BOOK REVIEW

LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S. By Robert Stevens.†

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Reviewed by Eric A. Chiappinelli*

I. INTRODUCTION

Law School is a history of American legal education from 1850 through 1945, with a foreshortened treatment of events to 1870 and a prolonged view of the period between 1870 and 1945. The work is chronological and details three developments: the hegemony of Harvard and later the American Bar Association and the Association of American Law Schools over educational standards; the role of Harvard in establishing the primacy of the case method of instruction; and the evolution of Legal Realism as the matrix of legal analysis.

The precursor of Stevens' book is the widely praised article "Two Cheers for 1870: The American Law School,"[1] which initially appeared in 1970. Stevens has expanded the ideas in that article, added ideas from other articles, and published "a tentative step" toward "a history of legal education as a whole, link[ed] to intellectual, political, and social trends" (p. *xiv*). Although a tentative step, Stevens' book is the only recent monograph on American legal education in general. *Law School* has been relied upon in such works as a biography of Joseph Story, a history of philosophies of evidence, and an arti-

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1. Stevens, *"Two Cheers for 1870: The American Law School,"* PERSP. AM. HIST. 405 (1971).

cle exploring the development of the idea of legal science.[2] It seems likely, then, that *Law School* will become the principal reference on American legal education for a wide range of scholars.

Although Stevens has not linked American legal education to any general trends, he has produced an admirable book. However, it is a pity that Stevens did not broaden his treatment of American legal education because his education and experience lend themselves to such an approach. English by birth, Stevens was educated and has practiced law in both England and this country. In addition to *Law School*, and the articles it subsumes, Stevens is the author of *Law and Politics*, a meticulous account of the House of Lords' judicial powers since 1800.

The main weakness of *Law School* is that the connection between historical events is largely left unexplored. The work is one of exposition rather than historicism. Although Stevens sets forth, often lucidly, the development of American legal education, he does not present a synthesized view of that development. Rather, Stevens narrates events while ignoring several important historiographical problems.

II. STEVENS' ANALYSIS OF LEGAL EDUCATION TO 1870

A. The Jacksonian Era

Stevens does not involve himself in one of the classic debates in American legal historiography: whether the period betwen 1830 and 1870 was the nadir of the legal profession and legal education. In the received tradition of American legal education, the years from 1830 to 1850 were ones of darkness. The spectre of Andrew Jackson haunted the land. This interpretation (first articulated by Charles Warren and iterated since by many) teaches that the rise of popular democracy brought the legal profession—the American aristocracy—into low esteem. As a concomitant, standards for admission to the bar were eliminated and organized legal education became moribund.

Even during this period, though, there were those who saw the bar in a different light. De Tocqueville, to cite the most

2. *See* R. NEWMEYER, SUPREME COURT JUSTICE JOSEPH STORY (1985); W. TWINING, THEORIES OF EVIDENCE (1985); and Hoeflich, *"Law and Geometry: Legal Science from Leibniz to Langdell"* 30 AM. J. LEGAL HIST. 95 (1986).

famous example, saw the American bar as the elite of the nation. Modern scholarship suggests that discontent with the legal profession did not begin with Jackson's era but predated the Revolution. These recent works also show that the lack of formal standards for legal education and bar admission did not mean that such education was completely abandoned, or that lay people routinely practiced law. Although Stevens presents facts and alludes to scholarship that support this more modern view (pp. 7-9), he is content with stating the obvious analysis of both sides without exploring the logic or factual basis of either position.

As articulated in *Law School*, prior to the Jacksonian years higher education developed along broad intellectual lines, and law was included in the undergraduate curriculum in such colleges as William and Mary, the University of Maryland, and Columbia. Despite prominent law professors at prominent colleges, most of the serious professional training took place in proprietary law schools such as Litchfield.

In the 1820's, the colleges and proprietary law schools began to combine. According to Stevens, from the law schools' view, the added cachet and the power to grant degrees were clear incentives to join forces. From the colleges' view, Stevens speculates only that (i) the universities saw combination as a means to increase their influence over practitioners; (ii) lawyers might have viewed combination as protecting them from "attack;" and (iii) lawyers and universities had a mutual interest in defeating popular democracy (p. 5). This treatment is disappointingly cursory; it fails to set out the logical connections between the facts and Stevens' views. What should have been an informed assessment of American culture in the 1820's, 30's, and 40's is reduced to an exposition of the salient developments and a recognition of some modern scholarship.

B. 1850 to 1870

The standard interpretation of American legal history holds that the effects of the Jacksonian era continued through the 1850's and 1860's, with occasional proto-scholars such as Dwight and Pomeroy, until 1870 when Langdell sprang full-blown from the mind of Eliot to lead the profession and legal education into the modern era. In sharp contrast to that interpretation, the facts suggest that between 1850 and 1870 the legal profession re-established itself in American society and

the beginnings of modern legal education were formed. The value in understanding the two decades to 1870, which eludes Stevens, is that American legal education was neither so retrograde nor so static as the received tradition would have it. Further, events after 1870 can only be properly evaluated by reference to those decades.

The 1850's and 60's had a vibrancy in many areas of the law. Educationally, these years produced Dwight, Pomeroy, Parsons, and Washburn. Even allowing for the lack of critical scholarship in this area upon which to draw, Stevens does not adequately interpret this period. Indeed, Pomeroy gets one mention in the entire work (p. 66, n. 14).

One of the most important legal educators in this period was Theodore W. Dwight.[3] As professor of law at Columbia from 1858 through 1891, Dwight was without question the arbiter of legal standards for the elite law schools. He is largely ignored in the standard interpretation of legal history because he was a proponent of the lecture, and remained unreconstructed after the victory of the case method. Apparently for this reason, Stevens treats Dwight and his accomplishments as being outside the mainstream of educational development when, in fact, Dwight embodied such development for twenty years.

Intellectually, such journals as the *American Law Review*, founded by John Chipman Gray and John Codman Ropes, and later edited by Oliver Wendell Holmes, Jr., and Timothy Walker's *Western Law Journal* flourished. Had Stevens focused on such journals, his investigation would have allowed him to counter another tenet of the received tradition: that the founding of the *Harvard Law Review* in 1887 marked the first important learned journal of American law. Although Stevens, in a note, characterizes the *Western Law Journal* as "at least as sophisticated as most of its erratically published competitors in the East" (p.17, n. 50), it is clear that he is not comparing that journal to student-edited law journals in the *Harvard Law Review* mold.

Substantively, the period between 1850 and 1870 saw such doctrines as torts and freedom of contract come about through Shaw, Doe, Dent, and other judges. Although the development of substantive law is beyond the scope of *Law School*, new substance is at the heart of legal education. It would have been

3. L. FRIEDMAN, A HISTORY OF AMERICAN LAW, p. 610 (2d ed. 1985).

provocative, at least, if Stevens had traced some doctrines from the reports to the classroom. For example, torts did not enter the curriculum as a separate course of study at Harvard until 1870. Michigan first presented the subject two years earlier. An examination of these courses' content, the instructors' approach, and academics' views on these courses vis-a-vis more established courses might shed considerable light on legal education in the 1860's and '70's. More importantly, tracing such developments would have provided a foundation for evaluating later changes such as the Harvard "national" curriculum at the turn of the century, and Columbia's curriculum reform in the 1920's.

III. HARVARD AND THE CASE METHOD

In the last quarter of the nineteenth century, Harvard began to overshadow Dwight's Columbia as the avant-garde in law school standards. This change was initiated by an anonymous article in the *American Law Review*,[4] the appointment of Charles Eliot as President of Harvard in 1869, and the appointment of Christopher Columbus Langdell as Dean of the Harvard Law School in 1870.

Under Langdell, Harvard produced a new legal educator: the recent law school graduate with little or no experience in practice. The appointment of James Barr Ames in 1873 was the first such instance. This practice spread to other schools principally through the hiring of recent Harvard graduates. Stevens notes these developments but does not look beyond them. For example, although he recounts the objections of the non-case method teachers to the new method and to inexperienced professors such as Ames, Stevens does little to document the effect of the success of the case method on those old style teachers. Further, Stevens does not examine the tensions in the law schools while the case method's victory was being won. Most importantly, Stevens has nothing to say about the effect of the case method's victory on the new professors and education.

The most salient feature of Langdell's innovations, though, was the case method of instruction, usually described as Socratic classroom manner coupled with a text of appellate decisions compiled with little or no explanatory material. Ste-

4. *Harvard University Law School*, 5 AM. L. REV. 177 (1870).

vens presents the spread of the case method as though its success were ineluctable. One by one the schools fell under the Harvard spell; Columbia's conversion in 1890-91 presaged the rapid capitulation of other elite schools. Only Yale remained recalcitrant until the early 1900's. Steven's approach fails, first, because the case method was not discrete from the lecture method and second, because he gives short shrift to the conflict between the two methods.

Each characteristic of the case method is more difficult to isolate than is commonly accepted. Before Langdell, classes consisted of lectures by the professor. Langdell's Socratic innovation was simply the injection of some student participation in class. But just as a single word spoken could render an opera, however serious, an "opera comique", so a single question might render a professor "Socratic." Although it appears that Langdell himself taught exclusively through questioning his students, many other early converts to the case method lectured frequently if not predominantly. Further, although adoption of the Socratic method at Harvard is fairly well documented, objective assessment of its spread to other schools is problematic because reports of classroom styles are largely anecdotal and usually not contemporaneous with the events described.

A Socratic approach was a part of the case method, though, only where the students were questioned about appellate opinions. If the professor assigned a treatise, he was not truly a practitioner of the case method. Gauging the classroom use of appellate opinions by measuring the acceptance of casebooks is probably deceptive. Casebooks, invented by Langdell in 1871, did not appear in quantity until the mid-1890's. At least in the early days of the case method, students were simply referred to cases by citation and expected to read them in the reports.[5]

Because the case method is less distinctive than generally assumed, it is difficult to document and assess the method's acceptance and effect. In large measure, the acceptance of the case method was simply self-selection by scholars. A teacher or school converted to the case method if it said it did. A valuable inquiry would be to focus on the schools' and teachers' perceptions of what that method and its acceptance entailed and how those perceptions affected legal education. Instead,

5. *See* S. Williston, *Life and Law* 75 (1940).

Stevens treats the case method as completely discrete from the lecture method and describes the conflict as one between irreconcilable methods rather than irreconciled teachers.

According to Stevens, the major effect of the case method was to shift the focus of American legal education from the substance of the law to the procedure of its teaching (p. 56). This is good reason for Stevens to have explored the substantive content of courses in the late nineteenth century. Rather than pursue his observation, Stevens is content simply to trace the twice told tale of the spread of Harvard's changes. He fails to put forth a sustained explanation for that spread or to pose the more problematic questions raised by his narrative.

IV. STEVENS' TREATMENT OF LEGAL FORMALISM

In one section Stevens demonstrates a capacity for insight and analysis that should have permeated *Law School*. Stevens relates the case method to a larger development, the philosophy of American formalism.

Stevens takes the position that during the Jacksonian period American legal culture consciously broke with its English roots. Toward the end of the nineteenth century, though, American legal theorists moved closer to their English counterparts, especially in their view of the law's essential character. American scholars adopted the English legal community's view of law as a closed system of interrelated rules. Although these rules were applied in disputes involving every conceivable social and economic setting, English scholars denied that social, economic, political or other values shaped legal rules. One did not need to look beyond the judges' opinions to find the law because nothing else influenced the law; it was a complete system in itself. Judges might err in their statement of the law or in their application of the law to particular facts, but such errors could be identifed and the proper answers found solely by reference to other appellate decisions.

The most important consequence of formalism in American legal education was that reported appellate opinions became not the repository, but the source of law. Stevens notes that the zenith of American formalism occurred at the same time as the spread of the case method and added to that method's acceptance. If formalism's view of law as a closed system were correct, the case method's examination of appellate cases was the ideal approach to the study of law.

In Stevens' analysis, the American imitation of English formalism failed because of the differences between the English and American legal systems. In England, the bench and bar were very small and highly organized, the court system was almost completely centralized, and the judicial system had almost completely stopped its involvement with "political" cases. None of these qualities existed in America, in Stevens view. The bench and bar were numerous; their organization, such as it was, was at the local level; the court system was fragmented; and the judiciary was increasingly presented with "political" cases.

Ironically, while formalism reinforced the new case method, American lawyers were, by the early twentieth century, moving away from formalism and toward a more pragmatic vision of the law. Moreover, Stevens explains that the case method's emphasis on litigation was gaining currency at precisely the time when the leading practitioners were shifting their practice from litigation to office work. In short, the case method became the principal method of instruction at the time when its underlying philosophy was being eroded and when the leading practitioners were concerned less and less with the case method's principal material. Most importantly, in Stevens' judgment, the attempts to reconcile English theory and American practice broke down as a direct result of the National Reporter System. That system, featuring the publication and elaborate rubrication of every appellate decision throughout the country, allowed lawyers and judges, in the name of *stare decisis*, to scour the nation's jurisprudence for cases factually indistinguishable from the case at hand. In England, the case reporting system was narrow and quite selective. Judges and lawyers relied principally upon "leading cases" containing general rules from which results could be fashioned. *Stare decisis* required that factually similar cases be given more weight regardless of their reasoning than "leading" cases which might apply should no case "on all fours" be found. This increased availability of cases on point rendered leading cases less important. Accordingly, formalism, with its emphasis on deduction, was replaced by a sort of factual pragmatism.

V. TWENTIETH CENTURY LEGAL EDUCATION

The principal legal philosophy in America in the twentieth

century is Realism. The major accomplishment of Realism, in Stevens' view, was to defeat the Langdellian notion of law as an objective science. Stevens does an admirable job of describing the rise of Realism and the virtually fatal blow delivered from the work of Lon Fuller, among others, on the eve of World War II.[6] Stevens also focuses on the seminal article of Harold Lasswell and Myres McDougal[7] which, in suggesting that law schools concentrate on training students to be policy makers, formed the lynchpin between pre- and post-World War II theories. What promises to be a thoughtful analysis of post-World War II legal philosophies and their effect on and incorporation into legal education becomes a mechanical trotting out of fashionable ideas: the process movement of Henry Hart and Albert Sacks, the Law and Economics approach, the proto-realism of Grant Gilmore, the English philosophical schools of H.L.A. Hart and Ronald Dworkin, and the Critical Legal Studies movement.

Between 1920 and 1930 the ABA and AALS legitimized their claims as the accrediting bodies for legal education and bar admissions. The actual implementation of ABA and AALS standards occurred in large measure between 1928 and 1935. In Stevens' view, this change was precipitated primarily by the economic contractions of the Great Depression. Although in this period the number of law students fell by only about 15 percent and the number of law schools actually increased, the percentage of students in ABA-approved law schools rose from roughly a third to one-half of the students in the country (p. 177). Since 1945, the ABA and AALS control of legal standards has been evidenced primarily by the imposition of increasingly detailed and stringent requirements.

In his recounting of the location and exercise of this control, Stevens cites an array of often repetitive statistics. What he does not do is reflect on the implications of those statistics and of that control on the American legal culture. By concentrating on the ultimate victors, the ABA and AALS, Stevens largely ignores groups that formerly exercised control or that might have exercised control in the absence of the ABA and AALS. Such groups as state or local bar associations, state supreme courts, or state legislatures all asserted claims to the

6. *See* L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

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

right to control legal education or bar admissions. While a complete analysis of such claims would exhaust a volume of *Law School*'s size, had Stevens devoted more thought to the competing claims of those groups the consequences of the ABA and AALS's success would be more fully appreciated.

A final example of Stevens' complacency with listing, rather than thinking, is his treatment of Roscoe Pound. Pound, Dean of the Harvard Law School for twenty years, and probably the most important legal scholar in the first half of the twentieth century, receives half a dozen isolated citations. The only extended discussion is a four-paragraph summary of his career and thoughts. In the first paragraph of this discussion Stevens accurately notes, "Universally considered one of the enigmas of American legal education, Pound's beliefs defy consistent analysis." (p. 136) He even recognizes in a note (p. 146, n. 36) that previous writers "merely touch on certain actions of [Pound] without attempting to draw them into a consistent pattern." Unfortunately, Stevens' treatment of Pound is simply a recitation of existing information; Stevens makes no attempt to integrate Pound and his influence into the work.

VI. STRUCTURE

Structurally, *Law School* is wildly disjointed. For example, Chapter 6, on the rise of the ABA and the AALS, takes the story through 1920. Not until Chapter 10 is the thread picked up and the story continued. Similarly, the first citation to the Lasswell and McDougal article occurs in the beginning of chapter 9; the detailed discussion of that article appears in Chapter 14. Logically, the article should have been discussed in Chapter 9. Stevens has adopted a chronological approach that fails him because *Law School* has more than one theme. As a result of this approach, the narration is ratchet-like: carrying one theme forward then backing up to bring up another. Stevens, by this plan, sacrifices conceptual clarity.

Although *Law School* is copiously documented and many of the notes are substantive rather than source citations, the book has numerous mechanical flaws. Given the intrinsic value of the notes and their volume in relation to that of the text (I count 130 pages of notes to 149 of text), the substantive notes should have been incorporated into the body of the text. At any rate, the notes should have been printed as footnotes rather than collected at the end of each chapter. Typographi-

cal errors and simple ignorance in citation also abound.[8]

Stevens has produced a book which concisely and lucidly narrates the history of legal education in America. The paucity of critical analysis and historical inquiry, however, leaves the field open for other scholars.

8. The Association of the Bar of the City of New York is referred to as The Bar Association of the City of New York at note 59, although it is correctly named in the text at page 23. Hastings College of the Law is consistently referred to as Hastings College of Law. The Los Angeles law firm of O'Melveny & Myers is cited as O'Melveny & Meyers at note 31. Herbert Wechsler is cited as Wechster in both note 50 and the bibliography at page 313, and his seminal article is misnamed in both places.