standards leapt and the structure hardened.<sup>132</sup> By 1950 three years of college became the norm<sup>133</sup> and

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better served if every lawyer is required to have an adequate general education as well as a technical training in the study of law.

STATEMENT OF THE ABA COUNCIL ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR (September 28, 1937) at 11. See First, 8 TOL. L. REV. *supra* note 92, for a review of the development of part-time schools.

127. See Clark, *A Contrast: The Full-Time Approved School Compared with the Unapproved Evening School*, 20 A.B.A.J. 548 (1934).

128. See, e.g., Comment, *The Problem of the Lawyer's Qualifications*, 6 IND. L.J. 268 (1931), where the author cited the New York Board of Bar Examiners and its fears that the number of lawyers in the United States would reach 240,000 by 1940. See also *Report of the Chairman*, 2 B. EXAMINER 181 (1933). In this report the author invoked the Alice in Wonderland analogy: "[T]he legal profession will soon be banging its head against the ceiling with one leg up the chimney and one arm out the window. . . ." *Id.*

129. First, 58 N.Y.U.L. REV., *supra* note 57, at 374.

130. STATEMENT OF THE ABA COUNCIL ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR (September 28, 1937).

131. Standards were proposed which included the following: "No Bar Examiner shall be appointed who does not have such scholarly attainments as are necessary which accurately reflect the law school training that is being offered in law schools approved by the ABA." Proceedings 50 (1940) (Stanford Law School Archives III).

132. World War II saw a dramatic, but only temporary, decrease in the number of both law students and law faculty. In 1938 there was a total of 28,000 students in 109 ABA-approved schools. By 1943 there was a total of 4,800 students in these same schools. See Wicker, *Legal Education Today and in the Post-War Era*, 18 TENN. L. REV. 700, 701 (1945). In 1940 there were 715 law teachers, 378 of whom taught part time. By 1943 the number of full-time law teachers had decreased to 138 and part-time teachers to 229. AALS PROCEEDINGS, HANDBOOK 115 (1944). By 1947 the number of law students in ABA-approved law schools had risen dramatically, well beyond the pre-war figures, to 43,719. Over eighty-three percent of law students in 1947 attended ABA-approved law schools. *Report of the Committee on Trend of Bar Admissions*, 17 B. EXAMINER 137, 142 (1948).

133. Hervey, *Pre-Legal Education of Students Admitted to Approved Law Schools, Fall, 1948*, 1 J. LEGAL EDUC. 443 (1949).

by the 1960's, four years of college. The two-year law school evaporated, and the problem-type bar examination was questioned only by the objective multi-state developed in the 1970's. The ABA-AALS minimum standards rolled ever on, requiring increasing numbers of volumes in law libraries and ever fuller full-time faculties. The clerkship route to the bar became a rarity. Today's law student may have difficulty believing that it was only about 1950 that the number of lawyers who had been to college exceeded the number who had not. The six-year lock step, and for most the seven, has become the norm. When the country went into this period of self-doubt in the mid-60's, we undoubtedly had a better trained bar than at any time since the colonial period, but it was one that had relatively fewer blacks and women than 50 years earlier and one that suffered from the weaknesses as well as the strengths of elitism.

#### STYLE AND SUBSTANCE

Thus far I have discussed the evolution of the structure of legal education during the period of institutionalization. I will now move on to inquire on the one hand about the theory of law and, on the other, about the concept of law which underlay the various structural changes.

While the Northern Indiana Normal School was creating the Valparaiso Law School, there were other changes in the East. At Eliot's Harvard—and very shortly at Butler's Columbia and Harper's Chicago—there was to be the birth of something in the law schools we now know as the case method—although in the 1870's and 1880's the study of cases was not necessarily associated with the so-called Socratic method. This growth of a new form of teaching, however, had its own implications. By 1873, with the appointment of James Barr Ames to the Harvard faculty we had the first genuine academic lawyer—a law graduate, with limited experience of practice, who was appointed for his academic and teaching quality. Previously, law professors were either practitioners who took a few hours away from the office each week to conduct classes or were among the very few full-time law teachers with extensive experience before appointment. Ames' appointment then was an important step in bringing the law school into the mainstream of the burgeoning American higher education industry. It also insured a continuing conflict in the schools between the “academic” and the “practical”—terms which while they had a core meaning, were to be semantically confusing to succeeding generations. One might add, as well, that the case method and the rise of the



academic lawyer insured another schizophrenic aspect of American legal education—the issue of what amounted to scholarship in the law schools.

The intellectual milieu of the latter part of the nineteenth century puts the work of Christopher Columbus Langdell in context. In his 1869 Inaugural Address, Charles Eliot argued that universities should embrace all knowledge.<sup>134</sup> While Veblen, was later to complain that “a school of law no more belongs in a university than a school of . . . dancing,”<sup>135</sup> Eliot saw nothing wrong in teaching dancing—indeed, making it compulsory—at Harvard.<sup>136</sup> It is a little difficult for us now to realize that the progressives at the beginning of this century were concerned that our colleges and universities were *too* relevant and practical.<sup>137</sup> Even the most prestigious of our private universities were thought to have absorbed too well the arguments of Herbert Spencer and Thomas Huxley that education should serve the needs of an increasingly specialized industrial society. If the law schools of Dwight’s Columbia or Langdell’s Harvard seemed to serve the emerging corporate law firms there was nothing unique about that in the higher education firmament. As Eliot himself said: “To impart information and cultivate the taste are indeed sought in education, but the great desideratum is the development of power in action.”<sup>138</sup>

The “real life” emphasis of the leading universities fit in well with the scientific spirit which swept through academe, and produced the new disciplines which were to go a long way to eradicating the trivium and the quadrivium of traditional liberal education. Just as there was to be a “scientific” base for history, classics and

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134. Charles Eliot, Inaugural Address at Harvard College (1869), *reprinted in* 2 R. HOFSTADTER & W. SMITH, *AMERICAN HIGHER EDUCATION, A DOCUMENTARY HISTORY* 601 (1961).

135. T. VEBLLEN, *HIGHER LEARNING IN AMERICA* (1918).

136. “I have often said that if I were compelled to have a required subject in Harvard College, I would make it dancing if I could.” Charles Eliot, Inaugural Address at Harvard College (1869), *reprinted in* R. HOFSTADTER & W. SMITH, *supra* note 134, at 601.

137. L. VEYSEY, *supra* note 55, at 90. Similarly, Thorstein Veblen wrote that: These schools devote themselves with great singleness to the training of practitioners, as distinct from jurists; and their teachers stand in relation to their students analogous to that which the “coaches” stand to the athletes. What is had in the view is the exigencies, expedients, and strategy of successful practice; and not so much a grasp of even those quasi-scientific articles of metaphysics that lie at the root of the legal system. What is required and indicated in the way of a knowledge of these elements of law is a familiarity with their strategic use.

T. VEBLLEN, *supra* note 135, at 155.

138. L. VEYSEY, *supra* note 55, at 91.

politics,<sup>139</sup> the spirit of science was to invade law. Had Langdell had an articulate educational philosophy, it might well have resembled that of John Fiske in Harvard College: "The truth of any proposition, for scientific purposes, is determined by its agreement with the observed phenomena, and not by its incongruity with some assumed metaphysical basis."<sup>140</sup> Moving from lectures and quizzes about rules to the examination of cases was the law schools' apparent passport to academic respectability.<sup>141</sup>

Langdell, whom it must be remembered frequently lectured and provided a summary of rules in his casebook on contract, argued that not only was his way the scientific way, it was also the practical way to legal competence.<sup>142</sup> While his disciples turned the scientific aspects of the case method into a system of interrogation on assigned cases with a minimum of lecturing and exposition, they would still have shared this vision of practicality. Langdell and his successor, James Barr Ames, kept a balance between the schoolmen and the practitioners, a balance which Harvard has always made some effort to retain.<sup>143</sup> Yet as the Langdell system travelled, this link with practice frequently withered.

The fashionability of the Langdell system grew with

139. P. BUCK, *SOCIAL SCIENCES AT HARVARD, 1860-1920: FROM EDUCATION TO THE OPEN MIND* (1965).

140. 1 J. FISKE, *OUTLINES OF COSMIC PHILOSOPHY: BASED ON THE DOCTRINE OF EVOLUTION WITH CRITICISM OF THE POSITIVE PHILOSOPHY* 272 (1874).

141. Nor should one just sneer at these changes. In respect to the reforms in the law and medical schools, President Eliot wrote:

So long as lectures were the only means of teaching in the law and Medical Schools of this University, the heterogeneous character of the class did not much affect the efficiency of the instruction, except so far as the lecturer felt obligated to adapt their teaching to the ignorant and untrained portion of their audience. But with the adoption of catechetical methods in both Schools, the presense in the recitation rooms of a considerable proportion of persons whose minds were rude and unformed became at once a serious impediment. The large use of examinations in writing also brought into plain sight the shocking illiteracy of a part of the students. . . .

Quoted in 2 C. WARREN, *HISTORY OF THE AMERICAN BAR* 396 (1913). At the risk of stating the obvious it may be worth noting that faculty complaints about the quality of law students are not new.

142. C. LANGDELL, *CASES ON CONTRACTS* viii (1873).

143. See generally, E. WARREN, *SPARTAN EDUCATION* (1942). Warren, a member of the Class of 1900, fell in love with the law school. In his day the "big four" were Thayer, Gray, Smith and Ames. His role model was Gray who spent only two days a week at the school and practiced the remainder of the week. *Id.* at 7. Thus, after returning as an Assistant Professor in 1904, Warren opened a law office in Boston. He

remarkable rapidity.<sup>144</sup> Columbia fell to the Langdell system in 1890<sup>145</sup> and the aging Dean Dwight fled to continue the lecture method at New York Law School, just as Langdell's educational opponents at Harvard had fled to Boston University in the 1870's to continue the lecture method.<sup>146</sup> Some schools moved easily toward the new orthodoxy. Even in the 1860's John Pomeroy taught equity from the cases at New York University. When he moved to Hastings College of Law in 1878 as that school's first professor of law, the trustees forced him to teach Blackstone by the lecture method, but being of the breed of independent creatures known as law professors, within a few years Pomeroy was teaching a modified form of the case method.<sup>147</sup>

When William Howard Taft, then district judge and dean of the law school on the side, reorganized the University of Cincinnati Law School in 1895, it was on the basis of the case method.<sup>148</sup> It was also in the 1890's that, with the arrival of J.H. Wigmore from Harvard, Northwestern began using the case method.<sup>149</sup> By 1900 the full-time

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did this, he claimed, with the encouragement of President Eliot who desired some of the faculty to be practitioners. The arrangement permitted Warren to cancel five percent of his classes. *Id.* at 13. Compare Warren's account with S. TUROW, ONE L: AN INSIDE ACCOUNT OF THE FIRST YEAR AT HARVARD LAW SCHOOL 80 (1977), wherein Turow complained that there were "no answers, of course. No answers."

144. See G. GILMORE, THE AGES OF AMERICAN LAW (1977).

Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell's idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea shaped our legal thinking for fifty years.

*Id.* at 42.

145. In this year, William Keener was appointed at Columbia, causing great controversy in that school. He noted that the method of teaching by cases had grown steadily in favor since its introduction at the Harvard Law School, and almost universally commended itself to those who had examined it or had seen its fruit. Keener proceeded to combine the case method with the lecture method. The success of this attack on the traditional approach of the Columbia Law School and President Low's approval of it, led to the resignation of Dwight and two faculty members in 1891. See *Two Cheers*, *supra* note 3, at 437-38.

146. See *The New England Magazine*, March, 1886, at 218. According to that account, the school was founded to provide practitioners as instructors in order to "follow the complex details of a difficult branch of law, from the lips of an eminent counsellor who has but lately exhausted the subject in an important case at the bar. . . . *Id.* at 218.

147. Golden Jubilee Book, *supra* note 74.

148. Address by William Howard Taft at the dedication of the College of Law, University of Cincinnati (October 28, 1925).

149. See J. RAHL & K. SCHWENIN, *supra* note 62, at 18.

faculty of five at Stanford all used the case method, citing William Keener as their role model.<sup>150</sup> The leading state universities were just as anxious to import the Harvard technique. The 1890's saw the case method arrive in Madison when President Charles Adams brought in Charles Gregory as Associate Dean. Edwin E. Bryant, the Dean, ran the Wisconsin Law School as an "ideal law office" and attacked the case method as narrow, slow and nonprofessional.<sup>151</sup> By the time that Harry Richards became Dean in 1903, however, the case method finally won and Richards was able to address himself to what he perceived as more important issues—how to Harvardize other schools and keep immigrants out of the profession.<sup>152</sup> The pattern seemed to be the same at most university-affiliated law schools: Tulane succumbed in 1906 when it added Monte Lemann and Ralph Schwarz as lecturers, the two just having returned from Harvard.<sup>153</sup> The appearance of the case method was almost invariably linked with rising standards. At Tulane, for instance, in 1907 a high school diploma was required for admission and the course extended to three years. Similar developments occurred elsewhere.<sup>154</sup>

The case method came to Valparaiso in the years 1908-1909. The faculty obviously was not entirely convinced. The catalog for

150. M. KIRKWOOD & W. OWENS, A BRIEF HISTORY OF THE STANFORD LAW SCHOOL 14 (1961).

151.

Case lawyers . . . elevated reason above moral sense and pridefully asserted that reason alone could guide judicial decisions. Viewed in this way, the mechanical application of precedents threatened the image of the lawyer as a free moral agent and in so doing threatened to undermine what to many nineteenth-century lawyers was the essence of "professional conduct."

W. JOHNSON, *supra* note 85, at 87.

152. *Id.* at 102-06, 117-18. Milo Jesse Bowman came to Valparaiso as Dean in 1907 at which time he introduced the case method. Applicants were required to have a high school education or the equivalent. In 1917 Bowman lengthened the program from two to three years and commenced an Arts-Law curriculum.

153. Dean Saunders of the Tulane Law School was reported as saying: In an endeavor to make the school equal to the best in the country, the method used at Harvard in teaching will be adopted here. That is known as the case method, and the pupils are taught the principles of law by being given cases to study, instead of being told a lot of principles, with no opportunity of seeing the application of these principles.

Daily Picayune, Aug. 16, 1906, at 2.

154. For example, at Northwestern the three year course first appeared in 1895. RAHL & SCHWENIN, *supra* note 62, at 17. Wisconsin moved to a three year program in 1894. Wisconsin first required a high school diploma in 1889 and later, in 1892, began to "recommend" some college study for its applicants. JOHNSON, *supra* note 85, at 87.

that year talks about the marvels of the case method;<sup>155</sup> but one can visualize a stormy faculty meeting out of which there emerged the provision in the catalog which said: "Yet the study of the entire body of the law from cases alone is laborious, wasteful of time, necessarily fragmentary and unsystematic. The average student who is required to gain all his knowledge from case studies becomes after a time so saturated with cases that his powers of discrimination are dulled." So there was still an incentive, the faculty thought, to read treatises. Not everyone gave Christopher Columbus Langdell and his system rave reviews.

Many legal practitioners viewed the new method of education with a healthy skepticism. In 1876 the *Central Law Journal* in St. Louis announced that it was not prepared to approve Professor Langdell's system of teaching "which we understand to involve a wide and somewhat indiscriminate reading of cases—some of them overruled cases;"<sup>156</sup> but already in the eighties kudos for the case method was apparent. The *American Law Review* reported that in their opinion "any student of English and American law, who will subject himself to that system for a time sufficient to acquire the habits belonging to it, will be for that reason a more thorough lawyer, a more formidable adversary, and a sounder counsellor than he otherwise would have become."<sup>157</sup> Columbia men could still speak of the case method "with unqualified condemnation."<sup>158</sup> Yet Justice Holmes, at one time a skeptic, after experimenting with Langdell's method, reported that:

[A]fter a week or two, when the first confusing novelty was over, I found that my class examined the question proposed with an accuracy of view which they never could have learned from textbooks and which often exceeded that to be found in the textbooks. I, at least, if no one else, gained a good deal from our daily encounter.<sup>159</sup>

One could, of course, report this verbal lobbing indefinitely,<sup>160</sup> yet the growth of the case method in elite schools (or schools which

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155. Valparaiso College Catalog 1905.

156. *Higher Legal Education*, 3 CENT. L.J. 540 (1876).

157. *General Notes*, 15 LAW STUDENTS 347 (1881).

158. Chase, *Methods of Legal Study II*, 1 COLUM. JUR. 69, 77 (1885).

159. Holmes, *The Use and Meaning of Law Schools, and Their Methods of Instruction*, 20 AM. L. REV. 923 (1886).

160. Sydney Fisher, in *The Teaching of the Law by the Case System*, 37 AM. L. REG. 416 (1888), expressed his approval of the system. John Chipman Grey similarly approved of teaching cases but admitted "that, given a drone for a teacher, and a dunce for a student, the study of cases would not be the surest mode to get into the

sought to be elite) was remarkable. The system rapidly absorbed the socratic aspects of the recitation and the quiz.<sup>161</sup> No doubt part of the method's popularity was snobbism. Law professors may have relished their increasing power and influence in the classroom; the change from treatise-reading clerk to flamboyant actor in a drama. The case method was touted for its alleged practicality. As Dean Keener of Columbia put it in 1894, "the student is practically doing as a student what he will be doing as a lawyer."<sup>162</sup> Moreover, by the 1890's going to law school was hardly a rarity; a law student who wanted product differentiation had to go to a case method school.<sup>163</sup> The new breed of academic lawyers was interested in (and the cynic may say probably only fully capable of) teaching in case method schools and Langdell's method had the success of inevitability.<sup>164</sup>

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bar." Grey, *Cases and Treatises*, 22 AM L. REV. 756, 758 (1888). James Schouler felt Harvard's success did not come until it relaxed its new method. Before that, "the rumor spread abroad that young men were fitted not for the bar, but for membership in the Antiquarian Society." Schouler, *Cases Without Treatises*, 23 AM. L. REV. 1 (1889). Theodore W. Dwight, an ardent opponent of the case method, declared "while it is not conceded that the alternative method is better for any students, it seems that it is inferior to the teaching in its effects upon those of average powers." Dwight, *Columbia College Law School of New York*, 1 GREEN BAG 146 (1889). See also McClain, *The Best Method of Using Cases in Teaching Law*, 16 REP. A.B.A. 401 (1893); Penfield, *Text-books vs. Leading Cases*, 25 AM. L. REV. 234 (1890); Phelps, *Methods of Legal Education*, 1 YALE L.J. 139 (1892); Smith, *The True Method of Legal Education*, 24 AM. L. REV. 211 (1890). For criticisms of the method, often reiterating original ones, see J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* (1978). "Case analysis is a form of tunnel vision which doubtlessly facilitates certain tasks that lawyers perform." J. AUERBACH, *supra* note 87, at 9.

161. For a discussion of the extent of the questions and answers in the non-case schools, see, e.g., Baldwin, *The Recitation System*, 2 COLUM JUR. 2 (1885).

162. Keener, *The Inductive Method in Legal Education*, 28 AM L. REV. 709 (1894). See also Grey, 22 AM L. REV., *supra* note 160, at 756-64. "In academic teaching, the study of cases is particularly valuable on account of its thoroughly practical character. If the cases are well selected, the student is being held close to real life all the time." *Id.* at 763-64.

163. "[B]y 1895, 'the prevailing opinion among lawyers' was that 'a thorough knowledge of legal principles is essential to higher professional success, and this knowledge . . . can rarely be attained except as the result of uninterrupted, systematic study, under competent guidance.'" J. SELIGMAN, *supra* note 160, at 42.

164. Christopher Columbus Langdell, in 1887, stated:

I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, 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 experiences in learning law.

*Harvard Celebration Speeches*, 3 L.Q. REV. 118, 124 (1887).

The trump, however, may have been finance. Once the case method absorbed the Socratic method, the university or college president was assured of a money maker in his law school. With the case method, you could have as many students as could be wedged into a room; one improved the quality of legal education by building larger lecture halls, not by adding to the faculty. President Eliot smiled on Langdell's celtic wisdom in having invented the financially-attractive case method system and Langdell, in return, purred.<sup>165</sup>

Only occasionally did the elite have their faith in the case method questioned. Perhaps the most disturbing was the prestigious report commissioned by the Carnegie Foundation in which Professor Josef Redlich of the University of Vienna examined teaching techniques at the leading law schools. The Redlich Report<sup>166</sup> said many flattering things about the case method but not enough to satisfy the leaders of the AALS. Redlich, while admiring it as a way of teaching common law, questioned how effective it was for teaching statutory law, and wondered how effective the whole method would be if the students did not use treatises on the side. Redlich also worried about the impact the method would have on legal scholarship; would case law teachers be the juriconsults as well? Redlich worried too that the case method was aimed at the brightest, not the average, student;<sup>167</sup> and Redlich doubted how effective it was in transmitting information and, indeed, how effective the case method was in terms of teaching after the first year.

While there may be those in this room who do not necessarily disagree with all Redlich said, the academic establishment of pre-World War I was furious. The President of the AALS dismissed the critical portions of the report by saying Redlich must have listened to gossip.<sup>168</sup> Certainly the steamroller seemed to be rolling inex-

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165. See A. SUTHERLAND, *supra* note 59, at 162-204. "Eliot's energy, his unflagging and understanding interest in the progress of the Law School through four decades, his insight into the qualities its teachers required, his willingness to risk innovation, his continuous support of Langdell and Ames, all were essential to the transformation effected in their deanships." *Id.* at 164. See also J. SELIGMAN, *supra* note 160, at 29-42.

166. J. REDLICH, *supra* note 105, at 55.

167. His concern was probably justified as Warren reported that in his days at Harvard, Ames used the Socratic method to speak to fifteen or twenty of the brightest students in the class. E. WARREN, *supra* note 143, at 7.

168. Others were highly critical of Redlich's conclusions. See *Minutes of the AALS Convention*, 4 AM. L. SCH. REV. 90 (1927). Harlan Stone, then Dean of Columbia Law School and later Supreme Court Justice, noted that, "my observation and experience lead me to believe that Redlich lays too great stress on the apparent confusion of the law student in beginning his law study by the case method, and too little

orably on. By 1912 the case method was authorized at Yale; by 1916 a Harvard man (Swan) was Dean of that school and by 1924 President Woolsey announced that "the case system is the cachet of the crack law school of today."<sup>169</sup> It was only the Archers and the Lees who would rather "fight than switch."<sup>170</sup>

Wherever one looked—at least in upwardly mobile law schools—the change was on. The case method was "scientific." Any university president wishing to have a first-rate law school had to subscribe. At the University of Montana there was a battle between the president who wanted to appoint Harvard men to the law school faculty and the State Board of Education who wanted local practitioners. The compromise was a local dean, a Harvard faculty and the case method.<sup>171</sup>

Meanwhile the progress continued. The University of Southern California, for instance, moved to the case method in the twenties; and the large state universities in the South began to crumble. In 1923 President Chase of the University of North Carolina announced

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stress upon the capacity of instructors in subjects usually taught in the first year classes in our schools. . . ." *Id.* at 93. Dean Frederick Woodward claimed that he once participated in a serious attempt to do what Redlich recommended and concluded that it did the first year student more harm than good. *Id.* at 100. Many critics also pointed out that a four year curriculum, as suggested by Redlich to provide room for more courses, was too long. Similarly Redlich's criticism of large classes was deemed unreasonable by many. J.H. Beale noted: "The principle of mob psychology in its best form you will find in a big class; that psychology which leads to our giving to every man added power to think and to reason and to reach individual conclusions." *Id.* at 108. The general attitude of most participants clearly reflected the considerable extent of the encroachment of the case method into legal education.

169. *Two Cheers*, *supra* note 3, at 439-40, 443.

170. The Valparsiso University Law School catalog of 1921-22, stated at 130-31: The method of instruction employed is commonly known as the case method. Beginning students, however, are first carefully grounded in the elements and fundamental concepts of the law and are given some acquaintance with its history and evolution. Thereafter the instruction consists chiefly in the discussion of legal principles as disclosed in judicial decisions, supplemented by a considerable amount of practice work. All phases of the work proceed on the principle that education consists in self-activity. Hence classroom work takes the form of recitation and discussion, rather than lecture, and students are held to the careful preparation of definite assignments.

171. MONTANA STATE UNIVERSITY, *supra* note 75, at 26-27. Lest any of you question the lessons to be drawn from history, I should point out that an almost identical scenario was acted out in choosing a new dean for the University of Texas Law School in 1979. Powerful alumni persuaded the President of the University of Texas to reject the four "eastern" candidates recommended by the faculty because they were "insufficiently Texan." *Chronicle of Higher Education*, Sept. 4, 1979, at 2.



that modernization of his University's law school was necessary to prevent the school from becoming a "coaching school" for bar examinations. The governor opposed Chase's suggestion for two years of college before law school while another opponent opined: "I know that most of the law schools follow the case system. This, I think, is due not so much to any merit in the system as to the fact that it is a system adopted by Harvard University." Meanwhile President Alderman of Virginia urged President Chase of North Carolina not to appoint faculty or deans because they were experienced practitioners: "Our successes have not been practitioners—our failures have been, or rather our mediocrities, as teachers."<sup>172</sup>

Just why President Alderman felt able to offer advice to his colleague at North Carolina was unclear. The University of Virginia, after the highest exhortations about the teaching of law by Thomas Jefferson fell under the spell of John Barbee Minor who taught law there from 1845 to 1895.<sup>173</sup> Minor's educational philosophy was that:

[T]he "foundation" of legal study "should be broad and deeply laid;" that law students should be instructed in practical know-how as well as in legal theory and reasoning; that the materials to be studied should be treatises, statutes, and selected legal opinions; that instruction should be conducted by the lecture method and the questioning of students in class; that there should be daily written tests and periodic written examinations.<sup>174</sup>

This educational philosophy lived on. As late as 1921, Dean Lile was arguing against the case method.<sup>175</sup> Indeed, in this atmosphere, the case method was only introduced in 1922<sup>176</sup> and was not totally vic-

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172. Coates, 47 N.C.L. REV., *supra* note 46, at 49.

173. This time span led the historian of the Virginia Law School, with perhaps more southern courtesy than historical accuracy, to suggest that "Minor and Langdell were the most influential American legal educators in the last half of the nineteenth century." J. RITCHIE, THE FIRST HUNDRED YEARS 54 (1978).

174. *Id.*

175.

The natural tendency of the system is to develop a race of case lawyers. But the most serious objection is the slowness with which the course goes forward, and the gaps that the method must leave in the continuity and completeness of the topics pursued. If the student had six years to devote to his law school course, instead of three, the case method might prove ideal.

*Id.* at 57.

176. It was introduced by Armistead Mason Dobie, who completed an S.J.D. at Harvard in 1922. He had joined the faculty in 1909 and was to serve as Dean from 1932 to 1939. *Id.* at 74.

torious at Virginia until the 1930's. Perhaps President Alderman spoke from bitter experience.<sup>177</sup> Yet until the 1960's all the plaudits ultimately went to the case method.

How realistic was James Barr Ames being when he emphasized the 'practical' or 'clinical' aspects of the case method: "If we cannot summon at will the living clients, we can put at the service of the students . . . the adjudicated cases of the multitude of clients who have had their day in court."<sup>178</sup> There was much criticism of the lecture method in the nineteenth century,<sup>179</sup> however, Eliot was being unfair when he said: "The lecturer pumps laboriously into sieves. The water may be wholesome but it runs through."<sup>180</sup> Ames was equally critical of the recitation method. It had not been "a virile

177. At Alabama the transition to the case method was more gradual. It took place during the deanship of Albert J. Farrah (1913-1944). It was part of a general business process of founding a law review and moving to a three year curriculum. The three-year course was started in 1921 and the law review in 1925. See McKenzie, *Farrah's Law School: The First One Hundred Years of the University of Alabama Law School, 1872-1972*, 25 ALA. L. REV. 121 (1972).

178. Dwight would say, "Not at all." See Dwight, *What Shall We Do When We Leave Law School*, 1 COUNSELLOR 63 (1891). Dwight stated: "Reading cases in a haphazard way leads to mental dissipation. . . . Law decisions are but a labyrinth. Woe to the man who busies himself with them without a clue . . . to guide him." *Id.* at 64. In Dillon, *Method and Purposes of Legal Education*, 2 COUNSELLOR 10 (1892), the author, a supporter of Dwight's position, noted: "It will not do to turn a beginner in the study of law over to the 1,000 cases which have been decided. . . . It is best to first outline principles, then have students read textbooks and one or more leading cases." *Id.* at 12. See also Smith, *The True Method of Legal Education*, 24 AM. L. REV. 211 (1890).

179. The inherently "dry and unillustrated style" of lectures was felt to be one of the major problems with the method. Dennis, *Object—Teaching in Law Schools*, 21 AM. L. REV. 228 (1887). Another difficulty was the probability that students would miss, or fail to retain, the material, "Only an imperfect and erroneous knowledge of law can result from such a system." Chase, *Methods of Legal Study*, 1 COLUM. JUR. 69 (1885). Professor Christopher Tiedeman of New York noted that if all students were well-trained before coming to law school, the lecture system would be superior to other systems, but the variety and lack of training of incoming students made lecturing undesirable as the sole method of instruction. Tiedeman, *Methods of Legal Education*, 1 YALE L.J. 150, 151 (1892). Simeon E. Baldwin summed up the worst features of the lecture system, which although the easiest recourse for the law teacher, "is a nasty review of some large subject by one familiar with it, before many who are unfamiliar with it. To make it of lasting value, there must be either a taking or transcribing of notes, or resort to published works on the same topic." Baldwin, *The Recitation System*, 2 COLUM. JUR. 1, 2 (1885). By and large it was not the use of lecturing in itself that was condemned, but the use of lecturing as the only method of teaching.

180. 2 R. HOFSTADTER & W. SMITH, *supra* note 134, at 610. Dwight had, for instance, been especially successful with the system which survived at Columbia until 1891. See GOBEL, *supra* note 26, at 35-37.

system. It treats the student not as a man, but as a school boy reciting his lines."<sup>181</sup>

This *macho* (or Darwinian) view of the case method was neatly caught in the Centennial History of the Harvard Law School. The student

is the invitee upon the case-system premises, who, like the invitee in the reported cases, soon finds himself fallen into a pit. He is given no map carefully charting and laying out all the byways and corners of the legal field, but is left, to a certain extent, to find his way by himself. His scramble out of difficulties, if successful, leaves him feeling that he has built up a knowledge of the law for himself. The legal content of his mind has a personal nature; he has made it himself.<sup>182</sup>

What happened, if he were not successful, was left to the imagination. Four years later, Reed was to see the effect of the system in this way:

American law became for the student not a field to be surveyed broadly, but a thicket, within which a partial clearing, pointing in the right direction, is made. The young practitioner is then equipped with a "trained mind," as with a trusty axe, and commissioned to spend the rest of his life chopping his way through the tangle.<sup>183</sup>

What truth was there, however, in the criticism offered in the Redlich and Reed reports? Was the increasing distance between the method and practical problems inherent in the nature of the case method, or more the result of hiring as professors those who had little or no experience of practice?<sup>184</sup> A later question might well be

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181. J. AMES, LECTURES ON LEGAL HISTORY & MISCELLANEOUS ESSAYS (1976). For comprehending many of the early contributions of the Harvard Law School, the author is indebted to Ralph Ardili, Yale Law School Class of 1973.

182. HARVARD LAW SCHOOL ASSOCIATION, CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 (1918) [hereinafter CENTENNIAL HISTORY].

183. A. REED, *supra* note 17, at 380. For a more recent analogy, see S. TUROW, *supra* note 143, at 67.

184. In 1915 Mr. Pope noted during the AALS convention that "it seems to me that the practicing lawyer and the professor have been getting further and further apart all the time." *Minutes of the AALS Convention*, 4 AM. L. SCH. REV. 90, 108 (1927). In 1929, during his attack on the elite schools of the ABA, Edward T. Lee, Dean of the John Marshall Law School in Chicago, unequivocally stated:

I do not believe that the law should be taught only . . . by professional law teachers who have never tried a case in court or had a single client. I do not believe that the American Bar Association should directly or in-

whether the case method entrenched itself in the law schools by capturing control of the bar examiners in the 1930's. Was it fair to say that the case method inhibited research and discourage the best minds from publishing research on law rather than about law?<sup>185</sup> The questions to be left to the sixties and seventies included such fundamental issues as whether the law schools were any more than high grade schools of rhetoric and, more uncharitably, whether their tendency was to produce analytic giants who were moral pygmies.

Returning to my basic theme, recall that the case method was originally seen as scientific. Langdell's most coherent exposition of his theory was published in the *Law Quarterly Review*. Langdell explained that he worked to put American law faculties in much the same position as those in continental Europe. "To accomplish these objects, so far as they depend on the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books."<sup>186</sup> It was in this context that Langdell made his memorable remark that if law were not a science, but a handicraft, then it should be learned by an apprenticeship and not in a university. Langdell had no doubt, of course, that it was a science and that the center of legal education was the library:

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directly endorse any system of legal education, or method of instruction, or dictate the number of "full-time" professors that should teach in a law school.

Address by Edward T. Lee before the ABA Section on Legal Education (Oct. 10, 1929). See also note 120 *supra*.

185. See J. REDLICH, *supra* note 105, at 49-50. Undoubtedly this work of making room out of the almost incalculable mass of published cases, a continually better system of those which are to be used in teaching, and of arranging these again systematically in the casebooks, has been performed admirably. But on the other hand, it is equally certain that this kind of literary activity has prevented many forceful writers among modern American law teachers from cultivating the fields of legal history and dogmatic literature as fruitfully as they might otherwise have done," and compare with a view that, in various ways the inherent conflicts in the law schools, which are the accident of history, are returning to haunt the 1980's. Consider legal scholarship. In many universities the law school is regarded, in the light of the caliber of research undertaken there, as little more than a trade school. Even the best university law schools have their problems: the intellectual ability of their faculties is rarely matched by a consummate scholarly output. Various reasons have been advanced. Until the last ten years, the production of teaching materials was regarded as a scholarly end in itself (and, happily for student relations if not for scholarship, prestige in law schools among both colleagues and students still normally depends more on teaching ability than scholarly reputation). Moreover, the faculty-student ratio at law schools is such that all members of the faculty are involved in teaching large classes, and the classes may well be elementary, or at least irrelevant to the professor's research interests; that, too, has a stunting effect on research.

186. 3 L.Q. REV., *supra* note 164, at 124.

We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the universities are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.<sup>187</sup>

Recently the case method had been attacked for fostering the notion of the lawyer as an "objective scientist" who discovers fundamental principles, rather than a system of training which would eschew technicalities and encourage an advocate to use "basic social and moral values" to make legal rules.<sup>188</sup> Such a juxtaposition inevitably oversimplifies. There was no doubt much wrong, intellectually and morally, in the blind obedience to German Scientism. In retrospect the period of high formalism seems rather ludicrous.<sup>189</sup> Yet, from the very beginning there were inherent contradictions in the scholarly and the pedagogical aspects of the case method.

Of course, there were those who believed that the law was a pure science. Gray and Wambaugh at Harvard took what Langdell said literally. It was Wambaugh, for instance, who propounded the acid test for discovering the *ratio decidendi* (a term I fear students today infrequently hear) of a case:

First frame carefully the supposed proposition of law. Let him (the student) then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good and had had it in mind, the decision would have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition; if the answer be negative, the case is authority for the original proposition and possibly for other propositions also. In short, when a case

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187. *Id.*

188. W. JOHNSON, *supra* note 85 at xvii.

189. It may be that every legal system, at some point in its development, goes through its Age of Faith. Sooner or later a Blackstone or a Langdell appears. The idea of a body of law, fixed for all time and invested with an almost supernatural authority, is irresistibly attractive—not only for lawyers and their clients but, perhaps even more, for the populace at large. If a Blackstone or a Langdell comes at the right time, he will be heard and his words will, for a generation, be devoutly believed: his message is a comforting one and ought to be true even if it is not.

G. GILMORE, *supra* note 144, at 64.

turns only on one point, the proposition or doctrine of the case, the reason of the decision, the *ratio decidendi* must be a general rule without which the case would have been decided otherwise.<sup>190</sup>

In other words, if you can make it scientific, make it scientific. This was a widely-shared assumption demonstrated by the catalog listings at Valparaiso. In 1900 students were required to take a number of courses which do not appear today. Students studied public speaking, mathematics, Latin and history.<sup>191</sup> When the case method arrived, these things immediately disappeared from the curriculum

Nor, in the 1890's, was this belief in law as a science limited to Harvard's disciples. It was, after all, the Yale Professor who became Dean of Social Sciences at Catholic University who wrote that:

Law as a science is a body of fundamental principles and of deductions drawn therefrom in reference to the right ordering of social conduct. The principles are universal, admitting neither exception nor qualification. The intellect in deriving legitimate deductions from the principles follows the legitimate process of logic, over which the will has no control, and which are always and everywhere the same, whatever may be the subject of investigation.<sup>192</sup>

It was, however, a questioning of the Harvard mystique which caused the most interesting academic crisis in terms of teaching techniques. In 1900, William Rainey Harper, as President of the University of Chicago, was ready to open a law school and he turned to President Eliot and Dean Ames for advice and support. (Indeed he lunched with the Harvard Law School faculty and pleaded with them to "come over into Macedonia and help us.") In the meantime, at Chicago, the feeling was different. Galusha Anderson of the divinity faculty wrote to Harper, warning that "Harvard is theoretical, doctrinaire, and should not have the privilege of just putting down its counterpart here; we are more practical and direct and all the better for that." As the preparations for a law school proceeded and it appeared that Joseph Beale would be seconded from Harvard to Chicago, Ernst Freund, a political scientist on the Chicago Steering Committee, drafted a circular about the new law school. It paid the usual homage to the school's obligation "to

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190. E. WAMBAUGH, *THE STUDY OF CASES* 17-18 (2d ed. 1898).

191. Northern Indiana Law School Catalogue 1900.

192. W. ROBINSON, *A STUDY OF LEGAL EDUCATION* 15 (1895).

cultivate and encourage the scientific study of systematic and comparative jurisprudence, legal history and the principles of legislation," but the document also foresaw in addition to the regular courses taught at Harvard, the teaching of international law. What was more, the document suggested electives in the second year in such novel subjects as taxation, constitutional law, jurisprudence and Roman law. When he read the document, Beale was horrified. "We have no such subjects in our curriculum," he announced with an air of finality. Said Dean Ames, "we are unanimously opposed to the teaching of anything but pure law in our department. . . . We think that no one but a lawyer, teaching law, should be a member of a Law Faculty." Although Beale originally said, "I could be of no use in such a school," he went to Chicago; the experiment worked satisfactorily, and turned out to be much closer to Harvard than Beale had feared or some of the Chicago faculty had hoped.<sup>193</sup>

The Chicago experience, however, highlighted another aspect of the Harvardization of American legal education: uniformity of curriculum. The courses which had been laid down at Harvard in the 1870's—in many ways themselves based on the Litchfield curriculum in the 1830's—were replicated at law schools across the land. As Reed was to note in 1921: "One or two leading schools develop a curriculum which, in more or less modified form, is copied by other schools throughout the country. The bar examiners recognize this as orthodox and build their own examinations upon it. Subsequently established law schools can do nothing else than conform to this model."<sup>194</sup> Some uniformity was, of course, inevitable. The law has evolved historically and, although we divide it up by subjects for convenience, we are inevitably influenced by traditional boundaries. Yet Reed had a point; the Harvard mold has made the area for curricula innovation narrow indeed.

We reached this point of discussing the structure of the curriculum as the result of following the narrow scientific interpretation of what the case law advocates said they were doing. The Harvard orthodoxy could well be interpreted as the high point of the law-is-the-law-is-the-law approach.<sup>195</sup> The case method had, however, many facets. To Oliver Wendell Holmes, Jr. it was a far less narrow experience. Discussing the advocates of the case method he noted:

They have said that to make a general principle worth

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193. F. ELLSWORTH, *supra* note 67.

194. A. REED, *supra* note 17, at 50.

195. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

anything you must give it a body. You must show in which way and how far it would be applied actually in an actual system. You must show how it gradually emerged as the felt reconciliation of concrete instances, no one of which established it in terms. Finally you must show its historic relations to other principles, often of very different dates and origins, and thus set it in the perspective, without which its properties will never be truly judged.<sup>196</sup>

Holmes knew the importance of the "dragon" of legal history; and, in the same article noted both how the case method was "to teach law in the grand manner and to make great lawyers"<sup>197</sup> and also that "under the influence of German Science (the case method) is gradually drawing legal history into its sphere."<sup>198</sup> Seen in this light, the case method had an intellectual purpose akin to the emerging social sciences.<sup>199</sup> No doubt Holmes knew what he was doing; and certainly the absence of any serious theoretical underpinnings to the Langdellian innovations made it easy for him to translate the scientific search for rules into a scientific analysis of facts. There was, moreover, in the Harvard model enough latitude to justify Holmes'

196. Holmes, 20 AM. L. REV., *supra* note 159, at 919, 922.

197. *Id.* at 920.

198. *Id.* at 921.

199. The positions of the social sciences in the American University began to gain importance in the late nineteenth century. Charles Homer Haskins, President of Columbia University, was to claim, in 1915, what had been felt by many for a period of years: "They [the social sciences] are practical, not in the narrower sense as leading to a livelihood, but in the larger sense of preparing for life." F. RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* 365 (1965). The late nineteenth century saw the breakdown of the dominance of the traditional classical curriculum. Eliot's example of introducing electives at Harvard was widely followed, and new courses, such as those in the social sciences, entered the standard curriculum. Gladys Bryson argued that the development of such new or previously neglected subjects as history, political economy, and sociology came from traditional courses in moral philosophy. As the emphasis of university education became more diversified, subjects which had previously been merely facets of discussions of moral philosophy came into their own as autonomous field of research. Bryson, *The Emergence of the Social Science From Moral Philosophy*, 42 INTL J. ETHICS 304 (1932). Laurence Veysey noted that an already existing wish to broaden the curriculum of American universities was not manifested in actual practice until the end of the nineteenth century due to financial constraints which were lessened by national financial successes following the Civil War. Further motivation was provided by a wish to outdo European universities. L. VEYSEY, *supra* note 55, at 1-3. Paul Buck has stressed the importance of the word "science" in the phrase "social sciences". As with legal education, the importance of such subject as history or economics was not accepted until they too obeyed the late nineteenth century idealization of science and empiricism. By adopting inductive methods into their courses, professors of the "humanities" gained recognition of their fields as legitimate courses of study in the same way law professors had. P. BUCK, *supra* note 139, at 1-5.



proto-Realist interpretation of the intellectual purposes of the case method.

In his presidential inaugural, Charles Eliot said, "the actual problem to be solved is not what to teach, but how to teach."<sup>200</sup> Thus, while Langdell's second edition of *Cases on Contract* had an appendix of rules,<sup>201</sup> the mostly English decisions were printed in rough chronological order so that the student might trace "by slow steps the historical development of legal ideas."<sup>202</sup> In his early experiments with the system it was touch and go whether Langdell would survive with his student body;<sup>203</sup> and with his failing eyesight he ended his career by lecturing.<sup>204</sup> While Ames and Brandeis were enthused about Langdell's teaching,<sup>205</sup> others were more reserved. Of the course in equity practice, Roscoe Pound said: "[I]t was a curious course . . . Langdell was always worried about 'Why?' and 'How?' He didn't care particularly whether you knew a rule or could state the rule or not, but how did the court do this? And why did it do it? That was his approach all the time."<sup>206</sup> Joseph Beale commented that Langdell had been "too academic; and many of his students said, if they did not really feel, that his teaching was magnificent, but it was not law."<sup>207</sup>

200. HOFSTADTER & SMITH, *supra* note 134, at 617.

201. C. LANGDELL, *CASES ON CONTRACTS* (2d ed. 1879). See also C. LANGDELL, *CASES ON EQUITY PLEADING* (1868). They were dropped from later editions. CENTENNIAL HISTORY, *supra* note 182, at 81. Langdell also included a disclaimer in a later work:

As the summary was written for the sake of the cases, and the two were designed to be companions, the cases constitute the . . . authority cited in the Summary. When other authorities are cited, it is for some special purpose, it being no part of the writer's object to make a collection of authorities upon the subject discussed . . . it is always assumed that the reader has [the cases] before him, and that, if he is already not familiar with them, he will make himself so.

C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* (1880).

202. CENTENNIAL HISTORY, *supra* note 182.

203. Basically the students resented his refusal to lay down the law. Only "Langdell's Freshmen" stuck with him. *Two Cheers*, *supra* note 3, at 441-47.

204. Chafee, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498-508 (1921). See Beale, *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906). Sutherland, *One Man in His Time*, 78 HARV. L. REV. 7, 10 (1964). See also Bachelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 440-41 (1906). The eyesight problem might explain a local myth, still current when I was a student at Yale, that in his later years Langdell had spoken at the Yale Law School and had been very upset by the fact that students asked questions.

205. See J. AMES, *supra* note 181, at 362-63; A. MASON, *THE BRANDEIS WAY* 34-8 (1938).

206. Sutherland, 78 HARV. L. REV., *supra* note 204, at 10.

207. Beale, 20 HARV. L. REV., *supra* note 204, at 10.

In short, while Langdell emphasized the case method as a means of studying rules scientifically, in this sense an adjunct to the reintroduction of an anglicized substantive formalism, in practice he was the instrument of change in a different direction. The lasting influence in the case method was to transfer the basis of American legal education from substance to procedure, and to make the focus of American legal scholarship—or at least legal theory—increasingly one of process rather than doctrine.

The early practitioners of Ames' "Vocation of Law Professor"<sup>208</sup> may not have appreciated what they were doing. Yet Langdell set the style when he moved from examination questions in essay form, calling for the systematic exposition of rules (a form of examination still the norm when I was an undergraduate at Oxford) to a primitive problem method. By this move he not only outraged many students,<sup>209</sup> but ensured that American law would take the atomistic rather than holistic form that distinguishes it from other common law systems today. Ames and his colleagues for a while sought to coordinate their casebooks with the relevant textbooks,<sup>210</sup> but they soon abandoned that attempt and resorted to the catch-all phrase that the case method trained "legal minds."<sup>211</sup> While it was not until after the Second World War that authorship of a practitioners' textbook came to be thought of as the kiss of intellectual death at our most elite institutions,<sup>212</sup> the genesis of this position belongs to Langdell and Ames. How surprised they would have been to realize it.

As one slowly examines these early years of the case method, the later history of American legal scholarship begins to fall into place. It has been said that Holmes was the grandfather of the Realist School. What he was saying equally qualifies him as the father of sociological jurisprudence or the great-grandfather of the process school. In fact Holmes may have been more the gadfly of his generation than intellectual giant.<sup>213</sup> Yet it is through his articulated

208. See J. AMES, *supra* note 181, at 354-70.

209. See Bachelder, 18 GREEN BAG, *supra* note 204, at 441.

210. Phelps, 1 YALE L. J., *supra* note 160, at 148-9.

211. W. KEENER, QUASI-CONTRACT (1888); Keener, 28 AM. L. REV., *supra* note 162, at 711.

212. "[T]here are intellectual, as well as administrative, reasons for the relative paucity of quality legal literature. The Realist movement in the 1930's, in addition to rendering pure doctrinal analysis out of favor, also threw some doubt on the treatise as a scholarly form." Stevens, *Aging Mistress: The Law School in America*, CHANGE, Jan.-Feb., 1970, at 36.

213.

Like Langdell before him, Holmes had intuitively sensed the felt

interpretation and his examination of what the early experiments of the case method actually did that we can comprehend what intellectual yeast was at work as the spotlight passed from Ames, Beale and Keenan to Pound, Swan and the Realists.

While I recognize that this discussion must jump over unconscionable lengths of time and must ignore trends outside of the narrow area of law, one can generalize that the period between 1880 and 1920 was the high point of formalism in the law and in all other areas. Holmes might be dubitante; the social sciences might be emerging; but the trends were clear.

The year 1916 provides a useful date for suggesting that the soft sciences were beginning to affect the increasingly ivory-towered law school. That was the year that Tom Swan became Dean at the Yale Law School. By November of that year the Law School had presented to President Woolsey a printed proposal for expanding the Yale School of Law into a School of Law and Jurisprudence.<sup>214</sup> The purpose of this change was to emphasize the threefold purpose of the Law School: the training of professionals; the training of non-professionals and the public at large; and a "scientific and constructive" purpose—"the study of law and its evolution, historically, comparatively, analytically, and critically, with the purpose of directing its development in the future, improving its administration and perfecting its methods of legislation." Much of the document seemed to reflect Arthur Corbin's philosophy.<sup>215</sup> Yet the whole enterprise may have been premature. The Yale Law School in the twenties was still a Connecticut school with a few out-of-state students, intellectually overshadowed by Harvard and Columbia. It is to these two institutions therefore that one should look for new waves in legal scholarships during the period of prohibition and unlicensed capitalism.

It was also in 1916 that Roscoe Pound became Dean of the Harvard Law School. Pound is one of the enigmas of American legal

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necessities of the time and had succeeded in giving magisterial expression to apparently revolutionary ideas which had, unnoticed, already worked their way into the common law. . . . Holmesian orthodoxy took from the Master only what suited them; the disturbing and heretical aspects of his thoughts were ignored.

G. GILMORE, *supra* note 144, at 87.

214. In the 1960's President Martin Myerson of S.U.N.Y. Buffalo transmuted the Buffalo School of Law into the Buffalo School of Law and Jurisprudence, and its dean became provost of the "new" institution.

215. Corbin, *The Law and the Judges*, YALE REV., 1914, at 234.

education. During my first visit to Cambridge in 1957, I was taken to the basement of the library and shown an office with the great man at work with his green eye-shade. He was, for foreign visitors, a kind of intellectual Niagara Falls or Empire State Building. At Oxford I knew of him as the exponent of a concept I was never able to grasp, then or now, known as sociological jurisprudence. No one wrote more about the "emergence of the law,"<sup>216</sup> the "spirit of the law,"<sup>217</sup> "social engineering" and the like.<sup>218</sup> Remarkably, while making a host of intellectually radically-sounding speeches, he presided over a Harvard Law School in the full-flight of formalistic Hessian-training.

The author of "The Scope and Purpose of Sociological Jurisprudence"<sup>219</sup> was in many ways a strange man.<sup>220</sup> Intellectually he blasted the legal Realists when—insofar as they took one approach—they appeared to be putting flesh on the bones of "social engineering."<sup>221</sup> A man hired as a progressive, in the sense that he was interested in reform of the legal system, turned out to be a coward when, as Dean, he was asked to stand up for civil liberties.<sup>222</sup> This lack of courage turned off Frankfurter, while Pound's authoritarian running of the law school alienated other faculty.<sup>223</sup> Pound became an admirer of Hitler and a critic of the New Deal;<sup>224</sup> and by 1936 everyone was relieved to see him retire.

To pin down Pound intellectually is almost as difficult as trying to pin him down politically. He was a great supporter of the American Law Institute and its work with the Restatement, regard-

216. *E.g.*, R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938). (Lectures delivered at Tulane and containing a good deal of unreliable history).

217. *E.g.*, R. POUND, *THE SPIRIT OF THE COMMON LAW* (1921). (Lectures delivered at Dartmouth).

218. *See generally* P. SAYRE, *THE LIFE OF ROSCOE POUND* (1948).

219. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *HARV. L. REV.* 591 (1911).

220. Holmes and Pollock obviously shared some of this skepticism. *See* 1 *POLLOCK-HOLMES LETTERS* 228 (M. Howe ed. 1941); 2 *POLLOCK-HOLMES LETTERS* (M. Howe ed. 1941).

221. Pound, *The Call for Realist Jurisprudence*, 44 *HARV. L. REV.* 697 (1931). On this point, *see* W.L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

222. He would not support Frankfurter when he was accused of left-wing leanings primarily in connection with the Sacco-Vanzetti defense; he did not respond to President Lowell's public anti-semitism. J. SELIGMAN, *supra* note 160, at 58-59. For an attempt to defend Pound's behavior, *see* P. SAYRE, *supra* note 218, at 218-23.

223. J. SELIGMAN, *supra* note 160, at 60-61.

224. "Frankfurter complained that Langdell Hall was being turned into a Nazi Holiday." *Id.* at 60.

ed not merely as an effort to produce a national legal system, but also an effort to beat back the Realist movement. Despite all the calls for reform in legal education, Pound was apparently wedded to large classes<sup>225</sup> and saw no reason to make changes in the curriculum.<sup>226</sup> Indeed his successful fund-raising was in part the result of his implicit promise to leave Langdell's LL.B. untouched. Instead, his increases in the endowment went into institutes<sup>227</sup> and the graduate program—which "Bull" Warren thought would be the death of the Harvard Law School.<sup>228</sup> The LL.B. students, however, began to rebel against the conventional. Not only did graduates flock to Washington to the New Deal,<sup>229</sup> but by 1935, as part of the Curriculum Study of that year, the Harvard student body strongly attacked the case method. In words that some of us were to hear with great frequency in later decades, the Harvard students complained that the case method lost its purpose after the first year, encouraged boredom and indolence, while the school was large and anonymous.<sup>230</sup>

Despite Swan's naive hopes and Pound's pretensions, the frontier of legal scholarship during the 1920's was at Columbia.<sup>231</sup> The

225. Sayer denies this. P. SAYER, *supra* note 218, at 231-32.

226. J. SELIGMAN, *supra* note 160, at 62.

227. Institutes of Legal history, criminal law, comparative law and international law. P. SAYRE, *supra* note 218, at 235.

228. E. WARREN, *supra* note 143, at 55-56.

229. Auerbach, *Born to an Era of Insecurity: Career Patterns of Law Review Editors 1918-1941*, 17 AM. J. LEGAL HIST. 12 (1973).

230. For a picture sympathetic to the students, see J. SELIGMAN, *supra* note 160, at 64-67. For a more defensive view, see A. SUTHERLAND, *supra* note 59, at 283-86.

231. See H. OLIPHANT, *Summary of the Studies on Legal Education by the Faculty of Law of Columbia University* (1928). In his introduction to the summary, Herman Oliphant stated:

For a number of years an increasing number of individual members of the Faculty of Law at Columbia University had been studying and discussing some of the major defects in legal education. . . . [This] served . . . to kindle general interest in the matter and resulted in the Faculty's voting to undertake a comprehensive study of the whole subject of legal education with the view of devising, and putting into effect, plans for its improvement. *Id.* at 5.

The report begins by summarizing current problems of legal education, including "Methods of Instruction and Study": "By and large, the average student [of the case method] does not devote enough time and energy to his work and he continues to expect and to get much 'spoon-feeding' from the instructor." *Id.* at 8; "A Survival of Belief in Natural Law": "Human relations are now too largely classified for legal treatment in categories too broad to give intimacy of view and too old adequately to disclose contemporary problems and contemporary practical considerations which should be weighed in solving them." *Id.* at 14; and "Research": "The total productive scholarship in American law school needs to be increased and something should be

work of Goebel,<sup>232</sup> Currie,<sup>233</sup> and Twining<sup>234</sup> have now made the intellectual Donnybrook of the late twenties at Columbia a public affair. The belief that the curriculum could be rearranged along functional lines and that Columbia could become primarily a research institute rather than a law school is a monument both to the naiveté of those who teach law and evidence that by 1930, the level of schizophrenia in the typical academic lawyer was reaching crisis proportions. Was it possible to be both legal scholar and a scholar of law? Was all the important work to be done on the borderline of law and the *other* social sciences?

For those who answered that latter question affirmatively, the action then shifted first to the Johns Hopkins Institute<sup>235</sup> and then to the Yale Law School. The Institute was killed within a few years by a lack of funds and the Yale of the thirties is so encrusted with mythology that it is difficult to evaluate what the 'scientists,' the Realists or indeed the school at large thought it was doing. At times its intellectual base seemed to be no more than a rebellion against Harvard and what legal education had stood for during the previous one hundred years. Even a careful reading of the minutes of the Yale Law School during the thirties fails to produce in the historian those pattern recognitions which are his or her stock in trade.<sup>236</sup>

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done to stop our present extemporizing in the matter of the selection and training of law teachers." *Id.* at 17. The report goes on to declare:

The time has come for at least one school to become a 'community of scholars,' devoting itself 'primarily to the non-professional study of law, in order that the function of law may be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life. This means not merely a broadening of the content of the legal curriculum, and not merely a graduate school in law added to the regular course; it means an entirely different approach to the law. It involves critical, constructive, creative work by both faculty and students rather than a regime devoted primarily to the acquisition of information.'

*Id.* at 20-21. In view of these facts, the study optimistically put forth the idea that:

It is both feasible and desirable for Columbia Law School to pursue both the 'community of scholars' objective and the 'training for public service in the law' objective. There should be set up a 'research school' at Columbia University, to be operated in conjunction with a 'training school,' only the latter to be financed out of the University's funds.

*Id.* at 23. Unfortunately, the plan was impractical and was never carried out.

232. GOEBEL, *supra* note 26.

233. Currie, *The Material of Law Study*, 3 J.L. EDUC. 331 (1951).

234. W. L. TWINING, *supra* note 221.

235. *Id.*

236. I should like to thank Dean Louis Pollak for access to these minutes.

Current research elucidates some aspects of the puzzle. Working from the Yale Law School archives, Professor Schlegal of Buffalo described—in exhaustive detail—the gradual disillusionment of Deans Robert Hutchins and Charles Clark with the fact-gathering aspects of the Realist contact with social science.<sup>237</sup> He also stripped away fact from fiction where the indefatigable Underhill Moore is concerned.<sup>238</sup> The truth may well turn out to be that the formalists had the last laugh: psychology and the collection of data added little to the realist's weapons. In any event, the realists soon became interested in other things—particularly in obtaining employment in the new agencies springing up in Washington, D.C. By the mid-thirties, while the rhetoric was still shrill, the realism of realism was thin. The Yale Law School of those days, contrary to the mythology, was a socially (and increasingly intellectually) elite institution.<sup>239</sup> While the school trimmed a little financially, it continued to pay its professors well and actually increased the size of its student body steadily through the Depression.<sup>240</sup> There was a great deal of partying (even before the repeal of the nineteenth Amendment) and even *Law Journal* editors were regarded as social outcasts if they spent the weekend in New Haven rather than socializing in New York.<sup>241</sup>

In this context, in terms of the long run, the work of the Realists may have been of less significance than others. While one may dismiss much of Jerome Frank's legal philosophy as immature, his pleas for lawyer-schools was an attack on the heart of the Langdellian argument that the case method was both practical and in the intellectual tradition of German scholasticism.<sup>242</sup> Frank was attacking the fact that law schools had become both too academic, and

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237. J. Schlegal, *American Legal Realism and Empirical Social Science* (mimeo. 1978).

238. J. Schlegal, *American Legal Realism and Empirical Social Science: The Singular case of Underhill Moore* (mimeo. 1979).

239. In 1929 there were 274 applicants, of whom 100 were accepted. J. Zen, *Yale Law School and the Thirties* (paper presented at the Yale Law School, 1976). In that year, of the 296 students in the school, 134 were Yale College men, 18 were from Princeton, 7 from Cornell, 6 from University of Pennsylvania and Columbia (97 of the 296 were still Connecticut residents). Of the 392 students in 1938-39, Yale provided 115, Princeton 45, Harvard 30, Dartmouth 25 and Amherst 18. (The number of Connecticut residents had dropped to 63.)

240. From 296 in 1929 to 394 in 1939.

241. J. Zen, *supra* note 239, *passim*.

242. See E.W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* (1953).

The most important immediate consequences of legal realism were in the field of legal education. While outside of academic halls the realists seemed to many to be merely cynics or iconoclasts, within those halls legal realism was a vital constructive influence . . . 'Cases and Materials' became the standard heading for the casebook, revised to include besides

too unrelated to practice. He called for the return of the lawyer-school and his plea became, in a sense, the basis for the return to clinical education in the sixties. This was an interesting argument considering that Keener and Langdell and their disciples brought the case method to the law schools to make them more practical. By the thirties, however, law teaching was largely in the hands of those who frequently had little contact with practice. Jerome Frank, in this guise, was a poor man's Bill Pincus.

On the broader intellectual plane, as the thirties gave way to the forties, the work of Harold Lasswell and Myres McDougal provided an intellectual link between the Realists and the process schools of the later decades.<sup>243</sup> Like so many others, the social science they embraced (this time of a highly-theoretical nature) may have been dated through the use of a polysyllabic private language, discouraging wide acceptance. Yet policy-science provided a possible link with the process school of the sixties.<sup>244</sup> In law, as in so much else, however, little happened in the fifties; things were to change in the sixties.

#### THE ROLLER COASTER DECADE

On May Day, 1970, Yale was an armed camp. The "panther trial" was about to begin; the campus was ringed by the National

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the traditional collection of reported judicial decisions, 'materials' showing economic or social theory of fact, relevant business practices, excerpts from works on psychiatry, forms of contracts, and frequently just straight legal text from law reviews or treatises. The realist drive for 'factual' or 'extra-legal material' to be studied in connection with reported cases, as a means of 'integrating' law and the social sciences, or as a means of showing the place of law in society . . . concurred with a movement toward the use of textual material in casebooks, heterodoxy to Langdell's earlier followers . . . .

*Id.* at 147. See also J. Mitchell Rosenberg's description:

Frank advocated a close realliance with the actualities of court practice and law office work. In his view a considerable proportion of law instructors—contrary to the prevailing situation—should have had actual and varied law practice before the courts and administrative agencies and in law office work. Although there is need for a 'library-law' teacher in the law school since part of the lawyers function is brief-writing for appellate courts, his dominance of the law schools should end.

J.M. ROSENBERG, JEROME FRANK: JURIST AND PHILOSOPHER 41 (1970).

243. See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

analysis of the place of process in Americal legal philosophy, see Morrison, *Frames of Influence for Legal Ideals*, in LAW AND SOCIETY (E. Kamemka, R. Brown, and A. Erhsooh Tay eds. 1978).



Guard; many students who regarded themselves as liberal left New Haven for their own safety; the residential colleges housed either liberation brigades from other institutions of higher education or field hospitals; the president disappeared into a command bunker. As the evening of Law Day, 1970, drew to a close, with the police in riot gear firing tear gas and a dynamiting attempt on Ingalls skating rink, one might well have assumed the end was near.<sup>245</sup>

Certainly that academic year and the previous one had seen a constant escalation of student demands and rhetoric. In the law school, students were given voting rights on committees and a place in faculty meetings. Grades had evaporated—at least in the first semester. It seemed as if this were the only beginning. Student disciplinary cases appeared to put the faculty on trial. Demands escalated—and while I was by no means unsympathetic to some of them—others still make me shudder. I remember one group which demanded that no classes be held in the fall semester until the whole community—faculty, students, staff—had decided who would be professors, who law students, and, I guess, who should clean the rooms—although radical groups proved to be no better about cleanliness than any other student group. Once that was decided, there would be an ongoing discussion of what the curriculum should be. It was modestly noted by the group that the overall process might be over by Christmas. I still recall the unreality of all this in contrast to the uncompromising correspondence, which I, (as chairman of a committee concerned with the calendar) was concurrently receiving from various bar admission committees and supreme courts about the minimum number of days for each law school term.

Empirical quantitative studies of these times have now confirmed the prejudice that many of these manifestations were by elite groups: that is, they were more likely to happen at Yale or Stanford—with basically wealthier students—than they were at the University of Iowa or the University of Connecticut.<sup>246</sup> Yet the symbolism cannot be denied. It seemed a crazy era. The tragedy of Vietnam was paving the way for the obscenity of Watergate. How did

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245. For newspaper accounts of May Day, 1970 at Yale and the events leading up to it, *see generally* N.Y. Times, Ap.-My., 1970. *See, e.g., id.*, Ap. 17, 1970, at 42, col. 2; *id.*, Ap. 22, at 1, col. 8; *id.*, Ap. 25, at 1, col. 1; *id.*, Ap. 28, at 1, col. 4; *id.*, Ap. 29, at 1, col. 5, col. 7; *id.*, My. 1, at 1, col. 1; *id.*, My. 2, at 1, col. 4; *id.*, My. 3, at 1, col. 1; *id.*, My. 3, § 4, at 9, col. 1 for a different viewpoint including some criticism of the N.Y. Times coverage.

246. *See Stevens, Law Schools and Law Students*, 59 VA. L. REV. 551, 583-8, 602-06, 665-68, 681-84 (1973).

substance, style and scholarship fit into that ambiance? What impact did it all have on the structure of legal education?

The interest in going to law school had grown dramatically in the late sixties as students decided, no doubt using a role model a handful of civil rights lawyers, that law was where the action was. Between 1968-69 and 1971-72 the number of persons taking the LSAT doubled from 60,000 to 120,000.<sup>247</sup> The encouragement was considerable; new schools appeared. Princeton, as in 1929, dipped its toe in the water but decided not to swim. Claremont, U.C.-Santa Barbara and Brandeis made similar decisions. Many universities, however, showed little restraint. The appeal was attractive. Typical was the statement by the current president of the ACLU, Norman Dorsen, who exclaimed "we need far more lawyers."<sup>248</sup> Already, however, two things were happening. First—even before the end of the war in Vietnam, the radicalism of students was declining;<sup>249</sup> second—and the cynic might see this as related—the demand for lawyers was declining.<sup>250</sup>

Indeed, just as in the 1930's, there was increasing talk of a surfeit of lawyers.<sup>251</sup> Potential lawyers are, however, not necessarily economically rational. The number of law students which rose from 68,562 in 1962 to 95,943 in 1971, leapt to 105,245 in 1972 and 114,800 in 1973.<sup>252</sup> Indeed this was the period when paraprofessionals—who were going to add still further to our lawyer-glutted society—came

247. Herbold, *Law is Where the Action is*, YALE ALUMNI MAGAZINE, Jan., 1972, at 27.

248. Dorsen & Gillers, *We Need More Lawyers*, JURIS DOCTOR, Feb., 1972, at 7. Dorsen argued that: "Law, as a product, is no less essential than any other goods and services distributed by an organized society—and in our legal system, lawyers play the dominant distributive role." *Id.*

249. The Deputy Dean of the Yale Law School, Burke Marshall, was reported as having said that the classes of 1973 and 1974 were very different from the Class of 1972 at Yale: "The students who entered more recently are more professionally oriented, less outwardly concerned about social injustice and more attentive to the technical intricacies of the law itself." Herbold, YALE ALUMNI MAGAZINE, *supra* note 247, at 28.

250. The ABA predicted in 1972 that the number of law jobs available in 1974 was 14,500, while 30,000 law students were enrolled in the Class of 1974. For an extended analysis, see York & Hale, *Too Many Lawyers?: The Legal Services Industry: Its Structure and Outlook*, 26 J. LEGAL EDUC. 1 (1973).

251. *E.g.*, *Law Students Facing a Job Shortage*, N.Y. Times, Feb. 6, 1972, at 31, col. 5; TIME, May 24, 1971, at 44.

252. AMERICAN ASSOCIATION OF LAW SCHOOLS, 1977 REVIEW OF LEGAL EDUCATION (1977) [hereinafter REVIEW OF LEGAL EDUCATION].

into their own.<sup>253</sup> It was also the period when there was some revival in academic undergraduate programs in law.<sup>254</sup>

In terms of numbers, even now it is unclear how serious the concern was. Statistics on legal education are still surprisingly amateur. The press continued to report that the boom in law schools was over,<sup>255</sup> and the market for lawyers was reported as overcrowded.<sup>256</sup> Yet the number of law students crept up slowly until it reached 126,085 in 1977.<sup>257</sup> It has grown slowly since then, but is now thought to have levelled off.<sup>258</sup> Nevertheless, to have the number of one's customers double in size in a decade would not be thought unsuccessful in other industries.

While expanding, however, legal education continued to be subject to much of the public questioning which characterized the battles of the late sixties. One should not be unrealistic. Lawyers have never been wildly popular in the United States—or indeed in probably in any other society. De Toqueville's natural aristocracy does not fit comfortably in a society which resounds to the rhetoric of equality. Yet the skepticism of the last decade—fueled by the Civil Rights movement, Vietnam, the women's movement and Watergate—saw

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253. See Brickman, *Experience of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153 (1971); Statsky, *Paraprofessionals: Expanding the Legal Service Delivery Team*, 25 J. LEGAL EDUC. 397 (1972). For more recent information on the progress of these members of the legal profession, see *Paralegals: Backup Team for Lawyers*, N.Y. Times, Mar. 22, 1978, § 4, at 13, col. 3; *Paramedic, Paralegal Training*, N.Y. Times, Dec. 20, 1978, § 4, at 13, col. 3.

254. Law had always been taught as part of business and similar undergraduate majors. It had not obtained much academic respectability. The new programs such as that at Hampshire College attempted serious academic respectability. During the decade similar programs were considered by MIT, Chicago, Yale, Buffalo and Berkeley.

255. *E.g.*, *Few New Law Schools are Being Opened*, N.Y. Times, Feb. 25, 1976, § C, at 20, col. 1.

256. *E.g.*, *Job Picture Bleak for Law Graduates*, New Haven Register, Feb. 10, 1975, at 1; *Job Prospects for Young Lawyers Dim as Field Grows Overcrowded*, N.Y. Times, May 17, 1977, at 1, col. 5.

257. See REVIEW OF LEGAL EDUCATION, *supra* note 252.

258. White, *Law School Enrollment Up Slightly But Leveling*, 65 A.B.A.J. 577 (1979). However, the author does note continuing increase in the numbers of women and minority applicants. The New York Times reported the number of law students in April, 1978 to be 118,453 which was a decrease from AALS figures of 1977. *The Legal Profession is Absorbing an Influx of Women*, N.Y. Times Ap. 18, 1978, at 18, col. 1. And as reported in June of 1978, applicant numbers decreased from 86,000 in 1974 to 78,171 in 1977. *More College Seniors Found Putting Off Graduate Work*, N.Y. Times, June 28, 1977, at 1, col. 2.

lawyers attacked from right<sup>259</sup> and left.<sup>260</sup> Not only did it become chic to work for legal services, it became positively anti-social to represent General Motors.<sup>261</sup> Yet even here there is evidence that at least the radical commitment, if not the rhetoric, was evaporating early in the decade.<sup>262</sup> Later studies have questioned how far this commitment went; and have confirmed the reversion to the norm.<sup>263</sup> What was clear, however, was that while congress and the bureaucracy

259. *E.g.*, M. BLOOM, *THE TROUBLE WITH LAWYERS* (1969) (billed as "[t]he book that shows how the American middle class is victimized by inept, lazy and corrupt lawyers."); E. SIEGLE, *HOW TO AVOID LAWYERS* (1969). In 1971 an organization called Lawyer Reform of the United States was founded in California. Its journal, *Lawyer Reform News*, announced its purpose: "to improve the honesty, openness, efficiency and relevancy to social welfare with which law is practiced."

260. This list, if anything, is longer. *E.g.*, J. AUERBACH, *supra* note 87: "[T]he bar must be judged by two standards (but not by a double standard): its sensitivity to the values and mores of society; and its implementation of the obligation to provide equal justice under the law." *Id.* at 12; M. GREEN, *THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS* (1975):

Though far less prominent than public officials, Washington lawyers have burrowed themselves into the federal establishment. They influence a whole range of policy matters that deal with the way we live—the drugs and food we consume, the cars we drive, the taxes we pay, the air we breathe, the things we view and read.

*Id.* at 4; *RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND THE COURTS* (J. Black ed. 1971); *VERDICTS ON LAWYERS* (R. Nader & M. Green eds. 1976) (a collection of articles criticizing the ABA, business lawyers, government lawyers, judges, and the legal profession in general); *WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES* (B. Weinerstein & M. Green eds. 1970).

Even the press got into the act. *See, e.g.*, *Those #\*XIII#\* Lawyers*, *TIME*, April 10, 1978, at 56. "What works against lawyers is that they are at once indispensable and intimidating—a combination guaranteed to breed bitter resentment." *Id.* at 58; *Too Much Law?*, *NEWSWEEK*, January 10, 1977, at 42.

261. *See* M. GREEN, *supra* note 260, at 163-85. The firm of Wilmer, Cutler and Pickening was picketed by law students from Georgetown and George Washington Universities for defending General Motors in the issue of air quality. "It has been said that when the 1970 Clean Air Act was passed, Japan hired engineers, and Detroit hired lawyers." *Id.* at 164.

262. *The Young Lawyers: Good-Bye to Pro Bono*, *NEW YORK MAGAZINE*, February, 1972, at 29. "Today's law students may talk like Danny the Red, but they wind up in Wall Street. What happened to sixties activism?" *Id.*

263. *See* Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 *J. LEGAL EDUC.* 264 (1978); Erlanger & Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 *LAW & SOC'Y REV.* 11 (1978); Simon, Koziol & Joslyn, *Have There Been Significant Changes in the Career Aspirations and Occupational Choices of Law School Graduates in the 1960's?*, 8 *LAW & SOC'Y REV.* 95 (1973). For a discussion of this phenomenon in the context of general trends in legal education, see Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 *B.Y.U.L. REV.* 695, 951-61.

were generating even more work for lawyers, the states, by moving to "no-fault" in auto insurance and divorce, were pointing to downward trends in conventional areas of private law.<sup>264</sup>

Of course, there were corresponding developments. The Legal Service program of OEO grew into the Legal Services Corporation.<sup>265</sup> The idea of legal insurance (prepaid programs) got off the ground—just.<sup>266</sup> Economists were busy developing models to test the demand for lawyers.<sup>267</sup> Realizing the competition and reluctantly accepting that the most intellectual of the professionals had about if an element of a trade. The bar agonized publicly for a long period about whether it would allow advertising,<sup>268</sup> only to be told by the Supreme Court that it was in restraint of trade for not doing so.<sup>269</sup>

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264. For continuation of these trends into the seventies, see *Those #XIII# Lawyers*, TIME, *supra* note 260, and *Too Much Law?*, NEWSWEEK, *supra* note 260.

The decade of the sixties was important, however, for the beginning of a more scholarly literature on legal education. E.g., W. JOHNSON, *supra* note 85. See also Heinz, Laumann, Cappel, Halliday, & Schaalman, *Diversity, Representation, and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar*, 1976 A.B.F. RES. J. 717; Heinz & Laumann, *The Legal Profession: Client Internists, Professional Roles and Social Hierarchies*, 76 MICH. L. REV. 111 (1978).

265. Arnold, *And Finally 342 Days Later . . .*, JURIS DOCTOR, Sept., 1975 at 32.

266. *Legal Arts: Pay Now, Litigate Later*, N.Y. Times, Jan. 18, 1976, § D (Week in Review), at 3. There had first been talk of this in 1970. *Lawyers Turn to the Middle Classes: Clients They Admit They Forgot*, N.Y. Times, Aug. 14, 1970, at 1.

267. E.g., B. Partigan, *The Market for Lawyers: The Determinants of the Demand and Supply of Lawyers* (National Bureau of Economic Research 1976). See also York & Hale, 26 J. LEGAL EDUC. *supra* note 250.

268. E.g., Baker, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. REV. 483 (1974); Agate, *Legal Advertising and the Public Interest*, 50 L.A.B. BULL. 209 (1975); *Ethics Committee Draft Proposal Would Eliminate Code Ad Ban*, AM. B. NEWS, Nov., 1975 at 1; *Should Lawyers Be Able to Advertise?*, The Reformer, Dec. 19, 1975, at 5.

269. *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Supreme Court declared that state restraints on advertising are violations of the First Amendment if they have no reasonable basis. For the ABA's reactions, see *Advertising Lawsuits and FTC Investigation Are Pending*, 62 A.B.A.J. 1567 (1976); *Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages*, 62 A.B.A.J. 309 (1976); Hobbs, *Lawyer Advertising A Good Beginning But Not Enough*, 62 A.B.A.J. 735 (1976) (pointing out the need for the public to have more information available for the selection of a lawyer); *Legal Profession Is Considering Code Amendments to Permit Restricted Advertising by Lawyers*, 62 A.B.A.J. 53 (1976); *Supreme Court Will Hear Lawyers' Advertising Case From Arizona*, 62 A.B.A.J. 1422 (1976); Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A.J. 1119 (1976).

Questioning of the use of a lawyer's right to advertise continues today. Since the United States Supreme Court declaration in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that lawyers have the right to advertise, ABA polls have shown that although the profession supports institutional advertising, *Lawpoll—Strong Support*

The Supreme Court had already in 1975 slaughtered another sacred cow of the legal profession—the professional minimum fee—in the *Goldfarb* case.<sup>270</sup>

The organized bar sought to undo much of this alleged misfortune and poor public image. Indeed the bar—led by the American Bar Association—had probably never been so public spirited or well-liked. If the ABA dragged its feet on no-fault compensation, it supported the Legal Services Corporation, stressed legal ethics and encouraged research.<sup>271</sup> Indeed after Watergate, legal ethics almost became an industry in itself. The bar tightened up its disciplinary procedures—although they remained ludicrously loose compared with those in England.<sup>272</sup> The bar attempted to make it more difficult to become a lawyer by raising the level of the character and fitness required, which, with the exception of a period in the early fifties when it was used to exclude those thought to harbor left-wing sympathies, had been largely honored in the breach.<sup>273</sup>

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for *Institutional Advertising*, 65 A.B.A.J. 872 (1979), individual lawyers remain reluctant to advertise. *Advertising Still Laying An Egg*, 65 A.B.A.J. 1014 (1979).

270. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court declared that the legal profession is subject to antitrust laws; the bar's minimum fee schedules would violate such legislation. For a pre-*Goldfarb* review of the issues, see *Do Fee Schedules Violate Antitrust Law?*, 61 A.B.A.J. 565 (1975). For a post-*Goldfarb* discussion, with special emphasis on the decision's application to restrictions on advertising and solicitation, see Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975).

271. See Auerbach, *The Walls Came Tumblin' Down*, JURIS DOCTOR, Jan. 1976 at 33. For examples of support for the Legal Services Corporation, see Fellers, *President's Page*, 61 A.B.A.J. 261 (1975) (James D. Fellers praises creation of the corporation); Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339 (1975); Ehrlich, *Giving Low-Income America Minimum Access to Legal Services*, 64 A.B.A.J. 696 (1978). For concern with ethics, see Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974); Martin, *Are Ethics In or Out?*, TEX. B.J. 385 (1975). For a discussion of new areas and means of research, see Harrington, *What's Happening in Computer Assisted Legal Research?*, 60 A.B.A.J. 924 (1974); Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A.J. 587 (1976). For more recent concerns in all these areas, see A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter ABA REPORT ON LAWYER COMPETENCY].

272. See, e.g., Q. JOHNSTONE & D. HOPSON, JR., *LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND* 459-531 (1967). "English solicitors are subject to a vast body of restrictions on their professional behavior, and our impression is that the general level of compliance is very high, certainly compared to that of American lawyers." *Id.* at 405. See also Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 776; Leach, *The New Disciplinary Enforcement in England*, 61 A.B.A.J. 212 (1975).

273. See Warren, *Albermarle v. Moody: Where It Began*, 27 LAB. L.J. 609 (1976). Initially, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court

For the most part, however, the bar expected the law schools to be the primary method of instilling legal ethics. It was not an unreasonable assumption, but the law schools did not view the new task with any particular pleasure. They felt that the basic moral values of their students were more likely to be molded in homes, high schools and colleges than by the Socratic method.<sup>274</sup> This was perhaps why much that traditionally passed under the rubric of legal ethics in law schools was concerned heavily with unauthorized practice. By the late 70's this approach changed dramatically.<sup>275</sup> The bars were moving to make the study of ethics compulsory,<sup>276</sup> yet most assumed that ethics were unlikely to subfuse law school teaching in the way the leaders of the bar had hoped.<sup>277</sup>

As a parallel track the bar began to consider the relicensing movement among physicians to make continuing legal education mandatory rather than voluntary. The legal side of the movement which began in Minnesota,<sup>278</sup> showed signs of spreading.<sup>279</sup> Specialization, again carrying overtones of medical practice, appeared.<sup>280</sup> Beginning in California<sup>281</sup> the concept, which in its early stages em-

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allowed the use of personnel tests to screen minority applicants. By 1975 the *Griggs* decision was superseded by *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), in which such tests were declared illegal on the grounds of discrimination. For a while the ABA had wanted law schools to make a moral evaluation of their students through testing programs, but the law schools and actions of the Supreme Court aborted such attempts.

274. Schwartz, *Law Schools and Ethics*, Chronicle of Higher Education, Dec. 9, 1974, at 20.

275. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); M. KELLY, *TEACHING ETHICS IN LAW SCHOOL* (1979).

276. For example, by 1975 Ohio asked for a Dean's affidavit that the student had taken ten hours of instruction in the Code of Professional Responsibility. Indiana required successful completion of two semester hours credit in Legal Ethics "regardless of the course name in the law school curriculum." (Information derived from Yale Law School files.)

277. See Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 714-16. See also Auerbach, *What has Teaching of Law to Do With Justice?*, 53 N.Y.U.L. REV. 457 (1978); Hellman, *Considering the Future of Legal Education: Law Schools and Social Justice*, 29 J. LEGAL EDUC. 170 (1978).

278. Harris, *Minnesota C.L.E.: The End of Licensing for Life?* TRIAL, Jul./Aug., 1975 at 23; N.Y. Times, Apr. 8, 1975 at 18, col. 2.

279. Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 913-18; N.Y. Times, Apr. 10, 1975 at 33, col. 3. A recent survey found that continuing education for lawyers was required in Colorado, Idaho, Iowa, Minnesota, Washington, Wisconsin and Wyoming, and in certain circumstances, Arizona, California, Florida, New Mexico, and Texas. N.Y. Times, Sept. 9, 1979, § G (Education), at 3.

280. See B. CHRISTENSEN, *SPECIALIZATION* (1967); R. ZEHLE, *SPECIALIZATION IN THE LEGAL PROFESSION: AN ANALYSIS OF CURRENT PROPOSALS* (1975).

281. *Final Report on Specialization*, 44 CAL. ST. B.J. 493 (1969).

phasized upgrading professional standards,<sup>282</sup> seemed increasingly to be little more than a form of advertising,<sup>283</sup> while critics of the profession assumed its primary purpose was to exploit the legal monopoly more effectively. Moreover, after the Supreme Court struck down the prohibition on advertising the movement seemed to run out of steam.<sup>284</sup>

As the fundamental way of upgrading the bar, however, the profession continued to look to the law schools which, by the 1970's, became effectively the only portal of entry to the profession.<sup>285</sup> The most important example of this new trend was Chief Justice Burger's oft-articulated concerns about the quality of advocacy in the federal courts.<sup>286</sup> What went on in law school always interested bars and they often criticized what they saw; but the new developments were seen, especially by the law schools, as having a sinister element of anti-intellectualism.<sup>287</sup> It is not clear where the guilt or responsibility lay. There was an apparent reluctance on the part of leading schools to be concerned with those skills which the profession regarded as important;<sup>288</sup> leaders of the profession also felt that the broadening of legal education had gone too far. By the sixties at many 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.

This clash of cultures, if you will, appeared in different areas and arenas. The first battle was over the so-called "Clare Proposals,"

282. See, e.g., CONNECTICUT PILOT PLAN ON LEGAL DESIGNATION (Draft No. 4, 1975).

283. Mindes, *Lawyer Specialty Certification: The Monopoly Game*, 61 A.B.A.J. 42 (1975).

284. The movement was rejected by New York in 1979. Carlson, *Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come*, 11 LAW & SOC'Y REV. 287 (1976); Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 711-14, 913-18; McKay, *Legal Education*, in 1977 ANNUAL SURVEY OF AMERICAN LAW 561-75 (1978).

285. As late as 1951, thirty-five states allowed law office practice in lieu of law school. By 1975 only California, Mississippi, Vermont, Virginia and Washington had such provisions. Some other states, including Maine, New York and Texas, allowed a mixture of law school and law office work. NEWSWEEK, June 16, 1975 at 62.

286. E.g., *Burger Urges Curb on Trial Lawyers Not Fully Trained*, N.Y. Times, Nov. 27, 1973 at 1, col. 3.

287. Allen, *The Prospects of University Law Training*, 29 J. LEGAL EDUC. 127 (1978); *Law Schools Warned of Acrimonious Tension*, Chronicle of Higher Education, Jan. 12, 1976 at 7.

288. At a 1979 A.B.A. sponsored conference on lawyer competence, the one hundred schools represented did not include Yale, Harvard, the University of Chicago, Stanford, Berkeley, and the University of Pennsylvania. *Absence of Leading Law Schools at Meet Noted*, 65 A.B.A.J. 1035 (1979).



in which the Second Circuit appeared to be calling for those lawyers who wished to practice in federal courts in that elegant circuit to have taken evidence, civil procedure, criminal procedure, professional responsibility and trial advocacy. To one outside the profession such modest requirements may not seem extreme. Yet to the law schools—and especially to the Deans of the elite schools<sup>289</sup>—the report appeared to reverse the power balance established over the previous one hundred years. Michael Sovern, Dean of Columbia, complained that the move would reduce law schools to “technical schools.”<sup>290</sup> Although the new rules were set to come into effect in 1979,<sup>291</sup> they appear to be in a state of suspended animation.<sup>292</sup>

Closer to Valparaiso, of course, is the Rule 13 controversy in Indiana which, for legal education, has some of the connotations of Proposition 13 for politicians.<sup>293</sup> When Indiana adopted a rule requiring some fifty-four hours of designated course work from potential Indiana practitioners in 1973, it was underlining the inherent schizophrenia of the practical versus the academic in legal education. It was also emphasizing the historical fact that when the bar in the last part of the nineteenth century allowed time spent in law school to count in lieu of time spent in law office, it saw the two in similar terms and had not intended to abandon its watching brief over the training of the legal profession. Indeed the Chief Justice of Indiana has given as one of his reasons for Rule 13 the growth of “social awareness” courses at the expense of lawyering skill

289. For all the egalitarianism of the seventies, it was a decade obsessed with “ranking” law schools. For example, *THE REPUTATION OF AMERICAN PROFESSIONAL SCHOOLS* (1974), ranked the following as the top nine law schools in descending order: Harvard, Yale, Michigan, Columbia, Chicago, Stanford, Berkeley, New York University, and Pennsylvania. In another survey, looking at the matter from various perspectives, Harvard and Yale came in first, but in the top eleven and in different order, Virginia, Texas and Georgetown appeared in addition to those schools previously listed. Flanigan, *Sizing Up the Graduate Schools*, *NEW YORK MAGAZINE*, Jan. 10, 1977 at 64.

290. *N.Y. Times*, Sept. 16, 1975 at 82, col. 1. See also Sovern, *A Better Prepared Bar—The Wrong Approach*, 50 *ST. JOHN'S L. REV.* 473 (1976). “Like the doctors who prescribe antibiotics for the common cold, the committee nevertheless proceeded to prescribe trial practice to cure an ailment not caused by lack of trial practice.” *Id.* at 476.

291. *Second Circuit Judicial Council Issues Statement on Proposed Admission Rules*, 62 *A.B.A.J.* 516 (1976).

292. See Gee & Jackson, 1977 *B.Y.U.L. REV.*, *supra* note 263, at 898-904; *What You Need to Know About the Proposed Federal Practice Rule*, 65 *A.B.A.J.* 60, 61 (1979).

293. See Gee & Jackson, 1977 *B.Y.U.L. REV.*, *supra* note 263, at 905-09.

courses,<sup>294</sup> opining that "war is too important to be left to the generals."<sup>295</sup>

The jury is still out. The Devitt Committee continued the work of the Clare Committee; Rule 13 remains in force and the tension persists.<sup>296</sup> Some amelioration may flow from the ABA's special task force on lawyer competence chaired by Roger Cramton, Dean of Cornell.<sup>297</sup> The Cramton proposals, emerging in the summer of 1979, em-

294. *Id.* at 907.

295. Givan, *Indiana's Rule 13: It Doesn't Invite Conformity. It Compels Competency*, 3 LEARNING & L. 16 (1976). In a similar vein, another writer has suggested: The present agitation for a so-called competency training is merely a reflection of the fact that the skills learned in apprenticeship training have been forced out of the law school curriculum and must be obtained, if at all, in unsupervised practice. . . .

If law schools want to be schools of legal philosophy and their students do not wish to engage in the public practice of law, then they can do what they will with their students and structure any curriculum they see fit. However, when by their own long-term efforts the law schools have secured control exclusive of legal education so that no person can become a lawyer except by passing through their portals, then they cannot escape public scrutiny of their product.

Seidman, *Personal Viewpoint—The Responsibility of Law Schools*, 62 A.B.A.J. 638, 638-39 (1976). Cf. Boshkoff, *Indiana's Rule 13: The Killy-Loo Bird of the Legal World*, 3 LEARNING & L. 18 (1976). Boshkoff comments: "Rule 13 confuses important information with essential knowledge." *Id.* at 20.

296. See Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 909-10; Otorowski, *Some Fundamental Problems With the Devitt Committee Report*, 65 A.B.A.J. 713 (1979). On Rule 13, see Cutright, Cutright & Boshkoff, *Course Selection, Student Characteristics and Bar Examination Performance: The Indiana Law School Experience*, 27 J. LEGAL EDUC. 127 (1975) (a study refuting the validity of Rule 13 as a way to improve success rate on bar exam).

297. *Bar Unit Urges Law Schools to Shift Emphasis*, Chronicle of Higher Education, June 18, 1979, at 6. See ABA REPORT ON LAWYER COMPETENCY, *supra* note 271; *Legal Education—Say More Dollars Crucial to Law School Improvement*, 65 A.B.A.J. 1034 (1979); *Bar Panel Bids Law Schools Stress Practical Training*, N.Y. Times, Aug. 16, 1979, § A, at 10, col. 1.

The ABA REPORT ON LAWYER COMPETENCY, *supra* note 271, could become one of the most important in the history of legal education. It urged law schools to take into account skills other than those reflected in the L.S.A.T. and not to lower standards as applications fell. *Id.* It also urged the teaching of lawyer skills in small law school classes and on a co-operative basis, continuous evaluation rather than single examinations, a more structured curriculum even at the risk of "the loss of some teacher autonomy," the use of more part-time practitioners as teachers, and an improvement in faculty-student ratio. *Id.* While ability to teach should still be the chief reason for appointment to the faculty, skills and the law in action should be given greater emphasis. *Id.*

The ABA was urged to expand accreditations to include self-studies of lawyer skill teaching, and increase both its financial support of and research into such

phasized the need of law schools to stress ethics and lawyer skills—going far beyond both advocacy which had been the crux of the Clare Report, as well as substance—the rationale of Rule 13. The major panacea was to be clinical legal education. It seemed as if the legal education establishment was offering to shape up the commitment to clinical legal education in return for being left in peace by the practicing profession with respect to the more conventional areas of the curriculum.<sup>298</sup> The skills which were presumably acquired in the better type of apprenticeship were now to be inculcated—consciously—by the law schools.

If clinical legal education were to be used to bail out conventional legal education in the eighties and to protect it from the ire of the practicing profession, it would be ironic but not novel. The push and pull of clinical legal education is intriguing. The push has been increasingly clear in the attitude of students. Even at the height of the radical phase on campus, students—who intended to practice even if their career goals may have been somewhat different from earlier generations—still complained across a wide spectrum of schools of the “theoretical” rather than the “practical” orientation of legal education.<sup>299</sup> The time was ripe for clinical legal education and if Bill Pincus and CLEPR had not been in existence, someone would have had to invent them. While CLEPR’s predecessor—COEPR—had been at work during the sixties, propping up the marginal legal aid clinics which existed in various law schools and attempting to relate them to the OEO Legal Services program after 1964, it was only with the \$6 million grant from Ford in the spring of 1968 that CLEPR achieved the leverage it needed to push even powerful law schools into undertaking serious clinical legal education.<sup>300</sup> Between

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development. The ABA was also urged to be flexible about course and term structures. The bar as a whole was urged to consider in its hiring the performance in skills evaluation as well as the traditional analytical examination. In at least three different ways the bar was reminded of its duty to support legal education financially. This same reminder was addressed to the federal government, in terms of financial aid programs, Title XI of the Higher Education Act, and the Legal Services Corporation. The state governments were also told to be generous.

298. The Report suggests that: “Bar-Admissions authorities, meanwhile, should not restrict law schools’ opportunities to experiment with the curriculum.” ABA REPORT ON LAWYER COMPETENCY, *supra* note 271, at 8.

299. Stevens, 59 VA. L. REV., *supra* note 256, at 559-60. The schools surveyed were Boston College, Connecticut, Iowa, Michigan, Pennsylvania, Southern California, Stanford and Yale. *Id.* at 558. See also Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 264-94 (1978).

300. Marsden, *CLEPR Origins and Program*, in CLINICAL EDUCATION FOR THE LAW STUDENT 3 (1973). See also Stevens, *Legal Education: Historical Perspective*, in CLINICAL EDUCATION FOR THE LAW STUDENT 43 (1973).

1970 and 1976 the number of programs grew from 169 to 494.<sup>301</sup> Pincus made no apology for his assault on the conventional academic content of law school arguing that, "academic work should contribute eighty percent of the first-year curriculum; and a very small percentage, no more than twenty percent, of the third-year curriculum."<sup>302</sup> While, in 1975, only twenty-four percent of second- and third-year law students had any clinical experience, the strength of the assault was undeniable.

Conventional law teachers have reacted with noticeable ambivalence to the CLEPR assault. Few could deny the alienation of many students nor that many students seemed drawn to clinical programs. Few also could honestly deny that a well-supervised clinic with feedback into the classroom and the curriculum was a reasonable expansion of legal education.<sup>303</sup> Yet in most schools the clinical faculty members have remained second-class citizens,<sup>304</sup> while the core faculty has seen clinical programs neither as an opportunity for experiencing or examining social issues nor as an integral part of the academic programs.<sup>305</sup> Clinical programs are also expensive.

Of course, some law schools were different, in the sense that they merged comfortably with the expanding clinical movement. Growing out of the Boston Y.M.C.A. school, Northeastern has made use of "co-operative education"—mixing classroom work with experience in law jobs.<sup>306</sup> More innovative, still, has been the Antioch

301. Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263, at 881.

302. Pincus, *Clinical Training in the Law School: A Challenge and a Primer for the Bar and Bar Admission Authorities*, 50 ST. JOHN'S L. REV. 479, 485 (1976), quoted in J. SELIGMAN, *supra* note 160, at 162.

303. Probably the most articulate spokesperson for intellectualized clinical legal education has been Gary Bellow of the Harvard Law School. SELIGMAN, *supra* note 160, at 164-73.

304. For instance in 1977, CLEPR announced a program of grants to bring clinical legal salaries up to "regular" faculty salaries. *Id.* at 164.

305. For a zealous statement from the trenches, see Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U.L. REV. 1025. For a recent articulate statement, see Melsner & Schrag, *Report from a CLEPR Colony*, 78 COLUM. L. REV. 581 (1976).

306. Gee & Jackson, 1977 B.Y.U.L. REV., *supra* note 263 at 857-58. The 79-80 PRE-LAW HANDBOOK (Association of American Law Schools & Law School Admissions Council—pub. 1977) [hereinafter cited as PRE-LAW HANDBOOK], describes the schedule: A student begins his or her first year in September and follows a full-time academic program for three quarters until the end of May. He or she takes the traditional first-year curriculum as well as courses in legal practice and social theory, and constitutional law. In the beginning of June, the students starts the second year. He or she goes to work as a paid law clerk for the summer quarter or remains at the law school and takes

School of Law in Washington, D.C., founded in 1972. It sees itself as a law school—law clinic—public interest law firm,<sup>307</sup> and its founding and accreditation were achieved amid a blaze of publicity.<sup>308</sup> The school undoubtedly achieved much in freeing up admissions and bringing law practice to the center of a law school curriculum. At the same time, it seems as if the school has been in a constant cultural revolution.<sup>309</sup> Similar experiments, however, will undoubtedly continue.<sup>310</sup>

Indeed, as I suggested a little earlier, the uneasy alliance between conventional legal education and clinical legal education may well continue. Whatever the so-called status of the school, in simplistic terms, the interest of students is likely to veer more toward the practical than the academic. For most students the law clinic is going to seem more interesting than the classroom—at least in the second and third years. While CLEPR funds are to be exhausted by 1980, federal funds, President Carter willing, may come in to replace them.<sup>311</sup> Clinical legal education, meanwhile, not only shows signs of getting the profession off the law schools' backs, but

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upper-level classes full time. At the end of three months the section that worked and the section that took classes exchange places and start a series of quarters that alternate work and study periods through the remainder of the second and third years.

*Id.* at 242.

307. The PRE-LAW HANDBOOK, *supra* note 306, states:

The [institute] represents an attempt to utilize the present system to solve many of the problems of the unrepresented of the inner city, through effective representation once reserved for the economically secure of the United States. The relationship of the law firm to the School of Law is analogous to that existing between a teaching hospital and the respective medical school. The School of Law is structured around this legal aid clinic and must operate 12 months a year to serve the disadvantaged who qualify as clients of the firm.

*Id.* at 56. See also Cahn, *Antioch's Fight Against Neutrality in Legal Education*, 1 LEARNING & L. 41 (1974).

308. *E.g.*, *A Plan to Learn While You Defend*, N.Y. Times, May 16, 1971, at 19, col. 3; Antioch School of Law, Newsletter, Jan. 1973, at 3.

309. *E.g.*, *Strife Impedes Antioch Law School's Reach for Goal: Clinical Education Test at Stake*, Washington Post, May 25, 1977, at 15, col. 3. Early in 1980, the founding deans were fired by the university. See *A Law School Comes to Judgment*, NEWSWEEK, Feb. 11, 1980, at 97.

310. See for instance the Law School of New College of California founded in 1972. Hyman, *A School for Advocates*, JURIS DOCTOR, Jan. 1975, at 23.

311. In 1978, the first funded year for Title XI, \$1,000,000 was made available to thirty programs. The hope had been to expand this to \$2,000,000 and forty programs in 1979. No line item was, however, included in President Carter's budget for fiscal year 1979.

also increasingly offers the possibility of freeing the tight structure of legal education.

Not all the professors—by any means—are anxious to free up the structure of the three-year law school. Demands for some structural change—especially from reformers in the elite law schools—has, however, been a continuing phenomenon of the last decade. Ten years ago, Representative Roman Pucinski, apparently influenced by a speech of Edward Levi, then President of the University of Chicago, introduced a bill into the House which would have facilitated the restructuring of legal education.<sup>312</sup> The well-funded and visible AALS Curriculum Committee—chaired by Paul Carrington of Michigan—argued in its 1971 Report that, since *de facto* the demand for legal service was variegated, the logic would be to have a basic and standard two-year J.D. degree, followed by a series of pluralistic alternatives.<sup>313</sup> From a more elitist perspective, Bayless Manning, the Dean of the Stanford Law School, called for a two tiered system of legal education,<sup>314</sup> although who belonged to which tier was always a matter of doubt.<sup>315</sup> The 1972 Carnegie Commission Report, by Thomas Ehrlich and Herbert Parker also of Stanford, suggested the two-year model, again as part of an overall freeing up of the alternative structures of legal education.<sup>316</sup>

In light of this, the 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 standard be modified to allow

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312. See H.R. Rep. 12617, 91st Cong., 1st Sess., 115 Cong. Rec. 18,392 (1969).

313. CURRICULUM STUDY PROJECT COMMITTEE, AMERICAN ASSOCIATION OF LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSION OF LAW (1971). While the ideas in this report are attractive, the reasoning supporting them is not always impressive.

314. Manning, *Law Schools and Lawyer Schools—Two-Tier Legal Education*, 26 J. LEGAL EDUC. 379 (1974). Manning may fairly be accused of attempting to institutionalize a hierarchy of law schools. For example, Manning states:

To the law schools, which do not, after all, hold themselves out as "lawyer schools," should go those functions of teaching law that are essentially analytic, intellectual, and suited to classroom learning techniques. To the bar's training schools should go the functions of training lawyers in the operating skills of lawyering. . . .

*Id.* at 382. However, he also elegantly articulates the position that it is not the law schools' responsibility to solve all the bar's defects. *E.g.*, *id.* at 380.

315. There was certainly evidence that the curricula of law schools was becoming more alike. E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975).

316. H. PARKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972). The idea of a two-year law school also received support from President Bok of Harvard. See Bok, *A Different Way of Looking at the World*, 20 HARV. L. SCH. BULL. 41 (1969).

the two-year law school. Many assumed the change would go through. They could not have been more wrong. In his witty article, "The Day the Music Died,"<sup>317</sup> Preble Stolz chronicles what actually happened. The deans of the leading law schools—all, ironically from an historian's point of view, from those groups against whom the three-year structure of legal education had been partially erected—extolled the virtues of the three-year law school.

Dean Albert Sachs of Harvard, in a position redolent of the best traditions of academic life, argued that the "time was not yet ripe," since Harvard was about to make the great breakthrough in legal education. Dean Bernie Wolfman of Pennsylvania opposed the idea because he argued—reflecting the follow-my-leader view of legal education—if one school went to two years, all schools would follow. Dean Mike Sovern of Columbia rejected the scheme on the rational ground that it would increase the supply of lawyers at the very moment when there was a glut, while at a local level he noted his students would have to sacrifice \$20,000 to stay on for the third year. 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, while students needed to be trained in history, philosophy and the social sciences. Only Dean Thomas Ehrlich of Stanford supported the proposals.<sup>318</sup>

While the two-year law school may have been dead, the debate about the lock-step of seven years of higher education continued. Dean Sovern of Columbia proposed the 2-1-1 idea; the three-year law school with a year of practice after the second year,<sup>319</sup> while Columbia had already developed a six-year program with a group of selective colleges.<sup>320</sup> Sniping, however, continued. Justin Stanley, President of the ABA in 1975-76, continued to argue for a two-year law school;<sup>321</sup> and once again the profession's heightened interest in pro-

317. Stolz, *The Two Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973).

318. *Id.*, *passim*.

319. Sovern, *Training Tomorrow's Lawyers: A Response to the Chief Justice's Challenge*, 11 COLUM. J.L. SOC. PROB. 72 (1974)

320. *Columbia Plans Six Year Course for Completion of Law Degree*, N.Y. Times, March 19, 1972, at 64, col. 5. Such an approach was not unique. C.C.N.Y. and New York Law School began a six-year integrated B.A.-J.D. program. *Law Course to Start in Freshman Year*, N.Y. Times, Jan. 10, 1975, at 1, col. 1.

321. E. GEE & D. JACKSON, *supra* note 315, at 852; Stanley, *Comments on Current Problems Facing the Legal Profession*, 57 CHI. B. REC. 109, 159-60, 164-65 (1975); Stanley, *Two Years +: The Third Year of Schooling Should Cater to the Special Demands of State Law*, 3 LEARNING & L. 18 (1976).

fessional 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.<sup>322</sup> Again the law school establishment was not amused.<sup>323</sup>

Yet the fact that even at elite schools the students were increasingly working in law offices during their third year<sup>324</sup> together with the professional pressure for competency meant the issue would not die. As we have already seen, earlier in 1979 a special task force of the ABA called on law schools to shift their emphasis to long-term aspects of lawyer competence.<sup>325</sup> Somewhat reluctantly, in 1979, Harvard accepted a large grant from the Legal Service Corporation headed by Tom Ehrlich (former Dean of Stanford and the only supporter of the two-year law school at the famed New Orleans meeting), to allow some Harvard students to finish the conventional Harvard Law School in two years and to spend the third year exclusively in a clinical program. If a medium could put us in touch with Christopher Columbus Langdell, the reactions from the other side would no doubt be intriguing.

All that I have said so far has ignored another factor in the structural battles of the seventies: the fact that accreditation in general,<sup>326</sup> and the accreditation of law schools in particular, has been under increasing pressure. The process irritated the radicals for being elitist and the market economists for being anti-competitive. Meanwhile the bull market for lawyers—at least in the early seventies—encouraged the growth of unaccredited schools while the increasing bear market of the later seventies brought back the profession's fears of "overcrowding." The night school which was going out of business in the sixties<sup>327</sup> has reappeared, often in connection with an accredited school.<sup>328</sup>

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322. See *Law Schools Are Cool to Chief Justice's Ideas on Reforming Curriculum*, Chronicle of Higher Education, Jan. 15, 1979, at 10.

323. Dean Cramton of Cornell contended: "The proponents haven't carried the burden of proof." Samuel D. Thurman, Chairman of the Section of Legal Education and Admissions to the Bar, said the two-year law school was "dead," explaining that the study of law was far too complicated to achieve in two years since "most deans are tearing their hair out to it in three." Dean Auerbach of Minnesota saw a two-year law school as "a confession of abject failure on our part." *Id.*

324. Stevens, 59 VA. L. REV., *supra* note 246, at 589.

325. See note 297 *supra* and accompanying text.

326. See Oulahan, *The Legal Implications of Evaluation and Accreditation*, 7 J.L. & EDUC. 193, 195-97 (1978).

327. Among the schools which gave up evening division programs in the sixties were St. Louis, Emory, University of Southern California, Southern Methodist University, New York University, and St. Mary's.

328. In 1972 fifty-six law schools had night divisions; thirty-three of those had



It may come as a surprise, but we have no clear idea how many students there are in unaccredited schools since these schools do not willingly share their data with the ABA-AALS accrediting bodies. Officially, the number of students in unaccredited schools rose from 3,646 in 1969 to 8,698 in 1973.<sup>329</sup> Thus, while the official statistic for 1978 is only 5,331, that is based on nine unaccredited law schools which replied and ignores the fifty-five which did not. There could be as many as 20,000 students in unaccredited schools. We still know all too little about these schools. They are primarily in Georgia and California, although they do exist in other states.<sup>330</sup>

Unaccredited law schools come packaged in various forms. Some look back to the 20's, as in the case of the Nashville Y.M.C.A. Night Law School.<sup>331</sup> Some emphasize the radical, as the National Conference of Black Lawyers Community College of Law and International Diplomacy in Chicago and the Peoples College of Law of the National Lawyers Guild in Los Angeles.<sup>332</sup> Paul Savoy, a radical law professor of the sixties, is dean of John F. Kennedy Law School in Orinda. Some are effectively defunct, while others are extremely vibrant—the Fullerton branch of Western State University has 604 full-time students and 1,269 part-time ones, while its San Diego branch has 1,095 students. Some schools are in store fronts and walk-ups; some are library-less; others have reasonable facilities and provide important functions for local communities.<sup>333</sup>

It is the forty-two unaccredited schools in California which have attracted most attention. With the decision of the state in 1973

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both ABA and AALS accreditation; seventeen had only ABA accreditation; and six had neither ABA nor AALS accreditation. Sleeper, *The Renaissance of Night Law Schools*, JURIS DOCTOR, Dec. 1972, at 6. Of the thirty-nine night-only programs, one was in a school with both ABA and AALS accreditation, four in schools with only ABA accreditation and thirty-four in schools with no accreditation. *Id.*

329. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1978 65 (1979) [hereinafter A REVIEW OF LEGAL EDUCATION—FALL 1978].

330. Three exist in Alabama, one in Arizona, one in Connecticut, four in the District of Columbia, four in Georgia, one in Illinois, two in Minnesota, one in Mississippi, two in Missouri, one in North Carolina, one in Tennessee, one in Texas, and one in Vermont. *Id.* at 57-58.

331. It was in fact founded in 1911. By the mid-seventies, its boom in enrollment caused it to limit the size of its freshman classes.

332. The Peoples College of Law had no dean and the governing body consisted of all faculty members and students. Ridenour, *Law and the People*, JURIS DOCTOR, May 1975, at 15. The first semester's enrollment was forty percent Hispanic, twenty-five percent Black, five percent Asian and thirty percent White. *Id.*

333. See Terbouri, *The Last Gasp of the Unaccredited Law Schools*, 3 JURIS DOCTOR 30 (Aug./Sept. 1973).

to have no more law schools in the state system, the inevitable tension between the demands of students and the bar's professional pride increased. While the "better" schools such as La Verne and San Fernando Valley have been approved by the State Committee of Bar Examiners, the bar as a whole has waged war on what it regards as the dangerous unaccredited schools. By the mid-seventies, the special consultant to the California bar, John Garfinkel, referred to a dozen of the unaccredited as a "horror story." At Ocean College of Law it was revealed that after the students had paid their tuition, the faculty was not paid while the dean was convicted of "pimping and pandering." The result was that the state bar proposed minimum standards for such institutions;<sup>334</sup> standards which look as if they are about to be enforced.<sup>335</sup>

The problem is that by the year 1980 no one is quite certain who is the gamekeeper and who is the poacher. Accreditation has become something of a dirty word. During 1976, one speaker suggested at the ABA Annual Meeting that perhaps accreditation might be abandoned in the interests of social justice, diversity and competition, with the FTC being left to protect the public from fly-by-night operations.<sup>336</sup> The idea was not well-received, but, at that very moment, the ABA was getting its fingers burned in its efforts to discourage accreditation of Western State University College of Law. That institution, which was a serious unaccredited school, sought accreditation from a regional college accrediting agency. The ABA opposed accreditation, because the school made a profit. Maxwell Boas, the dean of the school, argued that so did many university schools, except that the university siphoned off such profits,<sup>337</sup> an

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334. Resolution of the Co-ordinating Council of Higher Education (April 3, 1973). The resolutions was based on J. O'TOOLE, JR., *LEGAL MANPOWER SUPPLY AND DEMAND IN CALIFORNIA* (1972). See also *Policing Non-Accredited Law Schools*, Chronicle of Higher Education, Feb. 18, 1975, at 4.

335. *Unaccredited Law Schools Face Scrutiny on Coast*, N.Y. Times, April 16, 1979, § A, at 11, col. 1.

336. See Stevens, *Democracy and the Legal Profession*, 3 LEARNING & L. 12 (1976).

337. This is a constant concern of law school deans, and an increasing one as the universities have found themselves in ever-straitening financial circumstances during the 1970's. See *Law Schools Warned of Acrimonious Tension*, supra note 287. Judith Younger resigned as Dean of the Syracuse Law School in 1975, alleging the law school had been "milked" by the University. *Id.* Alphonse Squillante who resigned as Dean of Ohio Northern Law School in 1975 noted: "I was supposed to be fund-raising, but every fund I raised seemed to end up in the university coffers." *Id.* Frederick Mark, Dean of the University of New Mexico, explained that: "Law Schools are historically underfunded and the law school is a small unit, so it is hard to win political battles in the university." *Id.* In contrast, President John Silber of Boston University

argument that both hit home and undercut the ABA-AALS position. Since 1972, the ABA had been in trouble with the United States Commissioner of Education and his advisory committee on accreditation as a result of that case. The Western State fiasco resulted in the ABA being served with an order to show cause why it should not cease to be recognized as an accrediting agency.<sup>338</sup> The ABA shaped up. The Council of the Section of Legal Education and Bar Admissions voted in 1977 to accept profit-making schools for provisional approval, at least through June, 1979. The effect of this is still unclear, although the climate has changed. When the ABA inspection report noted that "the intellectual spark is missing in the faculty and the students," at the Delaware Law School, the ABA's consultant on legal education found himself stuck with a \$50,000 libel judgment.<sup>339</sup>

The movement toward stricter accreditation in California brought allegations of racism and social elitism. A spokesman for Glendale University College of Law saw the recent California moves as aimed at the "ethnic minorities, working class, physically handicapped and foreign students,"<sup>340</sup> and the National Conference of Black Lawyers predicted there would be fewer minority lawyers as a result of the change.<sup>341</sup> How true these claims were for California is not clear. Certainly, nationwide, as far as minority lawyers are concerned, there have been important changes from the paternalistic pontifications of ten years ago.<sup>342</sup> CLEO and other programs worked. The number of minority students in accredited law schools rose from 2,128 in 1969-70 to 5,350 in 1978-79.<sup>343</sup> Some of the programs under which these students came to law school appeared to

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said: "Every part of the university is related to every other part. If you can provide sound legal education and have an excess of income that the university can take back to fund other programs, there's nothing wrong with that." *Id.*

For a detailed analysis of the clash between the law school and the university administration at Hofstra, a clash which included both budget and tenure decision, see Friedman, *Holding Law Schools Hostage*, 4 LEARNING & L. 16 (1977).

338. See *Bar Association May Lose Accrediting Status*, Chronicle of Higher Education, Dec. 20, 1976, at 7.

339. *Education: Verdict Upheld in Libel Suit Against Consultant* 65 A.B.A.J. 683 (1979).

340. See *Policing Non-Accredited Law Schools*, *supra* note 334.

341. *Unaccredited Law Schools Face Scrutiny on Coast*, *supra* note 335.

342. AMERICAN ASSOCIATION OF LAW SCHOOLS, OPPORTUNITY FOR NEGROES IN LAW (1967); CARNEGIE CORPORATION, A STEP TOWARDS EQUAL JUSTICE (1973).

343. The big jump came by 1974. Since then there has only been a slow increase.

be questioned by *DeFunis*<sup>344</sup> or at least by *Bakke*,<sup>345</sup> although the decision in *Weber*<sup>346</sup> has presumably quieted these fears. Of greater concern now is the allegation of cultural bias not only in the LSAT, but in bar exams. In California the situation was particularly acute;<sup>347</sup> various studies were conducted and a commission with black and hispanic members investigated the charges.<sup>348</sup> The commission found minorities experienced serious problems in taking the bar, but no evidence of cultural bias. Meanwhile, the Georgia bar was taken to court<sup>349</sup> and concern grew nationwide that while the large law firms were taking black associates, few were promoted to partners.<sup>350</sup>

Other minorities, however, have fared better. In the thirties and forties Jewish students were heavily channeled in to government service, teaching and the non-elite law firms.<sup>351</sup> There was still a

344. *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974). In *DeFunis*, a white law school applicant unsuccessfully challenged preferential minority admissions. See J. SELIGMAN, *supra* note 160; Comment, *Beyond DeFunis: Disproportionate Impact Analysis and Mandate "Preferences" in Law School Admissions* 54 N.C.L. REV. 317 (1976).

345. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978). Alan Bakke, a white applicant, challenged a decision which denied him admission to the University of California at Davis Medical School in 1973 and 1974. Bakke alleged that more poorly qualified minority applicants had been accepted. The California Supreme Court upheld Bakke's contention that the special admissions policy was a violation of the Fourteenth Amendment. *Bakke v. California Bd. of Regents*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976). The United States Supreme Court affirmed the decision in part and reversed it in part. *Bakke*, 438 U.S. at 320. See Van Dyke, *Bakke v. The Regents of the University of California*, 3 HASTINGS CONST. L.Q. 891 (1976); Murray, Jr., *Special Admission Programs—The Bakke Case*, 28 J. LEGAL EDUC. 358 (1977).

346. *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979). In *Weber*, the Union made an affirmative action agreement with Kaiser Aluminum and Chemical Corp. to reserve 50% of openings in in-plant craft-training programs for blacks until the percentage of black craft workers was proportionate to that in the labor force. A white applicant, Brian Weber, challenged this agreement as a violation of Title VII. In June of 1979, the Supreme Court held that Title VII does not prohibit such race-conscious affirmative action plans.

347. Between 1971 and 1974 none of the sixty black and hispanic students who graduated from U.C.-Davis passed the bar, while the rate from U.C.L.A. was thirty-eight percent as opposed to eighty percent for whites. The Times Higher Education Supplement, London, Nov. 22, 1974.

348. California Bar Association, Commission to Study the Bar Examination Process (1974).

349. Green, *Taking the Bar Exam to Court*, JURIS DOCTOR, Jan. 1974, at 2.

350. Anderson, *Black Lawyers in the 20 Largest Firms: It's Better Than Before and Worse Than Ever*, JURIS DOCTOR, Jan. 1973, at 6.

351. See J. AUERBACH, *supra* note 87, at 184-88. "For no group of second-generation Americans did the New Deal serve as a more efficacious vehicle for social mobility

hint of anti-Semitism among the large firms in the 1960's.<sup>352</sup> By the seventies no hint of such discrimination existed; moreover the majority of law students at most elite schools were Jewish.<sup>353</sup> Women, too, have emerged from the era of "we'd like to take them but we have no separate washroom." The women's movement was strong enough to prevent their being satisfied with the profession of legal assistant and prompted them to enter law schools in large numbers. In 1968, 3,704 of the 62,000 law students in approved schools were women; by 1978, 36,808 out of 121,000. In short, ten years ago less than ten percent of law students were women; now they make up a third.<sup>354</sup> Such an increase was important since there was evidence that, as was the case with other minorities, women needed a critical mass to perform well,<sup>355</sup> and, perhaps not surprisingly, there was still evidence that women were being tracked into the less elite parts of the profession.<sup>356</sup>

During the seventies, we have also come to know far more about law students, indeed more than some of us might wish. *One L*<sup>357</sup> was graphic; *The Paper Chase* popular, finding its way from the silver screen to the idiot box.<sup>358</sup> Perhaps most significant were the number of studies of law students,<sup>359</sup> culminating in the related

and political power than for Jewish lawyers, who in many instances possessed every necessary credential for professional elite status except for the requisite social origins." *Id.* at 185.

352. Note, *The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L.J. 625 (1964).

353. See Stevens, 59 VA. L. REV., *supra* note 246, at 573-74, 690.

354. See A REVIEW OF LEGAL EDUCATION—FALL 1978, *supra* note 329, at 86.

355. Spangler, Gordon, & Pitkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 A.J. SOC'Y 1 (1978).

356. E. Spangler & R. Pipkin, *Portia Faces Life: Sex Differences in the Professional Orientations and Career Aspirations of the Law Student* (mimeograph 1978).

357. Turow recounts:

It is Monday morning, and when I walk into the central building I can feel my stomach clench. . . . By Friday, my nerves will be so brittle from sleeplessness and pressure and intellectual fatigue that I will not be certain I can make it through the day. . . . I am a law student in my first year at the law, and there are many moments when I am simply a mess.

S. TUROW, *supra* note 143, at 7.

358. J. OSBORN JR., *THE PAPER CHASE* (1971). See also popular pieces such as Brown, *Dear Dr. Smith: About Law School* —, JURIS DOCTOR, Dec. 1972, at 16.

359. For an annotated bibliography of empirical statistical studies over the last twenty years, see Barry & Connelly, *Research on Law Students: An Annotated Bibliography*, 1968 A.B.F. RES. J. 751. The bibliography is not exhaustive. See, e.g., Benthalt-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 KY. L.J. 373 (1975).

series of ABA studies.<sup>360</sup> While more work is needed on the socialization and professionalization of law students, and no doubt the time is ripe for at least some middle-level generalizations, the progress over the last few years has been significant. What do these studies tell us? That law students want to be lawyers. That the first year of law school can be both exhausting and terrifying, while the better students—at least those who do not make law review—can avoid excessive work during the later years, when their energies are, in any event, often siphoned off into clinics or part-time jobs which may or may not be in a legal setting. Perhaps we already knew it; perhaps now that our prejudices have been confirmed by empirical data we may do something about it, or harness the urges more effectively. What is clear is that while few law students are activists,<sup>361</sup> the dissatisfaction level is high. Thus while Harvard announced a new curriculum study in 1979, it is likely that many of the students concerns will be similar to those found in the curriculum studies of 1948 and 1959, and the student evaluations of 1935.

If we came to know more about both the practicing profession and law students during the seventies, and have even a little clearer idea of what subjects were covered in law school,<sup>362</sup> there was still much mystery surrounding the law teaching profession. Law schools were said to be losing their brightest students and potential professors to the practicing profession because they could not offer attractive salaries to young professors,<sup>363</sup> yet at the same time there was concern that faculties were stable because the static state of higher education had finally invaded the law school.<sup>364</sup> Yet law professors began to unionize,<sup>365</sup> although the NLRB held that

360. The parameters of this project appear in Bayer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221 (1974). For one of the earliest studies, see Pipkin, *Legal Education: The Consumer's Perspective*, 1976 A.B.A. RES. J. 1161.

361. See, however, the successful strike by University of San Francisco law students in 1973, calling for better faculty-student ratios and more student aid among other things. San Francisco Chronicle, Nov. 8, 1973, at 3. See also Carrington & Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977).

362. See E. GEE & D. JACKSON, *supra* note 315.

363. Personal Communication from Roger Cramton, Dean of Cornell University Law School.

364. An Association of American Law Schools' Committee, chaired by Dean Michael Kelley of the University of Maryland is currently studying this problem.

365. See for instance the fight between the University of San Francisco and its law school faculty who sought unionization when all university salaries were frozen during a financial crisis. San Francisco Chronicle, Aug. 17, 1973, at 18.

law schools were to be treated as separate bargaining units because of their traditional remoteness from the university at large.<sup>366</sup>

As the practicing profession moved into new areas, faced new concerns, and expanded its interests nationally and internationally,<sup>367</sup> as bar examiners fumbled with a multi-state bar exam<sup>368</sup> and practitioners looked to the computer—and especially LEXIS—to solve its research problems, style and scholarship still remained something of a mystery.

In the late sixties, the Socratic version of the case method had fascinated not only novelists, but psychiatrists working in law school.<sup>369</sup> It was a major cause of hostility among law students,<sup>370</sup> and was perhaps most elegantly assailed by Duncan Kennedy, then a law student at Yale.<sup>371</sup> Ten years later, now a law professor at Harvard, Kennedy is reportedly a sympathetic teacher;<sup>372</sup> and in most schools the case method is said to be less rigorous than it once was. Since few have ever admitted to using the case method in all its Kingsfieldian ferocity, the meaning of this is less than clear, and we must wait for the American Bar Foundation study of legal education to see whether there are more accurate pointers to changes in teaching style.

With the exception of clinical legal education, there has been some organic growth in the curriculum—in the areas of the environment and income security for instance—and there has been some catching up by middle-level schools adding their versions of what were previously the preserve of the elite. But the battles in the conventional area of the curriculum seem much as before.<sup>373</sup> Faculty, be-

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366. See, e.g., Fordham University, 193 N.L.R.B. 134 (1971); Syracuse University, 204 N.L.R.B. 641 (1973).

367. E.g., *Law Branches Grow Overseas*, N.Y. Times, Sept. 14, 1979, § D, at 4, col. 1.

368. Eckler, *The Multistate Bar Examination—August, 1974*, 43 B. EXAMINER 125 (1974).

369. See, e.g., Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971). According to Stone: "The goal should be to relieve the oppressive atmosphere of the Socratic method by altering the power relationships without compromising the intensity of the intellectual inquiry which, after all is said and done, is the legitimate justification of Socratic teaching." *Id.* at 418.

370. See Stevens, 59 VA. L. REV., *supra* note 246, at 591, 637-45.

371. Kennedy, *How the Law School Fails*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

372. See J. SELIGMAN, *supra* note 160, at 157. For a more general and recent study, see A. SMITH, *COGNITIVE STYLES IN LAW SCHOOLS* (1979).

373. See, e.g., E. GEE & D. JACKSON, *supra* note 315; D. JACKSON, *BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION* (1975).

ing scholars, have an urge to specialize through depth research; students, the vast majority seeking to be practitioners, seek breadth and generally seek practicality. Thus when, with considerable fanfare, Yale announced the Cluster program, designed to implement Dean Goldstein's commitment to depth research and a sequential curriculum, only one student opted for it. Dean Sachs at Harvard, while credited with opening up the curriculum,<sup>374</sup> has not apparently been successful in making the second and third years more intellectually meaningful. The underlying purpose of courses still often remains obscure and the sequential order of courses often a mystery.<sup>375</sup> Indeed, at many of the leading schools during the sixties, there were forms of internicene warfare between the "practitioners" and the scholars—very often cutting in a different way from the battles between the political liberals and conservatives in the faculty. Such divisions, for instance, were said to have existed during the decade at both Pennsylvania and Wisconsin. At Yale and Harvard, the schoolmen appeared in the mid-seventies to have made important inroads,<sup>376</sup> only to see the tide turn in the most recent years. At schools such as Berkeley, while there was a reaching out to related disciplines, it seemed clear—and understandable—that such reaching out was from the center towards the periphery. The basic professional purpose of the law school remained untouched.

Once again, during the sixties and seventies, the apparent nexus between law and the social sciences proved to be a thin thread. The work of the Russell Sage Foundation, the Meyer Foundation, the NSF and the ABF were all important, but many questioned the long-term impact of the quantitative studies undertaken. Only at Wisconsin did quantitative empirical work appear to have engaged a significant segment of the faculty, while at no school had the growth led to a serious emphasis on legal theory. Indeed, by 1979, the trend of intellectual interest appeared to be away from what might loosely be termed legal sociology towards legal history.<sup>377</sup>

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374. See J. SELIGMAN, *supra* note 160, at 212.

375. Yet an attempt in 1972 by the Visiting Committee of the Harvard Law School to have each professor spell out the rationale of their courses as part of the Committee's effort to comprehend the overall purpose and theory of the law school met with stiff opposition from the Dean's office.

376. The inroads at Yale were primarily associated with the work and leadership of Bruce Ackerman. Those at Harvard were chiefly attributed to the Brazilian scholar, Roberto Unger.

377. During this period, probably the two most important figures in the newly resurrected study of modern American history, as opposed to constitutional history, were Morton Horwitz at Harvard and William Nelson, now at New York University.



Equally important, however, has been the emotional involvement of law professors with the dismal science of economics. Such contacts began in the sixties,<sup>378</sup> and they thrived—some unkindly suggesting that this was the result of the fact that both law and economics achieved an apparent logic by failing to question basic assumptions. Much of the energy for this romance came—appropriately enough—from the Chicago Law School—where Richard Posner became the prophet of a rather extreme form of the Chicago brand of economics; but its widespread proselytizing activities undoubtedly owed much to Henry Manne of the University of Miami, who spread the word through endless workshops.

I do not mean to belittle this movement. It has not only helped produce much of the best legal scholarship to date, the marriage (or whatever relationship reflects current mores) has helped crystallize the move towards a modern theory of law—so absent in the post-Realist era. The process school of legal thought which emerged in the 1950's,<sup>379</sup> after showing signs of flirting with the school of linguistic philosophy, led by Herbert Hart,<sup>380</sup> emerged into a period of intellectual vigor. Bruce Ackerman and Duncan Kennedy appear to be giving the process school a sense of intellectual rigor and purpose. Perhaps one day law, like every other subject which claims to be a discipline, will have a viable and articulate theory treated as the core of a legal education. If this were to happen, the hopes of Josef Redlich in 1910 would be met.

Thus as we move forward into the eighties, we shall have to wrestle with constraints, values, approaches and attitudes which the generations before us have imposed on legal education since 1879. Standards and styles are both relatively recent in legal education. Legal education grew up as an integral part of professionalizing the law. Yet with practitioners booming and higher education in a slump, the eighties may well see academic lawyers at the mercy of the profession. If law schools attached themselves to universities to avoid being dependent on the whims or wishes of students, then this readjustment of the power balance may well merely force law schools to respond more effectively to their customers, their students as well as the bench and bar. Yet the increased power of

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378. See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* (1970), a brilliant, albeit turgidly written, study which has had a wide impact on the teaching of tort law.

379. The process school is associated, for instance, with the names of Al Sachs and Henry Hart at Harvard and Alex Bickel and Harry Wellington at Yale. See Ackerman, *Law and the Modern Mind*, 103 *Daedulus* 119 (1974).

380. For example, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

the profession over law schools could have a dangerous anti-intellectual impact and cause American legal education to lose its outstanding international reputation as well as its great vigor.

It is in this context that Valparaiso must look forward. The excellence of this institution is well-known. Like all of us in the private sector of higher education, you will not find the years ahead easy. Yet it may be in relatively small schools like this that the important breakthroughs come. The most important battles of legal scholarship have yet to be fought. The final relationship between conventional academic law and clinical legal education has yet to be forged. I would expect to see Valparaiso in the forefront of the redrawing of lines between the practical and the academic—indeed giving such lines meaning if they are to have value. I shall watch with interest your progress.

