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THE PATH OF LEGAL EDUCATION FROM EDWARD I TO LANGDELL: A HISTORY OF INSULAR REACTION

RALPH MICHAEL STEIN*

This article presents an analytic overview of key aspects in the history of legal education in England and the United States from the time of Edward I to the end of the last century. The response of lawyers and legal educators to the perceived need to protect the profession from a variety of ills and plagues is explored.

In general terms this history of legal education can be divided into three parts. The first period begins in 1292 and continues up to the American Revolution. The focus is on the English system, since even in the late colonial period American legal education was dependent on the English model.

The next two periods are predominantly American. The half century or so after the Revolution saw a good deal of experimentation in the United States as new institutions were developing that were not only unknown to England but were reactions to the perceived shortcomings of their English counterparts. The third period, ending in 1895, begins with the appointment of United States Supreme Court Justice Joseph Story to a professorship at the Harvard Law School, and culminates in the firm establishment of the study of law as a science in the universities during the tenure of Dean Christopher Columbus Langdell at the Harvard Law School.

The development of a sense of professionalism by those engaged in the teaching of law, a sense of professionalism that was reactive to public perception about lawyers as well as to academic dismay at the roles played by lawyers, will be explored herein.

PRE-REVOLUTION LEGAL EDUCATION

England

The need for special education for those charged with appearing before the increasingly professional courts of England became obvious in the late thirteenth century. The reforms of Henry II and the com-

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plex real property law problems of disintegrating feudalism required specialists.

In 1292, Edward I issued a royal edict to his judges of the common bench to find and select "apt and eager" students representative of each county in the realm to learn the business of the courts.¹ These students were to be concentrated at the seat of the courts, Westminster.² The earliest form of education was simplicity personified. Attendance at court and discussion of the cases heard sufficed.³

With the passage of time, the students, whose lives were spent in that small area of London dominated by Westminster, regularly congregated at a small number of dwelling places and began to organize. The present day Inns of Court began to take their familiar form when masters, men experienced in litigation, were hired to lecture students where they lived.⁴ Groups of practitioners became affiliated, at first rather loosely and then formally, at the dwelling places commonly known as Inns. A number of these hostelries became known as the Inns of Court, of which number four dominated the scene: Gray's, Lincoln's, Middle Temple and Inner Temple.⁵

As might be expected, control of the Inns soon passed from the hands of the putative employers, the students, to those of the teachers, the masters.⁶ There developed a hierarchy, a virtual inevitability in a society as class- and status-conscious as England was and is. The masters became known as benchers while the students were classified into three categories. Experienced students, known as readers, were employed in instruction in somewhat the same manner as contemporary

1. P. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 13 (1939) [hereinafter cited as HAMLIN]. The business of the king's courts was becoming increasingly complex. The development of various new royal courts and the rise of major commercial relationships with foreign merchants were but two factors pointing the way to an enlarged and specially trained group of legal professionals.

2. Westminster had been the London site for kings and courts, royal and judicial, insofar as that distinction was valid in early English history, since Anglo-Saxon times. It was natural for the new courts to develop in that area. See W. BESANT, *EARLY LONDON* (1908).

3. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 217 (1936) [hereinafter cited as PLUCKNETT].

4. M. KNAPPEN, *CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 295 (1942) [hereinafter cited as KNAPPEN].

5. The two former Inns originally belonged to the earls of Gray and Lincoln, respectively; the two latter had been granted to the Knights Templar. BLACK'S LAW DICTIONARY 709 (5th ed. 1979). These Inns of Court survive and thrive to the present day. Their function as training schools for barristers is unchanged and virtually unchallenged. KNAPPEN, *supra* note 4, at 296.

6. The pattern perhaps anticipated the same dynamic which led to the founding of the first American law schools. See text accompanying notes 58-60 *infra*. In any event, with the example of other guilds before them, the new Inns of Court organized rapidly and effectively. The quality of the learning experience undoubtedly increased.

law school teaching assistants.⁷ The second category of student, the outer barristers, was perhaps the equivalent of today's second year law school class and their studies were dominated by participation in the moots.⁸ New students, whose course of instruction was largely lecture and observation, were denominated inner barristers.

The method of legal education available and predominating at the Inns at any given time depended on whether or not court was in session. When the courts were not hearing cases, the readers would give lectures covering a variety of topics and conduct special moots called bolts.⁹ When court was in session, the Inns were crowded with the judges and lawyers as well as the students. In the evenings the dual nature of an Inn became apparent as those who dwelled there took part in an educational exercise that has survived, with intermittent interruptions, for seven centuries: the moot court. Practice courts were held in which cases on current questions of law were presented and argued by admitted and skilled litigators with aid from the students. After such practice courts, discussions were held. This collegial and pedagogical drawing together of the judges, lawyers and students was of great importance in an age when law reports and legal literature were in an embryonic stage of development.¹⁰

7. PLUCKNETT, *supra* note 3, at 225. This is not to suggest that the division of the students into these categories resulted in anything approximating a present day law school or equivalent student body. A great deal of fluidity marked attendance at the several Inns, especially with reference to duration of stay. See 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 484 (1903) for a detailed discussion of the growth and, most particularly, regularization of the Inns of Court as functioning teaching institutions.

8. The moot, like other forms of legal education, underwent changes over the centuries. Essentially, however, "[a] Moot would begin, after supper in the Hall, with the putting of some doubtful case by an Outer Barrister, which would be argued by one or two of the Benchers. Then would follow a kind of mimic lawsuit, in which Inner Barristers recited the pleadings in Law French, Outer Barristers argued for Plaintiff and Defendant respectively, and opinions or judgments were delivered by the presiding Readers and Benchers." BARTON, THE STORY OF THE INNS OF COURT 14 (1924). Shakespeare, who may have been well-trained in the law, includes the moot in King Henry VI, Part I, Scene IV. Declaimed the Earl of Suffolk on removing an argument to the Temple-garden: "Within the Temple-hall, we were too loud; the garden here is more convenient." The importance of the moots increased in the fifteenth and sixteenth centuries. See generally 4 & 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924). The moots were much closer to what we today offer as Trial Practice in law schools rather than to what we denominate as moot court, the concern of which is appellate practice. A further conspicuous distinction between the moots of the Inns of Court and present day practice is that in the conclusion of a moot, "the mooters presented the judges with a slice of bread and a mug of beer. . . ." W. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 1590-1640, at 119 (1972) [hereinafter cited as PREST].

9. Bolts were basically moots without pleadings. Thus they were more rooted in legal theory and not wedded to fact patterns. PREST, *supra* note 8, at 119.

10. KNAPPEN, *supra* note 4, at 296-98. This refers, of course, to the earliest period of Inns of Court training where case reports were relatively rare. By the Stuart period, the Inns were making full use of treatises as well as reports.

An important by-product of the development of the Inns of Court was the creation and fostering of the profession of law as a somewhat closed society. Culturally, professionally and, obviously, geographically, the legal talent of England was centered in the environs of the great central courts.¹¹ This gave a unique "priesthood" aspect to the English bar which, whatever the accompanying benefits for England, was to be treated with suspicion by Americans.¹²

Admission to the bar was fully in the hands of the benchers and the readers. Attendance at a required number of meals was the only formal requirement, presumably to insure that some exposure to the moots was experienced by the prospective barrister. It should not be assumed, however, that a student's intellectual abilities and performance at the educational activities of the Inn were not taken into account. Perhaps because evaluative methods were primitive and highly subjective, few records relating to academic requirements have survived.

The growth of the English legal profession in the earliest period of its organized existence was slowed by several ancient principles. Litigation was very personal and, since the theory of agency was just beginning to develop, personal pleading of legal matters was the rule. Furthermore, procedure and the swearing of oaths were very formal, with the outcome often depending on the exact words pleaded and their pronunciation. The idea was that if someone who had sworn an oath lied, God would confuse his tongue and cause a jumble of words or a mispronunciation. Under this view, it was unfair and improper to have a professional pleader appear for a litigant.¹³

Nevertheless, the legal profession inexorably increased in importance and stature, as did the Inns of Court, which achieved dignity during the Tudor-Stuart period (1485-1637) akin to that of a third university after Oxford and Cambridge. The Inns not only provided legal education, but also exposed students to the arts and other intellec-

11. While justiciars and judges travelled on what would become regular assizes, the center of the profession of law always was and still is London. This also insured that legal training, especially for barristers, would remain centralized. Just as, for example, the existence of one national military academy in the United States results in a certain cultural homogenization of students who attend from all over the country, so this centralization of legal training further isolated and identified the English legal profession.

12. English lawyers generally eschew the term "priesthood" as descriptive of their Bar while rarely disclaiming the underlying concept. *See generally* B. HOLLANDER, *THE ENGLISH BAR: A PRIESTHOOD* (1964). Hollander, an Anglophilic American attorney, shrewdly depicts the closed world of the English profession of law.

13. I F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 211 (1959) [hereinafter cited as POLLACK & MAITLAND].

tual endeavors. It is interesting to note—and to compare with the often solely trade school role associated with contemporary legal education—that the first performance of William Shakespeare's *Twelfth Night* was performed at Middle Temple Hall before an audience that included the Queen.¹⁴

While the Inns of Court were the preparatory schools for the barristers, the practitioners of the minor legal arts, the solicitors and attorneys, had no organized educational institution.¹⁵ For a time, it should be noted, attorneys were admitted to the Inns with the status of outer barristers. The attorneys developed in part as a result of the rule that a person was required to appear personally at his lord's court if there were any legal proceedings involving him. Inasmuch as the various manorial courts met at the same time of the year, this could be vexatious if a person held land of several lords, a common enough situation. It was possible to obtain royal permission to send a surrogate to appear. There was no requirement that these surrogates, soon called attorneys, have any legal education or skills and many did not. Almost anyone, even a wife, could appear.¹⁶

The Crusades, characterized by the often permanent absence of the parties in interest, exacerbated the problem of resolving disputes in manorial courts, and there was a resulting liberalization in the granting of permission for appointment of attorneys. Professional attorneys could be appointed, subject to the regulation of the courts. This, incidentally, is the origin of the modern rule that an attorney is an officer of the court and not merely an employee of the client. Attorneys were limited to routine legal matters.¹⁷

The solicitors, who have always constituted the largest class of English lawyers, developed as the Court of Chancery emerged and grew in importance. In their earliest form the solicitors were clerks in Chancery who aided litigants in drawing up papers.¹⁸ The demands of the market led to the establishment of a permanent professional class of lawyers who handled cases in chancery.¹⁹

14. PLUCKNETT, *supra* note 3, at 225.

15. The picture before the thirteenth century is a bit obscure, but while attorneys and solicitors were regulated, they were not formally trained. This situation continued even after the formation of the Inns of Court. See H. KIRK, *PORTRAIT OF A PROFESSION* 1-16, 48 (1976).

16. POLLACK & MAITLAND, *supra* note 13, at 213.

17. KNAPPEN, *supra* note 4, at 204-05. What was routine was subject to shifting interpretations. The Inns of Court initially by themselves, and then later with the aid of the Chancery practitioners, sought successive jurisdictional enlargement.

18. *Id.* at 299.

19. *Id.*

The attorneys and solicitors essentially obtained their legal education through the apprentice method.²⁰ These apprenticeships were created in the same legal form as an apprenticeship with a baker or cobbler and regulated by the same legal principles. They were contractual agreements and could be the subject of litigation.

The Inns of Court, having reached their peak of dignity and educational effectiveness during the Tudor-Stuart period, began to decline during the late sixteenth and early seventeenth centuries as the common lawyers secured a pre-eminent position in the legal and governmental fields.²¹ By the eighteenth century the readings and moots had declined, and the students were largely left to their own devices.²² Notwithstanding the fact that the only requirement for admission to the bar by the benchers of the Inns was proof that the student had kept twelve terms by eating the required number of meals, some students were clerking with established barristers. Even so, clerking with a barrister did not necessarily carry with it the formal commitment to spend definite, verifiable time in the barrister's chambers as did the apprenticeship with an attorney or solicitor. The quality of an apprenticeship was, of course, not subject to objective evaluation.

Although student-barristers were expected to read certain standard works, such as Littleton, Coke, Glanville and Bracton, as well as be acquainted with the Year Books, the majority of a barrister's legal education was obtained at the courts. To accommodate the needs of the students, Lord Mansfield, a born teacher, gave the reasoning behind his decisions and extensively cited cases in them.²³ He even set aside a portion of the courtroom for their exclusive use, which became known as the "crib." Incidentally, the modern phrase "crib notes" seems to be

20. *Id.* at 407.

21. *Id.* at 508.

22. See 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 15-60 (1938) and I C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 38 (1970) [hereinafter cited as WARREN]. Many factors combined to bring about this decline. The Inns of Court increasingly resembled finishing schools for the younger sons of aristocracy and gentry. Many competent lawyers were increasingly involving themselves in the emerging English party system and thus probably had little time for an interest in teaching law. Crime and disorder were on the increase and areas around the Inns of Court were unpleasant as any review of Hogarth's works quickly demonstrates. Courts of both law and equity were becoming increasingly cumbersome institutions and provided, generally speaking, little as models for the education of young practitioners.

23. Lord Mansfield consciously attempted to create learning models through his decisions. Presumably he was less than satisfied with the state of legal education. The inimitable Lord Campbell, a critic at once biting severe and oppressingly dull, catalogued the care with which Mansfield drafted opinions, a care which went beyond the requirements of efficient adjudication. 2 J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND (1849). A new and refreshing view of Campbell in all his roles is provided by E. HEWARD, LORD MANSFIELD (1980).

descended from this practice as the notes taken by students were given some value as recordings of authority.

As Abel-Smith and Stevens document, by 1750 the Inns of Court were in a decline, at least with reference to their educational function, from which they never completely recovered.²⁴ The Act of 1729 reorganized the legal education of the attorneys and solicitors who, by 1700, had merged into one body, the solicitors.²⁵ Training by apprenticeship was formally established. No similar reorganization was in the offing for the barristers, and this left a serious gap in English legal education because in 1750 the common law was not being formally taught or studied in any institutional setting.

Oxford and Cambridge Universities had long taught canon law and civil law, but had never accepted the common law as worthy of university study.²⁶ The robed dons of the ancient colleges did not seem to distinguish between theory and profession and saw the common law as a trade unworthy of serious academic consideration. This caused no alarm among the practitioners of the common law, since they had effective control of the high courts and they manifestly had no desire to share their guild-like domination. In 1753 Blackstone commenced a series of lectures at Oxford, and was subsequently appointed Vinerian Professor there.²⁷ It might have seemed that the common law would be accepted at the great universities which would begin to provide, belatedly, a ground for research and discussion. Unfortunately, the successors of Blackstone to the chair treated it as a sinecure.²⁸ Perhaps this failure of the common law to finally spread roots at the universities was presaged in Blackstone's own words. These lectures were not designed for the legal profession, but, as Blackstone said, for "gentlemen of all ranks and degrees."²⁹ The sometimes overwhelming importance of

24. See generally B. ABEL-SMITH & R. STEVEN, *THE LAWYERS AND THE COURTS* (1967) [hereinafter cited as ABEL-SMITH & STEVEN].

25. The term attorney survived but was often associated with less honorable aspects of legal practice.

26. The universities did not prepare men for professions but for an academic contemplative life. Medicine as much disinterested the dons as did law.

27. I SHARSWOOD'S BLACKSTONE'S COMMENTARIES, xii-xiii; G. JONES, *THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* xii-xiii (1973).

28. ABEL-SMITH & STEVEN, *supra* note 24, at 26.

29. I W. BLACKSTONE, *COMMENTARIES* 16 (1765). See also *id.* § 1, *On the Study of the Law, passim*. The legal profession by Blackstone's time was unreservedly the province of the scions of the landed class with some but not many places going to vicar's sons and occasionally a merchant's son. This group, never noted in English history for pretensions to intellectual eminence, acted as a reactive force to any attempt to restore a serious pedagogical function to the Inns of Court.

Oxford and Cambridge as a *rite d' passage* for gentlemen did little to ensure academic innovation and progress.

The following 120 years saw a good deal of turmoil in English legal education, but little development.³⁰ The Inns of Court attempted to offset the increased power and status of the solicitors by revising their entrance standards. The Inns also reduced the period between admission to an Inn and the call to the bar from five to three years for university graduates.³¹ The educational functions of the Inns were not seriously revived during this period, the Inns remaining predominantly social clubs in nature. Admission to the bar still required no significant educational activity or examinations.

In 1846 an investigating committee of Parliament examined the education and training provided for prospective barristers, and found the system to be inferior to the legal education provided in Europe and the United States. Recommendations were made for reform of the system, including entrance examinations for admission to the Inns and the bar. A national law college was called for, as well as more instruction in the common law by the universities. The suggestions of this committee, and the numerous other commissions that succeeded it, were not followed. It was not until 1871 that Oxford, and 1873 that Cambridge, reformed their law teaching faculties. Even then the best law students stayed in the traditional system, as the established bar did not accept a university degree as the equivalent of practical experience.

Although the system of legal education for barristers had seriously degenerated by the eighteenth century, and admission to the bar tended to be on the basis of birth and money, even into 1981,³² Reed cites three reasons why great barristers did develop.³³ The first reason is that the

30. This period covered the whole era of major English legal reform which greatly affected substantive and procedural law as well as the nature and organization of the legal profession. During this period those who were—at least nominally—responsible for training lawyers were at best non-contributing and at worst obstructionist. In fact, several reforms were reactions to the entrenchment of what appeared, not just to observers like Dickens, to be a massive protectionist society that cared not a whit about the education of its members. Even venerable Inns could not necessarily guarantee their own existence and an entire class of lawyers, the serjeants-at-law, was summarily abolished in the wake of the reformers' massive dissatisfaction.

31. That university graduates were not flocking to the Inns appears to have been lost on the Benchers.

32. Traditionally, three professions were acceptable for the younger sons of aristocracy and gentry: army and navy, church and law. Money independent of income earned through the practice of law has always been a major requirement for barristers but not solicitors. The simple reason for this is that barristers, unlike solicitors, must practice in solo and are totally dependent on professional referrals. Furthermore, the barrister is not permitted to sue to recover his fee, which is regarded as an *honorarium*. J. PRICE, *THE ENGLISH LEGAL SYSTEM* 24 (1979).

33. A. REED, *TRAINING IN THE PUBLIC PROFESSION OF THE LAW* 20 (1921). That great barristers did develop is beyond question. It was not training, however, that shaped superior advo-

wealth needed to become a barrister often made possible a university education as well as attendance at one of the Inns. Secondly, even though a period of clerkship was not a requirement for admission to the bar, it was an added edge when a barrister began to practice, and many students clerked.³⁴ Thirdly, the unique English system whereby the solicitor, rather than the client, selected the barrister served to prune the deadwood. Solicitors wanted to win cases as much as anyone else, and they prudently channelled litigation toward the competent barristers, and away from the incompetent.

Six hundred years of English legal education development had resulted in an often competent but closely inbred profession. For barristers in particular, exposure to general education was often absent if not positively discouraged. Great advocates and judges emerged, but of great teachers, except for Blackstone, almost nothing is heard.³⁵ An anti-academic bias in the legal profession, sown perhaps in the medieval period, had finally established itself.

Colonial America

Legal education in the American colonies prior to the Revolution appears to have passed through six periods.³⁶ The earliest periods of settlement saw, understandably enough, few persons with legal education coming to the struggling and often disease-ridden colonies, and there was little opportunity to use what knowledge was brought over.³⁷

cates but practical experience in a small professional elite in which expanding abilities were quickly noted and, presumably, encouraged. Many biographical accounts of the legendary barristers, especially those of the mid to late nineteenth century, stress the nature of the "on-the-job" training and its overwhelming importance. *See, e.g.,* E. MAJORIBANKS, *FOR THE DEFENSE, THE LIFE OF SIR EDWARD MARSHALL HALL* (1929); E. MAJORIBANKS, *CARSON THE ADVOCATE* (1932); D. WALKER-SMITH, *LORD READING AND HIS CASES* (1934); H. HYDE, *LORD READING* (1967). Especially vivid descriptions of the learning process are provided by two members of the ancient but abolished serjeantry-at-law. *See* B. ROBINSON, *BENCH AND BAR: REMINISCENCES OF ONE OF THE LAST OF AN ANCIENT RACE* (1889) and W. BALLANTINE, *SERJEANT BALLANTINE'S EXPERIENCES* (1882). Both men recognized that learning was by observation and practice. One consequence of this type of training, quite naturally, was that barristers became far more proficient in the techniques of advocacy than they were in the substance of the law.

34. Properly speaking, an aspiring barrister engages himself/herself for a pupillage, while a solicitor begins as a clerk.

35. No status accrued to being a teacher of law and even Blackstone's reputation is essentially vouchsafed because of the impact of his Commentaries on practicing lawyers on both sides of the Atlantic rather than his ability as a professor.

36. *See generally* HAMLIN, *supra* note 1, and WARREN, *supra* note 22.

37. The atmosphere in the colonies did not encourage, nor indeed in the earliest period, require formal legal practice. Many colonists were truly refugees from English law. Many settlers, because of religious belief, were anti-intellectual and anti-legalistic and the rigors of early colonial development provided a poor climate for lawyers. Nevertheless, law did, of course, exist and Professor Kammen has warned of the danger of assuming the practice of law was largely

For example, in the earliest days the common law was, for practical purposes, in force in New England only so far as it was specifically adopted by statute or the colonists had assented to its binding force.³⁸ Biblical law was supreme, and the clergy dominated the magistracy and the courts.³⁹

Hamlin, in his discussion of legal education in colonial New York, delineated the next five periods, with specific reference to New York.⁴⁰ However, the general trends developed may be cautiously applied to all the English colonies.⁴¹ In the first twenty-five years of British rule in New York, 1664-1689, the majority of lawyers were educated in England.⁴² The next phase, roughly 1689-1702, saw a decline in the prestige of the legal profession with an opening up in the educational opportunities available to colonial youths. It was possible to be apprenticed to a practicing attorney or, if sufficient money was available, to hazard the passage to England to attend one of the Inns, be apprenticed or attend at court. The first quarter of the eighteenth century saw a number of qualified judges being sent to the colonies as a result of increased interest on the part of the British government in the governance of the colonies.⁴³ These judges demanded a higher standard of preparation and professional demeanor from the lawyers appearing before them than many colonial practitioners were accustomed to. For the first time, an adequate education was required, although what that was was not very clearly delineated. The next quarter century saw the rise of a relatively well-educated legal profession that adapted the pro-

absent simply because the form of practice did not resemble Westminster. M. KAMMEN, *PEOPLE OF PARADOX* 289 (1972).

38. WARREN, *supra* note 22, at 25.

39. The supremacy of biblical law was put into practical effect by the statutes and common law insofar as they were understood and interpreted by the judges who were often clergy. The Salem witchcraft trials of 1692 are a paradigm of the fusion of law and theology by clerics.

40. HAMLIN, *supra* note 1.

41. New York and Virginia provide the most complete records along with Massachusetts.

42. P. HAMLIN & C. BAKER, *I SUPREME COURT PROVINCE OF NEW YORK 1691-1704*, at 99 (1959) [hereinafter cited as HAMLIN & BAKER].

43. One by-product of the Glorious Revolution of 1688 was a renewed and more professional interest by Englishmen in the colonies. The administration of several colonies, especially Massachusetts, came under scrutiny, and a disapproving scrutiny at that. Not the least reason for the dispatch of more able administrators and judges to the colonies was a desire to maximize commercial and tax gain. Because of the time needed for ideas, as well as goods, to travel the Atlantic, the impact of 1688 was not felt in the colonies for several years. At that point, however, the legal profession was profoundly affected by the libertarian principles which were being espoused in England. It is from this period that the role of the lawyer—that is, the trained lawyer (for there was no shortage of the other variety in the colonies)—as political agitator, mover for reform and occasionally statesmen begins to take form in America. See D. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* (1972) and *THE GLORIOUS REVOLUTION IN AMERICA* (M. Hall, L. Leder, M. Kammen ed. 1964).

cedures and principles of English law to the colonial situation.⁴⁴

As a body of educated lawyers developed, the profession organized to protect its interests.⁴⁵ In the 1720s plans were made to regulate clerkships, but these plans fell through.⁴⁶ The need for some form of regulation was great, however, and what was perhaps the first major departure from the English system was to occur in 1730. In that year the provincial supreme court of New York issued an order regulating the training of clerks, and mandating a seven-year clerkship. The court's taking charge of admission to the bar was a significant departure from the traditional English system of letting the profession regulate admission.⁴⁷

The courts controlled admission to practice before them for about twenty-five years, with control reverting in 1756 to the New York City bar which established a strict set of standards. These standards called for four years of college or university, culminating in a bachelor's degree, five years clerking, the passing of an examination and recommendation by six attorneys. The four years of college were reduced to two in 1756, the degree requirement was dropped, and a five-year clerkship required.

In 1767 the supreme court again took charge of admission to the bar, requiring either a five-year clerkship alone or three years of clerking for applicants with a bachelor's degree. The New York State Constitution of 1777 gave courts power over the attorneys appearing before them relative to qualification and admission, and there the power has remained.

Clerking—The Main Road to The Bar

The predominant method of legal education was the clerking system, although it must be noted that some students went to England and

44. This statement must be cautiously viewed as being descriptive only of what might perhaps be best termed the urban segment of the legal profession and then only the most visible and active members of that group. Still, in those matters of greatest economic value, the quality of legal practice clearly increased.

45. The best review and analysis of the origins of American bar organizations is still R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953). As Pound demonstrates, the desire to organize so as to raise the integrity and competence of the bar was also accompanied by a recognition that the nature and quality of lawyers' training had to be raised.

46. HAMLIN, *supra* note 1, at 35.

47. The general milieu of distrust of attorneys, so often seen in colonial accounts of lawyers, contributed to this shift. Lawyers were also at a disadvantage, having but recently begun to organize and lacking the well-established associations of their English counterparts. A further cause for shifting responsibility to the courts was a fundamental colonial assumption that judges would not necessarily come from the ranks of lawyers, and this reflected and encouraged a certain distance between bench and bar absent in the Mother Country.

were admitted through the Inns of Court. Five signers of the Declaration of Independence and six members of the Constitutional Convention obtained their legal education in this manner.⁴⁸ A clerk was essentially an apprentice to an attorney with some form of contract or agreement governing the relationship. The clerk generally paid the attorney a sum of money and was required to perform duties as set forth by the attorney. These could range from nonlegal but necessary duties such as starting the fire in the morning, through copying legal papers to aiding in the presentation of a case. The student was also expected to read the classic treatises.⁴⁹ In return the attorney opened his office to the student, he allowed him to use his library and he was supposed to provide advice and guidance. The quality of training under such a system depended heavily upon the nature, skill and teaching interest of the attorney. Certainly some abused their clerks, their desire being only to maximize their incomes. On the other hand, some lawyers took a great deal of interest in their clerks' education. John Jay and John Adams are but two prominent examples of clerks who had the benefit of excellent relationships with fine attorneys and whose practices and professionalism were continuations of their formative training.

The effect of the Revolution on the legal profession was dramatic and further served to distinguish the American bar from its English progenitor. Many of the members of the bar and bench were loyal to England and, reluctantly or otherwise, left the colonies. A certain amount of hostility towards English law on the part of those who considered themselves American was manifest. As unpopular as lawyers and the common law were,⁵⁰ almost half of the signers of the Declaration of Independence were lawyers, as well as more than half of the members of the Constitutional Convention.⁵¹ From the start of the nation as an independent political entity, lawyers have endured antipathy while often simultaneously being courted as indispensable.

POST-REVOLUTION LEGAL EDUCATION

The effect of the Revolution upon legal education was dramatic. As a separate legal entity the United States was no longer tied to the

48. Vanderbilt, *University Legal Education and the American Bar*, 24 A.B.A.J. 105 (1938) [hereinafter cited as Vanderbilt].

49. An attorney might or might not have the mainstays of English legal literature. Most had, however, at least the basics.

50. WARREN, *supra* note 22, at 3-4.

51. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 265 (1973) [hereinafter cited as FRIEDMAN].

English system—or relative non-system—of professional legal education.⁵² Two innovations appeared on the American scene: the teaching of law within the university framework and the rise of private law schools. Before reviewing the chronology and impact of these developments, it is interesting to note some of the obstacles that the bar and legal education would have to overcome between the Revolution and 1815. First, there was the continued and often outspoken unpopularity of lawyers.⁵³ Their major legal business was all too often debt collection, never particularly popular, especially when debtors' prisons still flourished in many jurisdictions.⁵⁴ Second, there remained a bitter feeling towards England that carried over to English law. Third, there was a lack of a distinct body of American law, in part due to the relative paucity of American reports and texts.⁵⁵

The teaching of law within the university framework was in part due to a rise in American nationalism during and after the Revolution. In 1777, for example, the legislature of the state of Connecticut proposed to endow three professorships at Yale, with one dedicated to the teaching of civil and common law, American statutes and codes and theories of government.⁵⁶ Unfortunately this advanced proposal was not carried through. In 1778 Isaac Royall, a Tory refugee, left a legacy to the Harvard Corporation to be used to endow a professorship in either medicine or law. Because Royall died in London at a time when there were some difficulties between the English and the Americans, the money was not actually received for some time and the chair was not filled until 1815.⁵⁷

In 1779 Thomas Jefferson was elected Governor of Virginia and a Visitor of William and Mary College. In December of that year his reorganization plan for that institution was put into effect; it included

52. The training of lawyers in England was accomplished within the framework of a unitary legal system while both the colonies and the emergent republic reflected a diverse and increasing number of jurisdictions. Legal education, however, was fairly uniform, especially during the colonial and early Republic periods.

53. See 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 3-91 (1965). The reasons underlying the unpopularity of lawyers are complex and varied and regional considerations are evident. While the subject is beyond the scope of this article, it must be noted that the poor or virtually non-existent training of many lawyers, especially those practicing on circuit and on the frontier, contributed in no small way to their poor public image.

54. J. DILLON, *THE LAWS AND JURISPRUDENCE IN ENGLAND AND AMERICA* 359 (1895). See also 2 J. KENT, *KENT'S COMMENTARIES* 522-24 (10th ed. 1860).

55. WARREN, *supra* note 22, at 186. This problem was more pronounced in some states than in others. New York, for example, had numerous case reports printed and in general circulation.

56. *Id.* at 166.

57. *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL* 2 [hereinafter cited as *CENTENNIAL HISTORY*].

the establishment of a professorship of "Law and Police." The first person to fill the position was George Wythe, signer of the Declaration of Independence, Chancellor of Virginia, leader of the bar and the attorney with whom Jefferson had clerked.⁵⁸ The method of instruction was lecture, based on Blackstone's exposition of the English common law, with differences of local law being noted and commented upon by the professor.⁵⁹ The students and their professor also held practice courts in the Virginia state capital.⁶⁰

The year 1790 saw professorships of law instituted at Benjamin Franklin's College of Philadelphia and at Brown College. King's College (Columbia) followed suit in 1793, as did Princeton in 1795. In 1798, the University of Transylvania in Lexington, Kentucky, established the first regular professorship of law for students other than undergraduates. These university professorships, except those at William and Mary and at Transylvania, were primarily intended for the instruction of undergraduates. They are significant as the first sign of acceptance of the study of the common law as a course worthy of inclusion in a university program. Of greatest importance, this development reflects the gradual integration of law into the corpus of American intellectual pursuits in an academic setting.

These professorships were not intended to, and did not, provide a complete or practical education for students seeking to become attorneys.⁶¹ With the universities concentrating on the theory rather than the practice of law, with the option of attendance at the Inns of Court essentially cut off, and with the inadequacies of the clerking system becoming more apparent, the pressures of the market led to the founding of small, private law schools, which thrived for perhaps thirty-five years.

American attorneys, with the exception of those in Massachusetts,⁶² as a rule had no limits placed on the number of clerks they could have. As was to be expected, some attorneys found that teaching

58. CHROUST, *supra* note 53, at 177-78.

59. *Id.*

60. The moots were modelled on those of the Inns of Court. The practice of inviting distinguished, and perhaps not so distinguished, members of the bar, to participate and critique was a feature of these moots. See WARREN, *supra* note 22, at 169-72; Dworkin, *America's First Law School: The College of William and Mary*, 37 A.B.A.J. 348-50 (1951); Hughes, *William and Mary's Pioneer American Law School*, 7 A.B.A.J. 309 (1921).

61. While the quality of the schools, created on the entrepreneurial model, varied greatly, more than a few were excellent. Many lawyers used their clerks unabashedly as a form of slave labor and taught them little if anything. The private law school stood for the primacy of the teaching role.

62. FRIEDMAN, *supra* note 51, at 278.

law was either more lucrative or more rewarding intellectually than the practice of law. As these attorneys spent more and more time with their clerk-students, and less on their practices, their offices became in essence small law schools. Ultimately some of these attorneys started law schools, advertising for students in newspapers.⁶³ The well-known Litchfield Law School is atypical of this type of educational institution only in its success and longevity. It is recognized as the first American law school.

In 1784 Judge Tappan Reeves started the Litchfield Law School. He served as its sole faculty member for twelve years.⁶⁴ Judge Reeves has been described as one who "loved law as a science and studied it as a philosophy."⁶⁵ The curriculum at Litchfield consisted of lectures from Blackstone, with collateral reading and examinations on Saturdays. The course covered fourteen months with two four-week breaks.⁶⁶ As hard as Judge Reeves tried, the Litchfield Law School could not approximate and become the New World's Inns of Court. The traditions of the Inns could not be maintained in so small a town, and the American bar was too spread out compared to the concentration found at Westminster.⁶⁷ Nevertheless, the record of achievement of the graduates of the Litchfield Law School may well be unsurpassed. The school closed in 1833, having had 1,015 students about whom it is known that:⁶⁸

16 served in the United States Senate
 50 served in the United States House of Representatives
 40 served as judges of higher state courts
 8 served as Chief Justices of higher state courts
 2 served as Justices of the United States Supreme Court
 10 served as Governors
 5 served in Presidential cabinets

THE HARVARD LAW SCHOOL ERA: PARKER TO STORY TO LANGDELL

The history of American legal education and teaching methods for

63. *Id.* at 279.

64. Thus a truly unique situation in the history of American legal education arose. For twelve years the law school conducted its business sans faculty meetings, faculty dissension or faculty politics.

65. Quoted in G. Farnum, *Historic New England Shrines of the Law*, 22 A.B.A.J. 238 (1936).

66. FRIEDMAN, *supra* note 51, at 279.

67. Vanderbilt, *supra* note 48, at 106. Even today, most of Britain's 4,000 barristers practice in chambers in one of London's four Inns of Court, although some practice in chambers in the provinces. J. PRICE, *THE ENGLISH LEGAL SYSTEM* 24 (1979).

68. WARREN, *supra* note 22, at 181-82.

the century following the founding of the Litchfield Law School is, in the main, the history of the Harvard Law School which was to rise to dominance in this period.⁶⁹ However, to focus too closely on the happenings at Cambridge, Massachusetts is to risk failing to adequately cover the rest of the nation.⁷⁰

Failure to accord justice to legal education west of the original coastal colonies is not difficult. The farther west one went the lower the standards in legal education and for admission to the bar became.⁷¹ The experience of Stephen A. Douglas is illustrative of the gap that existed. In Douglas' home state of New York seven years of study and clerking were required. Douglas moved to Ohio, and found the requirement for admission to be one year. Unfortunately, this was one year more than he had accumulated, so he continued on to Illinois where no license was required to appear before a justice of the peace. After some experience before a justice of the peace one could obtain a license to practice. Many lawyers in the Western part of the country read a few treatises, obtained a license and practiced law. This was the course that Abraham Lincoln followed, and the course he advised.⁷² Many men clerked with an attorney, and those with the money attended the educational institutions available.⁷³ Despite the varying standards for admission to the bar, many fine advocates emerged.

Conflicting Principles and Pressures in Legal Education

Before returning to the Harvard Law School, mention should be made of two pairs of principles and two conflicting pressures that have affected legal education during the nineteenth and twentieth centuries. The first pair of dichotomous principles concerns whether legal education should be conceptualized as primarily vocational in nature or as a rigorous scientific method. The training of the clerk was essentially

69. Harvard enjoyed the reputation, at least intermittently, as the premier university and its law school was generally highly regarded. So long as the majority of lawyers were admitted to the bar through clerking, the role of any law school was somewhat limited in scope and impact. Perhaps Harvard's greatest contribution in the nineteenth century was to demonstrate the viability of university legal education as a valid and indeed preferable alternative to the older system of apprenticeship. In so doing, it presaged fundamental changes in criteria for bar admission.

70. An adequate study of the training of lawyers, especially on the constantly changing frontier, is still to be done.

71. This, of course, only paralleled the early colonial experience. If lawyers were perceived as being needed and those with proper credentials eschewed the rigors and the dangers of the frontier, less trained practitioners were grudgingly accepted. The same principle applied to doctors and clergymen.

72. Though few seemed to have his ability and intellect.

73. See generally Nortrup, *The Education of a Western Lawyer*, 12 Am. J. Legal History 294 (1968).

akin to the training of the blacksmith's apprentice; it was practical rather than theoretical. A university education, on the other hand, was predominantly an exposure to principles and methods of analysis.⁷⁴ It was not until well into the twentieth century that the latter principle gained command. The second conflicting set of principles concerned the question of whether legal education should be integrationist or segregationist with reference to the liberal arts. There were conflicting pressures to raise professional standards and, on the other hand, to open practice to more people. The former pressure was exerted by the leaders of the bar who sought to preserve their income and prestige, and, perhaps, the integrity of the bar. The latter position was supported by precepts of Jeffersonian and Jacksonian democracy, but also by the realities of the market.⁷⁵ All the questions and issues raised by these conflicts have yet to be resolved.⁷⁶

Regardless of developments in the American West, the problems of legal education in England and the conflicts in modes and styles of legal education, the focus and center of academic development and innovation in legal education for the United States was to be the Harvard Law School. It was there that the teaching of the common law was fully accepted by a major university and there that the teaching and study of the common law as a science was fashioned in a form rather familiar to the law student and lawyer of today.

Judge Parker: The Founding

As related earlier, the Harvard Corporation was left a legacy to endow a professorship of law or medicine by a displaced loyalist.⁷⁷ Inasmuch as Harvard already had a medical school, it was decided to use the money to endow a chair for a professor of law. Because of the Revolution and ancillary problems in probating Royall's will, the Corporation did not receive any proceeds of the legacy until 1796.⁷⁸ The

74. The universities did not exist to train students for trade. Most Americans were probably suspicious of and skeptical about the value of university education.

75. A legal elite could not be fostered in America as a counterpart to the English legal profession. The business of law was in no way centralized as in England and the potential employers of lawyers were often uneducated people who neither accepted nor valued elitism. Toleration of a system which restricted entry to the ranks of professional advocates would be rejected by most. Thus the profession of law, and the system it supported for training lawyers, reflected a social fluidity unknown to and unacceptable in England.

76. Entry to the practice of law is a highly desired part of the program of every minority group in this country. The issue of standards and their relevance is a battlefield beyond the scope of scrutiny of this article. Suffice it to say that the combined need for but distrust of lawyers is reflected in the strong desire of minority groups to see their own members trained in law.

77. See text accompanying note 57 *supra*.

78. A. SUTHERLAND, *THE LAW AT HARVARD* 41 (1967) [hereinafter cited as SUTHERLAND].

proceeds were invested at that time, and Harvard waited until more money was available. On October 11, 1815 Chief Justice Isaac Parker of Massachusetts was selected to fill the position.⁷⁹

The educational method first followed by Judge Parker consisted of lectures on broad topics of the law for the benefit of undergraduates who had not been assigned prior reading and were not subsequently tested on their comprehension.⁸⁰ Parker well knew that this was not adequate, and within two years he proposed a plan calling for a distinct law school at Harvard at which the professor would confer with and examine his students upon their prescribed studies and lectures.⁸¹ The plan was accepted and a true law school developed. Regular lectures were given, a small library acquired, examinations given, moot courts and discussions held and dissertations were written by the students.⁸² Students came and went without any regular times of attendance set by the school, and it was said that the best students left for practicing attorneys' offices since all that the law school was was a glorified law office.⁸³ This may have been so, but no law office of the time required the passing of rigorous examinations in the traditional university model or granted a degree, as did Harvard.⁸⁴

Justice Story: Growth in Size and Respect

The 1820s saw a decline of Harvard University as a whole, with the law school being especially affected. However, a new administration ascended to control of the university and the old administration of the law school was dismissed. With the aid of a newly-endowed professorship, Justice Joseph Story of the United States Supreme Court was enticed to become a professor at the law school in 1829. Story, created Dane Professor of Law, asked for an assistant, who was named to the Royall Professorship. Up to 1835 the instructional methods remained pretty much the same as under Parker. Innovations in that year consisted of splitting the student body into classes and tailoring the lectures in sequence with prior lectures. In 1836 regular times for attendance at class were set.⁸⁵

Justice Story continued the moots, and introduced a curriculum of

79. *Id.* at 48-49.

80. *Id.* at 52-53.

81. CENTENNIAL HISTORY, *supra* note 57, at 3.

82. SUTHERLAND, *supra* note 78, at 76.

83. CENTENNIAL HISTORY, *supra* note 57, at 9.

84. SUTHERLAND, *supra* note 78, at 77-78.

85. CENTENNIAL HISTORY, *supra* note 57, at 9-13.

courses of study to replace the former system of successive study of particular treatises. His classroom method became increasingly based on assigned readings in texts with in-class discussion and commentaries.⁸⁶

One of the requirements of the Dane professorship was legal writing.⁸⁷ Story, a scholar on and off the bench, took to this with enthusiasm, writing a number of legal works that have become classics.⁸⁸ By 1845 his books were bringing him \$10,000 a year, so he was certainly free of financial worries.⁸⁹ The student body and the reputation of the law school had grown, as had the need for additional instruction.

In 1845, Story felt free to step down from the bench and concentrate on teaching. Unfortunately, before he could accomplish this he died, in his sixty-fifth year.⁹⁰ The impact of Story, and his successful teaching of law at a university, may perhaps be illustrated by the list of law schools founded during or shortly after his tenure, each modelled conspicuously on his Harvard Law School:⁹¹

- 1833 Cincinnati
- 1836 Carlisle Law School (Pennsylvania)
- 1843 Yale granted its first law degrees
- 1846 Louisville (Kentucky)
- 1847 Lebanon Law School (Tennessee)
- New Orleans
- 1850 University of Pennsylvania
- 1851 Albany

For a few years after Story's death the momentum he had generated carried the law school, but soon the school slipped into what a few have uncharitably called its Dark Age.⁹² In the 1850s and 1860s the scientific approach and scholarliness exemplified by Story abated.⁹³ In a cycle which appears to repeat itself regularly, the purpose of students became much more practical and self-centered.⁹⁴ The faculty failed to meet, the student body decreased in size, the number of college gradu-

86. SUTHERLAND, *supra* note 78, at 104-05.

87. Thus there clearly arises one of the recurrent issues of contemporary legal education: the requirement of scholarship which in many cases has become an overriding factor in promotion and tenure decisions to the detriment of evaluating teaching ability or encouraging its nurturement. Clearly, scholarship is vital and is directly connected to the teaching of law, but a proper balance between writing and other major factors is more often sought than attained.

88. Justice Story was both a constitutional and a common law scholar. His works covered all areas and were invaluable to practitioners.

89. SUTHERLAND, *supra* note 78, at 134.

90. *Id.* at 135. CENTENNIAL HISTORY, *supra* note 57, at 14.

91. II WARREN, *supra* note 22, at 497.

92. In reality, the school was caught up in the crosscurrents of domestic instability.

93. The school seemed to attract a lesser quality of both teacher and student.

94. CENTENNIAL HISTORY, *supra* note 57, at 21.

ates declined and stagnation appeared.⁹⁵ For nearly twenty years the college catalogues reassured the reader that "[t]here have been no new arrangements in relation to the organization of the School or the course of instruction."⁹⁶ The stagnation of the law school reflected the situation not only at Harvard University, but in all of American higher education and certainly American legal education. The resurgence in interest in American higher education that followed the Civil War was to dramatically affect Harvard University and its law school.

Dean Langdell: Innovation and Pre-eminence

On May 19, 1869 the governing body of the Harvard Corporation elected Charles William Eliot as President of Harvard University. Eliot was a young academic, only thirty-five at the time of his selection, and he had many ideas for reform in higher education. Within the year Eliot had the opportunity to fill the Dane chair at the law school, which he proceeded to do in an unprecedented way. Until then, university law professors from George Wythe through Joseph Story to Nathaniel Holmes (who had been appointed to the Royall chair in 1868) had been selected from the ranks of eminent judges or distinguished and well-known members of the bar.⁹⁷ Eliot appointed Christopher Columbus Langdell, who was not a judge. He was not appointed because of his experience in practice or his reputation, although, in fact, Langdell was highly respected by the New York bar. Rather, as Langdell explained, law professors must be proficient in the *method of teaching* perhaps even more than in the substance of the subject.⁹⁸ This especial quality Eliot believed Langdell to possess. As Langdell more fully explained:

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 cases—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman praetor, still less of the Roman procurator, but the experience of the Roman jurisconsult.⁹⁹

95. *Id.* at 22-25.

96. SUTHERLAND, *supra* note 78, at 153.

97. In this sense, at least, the English experience was being repeated.

98. Although Langdell is hardly likely to have been the first to conceive of the role of the teacher of law as being rooted in the method of teaching, his greatest contribution was in institutionalizing this approach.

99. Quoted in CENTENNIAL HISTORY, *supra* note 57, at 25-26. The praetors were civil magistrates and the procurators were fiscal officials who had jurisdiction over taxpayer suits. M. CARY, A HISTORY OF ROME 115, 534 (2d ed. 1965). The jurisconsults constituted a unique professional class in Roman legal history. Their emergence reflected the general lack of legal knowledge of praetors and advocates. The jurisconsult was, in effect, a freelance law professor who produced treatises and rendered opinions for a fee. See W. MARKBY, OUTLINES OF ROMAN LAW 102-04

The advent of the new Dane professor adumbrated other changes in the law school. In the fall of 1870, the first term that Langdell taught, the faculty met and selected Langdell to fill the newly developed position of Dean.¹⁰⁰ In that same year the laxity with which degrees had been awarded was eliminated when requirements for graduation were set up. Degree applicants had to demonstrate at least one year of attendance and successful completion of exams in seven required and seven elective courses.¹⁰¹ Other changes were to come, such as the establishment of entrance exams and the extension of the course of study to two and then three years. But the greatest influence on the development of American legal education was to be Langdell's introduction of the case method of study.

Langdell threw down the gauntlet in the introduction to his casebook on Contracts, first published in 1871, which was to start a controversy in legal education that was to last at least half a century. Langdell's theory of legal education was contained in the preface to his Contracts casebook:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.¹⁰²

Langdell said very little about his concept of the case method after that, preferring to let his performance, and the performance of his students, speak for him. The gist of Langdell's theory was that the law should be studied as a science, in itself hardly a new concept, and that the students should derive principles of law from the close study of original sources, thereby developing their own analytical powers. The only

(1885). The jurisconsults "were in the effect both practical and academic lawyers." JUSTINIAN, *THE DIGEST OF ROMAN LAW* (C. Kolbert trans. 1979) 23.

100. CENTENNIAL HISTORY, *supra* note 57, at 26-27.

101. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 497 (1920) [hereinafter cited as Fessenden].

102. C. LANGDELL, *CONTRACTS* (1871). Many professors were violently opposed to the case method for a variety of reasons, some hardly academic. In retrospect it can be seen that the case method was seen by some as a surrender of the power to dictate all rules and concepts by fiat. Many faculty were perhaps afraid to, in effect, debate with their students. See Brandeis, *The Harvard Law School*, 1 THE GREEN BAG 10, 19-23 (1889); SUTHERLAND, *supra* note 78, at 174-75.

materials needed were the original reported cases.¹⁰³ The last two parts of Langdell's approach were new, and caused the controversy.

The casebook developed by Langdell purged the social sciences from the law courses,¹⁰⁴ and covered only a few major topics in contracts. All of the important English and American cases developing a principle of law appeared chronologically in a rather slow moving, often repetitive and irresistible manner. The second edition of the Contracts casebook had summaries prepared by Langdell that stated what today's students would call black-letter law. Because these were thought to be too helpful to the students they were excluded from later editions and other casebooks prepared at Harvard.¹⁰⁵

The introduction of the case method has been extensively covered by many scholars.¹⁰⁶ Fessenden's discussion of Langdell's method is especially inclusive and serves as a useful basis for description and further analysis.¹⁰⁷ The introduction by Langdell of a new teaching method had no immediate effect on his colleagues who still used the textbook system that had developed after Story's death.¹⁰⁸ Assigned portions of a text would be read in class, with the instructor making any comments or citing any cases that he felt illuminated the subject. A student might occasionally ask a question or, even more rarely, *mirabile dictu*, the whole class might engage in a general discussion. It was accepted that the text writer had mastered the cases and "had found out the true rules of law relative there to."¹⁰⁹ This was the expected instructional method when the goal of going to law school was the accumulation of the largest number of legal principles that could be remembered.¹¹⁰

Langdell's first Contracts students were provided with the advance sheets of his casebook. When Langdell began the class by questioning students about the cases, most of the students responded that they were not prepared, an event in the history of legal education fortunately forever belonging to the past. The nonplussed students felt they had come to be taught the law, and not to teach the professor. Attendance in his

103. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL ED. 1, 2 (1951) [hereinafter cited as Patterson].

104. FRIEDMAN, *supra* note 51, at 535.

105. CENTENNIAL HISTORY, *supra* note 57, at 80-81.

106. See, e.g., Patterson, *supra* note 103.

107. Fessenden, *supra* note 101.

108. Despite his position as Dean, Langdell truly was a prophet in his own land. Or perhaps because he was Dean his theory was initially rejected for political reasons.

109. Fessenden, *supra* note 101, at 500.

110. Books published for law students reflected this passion for learning principles. Few were analytical and many were merely compilations of maxims with a minimum of analysis.

classes fell off as the differences in the two systems became clear. The lecture-textbook method depended on passive absorption and acquiescence by the student who was presumably satisfied with hearing the rule read and accepting the conclusion of someone else. This was easy or, at least, made a minimal demand upon the student. Langdell's system was harder, since it stressed an active search and inquiry and required work and discussion outside class. Langdell attempted to foster an excitement in earnest inquiry, and encouraged accurate thought and expression. In a real sense, his method suggested an underlying respect for the law student as both scholar and junior colleague.

Attendance at Langdell's sessions fell off to as few as seven or eight students.¹¹¹ Probably very few of those who absented themselves from Langdell's classes were dullards. They simply did not recognize the value of the new method, since they faced a job market that valued practical experience and knowledge of the principles of law as reflected in treatises and books of maxims. Having come to law school, they found themselves burdened with an instructor who was not even a judge and who asked *them* questions. In fairness, they should not be blamed for their lack of enthusiasm, but a reproachful finger can be pointed at Langdell's unsupportive colleagues.

The seven or eight faithful students who attended Langdell's classes became set off from the rest of the student body. They used the library heavily, constantly discussed law among themselves, asked questions in other courses, and even had the temerity to criticize the decisions of judges. This group formed a new club, the Pow Wow, which met weekly and held discussions and moot courts. The success of the members of the Pow Wow and their enthusiasm finally infected at least some of the other members of their class. By the middle of the year attendance at Langdell's course picked up, and those who had missed classes sought to copy the notes of those who had attended.

Predictably, members of the bar feared that the innovations at Harvard of selecting non-judges as professors, coupled with Langdell's case method, would doom the law school. In fact, enrollment did dip for a short time.¹¹² This fear so motivated some members of the Boston bar that they caused the founding of the Boston University Law School to continue the old lecture-textbook method. Notwithstanding these alarms, two results of the innovations of Langdell insured the future of the law school. The case method caught hold with the students and

111. SUTHERLAND, *supra* note 78, and CENTENNIAL HISTORY, *supra* note 57.

112. *Id.*

stimulated them in their academic endeavors. Secondly, graduates of Langdell's method proved to be very successful attorneys in practice. Langdell's method was not accepted totally for many years, least of all by the legal educators who were generally slow to abandon the lecture as the prime teaching tool, but the bar recognized the skill and abilities of his students.

Langdell was Dean of the Harvard Law School for twenty-five years, resigning his position in 1895. Under his administration the student body grew from 136 students in 1870-71 to 475 in his last year as Dean. The percentage of students who were college graduates increased from 47% to 75%.¹¹³ When Langdell came to Harvard the funds of the law school were small. When he resigned there was \$360,000 in investments and a \$25,000 cash surplus.¹¹⁴ The most important measure of his success can be seen in the spread of the case method, which gradually but inexorably became the dominant method of legal education by the end of the first quarter of the twentieth century and still shapes legal education today. The case method even spread to England where it was introduced at Oxford in the 1880s. Sir Frederick Pollack was an enthusiastic supporter, but the case method was not warmly received.¹¹⁵

Langdell's success at Harvard requires explanation. Early attempts at methods similar to his had been tried in private law offices and at New York University without noticeable success.¹¹⁶ However, it was not merely the pedagogical innovations of Langdell nor his abilities as a teacher and administrator that saw the case method through to acceptance.

The United States underwent a crisis after the Civil War, a crisis in spirit and government that deeply affected the legal profession. Reports of corruption, in which lawyers surfaced as major figures, abounded and were too often confirmed.¹¹⁷ The legal profession re-

113. II WARREN, *supra* note 22, at 520.

114. CENTENNIAL HISTORY, *supra* note 57, at 515.

115. II WARREN, *supra* note 22, at 513.

116. A. HARNO, LEGAL EDUCATION IN THE UNITED STATES 54 (1953).

117. The post-Civil War period witnessed an enormous expansion of American industry, capital and urban development. Towards the close of the century, American eyes were increasingly focussed on foreign soil and foreign adventures. Perhaps because of the rapid development of capital and industry, together with the growth of municipal government, corruption was a ready stepchild searching for appropriate adoptive parents. Exposés of corruption both bewildered and shocked a population committed to the Victorian ideas of science and progress. See F. SHANNON, THE CENTENNIAL YEARS (1967); H. PECK, TWENTY YEARS OF THE REPUBLIC 1885-1905 (1917), and E. MAY, IMPERIAL DEMOCRACY (1961). Lawyers were in a particularly advantageous position to benefit both from the growth in local government and from massive industrialization. The need for rigorously trained and highly ethical exponents of law and advocates of causes was never

sponded to this crisis in various ways. For example, one response to the incredible corruption of the courts during the hegemony of the Tweed Ring in New York City was the founding of the New York City Bar Association on February 1, 1870, partly to restore the bar to dignity and to return honesty to the bench.¹¹⁸ While there is no direct proof that Langdell was deeply involved in this movement, it must be kept in mind that he was in New York at that time, and he was very highly respected in the New York City bar of 4,000 practitioners and could not be unaffected by events. The results of Langdell's concepts of legal education did lead to a setting apart of legal science from politics, legislation and the man on the street. The case method's rejection of the broader scope of intellectual inquiry that encompassed other disciplines is, in part, a self-protective shield against contamination by forces feared by but beyond the control of Langdell and fellow thinkers who wished to view the study of law as a science. His thoughts on the need for rigorous formal training of counselors justified the lawyers' monopoly of practice.¹¹⁹ Langdell might not have initiated the movement, but his work supplied the foundation of theory, as well as the lawyers educated in his case method, upon which the modern profession of the law is largely built.

CONCLUSION

The development of legal education in the United States was and still is a process reactive to, but often estranged from, traditional concepts of liberal arts and science education. Unable for ideological and social reasons to develop the professional isolationism characteristic of the English legal system, American law, including its educational components, in relating to the general society it serves, often paralleled the career of another major American institution, the army. Both law and the military are thoroughly intertwined with society at large and yet at once set apart from it. Both have to train personnel to operate in a world not subject to institutional control and both have experienced,

greater. Regrettably, both training and ethics were at a low point. A noted historian has painted a bleak but very real picture, noting that legal education was poor, bar admission standards lacking and ineffective. A. SCHLESINGER, *THE RISE OF THE CITY* 217-18 (1933). The same author, reviewing legal education, noted that "[t]heological training was on a sounder basis. . . ." *Id.* at 218. Schlesinger singles out Harvard and Columbia as being among the few law schools with real entrance conditions. For a realistic and perceptive analysis of the problems of corruption among lawyers and the responses of the bar of the greatest city in the nation, see G. MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* (1970).

118. Blaustein, *New York Bar Associations Prior to 1870*, 12 AM. J. LEGAL HIST. 50, 51 (1968).

119. FRIEDMAN, *supra* note 51, at 536.

and continue to experience, public hostility. Both professions claim elite status when, in reality, many of the practitioners of both law and martial science are relegated to relatively mundane and insignificant positions.¹²⁰

The case method flourished and continues to dominate for many reasons. Not least of the underpinnings for its growth and survival was its professional nativism—a method born of a major American law school. While undoubtedly sharpening the analytical powers of generations of men and women, it has also succeeded in narrowing the scope of inquiry in two vital areas.

First, while not actually forbidding it, Langdell's case method is designed to discourage wide-ranging investigation of questions beyond the law of the case. Second, perhaps more by chance than design, the search for legal principles through case analysis largely depersonalized the study of law and removed from its future practitioners early and meaningful exposure to the pain, physical and other, experienced by those they would serve. Case study is emotionally neutral except to the sensitive and the distance it helps to create between the future lawyers and their future clients is both great and professionally unnecessary. Langdell, in emphasizing the study of cases, transformed flesh-and-blood litigants themselves into cases and principles.

The widespread adoption of supplementary teaching methods and the current interest in clinical education now limit some of the less desirable effects of the almost universally employed case method. Nonetheless, the case method was the logical successor to the insular training programs of English law and its sway continues to exert a powerful hold on American legal education.

120. The lawyer and the professional officer both represent castes which society traditionally alternates between revering and reviling. Both professions are active service occupations but neither permits the professional to begin his function outside authority—and usually controls—from without the profession. This leads to feelings of both superiority and inferiority, competence and incompetence, faith and lack of faith. Both lawyers and military officers are often accorded a large measure of public blame when all does not go well, despite the fact that policy is often beyond their control and sometimes beyond their real influence. Both lawyers and military officers have developed a clan mentality, resist socializing with outsiders to some extent and demonstrate a high degree of intra-profession support for their colleagues, support which is not always consistent with professional ethics or good policy. *See generally* M. JANOWITZ, *THE PROFESSIONAL SOLDIER, A SOCIAL AND POLITICAL PORTRAIT* (1964) and M. JANOWITZ, *THE NEW MILITARY* (1964).