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LEGAL EDUCATION IN THE UNITED STATES

A CRITIQUE OF DEAN HARNO'S REPORT PREPARED
FOR THE SURVEY OF THE LEGAL PROFESSION

LOUIS PRASHKER †

*Legal Education in the United States*¹ is Dean Harno's report prepared for the Survey of the Legal Profession conducted under the sponsorship of the American Bar Association. The book gives a brief history of legal education and evaluates its achievements.

I

The historical aspects of legal education in the United States are treated in five chapters (each containing, on the average, twenty-four pages), titled and numbered respectively: Our English Heritage (Chapter II); The Formative Period of American Legal Education (Chapter III); Early American Law Schools and the Laissez Faire Period (Chapter IV); The Case Method (Chapter V); Impact of Professional Organizations (Chapter VI). The evaluation aspects of legal education in the United States are treated in two chapters (each containing about forty pages), titled and numbered respectively: Criticisms of Modern Legal Education (Chapter VII); Legal Education—A Present Appraisal (Chapter VIII).

Many hands have written before this on the history of legal education but Dean Harno tells the oft-told tale in a

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¹ *Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession*. By Albert J. Harno. San Francisco: Bancroft-Whitney Company, 1953. Pp. v, 211. \$3.75.

concise and interesting manner. And the history of cultural institutions, thus told, is always illuminating.

Legal education in the United States, like the operative system of common law, had its roots in the development of England. For several centuries, apprenticeship training and the Inns of Court were there the sole avenues to a career at the bar.

In 1753, Blackstone was appointed lecturer, and, in 1758, professor of law at Oxford. His vision was to establish in England a university system of preparation for the bar. But though he produced his famous *Commentaries*, he failed to establish in England an effective alliance between formal university education and preparation for the bar.

In the United States, in the late 1700's and early 1800's, Blackstone's *Commentaries* constituted basic reading for preparation for the bar. Blackstone's influence was also discernible in the establishment of chairs in law at a number of American colleges and universities. In 1779, under the aegis of Thomas Jefferson, William and Mary College established a chair in law. In 1790, James Wilson, associate justice of the United States Supreme Court, was appointed professor of law at the College of Philadelphia. In 1793, Columbia College appointed James Kent, professor of law. In 1799, Transylvania University, in Lexington, Kentucky, set up a professorship in law and politics. In 1816, the University of Maryland established a professorship of law.

The incumbents of these professorships in the formative period of our republic were men of great talent and devotion. But the lectures they delivered were not the avenues for professional training. The lectures laid only the broad foundation for what seemed the inescapable avenue of learning by apprenticeship. If one speculates on the contemporaneous thinking of these early American professors of law, one is led to believe that they were not happy in their newly assumed role of schoolmasters. Kent, appointed at Columbia College in 1793, resigned in 1797; but after a distinguished public and judicial career, he was re-elected professor of law in 1823 and resumed his lectures at Columbia. Out of this latter period of his career came his famous *Commentaries on American Law*.

These university professorships in the United States were no more successful than Blackstone's efforts at Oxford. Apprenticeship continued to be the normal approach for a career at the bar.

But then there was the Litchfield Law School. In 1772, Tapping Reeve, a graduate of Princeton, began the practice of law in Litchfield, Connecticut. His brother-in-law, Aaron Burr, came to study law at his office. Other apprentices also came there. Reeve departed from the informal instruction which had been the common diet of law apprentices, and in 1782 prepared a series of law lectures for them. In 1784, Reeve (later Judge Reeve) erected a small one-story wooden building close by his colonial home in Litchfield. Reeve's law office was in the new building. The first (Litchfield) law school of the United States was there too. Instruction was largely by lectures. Collateral reading was assigned and moot courts were held. The Litchfield Law School was the creation of a practitioner and was intended to train practitioners. It had little of the scholastic atmosphere of the University chairs, but its achievements were quite remarkable. In 1813, the Litchfield Law School reached a peak enrollment of 55. When the school closed in 1833, its register listed 805 names as its past students. Later estimates indicated that during the period of its existence, 1015 persons had studied law there. A very large proportion of them later achieved great distinction.

At about this time, things began brewing at Harvard. In 1781, Isaac Royall, by will, provided for an endowment for the establishment of a chair in law at Harvard College. The chair was not filled until 1815 when Isaac Parker, Chief Justice of the Supreme Court of Massachusetts, was elected to fill it. This marks the beginning of Harvard Law School. In the first twelve years of its existence, the School averaged less than nine students a year, and attendance by registered students was irregular. In the face of criticism, Judge Parker, in 1827, resigned his professorship. In 1829, Justice Joseph Story, who had already achieved fame as an honored member of the Supreme Court of the United States, was invited to fill the newly created Dane Professorship of Law at Harvard Law School. He accepted the invitation but con-

tinued his services on the Supreme Court. His tenure at Harvard was characterized by a scientific approach and an amazingly large amount of productive scholarship in varied fields of law. During the period from 1832 to 1843, he wrote and published eight separate treatises including his famous *Commentaries on the Conflict of Laws*. He continued his services on the Supreme Court and at Harvard Law School until his death in 1845. Under Story's leadership, registration at the school had increased substantially. In the first year after his arrival at Harvard, enrollment was 24; in 1839, it was 86; in 1841, it was 115; in 1844, the year preceding his death, it was 163. Story laid strong foundations for the university law school and emphasized productive legal scholarship by its faculties.

Following the reorganization of Harvard Law School by Story, other law schools were organized. By 1850, there were 15; by 1860, there were 21; and by 1870, there were 31. But private reading of law books and office apprenticeship were still the common avenues for a legal career.

Harvard seemed to have made little progress since the days of Story.

Then came the influence of Charles Williams Eliot and Christopher Columbus Langdell. Eliot, a great chemist and educator, became president of Harvard in 1869. Harvard's overseers had elected him to the presidency in a large measure because of two articles he wrote that year for the *Atlantic Monthly* titled "The New Education." Eliot set about to reorganize Harvard's professional schools. He sought out a man to head the Harvard Law School. He chose Langdell, a practicing lawyer in New York City for sixteen years, but almost unknown in the profession. Langdell's work had been restricted to office practice. Eliot chose him because he thought Langdell was a man of genius with a scientific approach to the study of law. Langdell, he felt, would base his legal conclusions only on scientifically proven facts, and where possible, would seek out those facts in primary sources.

Langdell brought to Harvard none of the fame and glamour or scholastic achievement of Story. But he brought to it (as did Eliot himself in the field of general education) a new methodology in teaching. Langdell's contribution to

legal education is the evolvement and implementation of the case system of instruction. The dissection of cases; the discernment of legal principles; and a critical analysis of their application by the courts in specific cases—these Langdell felt (and this view must have appealed strongly to Eliot) were of the heart of legal education. The Socratic method—and not the lecture system—was to be the dominant medium for instruction. Legal treatises were to be treated as secondary sources; cases were the primary sources. This necessitated the preparation of a different set of tools for use by law students. And thus began the preparation of the now familiar casebook.

The casebook clearly was a great innovation. It is a handy tool for student and teacher alike. It is an excellent device for testing one's intellectual faculties. It is challenging. It is illuminating. It is forthright. And it is an occasion for a "joint exploration" (Professor Lon F. Fuller's phrase) by professor and students alike into law's mysteries, and a fathomless and merciless inquiry into the validity of accepted rules of law and the soundness of court decisions.

There is no end to the questions that a Socrates might ask. But every interrogator is not a Socrates.² And pedagogy apart, there is much significant truth in non-decisional writings. Early orthodox devotees of Langdell evinced a positive aversion for statutory law, and argued that material not strictly legal had no place in a casebook; textbooks and treatises were for the intellectually blind and weak; all the truth worth knowing could be found in reported decisions.

The modern casebook is a marked variant from Langdell's *Selection of Cases on the Law of Contracts* published in 1871. It contains non-decisional law in the form of statutes, legislative reports, excerpts from law reviews and legal treatises. It evidences substantial editing of cases, and is not committed to the doctrine that a casebook editor shall refrain from personal comment. And this variation from the Langdell pattern represents not merely a deviation in case-

² Dean Harno appropriately observes: "One of the greatest teachers of all time made no text assignments, delivered no lectures, and wrote nothing. Socrates asked questions, and through that approach to teaching became the exponent of a method that bears his name." *Id.* at 53.

book format but ensues from a fundamental change in concept of the substance of legal education. "The literal case-law instructor," writes Dean Harno,

is today a rarity. A new generation of teachers is taking over. The new teacher believes that case instruction is a vital factor in legal education, but he recognizes also that the law does not operate in a vacuum; that it must not be isolated from the world about it; that other disciplines are intimately related to law; and that the materials of law study and law instruction must be broadened to give the legal neophyte insight into the interplay of the complex forces that create the need for law and that must be taken into account in its administration. This, in essence, is a return to the views held on legal education by those brilliant lawyer-teachers of the post-Revolutionary period.³

Chapter VI titled, *Impact of Professional Organizations*, is the concluding chapter in Dean Harno's treatment of the historical phases of legal education. The main professional organizations examined are the American Bar Association (formed in 1878); the Association of American Law Schools (formed in 1900); the American Law Institute (formed in 1923); and the National Conference of Bar Examiners (organized as an integral unit in 1931).

The two organizations which have played major roles in the development of legal education in the United States are the American Bar Association (ABA) and the Association of American Law Schools (AALS). AALS is an outgrowth of ABA. ABA is an association of approved individual lawyer-members. AALS is an association of approved law school members.

ABA, almost from its inception, recognized accreditation of law schools as one of its major responsibilities. AALS, in fixing requirements and standards for its member-schools, likewise functions as an accrediting agency. The role of ABA in legal education is in a sense broader than that of AALS. It is effective in its several liaisons with local bar associations and with agencies charged with bar admission functions. Approval of a law school by ABA is a matter of

³ *Id.* at 69.

substantial import to the school affected. The result of ABA's publication of lists of approved and unapproved law schools has operated to substantially improve the status of law schools in this country.⁴

The program of AALS has a more direct influence on the day by day work of members of law faculties. This flows naturally from the fact that in essence AALS is a professional organization patterned on a school-membership level.

II

The evaluation aspects of Dean Harno's book (Chapters VII and VIII) are the most significant part of his report.

Dean Harno discusses the following criticisms which have been made of modern legal education :

1. The Case Method
2. Lack of Perspective
3. Failure to Provide Synthesis
4. Neglect of Training in Practical Skills
5. Failure to Inculcate Professional Standards and Ideals.

Basically, these criticisms are directed against the law school curriculum and methods of legal education.

The Case Method. The case method of instruction continues to draw heavy criticism. Basically, the criticism is that the case method of teaching is time consuming. Law teachers have always recognized this feature but they have believed that the resulting analytical-training value to the student is worth what it costs in time and labor. There is, however, an increasing recognition that there is little need for a consistent continuation of this method of instruction throughout the three-year law school course.

Lack of Perspective. Criticism has been made that law school programs lack breadth and perspective and are not

⁴Forty law schools not approved by ABA are in operation in the United States. One hundred twenty-four law schools in the United States have been approved by ABA.

keyed to the problems lawyers must face in the practice of law.⁵ This criticism, while directed at legal education in general, points more specifically to the limitations of the case method as pursued in its earlier days. The law student did not acquire an awareness of law as patterned and molded by non-judicial bodies. "It is passing strange," writes Dean Harno,

that law teachers could at any time, at least in the modern era, have ignored a phase so real, so essential to the education of lawyers as the legislative process.⁶

The present trend is in the direction of enriching the law school curriculum by adding courses in legislation and public law.

Failure to Provide Synthesis. Criticism has been made that law school training has emphasized the particulars of the law and that it has failed to note its universals; that in consequence, the student sees the trees, but never the forest. This criticism too, while directed at legal education in general, points more specifically to deficiencies in the case method.

This criticism has much substance. But it should not be accepted as an inescapable indictment of the case system. The case system must be, and presently is, supplemented by lectures and readings which tend to establish the relationship between the particular and the general. Inductive thinking is correlated with deductive thinking.

Neglect of Training in Practical Skills. The most vocal criticism is that legal education is not practical enough; that the law school does not adequately train its students in the skills of the profession. The law school graduate, it is claimed, is weak in dealing with facts; in legal planning; in negotiation; in draftsmanship; in procedure; and in advocacy.

This criticism increasingly is losing its former validity. Law schools are recognizing their responsibility, and courses in procedure, draftsmanship and legal writing are given to a

⁵ Harno, *op. cit. supra* note 1, at 140.

⁶ *Id.* at 142.

greater extent than in former years. Participation in moot courts is encouraged, if not required.

In this area of education, many critics are demanding too much.⁷ The law school cannot reasonably be expected to turn out finished law practitioners at the end of a three-year course. No system of training is likely to do that within that period. In its final form, the problem is to determine how to utilize most effectively the three-year period available for training the recruit who comes to law school after completion of a three or four-year period of college study.

Students of the subject (Chief Justice Stone—one time dean of Columbia Law School, Judge Charles E. Clark—formerly dean of Yale Law School, and Professor W. Barton Leach of Harvard) have expressed the view that law schools should not undertake to do what they are not qualified or equipped to do; and particularly that they should not attempt to do these things at the expense of training which they are equipped to give.⁸ Sound law school administration implies an unwavering application of this basic thinking.

Failure to Inculcate Professional Standards and Ideals. Criticism is made that law school education is deficient in that it omits or gives little attention to formal courses in ethics. "The charge," writes Dean Harno,

is founded on too narrow a premise. Learning about professional ethics does not insure ethical conduct. Ethical conduct is an expression of character—it is an expression of the inner man. The problem of ethics is not concerned with facts, but with values and objectives.⁹

Dean Bernard C. Gavit pointed out some years ago that what is a desirable objective is not so much that the law schools devote more time to the teaching of the Rules of Professional Ethics "but that they make some intelligent and whole-hearted attempt to develop Professional Character."¹⁰

⁷ See, e.g., Arch M. Cantrall, *Law Schools and the Layman; Is Legal Education Doing Its Job?*, 38 A. B. A. J. 907 (1952); James T. Connor, *Legal Education for What? A Lawyer's View of the Law Schools*, 37 A. B. A. J. 119 (1951).

⁸ Harno, *op. cit. supra* note 1, at 154.

⁹ *Id.* at 155.

¹⁰ *Id.* at 156.

Professor Elliott E. Cheatham has devoted many years of thought to this aspect of legal education and made a careful study of the subject for the Survey of the Legal Profession. He concluded his findings with the observation that there is general dissatisfaction with the work of the law schools in this area.¹¹

Here is a challenging task. The American Bar Association and the Association of American Law Schools are attempting to meet the challenge. A special committee of AALS is exploring the feasibility of compiling and publishing a selection of articles under the title "The Legal Profession and its Ethics." And early in 1952, the presidents of ABA and AALS appointed the members of a Joint Conference on the Legal Profession assigned to work cooperatively within the field of professional ethics.¹²

Dean Harno considers too the related problems of:

1. The Objectives of Legal Education
2. The Unapproved Law School
3. Prelegal Education
4. The Financial Status of Law Schools.

Here, I shall make brief comment on objectives of legal education and prelegal education.

The Objectives of Legal Education. The formulation of objectives of legal education is an exercise in the philosophy of legal education. And just as there are variants in the fields of general philosophy and philosophy of education, so there are variants here. Each sees the problem through his own lens. Some set the goal high; some set it low. Some set it far above human reach; some set it within the reach of the indolent.

"In the last analysis, legal education has two related objectives—the training of lawyers, and the improvement of the law."¹³ So wrote the Board that, in 1949, made a study on Legal Education in California. But how, and for what,

¹¹ *Id.* at 156-158.

¹² *Id.* at 195.

¹³ *Id.* at 122.

shall the lawyer be trained? What direction shall be given to improvement in the law?

One of the initial determinations made by the Council of the Survey of the Legal Profession was that there should be a personal inspection of all the law schools in the United States. One of the inspectors reported: "Of the nine schools I inspected, six showed no impact of the modern world, whatsoever."¹⁴

It seems fair to conclude that law training must be geared to our contemporary civilization more than it has been in many quarters.

Prelegal Education. The American Bar Association and the Association of American Law Schools prescribe three years of college work as a condition for admission into law school. This prescription implies an essential relationship between college and law school work. But thus far, little correlation has been effected between the two. Many law students fail to see the meaning and importance of their college courses in economics, history and the social sciences in relation to their law studies. And college studies in the pure sciences of mathematics and natural history seemingly have no significance whatever. Likewise meaningless as a preparation for law study seems to be the time consumed in learning foreign languages. "Prelegal and legal education," writes Dean Harno, "are in fact divorced from each other, or if not that, exist under an agreement of separate maintenance."¹⁵

Effecting correlation between the two is another challenging problem in modern legal education.

III

Early upon the commencement of the Survey of the Legal Profession, questionnaires were distributed to the members of the legal profession. These questionnaires sought to gather information affecting many aspects of professional activity, including, if I recall correctly, the nature of profes-

¹⁴ *Id.* at 163.

¹⁵ *Id.* at 130.

sional work done; the compensatory aspects of the professional work; and the correlation of professional activity with the legal education acquired. Other questionnaires were distributed to the law schools. These too sought to gather considerable information affecting many aspects of law school activity, including law school objectives, faculty organization, curricular set-up, and research activity by faculty members. I do not know whether the substance of the material gathered by these questionnaires was made available to Dean Harno. Perhaps it is the intent of the Survey to have this material analyzed and made the subject-matter of a separate report.¹⁶ One thing seems clear: here is a depository of statistical material which should be extremely helpful in appraising law school achievement. The considered reaction of the lawyers of the land to legal education as they experienced it, with specification of its recollected deficiencies and proficiencies; and with specification of the correlation between what they were taught and what they subsequently experienced in practice, with separate reference to their early and later experience—all this is valuable background for educational testing and appraising. Indeed, I think that educational achievement should be recurrently tested, and that symposia and institutes on appraisals of legal education should be conducted, the active participants therein to be dominantly members of the legal profession.¹⁷ Such symposia and institutes are certain to be of mutual benefit to members of the legal profession and of the law faculties. The critics will have their forum and the criticized will have an opportunity

¹⁶ The Law School Questionnaire contained 210 main questions, with, in many instances, subsidiary questions, all grouped under ten divisions. I have selected and set forth as an Appendix some of the questions which I believe are significant for the purposes of this critique.

Mr. John G. Hervey, Assistant Consultant on Legal Education for the Survey of the Legal Profession, and Adviser to the American Bar Association Section of Legal Education and Admissions to the Bar, in answer to my inquiry, advised me by letter dated September 29, 1953, that he has completed a study of the materials gathered by this questionnaire and has passed his summation along "but it remains to be determined by the publication committee what disposition is to be made of it."

¹⁷ Law school faculties can be expected, I think, to make adequate discount for unfounded criticism by some members of the bar which takes the form of the "not unusual professional baiting of the schools." (Judge Charles E. Clark's phrase, Harno, *op. cit. supra* note 1, at 148). Maturity implies fortitude to withstand criticism and a capacity to appraise the critic.

to explain and to indicate, if they wish, their projects for the future.

In his concluding chapter, Dean Harno writes of the existing ferment among members of law faculties in the United States. Never before, he observes, has there been so much self-criticism among them nor so much experimentation in legal education. These augur well for educational advance.

Dean Harno's book is a most reasoned and significant guide.

APPENDIX

SELECTED QUESTIONS FROM LAW SCHOOL QUESTIONNAIRE

AMERICAN BAR ASSOCIATION

SURVEY OF THE LEGAL PROFESSION

1949

Division V—Curriculum

Q. 92. Attach to this questionnaire a list of all courses offered and to be offered in the present year, and state as to each course:

- (a) Whether it is required or elective.
 - (b) If elective, in what student year is it ordinarily taken.
- (Additional subsidiary questions.)

Q. 93. List all optional courses and indicate the year each was given and the number of students completing it.

Q. 102. (a) How many hours of work outside of class is it believed should be devoted to study for each hour of classroom instruction?

(b) How many hours is it believed that the average student actually devotes to study for each hour of classroom instruction?

Division VI—Faculty

Q. 117. (a) What is the prevailing method of instruction in the school (case method, text, lecture, etc.) in the

- (1) First year?
- (2) Second year?
- (3) Third year?
- (4) Fourth year?

(b) Is this a matter of law school policy or is it decided by the individual instructor?

Division VII—Students

Q. 163. (a) To what extent do you require that applicants for admission shall have had college work in specified pre-legal subjects (such, for example, as Accounting, Economics, History, English, Philosophy, Social Science, etc.) as a prerequisite for admission?

(b) To what extent do you recommend to prospective applicants

that specific pre-legal subjects be taken in college? (Specify subjects in detail.)

Q. 166. (a) Is there a definite rule as to exclusion of students for deficient scholarship? If so, quote it.

(b) Is this rule ever waived or suspended?

(c) As to how many students has this rule been waived, suspended, or otherwise not applied during the past three years? Give names of such students who are now in school?

Q. 171. What proportion of students were dropped from school for defective scholarship, under the rules, during each of the past three years? (Give figures, thus: "10 out of 100.")

Q. 173. How many of the students entering the school are subsequently graduated? Give figures for the graduating classes of the past three years:

Entered

Graduated

Q. 175. Have studies been made in your school which show the correlation of law school grades with—

(a) Amount of pre-law college training?

(b) Quality points earned in pre-law college work?

(c) Success on bar examinations?

(d) Success in practice?

Q. 181. How many of your students have been receiving educational benefits under the G.I. Bill?

Total Students

Number under G.I. Bill

1944-45

1945-46

1946-47

1947-48

1948-49

Q. 186. How many students have been permanently dropped each year from the law school for failure in scholarship during the six years indicated:

1938-39

1945-46

1939-40

1946-47

1940-41

1947-48

Division VIII—Graduates

Q. 197. With respect to each of your last three graduating classes, give:

	Class of 1946	Class of 1947	Class of 1948
Number of graduates			
Number who are now			
(a) Employed by law firms			
(b) In independent practice			
(c) Have not as yet secured employment as lawyers			
(d) Others, including graduates who have permanently gone into gainful occupation other than law			

Q. 198. Do you maintain a placement bureau or office: (Subsidiary questions (a) and (b).)

Division IX—Student Activities

Q. 203. (a) Does your school maintain a legal aid clinic? (Subsidiary questions.)

Q. 204. (a) Does your school operate a moot court system? (Subsidiary questions.)

Division X—General

Q. 210. What suggestions have you to make with regard to—

- The improvement of legal education in your state?
- The state bar examinations?
- The need of the state for additional young lawyers?
- Any other matters not herein stated which you deem of importance to the present Survey?