

The Progression of Change in American Legal Education

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The American model of legal education is often referred to for ideas and inspiration, especially by those outside the United States involved in legal education reform. But what is the American model? The U.S. system of legal training has gone through many changes since the American colonial period, and it continues to change. It is hard to describe “the” American model because the system of legal training always seems to be in flux, responding to suggestions from the bar and the academic legal community for reforms in the current training system for lawyers. Although the initial impetus of this paper was for a talk to an academic law group outside the United States, even American lawyers of the 21st century--almost all graduates of the standard American three-year law school and busy in their pursuit of public, private, and academic legal activities--are generally unaware of the variety of precursors to the current system of legal education in the U.S. This paper looks at the progression of change in legal education in the United States with the hope that the current American model can be appreciated more clearly in its fascinating and complex historic context.

Colonial period - before 1776

“For a majority of those who came to America, the recollection of English law was not a pleasant one. It was the remembrance of a legal system mired in precedent, antiquity, and corruption.”¹ The early settlers who came from England in the late 1600s to the North American

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¹ David Mellinkoff, The Language of the Law 201 (1963)[hereinafter Mellinkoff].

continent tended to bring with them, in addition to a dislike of English law, a dislike of lawyers as those who represented much that had been objectionable in England. For the colonies, founded on religious principles, the legal profession, “with its special privileges and principles, its private, esoteric language, seemed an obstacle to efficient or godly government.”² Lawrence Friedman gives several examples illustrating that lawyers were not favored and frequently not welcome in the colonies.³ Most telling is his quote from early Pennsylvania documents: “They have no lawyers. Everyone is to tell his own case, or some friend for him...”⁴’Tis a happy country.”⁴

The people of the American colonies would have been happy to do without lawyers and, for quite a while, did just that. For many years, as suggested by the Pennsylvania example, much of the legal work was done by lay “attorneys-in-fact” and lay judges. This unfriendly and hostile attitude towards the few lawyers who lived in the colonies in the early period was observed by historian Daniel Boorstin who commented that “ancient English prejudice against lawyers secured new strength in America...[D]istrust of lawyers became an institution.”⁵ The training of lawyers in this period was not an issue because of the scarcity of lawyers and lack of real need in these early days.

Inevitably, as the complexity of daily interactions and commerce increased, it became clear that lawyers would be a necessary part of life. England had sent lawyers to the colonies to

² Lawrence M. Friedman, A History of American Law 95 (2d ed. 1985)[hereinafter Friedman]. Professor Friedman’s book remains the outstanding comprehensive treatment of the history of American law and the legal profession from its English origins to its state in the late 20th century.

The author acknowledges the contributions of the late Professor J. Willard Hurst, who was frequently cited or otherwise credited in the articles and books used for this paper. To quote Professor Friedman: “One major influence, not adequately reflected in citations, should be mentioned: the work, personality, and spirit of Willard Hurst....American legal history stands enormously in his debt...” Id. at 13. Professor Hurst was on the faculty of the University of Wisconsin Law School from 1937 to 1981; Professor Friedman, from 1961 to 1968.

³ See id. at 94.

⁴ Id., referring to Francis R. Aumann, The Changing American Legal System: Some Selected Phases 13 (1940).

⁵ Friedman at 94, quoting Daniel J. Boorstin, The Americans: The Colonial Experience 197 (1958).

take care of the tasks of governing the individual colonies, and there were also some lawyers who had emigrated, despite the chilling attitude.⁶ “There was a competent, professional bar...in all major communities by 1750, despite all bias and opposition.”⁷ In the early 18th century, local training developed largely through apprenticeship – a system of “on the job” training. Those wanting to become lawyers in the colonial period sought out an established lawyer, paid a fee, and got practical experience working at the lawyer’s office as well as more academic learning by reading legal treatises and receiving instruction from the lawyer.⁸ “At worst, an apprentice went through a haphazard course of drudgery and copywork, with a few glances...at the law books....Other young men found clerkship valuable experience.”⁹

Some colonial men went to England for legal training at the Inns of Court, the long-standing system in England that gave lawyers-to-be technical training and association with established lawyers. The Inns themselves had lost much of their vigor as an educational system; they were “no longer providing any sort of a regular education in English law for student lawyers.”¹⁰ However, they provided camaraderie and a place to eat and live for those of the legal profession and gave the colonial lawyers-to-be a sense of English legal culture while they read law and observed English practice.¹¹ And some colonial men went to college in the colonies where they possibly might hear occasional lectures in law.¹² However, at this time, there were no law schools, and those wishing to become members of a bar in the colonies went through “some form

⁶ Friedman at 94

⁷ Id. at 97.

⁸ Id.

⁹ Id. at 98.

¹⁰ Mellinkoff at 195.

¹¹ Friedman at 97.

¹² See infra text at footnotes 27-28.

of clerkship or apprenticeship.”¹³

Early Republic to mid-1800s

The apprenticeship model continued in the early days of the founding of the United States, supplemented by self-study. Lawyers-to-be could read various legal texts on their own, the most popular one being Blackstone’s Commentaries. Blackstone, born in England in 1723, was educated at Oxford and got his legal training at the Middle Temple of the Inns of Court.¹⁴ “His lectures at Oxford (1753-63) reduced the contradictions and absurdities of the statutes to some order and logic, and expounded the result with clarity and charm.”¹⁵ His Commentaries were based on these “innovative lectures.”¹⁶

[H]is lectures caught on and became immensely popular. Americans crossed the ocean and flocked in great numbers to hear them. Eventually, his message was transmitted back to America, where the Commentaries were received with...enthusiasm....[They] were read and digested by hundreds of students preparing for the bar.¹⁷

An American edition, printed in 1771 and 1772, was “ubiquitous on the American scene.”¹⁸

The legendary example of self-study as a means to enter the legal profession was that of Abraham Lincoln. Writers for Harvard Law School’s centennial history, in making a point about early law schools in the United States, referred to the “example of Abraham Lincoln, who without

¹³ Friedman at 97. See also Marian C. McKenna, Tapping Reeve and the Litchfield Law School 6 (1986).

¹⁴ Will and Ariel Durant, Rousseau and Revolution 737 (1967).

¹⁵ Id.

¹⁶ McKenna, supra note 13, at 7.

¹⁷ Id. at 15-16.

¹⁸ Friedman at 102.

any schooling whatever had made himself a successful lawyer...”¹⁹ Another writer commenting about the unessential nature of law schools to enter the profession also used Lincoln as an example: “Perhaps Abe Lincoln had *not* been to law school; his casual passing of the bar examination...had become part of the profession’s lore.”²⁰ Lincoln himself had written, “[T]he cheapest, quickest and best way” [to become a lawyer was to] read Blackstone’s Commentaries,..., get a license, and go to the practice and still keep reading.”²¹

A person could also spend some time in self-study and some time working as an apprentice in a lawyer’s office. Professor Friedman noted “[a]pprenticeship was useful to everybody: to the clerks, who picked up some knowledge of law...and to the lawyers who (in the days before telephones, typewriters,...) needed copyists and legmen badly.”²² The apprentice gained practical experience and frequently received excellent instruction in law by the lawyer he was apprenticed to. Indeed, some lawyers were so skilled as lecturers to their apprentices that they gave tutorials and established their own private schools.²³

The earliest and most well-known of such private law schools was the Litchfield School in Connecticut, which was started around 1784 by lawyer Tapping Reeve and which continued to be operational for almost 50 years; over a thousand students were taught at the Litchfield School by the time it closed in 1833.²⁴

¹⁹ The Harvard Law School 1817-1917 (Harvard Law School Association 1917) at 48-49.

²⁰ Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983) at 25 (emphasis in the original)[hereinafter Stevens].

²¹ Friedman at 606, referring to a letter Lincoln wrote in 1858, cited in Jack Nortrup, “The Education of a Western Lawyer,” 12 *Am. J. Legal Hist.* 294 (1968).

²² Friedman at 318.

²³ Id. at 318-319.

²⁴ Friedman at 319; see also Marian C. McKenna, Tapping Reeve and the Litchfield Law School (1986)(an absorbing look at the life and times of the talented Judge Tapping Reeve and the many lawyers, including those of national renown, who received training at his school).

The Litchfield School taught law by the lecture method. Its lectures were never published; to publish would have meant to perish, since students would have lost most of their incentive for paying tuition and going to class.²⁵

There were several other private law schools; in 1850, there were 15 in existence.²⁶ These schools did not give degrees; they did provide lectures on various law subjects, and some later became absorbed by or affiliated with a university.

Some colleges of the late 18th and early 19th centuries established professorships through which they offered lectures on the law;²⁷ however, these were not for the purpose of legal training, but rather for the student's general liberal arts education.²⁸ "In America legal training in the colleges was proposed initially to provide liberally educated men with a necessary knowledge of the law for their roles as citizens, not as a means of professional preparation."²⁹ Nevertheless, if the person had graduated from college, the length of the apprenticeship was reduced.³⁰

1850 to 1900: The Beginning of Law Schools as the Training Ground for American Lawyers

The general model of legal education in the late 18th and 19th centuries, then, was primarily through an apprenticeship in an attorney's office, as well as through self-study. There were also optional private law schools that were an outgrowth of the tutorials given to apprentices in the attorney's office; education at such schools, although not required by any states to enter the bar, was felt to be more efficient than training through only an apprenticeship. The examination to

²⁵ Friedman at 319-320.

²⁶ Id. at 607.

²⁷ The first chair of law in America was at William and Mary College and was held by George Wythe, at the behest of Thomas Jefferson. Id. at 320.

²⁸ See Friedman at 320-321; McKenna, supra note 24, at 59.

²⁹ Stevens at 3.

³⁰ "From an early stage,...bar organizations gave preferential treatment to college graduates." Stevens at 4. "As early as 1756, some New York counties had required only three years of work under a counselor for college graduates as opposed to seven for nongraduates." Id. at 11, note 12. See also Friedman at 316.

qualify a lawyer for the bar varied from jurisdiction to jurisdiction. The difficulty and formality depended on location and local custom, but generally the exam was not stringent.³¹ The average age of admission to the bar was around 25 or 26 years of age during the middle of the 1800s.³²

In contrast to the earlier model of law lectures for the general edification of students, the law school as a formal means of legal training gained proponents in the second half of the 19th century, and slowly began to replace the apprenticeship model as the dominant means of legal training.³³ Such formal legal instruction included law programs or schools associated with a university as well as independent, proprietary law schools. We can see the growth in the number of law schools, as follows.³⁴

| Year | Total Number |
|-------|--------------|
| 1850: | 15 |
| 1860: | 21 |

³¹ Friedman at 315-317. In the 1850s, New York, for example, had “only an erratic oral examination for applicants to the bar.” Stevens at 26. By 1860, “Professional standards...[were] largely nonexistent. The bar examination, although required in all states but [two], was everywhere oral and normally casual.” Stevens at 25. An anecdote involving Lincoln exemplifies this casualness: “An Illinois attorney examined by Abraham Lincoln as Lincoln lounged in a tub described his oral examination this way:

He asked me in a desultory way the definition of a contract, and two or three fundamental questions, all of which I answered readily, and I thought, correctly. Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections...of his early practice and the various incidents and adventures that attended his start in the profession. The whole proceeding was so unusual...that I was at a loss to determine whether I was really being examined at all.”

Beverly Moran, The Wisconsin Diploma Privilege: Try It, You’ll Like It, 2000 Wis. L.Rev. 645, 645-46 (2000), citing Joel Seligman, Why the Bar Exam Should Be Abolished, Juris Dr., Aug./ Sept. 1978, at 48.

³² William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures 52 (1978).

³³ “The middle-class urge to get ahead through structured education was receiving powerful support from the increasing dissatisfaction arising from training professionals through apprenticeships in offices.” Stevens at 22.

³⁴ Alfred Z. Reed, Training for the Public Profession of the Law 445 (1921)[“Training”] and Alfred Z. Reed, Present-Day Law Schools 98 (1928)(Arno Press 1976); see also Friedman at 607. For data on ABA-accredited law schools from 1947 to the present, see <<http://www.abanet.org/legaled/statistics/femstats.html>>. Currently, there are 188 ABA-approved law schools in the U.S. Id.

| | |
|-------|------------------|
| 1870: | 31 ³⁵ |
| 1880: | 51 |
| 1890: | 61 |
| 1900: | 102 |
| 1910: | 124 |
| 1920: | 146 |

In the 1850s, at the beginning of this so-called “revival” movement, the law school’s program was generally a one-year course of study, with lectures on various legal topics; later a two-year program was introduced.³⁶ The lectures were presented by part-time law professors, most of whom were practicing lawyers. Their lectures instructed the law students on the various principles of law; students listened and took notes. Textbooks also were used for instruction, with the students’ being responsible for studying and committing to memory an assignment in the text, which then would be lectured on by the teacher in the next class.³⁷ There was little or no discussion.

Professor Friedman comments that the lecture method or the textbook method in itself was not necessarily bad; as with almost any classroom or educational setting, much depended on the person who was teaching.³⁸ There were certainly many inspiring teachers; one who is singled out is Theodore Dwight.

A leader in this revival period of law schools, Dwight was convinced that the training of

³⁵ The University of Wisconsin Law School was established in 1868, although a proposal to have the Law School was first initiated in 1857; however, it did not find sufficient support at the time. Johnson, supra note 32, at 13. It provided a one-year program, the standard of the time, and its first graduating class was in 1869.

³⁶ Friedman at 609.

³⁷ Id. at 610.

³⁸ Id.

lawyers in practitioners' offices was not sufficient, but should be part of an academic program.³⁹ He was a professor of law and other topics at Hamilton College, a college in upstate New York founded in 1793 (as Hamilton-Oneida Academy) that provided a classical education in the liberal arts and sciences.⁴⁰ In 1858, he came to Columbia University to run its newly-established School of Jurisprudence.⁴¹ The law teaching at Columbia previous to this date had been either non-existent or erratic at best.⁴² Dwight developed a formal program of law, using lectures, examinations, recitations, quizzes, and moot trials, and stayed at Columbia until 1891. "By all accounts, [he] was a brilliant teacher; observers...thought his school the very best imaginable."⁴³ Columbia maintained this prominence as "the most important of the law schools...through the 1870s."⁴⁴

In addition to his monumental work in developing Columbia's law program, Dwight was one of the founders of and an influential leader in the bar organization of the city of New York.⁴⁵ He was active during a period that saw significant changes in legal training, when members of the legal profession endorsed the idea of legal training, at least in part, at a law school, an indication of their growing discontent with casual professional standards and unpredictable apprenticeship training by.⁴⁶

Among Dwight's contributions to legal education was his idea of the "diploma privilege"

³⁹ Id. at 24.

⁴⁰ From the Hamilton College webpage "General Information," http://www.hamilton.edu/hamilton_at_a_glance/general_information.html (visited June 21, 2005).

⁴¹ Stevens at 23.

⁴² Id.

⁴³ Friedman at 610-11.

⁴⁴ Stevens at 23.

⁴⁵ Id.

⁴⁶ Id. at 24-25.

for entrance to the bar. When Dwight taught law at Hamilton College in the 1850s, no formal legal education was required to enter the profession. In order to attract students, Dwight arranged for graduates to be admitted to the bar automatically after an examination given by three lawyers who were also teaching at the college. This was the beginning of what is known as the “diploma privilege.”⁴⁷ The diploma privilege was adopted by other law schools as well, although not all.⁴⁸ “The bar leadership was not pleased with the diploma privilege, which it felt took control of entry into the profession away from practitioners and gave it to legal educators.”⁴⁹ Its use slowly waned. In 1928, thirteen states still had the diploma privilege;⁵⁰ by 1989, Wisconsin alone retained it.⁵¹

In the late 18th and 19th centuries, the emergence of science and scientific studies was becoming more strongly felt in academic and intellectual thinking, and law was included as one of the areas that could lend itself to the “scientific method.”⁵² The idea of law as a science is an important backdrop for understanding the approach to legal instruction that was introduced at Harvard Law School by Christopher Columbus Langdell, a practicing lawyer who was appointed

⁴⁷ Id. at 26.

⁴⁸ Id.

⁴⁹ Id. The ABA, founded in 1878, came out against the diploma privilege in 1892, id. at 34, note 57, and the AALS in 1901. Id. See also Reed, Present-Day Law Schools, supra note 34, at 54: “In 1892...[the ABA] declared itself against the continuance of this privilege, and again in 1908, in 1918, and in 1921.”[citations omitted]

⁵⁰ Stevens at 34, note 57, citing Reed, Present-Day Law Schools [supra note 34], at 53-54.

⁵¹ Derrick Nunnally, “State’s law students get free pass on bar exam,” Milwaukee Journal Sentinel, Aug. 6, 2004, available at <http://www.lawschool.com/freepass.htm>. See also Beverly Moran, supra note 31, at 648. Professor Moran’s informative article reviews the history of bar examinations and the diploma privilege, compares the two, and suggests that “some states [but not all] might do well to consider re-establishing the diploma privilege.” Id. at 655. The statutory reference for the Wisconsin diploma privilege is found at Wis. Stat. 757.28(1)(a),(b) and also Wisconsin Supreme Court Rules (SCR) 40.03.

⁵² For example, the Litchfield School, which was established around 1784, claimed that it taught the law “as a science, and not merely nor principally as a mechanical business, nor as a collection of loose independent fragments.” Stevens at 7. See also Stevens 21-22 for other examples of law schools during the revival period of the 1850s claiming to teach law as “a science.”

a professor of law at Harvard in 1870 by Harvard's President Eliot. Eliot had been a student at Harvard when he first encountered the older Langdell, while visiting a friend's room:

I there heard a young man...talk about law. He was generally eating his supper at the time....I was a mere boy, only eighteen years old; but it was given to me to understand that I was listening to a man of genius. In the year 1870 I recalled the remarkable character of that young man's expositions, sought him in New York [where he was practicing law], and induced him to become...Professor Langdell.⁵³

Shortly thereafter, Langdell was made dean of the Law School.

Langdell, trained at Harvard Law School under the lecture-textbook method, was a proponent of the "law as science" way of thinking. When he was appointed to his position at Harvard, he began to make changes. He is most well-known for instituting a way of learning based on the premise that law was a science and, as such, its principles could be discovered by looking at the data. Langdell believed through a study of the law's data--that is, cases--the student, guided carefully by the teacher, could draw out the principles of law through inductive, scientific reasoning. In order to carry out this method of instruction, Langdell dispensed with the law books that were used at that time and with lectures, and prepared books composed mostly of English appellate level cases for students to use.⁵⁴ By the use of these "casebooks" composed of specially selected appellate-level cases,⁵⁵ and with judicious and frequent questioning by the teacher ("the Socratic method"), Langdell believed that students could be led to inductively derive the principles of law, rather than having these presented to them through lectures.

There was "nothing startlingly original" in using cases; across the Atlantic, a young Englishman had lectured on the importance of using cases 40 years earlier than Langdell.⁵⁶

⁵³ The Harvard Law School 1817-1917, supra note 19, at 25-26.

⁵⁴ "[W]ith the opening of the first year of his service as professor, in the fall of 1870, ...[t]he day came for its first trial. The class gathered in...the one lecture room of the [Harvard Law] School – and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes!" Id. at 34.

⁵⁵ And only cases; there was no supplemental material as is found in the modern-day case book.

⁵⁶ Reed, Training for the Public Profession of the Law, supra note 34, at 371-372.

Pomeroy of New York University Law School used a case method in the 1860s. “But Pomeroy did not ‘shape the whole program of a leading school’ with this technique.”⁵⁷

At Langdell’s Harvard, the classroom tone was profoundly altered. There was no lecturer up front, expounding “the law” from received texts. Now the teacher was a Socratic guide, leading the student to understand the concepts and principles hidden as essences inside the case.⁵⁸

Langdell’s “originality and peculiar merit” also lay in “having the ingenuity to devise and the courage to put through a method of presenting law in its sources” that was able to deal with the enormous growth in the number of cases in the late 19th century, a phenomenon that has not abated in current times.⁵⁹

Langdell’s abrupt changes in the form of legal instruction caused an outcry; the form and way of thinking of the law was being turned topsy-turvy.⁶⁰ Langdell’s students, used to the lecture method, skipped his classes “in droves.”⁶¹ “[O]nly a few remained. But these few were the seed of the new School.”⁶² Of those that remained in Langdell’s class, one was James Barr Ames, who was hired as a professor at the law school after his graduation and later was appointed its dean.

Although most well-known for introducing the case method, Langdell also instituted other changes at Harvard:

he established an entrance requirement of a bachelor’s degree, or an entrance examination

⁵⁷ Friedman at 613, note 20, quoting J. Willard Hurst, The Growth of American Law 261 (1950).

⁵⁸ Friedman at 613.

⁵⁹ Reed, Training for the Public Profession of the Law, supra note 34, at 373.

⁶⁰ “The Langdell plan burst like a bombshell in the world of legal education.” Friedman at 615.

⁶¹ “To most of the students, as well as to Langdell’s colleagues, [the new method of instruction] was an abomination.” Harvard Law School, supra note 19, at 35. See also Friedman at 615.

⁶² Harvard Law School, supra note 61.

if the person had no bachelor's degree;⁶³

he extended the length of study first to two years and then to three;

he gave the curriculum a certain order that it had not previously had, with basic ("core") courses followed by advanced courses;

he instituted full-time teachers of law (most previously had been part-time only);⁶⁴ and

he imposed final examinations such that the student had to pass the exams for the first-year courses before proceeding to the second-year courses.⁶⁵

Although Langdell had been in private practice, he believed that no experience in practice was necessary to teach the law; rather, one needed professors who had been trained academically in the law--legal scholars. To "teach science, scientists were needed, not practitioners of law."⁶⁶

Langdell continued:

I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having travelled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, nor experience in dealing with men, nor experience in the trial or argument of cases--not, in short, in using law, but experience in learning law.⁶⁷

In turn, he hired full-time professors of law at Harvard who had had no actual experience in practicing law.⁶⁸ Ames, his former student, was one of the first hired under this practice.

It looked as though Langdell's radical ideas would not take hold, but Langdell continued to be supported by Harvard's President Eliot, who had first appointed him, and gradually

⁶³ Stevens at 36.

⁶⁴ Friedman at 609.

⁶⁵ Id. at 612.

⁶⁶ Id. at 615.

⁶⁷ Calvin Woodard, "The Limits of Legal Realism: An Historical Perspective," in Herbert L. Packer and Thomas Ehrlich, New Directions in Legal Education (1972), at 360 (quoting Langdell from J. Ames, "Christopher Columbus Langdell," in Lectures on Legal History at 478 (1913)).

⁶⁸ "This hiring practice was a radical break with the past; it evoked strong opposition." Friedman at 615.

Langdell's innovations prevailed.⁶⁹ Little by little, "Langdell's case method"⁷⁰ approach using case books and the Socratic method of teaching spread to many of the other university law schools.⁷¹ By the beginning of the 20th century, it was firmly established in almost all of the university-based law schools throughout the United States.⁷²

Competition to university-based law schools was given in the late 19th and first half of the 20th centuries by independent, proprietary law schools, including night schools and correspondence schools of law.⁷³ Such schools allowed significant numbers of working class and immigrant lawyers to enter the bar. The existence of such schools perturbed the more established members of the bar; however, the schools continued in strength throughout the early part of the 20th century.⁷⁴ The American Bar Association (ABA), founded in 1878, and the organization representing university-based law schools, the American Association of Law Schools (AALS), founded in 1900, together eventually helped bring about the preponderance of university-based

⁶⁹ "[President Eliot] stood behind him [Langdell] in the trying years of change...Eliot helped and encouraged Langdell in the work of change." The Harvard Law School 1817-1917, supra note 19, at 29.

⁷⁰ Langdell was not the first to use the case method, see supra text at notes 56 and 57, and Ames was much more active in promoting its use. See Woodard, supra note 67, at 343, note 25. Nevertheless, Langdell's name is associated with the establishment of the case method in American legal education. See Friedman at 612; Reed, Training, supra note 34, at 369: "His chief claim to fame will always rest...upon his radical innovation of conducting classroom instruction by the so-called case method, instead of by the method of lecture or text, previously universal." Id.

⁷¹ "[W]hile some [law schools] stood firm, repudiating the [case method], others began to take it up,...by calling in Harvard trained men as teachers..." Reed, Training, supra note 34, at 380. The case method was introduced at the University of Wisconsin Law School in the 1890s; after initial negative reaction from some of the faculty, it became established by 1905. Id.

⁷² "Slowly what had once been regarded as a Harvard heresy established itself as the ideal..." Id.

⁷³ Friedman at 619.

⁷⁴ "In the first two decades of [the 20th] century, [the American Association of Law Schools] was representing a steadily smaller proportion of the total law school population, ...mainly through the growth of nonmember proprietary and part-time schools. Leaders of the AALS noted this with concern..., but the growth of the competitor schools continued nonetheless." Stevens at 97-98.

law schools as the dominant institution for legal education.⁷⁵ By the middle of the 20th century, “the [ABA] approved law schools were fast becoming the principal gateway for entry into the profession.”⁷⁶

The Contemporary American Law School: Ongoing Change

Langdell’s case method, established in the late 19th century, became one of the distinctive and dominating features of the early 20th century American law school, and continues to be a component of the American law school in the 21st century. His case method was criticized from its inception.⁷⁷ “Schools that envied Harvard’s success hoped that the teaching system would be its Achilles’ heel and felt free to snip. Dwight [of Columbia] provided a particularly virulent example of this license, and he had been supported by various groups within the bar.”⁷⁸ The lead article of the Harvard Law Review of 1906 with remembrances of Langdell after his death noted, “[F]rom that time [1870] until now [1906] there has been a Langdell system of study, and to describe or attack or defend that system has been one of the most frequent undertakings of law students and of law teachers.”⁷⁹

⁷⁵ “The motives behind the urge of the AALS, eventually joined by the ABA, to reform legal education in the United States are complex” (Stevens at 99) and intriguing, involving a mixture of market considerations, a desire for exclusivity of the profession, as well as wanting to raise the standards of legal education itself. See Reed, Present Day Law Schools, chs. 5 and 6.

⁷⁶ Legal Education and Professional Development—An Educational Continuum [“The MacCrate Report”] 111 (American Bar Association 1992).

⁷⁷ A basic criticism affecting the law school curriculum comes from Langdell’s emphasis on the common law tradition. Friedman comments that the case method “promised to solve the problem of teaching law in a federal union. [Langdell] handled local diversity by ignoring it entirely. There was only one common law; Langdell was its prophet.” Friedman at 618. Yet American law has become highly statutory and administrative; Langdell’s case method approach does not consider this aspect of American law.

⁷⁸ Stevens at 117. Dwight did not agree with the case method of teaching. When it was introduced at Columbia in 1890 and began to replace the method of instruction that he had developed and implemented at Columbia, Dwight resigned. Id. at 60.

⁷⁹ Eugene Wambaugh, “Professor Langdell—A View of his Career,” 20 Harvard Law Review 1 (1906).

But clearly the case method had its proponents.

Justice Holmes, at one time a skeptic, after experimenting with Langdell's method, reported that "after a week or two, when the first confusing novelty was over, I found that my class examined the question proposed with an accuracy of view which they never could have learned from textbooks and which often exceeded that to be found in the textbooks."⁸⁰

There does not seem to be a challenge to the idea of a university-based law school itself.

This is another legacy of Langdell:

And if a few university faculty members...once objected to professional schools being part of a university...virtually no one today challenges the propriety of the law school's place in the university. This achievement is Langdell's greatest contribution to both legal education and legal history....Langdell did not make legal education a part of university learning by "humanizing" it; he made it an inductive science at a time when the idea of a university, and indirectly knowledge itself, was being similarly secularized in terms of the scientific method.⁸¹

Langdell's case method as the basic teaching format of American legal education, however, has been questioned numerous times.⁸² In the late 19th century, debate about the case method approach was one factor that prompted the legal profession to evaluate its methods of training. There were other concerns also, including standards for bar examinations and stricter requirements for entrance into law school. (As late as the 1930s, one could enter law school

⁸⁰ Stevens at 62-63, quoting Oliver Wendell Holmes, Jr., "The Use and Meaning of Law Schools, and Their Method of Instruction," 20 Am. Law Rev. 923 (1886).

⁸¹ Woodard, supra note 67, at 359.

⁸² A study by historian Bruce A. Kimball re-evaluated Langdell's teaching philosophy and methods by examining the annotated teaching materials of Langdell and Ames. (Ames was one of Langdell's students who remained during the first case-method classes, see supra text at note 62; he was then hired as a full-time law professor at Harvard and went on to prominence in his own right.) Kimball also was able to view students' written comments of the period, many of which had been stored but never examined. Kimball's research has shed new light on Langdell's position in the history of American legal education. See "Forum: That Impecunious Introvert from New Hampshire: Re-Imagining Langdell," 17 Law & Hist. Rev. 55-159 (1999), in particular Bruce A. Kimball, "Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1883, id., at 57-140.

without having a college degree.⁸³) Discussion about the makeup and quality of law schools started slowly in the 1890s with the establishment of the ABA's Committee (1888) and then Section (1893) on Legal Education and Admission to the Bar.⁸⁴ In 1913, the ABA's Committee on Legal Education, impressed by an evaluation of the status of U.S. medical schools made by the Carnegie Foundation,⁸⁵ requested that the Carnegie Foundation make a similar evaluation of U.S. law schools.⁸⁶

The Carnegie Foundation responded positively, authorizing three studies. The first was carried out by a professor of the faculty of law and political science at the University of Vienna, Josef Redlich, who visited ten American university-based law schools over a period of two months in 1913.⁸⁷ Alfred Reed, a non-attorney on the staff of the Carnegie Foundation, followed with two more comprehensive reports, one of which reviewed 133 law schools over an eight year period.⁸⁸ Redlich's and Reed's early reports were the beginning of the American law community's almost continuous discussion about the goals of the American law school and its attempts to evaluate its curricular content. A comment from a mid-century symposium on legal education states the basic quest:

⁸³ A newspaper article reported the awarding of the undergraduate bachelor's degree to Pauline LaFon Gore, the mother of then U.S. Vice-President, Al Gore. His mother, age 86, had earned her law degree years earlier in 1936 from Vanderbilt Law School, at a time when "students were allowed to attend law school without receiving a bachelor's degree." N.Y. Times, April 11, 2000 A25:1.

⁸⁴ A short description of the establishment of the ABA's first section and its early meeting can be found in Reed, Present-Day Law Schools, supra note 34, at 22-24.

⁸⁵ The Flexner Report, noted in Stevens at 102.

⁸⁶ Reed, supra note 34, at xvii.

⁸⁷ Josef Redlich, The Common Law and the Case Method in American University Law Schools 1914 (subtitled "A Report to the Carnegie Foundation for the Advancement of Teaching, Bulletin number 8").

⁸⁸ Alfred Z. Reed, Training for the Public Profession of the Law 445 (1921)(subtitled "Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada; Carnegie Foundation Bulletin number 15") and Alfred Z. Reed, Present-Day Law Schools in the United States and Canada (1928)(Carnegie Foundation Bulletin Number 21)(Arno Press 1976).

[A]ll the insights and knowledge produced by modern innovations and experiments have served only to raise, rather than to resolve, the most fundamental issues of legal education: What should we teach? How? To what end?⁸⁹

The answer to these questions is made more complicated by the dual function of the law school: on the one hand, it is the place for the first stage of lawyer training (followed after admission to the bar by continuing legal education⁹⁰) and can be viewed as essentially a trade school.⁹¹ On the other hand, it continues its academic and scholarly association with the modern university as an institution for legal research and study. This disparity has been described as follows:

In the history of legal education, two paired sets of principles were constantly in battle. A principle of vocational training struggled against a principle of scientific training. At the same time, a principle of integration with general liberal education struggled against a principle of segregation.⁹²

It is no wonder, then, that there is almost continual ongoing debate and discussion in the United States, through established legal organizations such as the American Bar Association, the American Association of Law Schools, and local bar associations, concerning changes in the system of legal education, such as modifying course design and content and changing the time frame of the current three-year program.

An earlier title of this paper referred to the myth and reality of the American law school.⁹³

The myth of the American law school? Many of the components of the present American law

⁸⁹ Woodard, supra note 67, at 331. The involvement of the Carnegie Foundation has continued: Woodard's article, originally published in 1968, was reprinted as an appendix to Packer and Ehrlich's book, supra note 67, which was a 1972 Report prepared for the Carnegie Commission on Higher Education.

⁹⁰ See McCrate Report, supra note 76, ch. 9, pp. 305-317, "Professional Development after Law School," for an overview of continuing legal education (CLE) issues.

⁹¹ Stevens at xv.

⁹² Friedman at 618.

⁹³ "The American Law School: Myth and Reality," 687 NBL 6-14 (April 15, 2000).

school clearly derive from the changes that Langdell instituted more than 100 years ago. Although Landgell's influence is still felt, we can say it is a myth that all courses are taught using the case method. This is certainly no longer true. The case method and Socratic approach to teaching are used, especially in first year courses, because it is felt that by being instructed through the use of the case method, students develop and sharpen analytic problem solving skills. However, the modern-day American law school has a wealth of other instructional formats, including lectures, seminars, group work, clinical experiences, and individual research.

Recently, interest has been expressed by other countries in learning about the "American law school model." That there is a model is also most likely a myth. It is true that significant similarities exist among American law schools, especially those that meet the accreditation standards set by the American Bar Association.⁹⁴ This results in an apparent uniformity in the basic subjects offered. Nevertheless, each law school has its own distinguishing characteristics, including varying course offerings and teaching styles. Even identically-titled courses taught at the same law school may have different content and different approaches to the subject matter, depending on the teacher and text used in the class.⁹⁵ Adding to these differences, law schools tend to be engaged in on-going adjustments in their programs, and law professors in innovations in their class teaching. This means that, although we may be able to describe a general American law school model, there is always a flux in the legal instruction occurring at American law schools. All of these variations qualify the so-called "American law school model;" instead, it would be more realistic to talk about various law school models.

For the near term, the reality of the American law school is that the three-year university

⁹⁴ See <http://www.abanet.org/legaled/accreditation/acinfo.html>.

⁹⁵ For example, a course in contract law taught using the text Contracts: Law in Action (authored by Stewart Macaulay, John Kidwell, and William Whitford (2d ed. 2003)), which looks at contract law in broad context, will be substantially different from a course with the same title taught using a more traditional casebook (such as E. Allan Farnsworth, William F. Young, and Carol Sanger, Contracts (6th ed. 2001)).

law school requiring an undergraduate degree for admission is a fixture in the legal training of lawyers. The law school continues to have “core” courses in the first year, with later ones building on the foundation of general legal knowledge provided by the first year courses. The courses are taught mostly by full-time teachers of law, with practicing attorneys acting as adjunct lecturers. Almost all of the courses have final examinations or final papers, or both. Among the apparent stasis of these basic components is the ongoing flux of modifications, refinements, and innovations.

Where do American law schools now stand with regard to the progression of change in American legal education? Since the end of the 20th century, the trend in American legal education has been to focus on what lawyers really do. In this light, the American Bar Association created a task force in 1989 to produce a report⁹⁶ to “determine what skills, what attitudes, ...what qualities of mind are required of lawyers today.”⁹⁷ Robert MacCrate, the head of the task force, commented about his committee’s work: “[W]e approached our task from a quite different direction than prior studies of legal education in the United States. We started by looking not at law schools, but at American lawyers, all lawyers, the total profession....”⁹⁸

This idea--to look at what lawyers do in order to see what American law schools should teach--was echoed in comments that then U.S. Attorney General Janet Reno made in addressing the annual meeting of the American Association of Law Schools in early 1999. The thrust of her message was that lawyers in practice are problem solvers and that law schools should teach law students with this model in mind. She did not advocate dispensing with the case method

⁹⁶ The McCrate Report, supra note 76, at 111.

⁹⁷ Robert MacCrate, “Legal Education and Conduct: Selected Observations,” in Legal Education for the 21st Century 131, 132 (Donald B. King, ed. 1999).

⁹⁸ Id.

approach, and she acknowledged its value in developing analytic skills.⁹⁹ However, she stressed that legal education should focus on ways to give students practice in the real kind of problem-solving that lawyers are asked to do. She asked those present and their colleagues to “figure out” what could be done

to create a problem-solving capacity in all of America’s lawyers.....[S]ome law schools are making great advances in incorporating problem-solving into the core of education....I come today to urge you to do everything you can to expand this mission to all law schools....¹⁰⁰

In addition, Attorney General Reno emphasized the need for lawyers to work cooperatively with other disciplines in approaching problems.¹⁰¹

American law schools have thus been “rethinking and reconfiguring”¹⁰² the content of legal education in light of what lawyers really do. Although the U.S. may have a reputation for being a litigious nation, litigation is only part of lawyering; more important is the advice and “anticipatory guidance” that lawyers offer to clients in trying to help them solve the problem at hand.¹⁰³ The

⁹⁹ “Let me hasten to add that I am a product of the case method....I don’t take a thing away from it.” Janet Reno, “Lawyers as Problem-Solvers: Keynote Address to the AALS,” 49 J. Legal Ed. 5 (1999).

¹⁰⁰ Id. at 5-6.

¹⁰¹ Id.; see also the American Bar Association website on “multidisciplinary practice” issues at <http://www.abanet.org/cpr/multicom.html>.

¹⁰² Personal interview with Ralph Cagle, Clinical Professor of Law, University of Wisconsin Law School, Oct. 1999.

¹⁰³ This idea of the lawyer as advisor (problem solver) as contrasted with the lawyer as advocate (litigator) is not new. In the 1800s, lawyers developed a name for themselves by their oratorical skills in the courtroom; people became familiar with the lawyers who rode the circuit, coming to town on “court days.” Johnson, supra note 32, at 28; see also Friedman at 312-314 (talking about the “ready audience” for a “good trial,” a “good courtroom speech,” with exemplary excerpts from a courtroom argument by the famed orator and attorney Daniel Webster). In the later part of the 19th century, when the practice of law changed in response to the changes in law and the growth of the cities, a significant number of lawyers found themselves settled in larger cities, where their work was largely to act as an advisor to their clients. Johnson, supra note 32, at xiii; Friedman at 637-638, 643.

Sometimes the word “counselor” is used to designate a lawyer in the United States, with the idea of the lawyer’s role as an advisor (i.e., one who counsels). The original use of “counselor” in England was to designate one of the grades in the legal profession—attorneys, counselors, barristers, and sergeants. Such distinguishing labels, other than barristers and solicitors, appear to be largely unknown in the U.S. The term “counselor” in the U.S. took on a more general meaning as a substitute for “attorney.” Friedman at 315.

focus will increasingly be on incorporating problem-solving into law courses as well as going outside the law to other disciplines to help solve problems.¹⁰⁴ There will be continued and increased emphasis in law school training on alternative dispute resolution mechanisms, negotiations, and clinical legal education.¹⁰⁵

Professor Friedman commented about the lawyer who practiced at the end of the 19th century, saying: “The lawyer’s role in American life had never been too clearly defined. The practice of law was what lawyers did. This was a truth as well as a tautology.”¹⁰⁶ The lack of clear definition may still be with us a century later; this lack of clarity combined with the subtle and ongoing changes in what lawyers do in practice are factors that add complexity to the problem of trying to find “the model” for the American law school. Because of the changing nature of the lawyer’s work, the ongoing proposals for and implementation of refinements in America’s law schools are precisely the appropriate responses to the changing roles that lawyers play and will continue to play in the 21st century. This progression of change seems unlikely to abate, although what the specific changes will be is hard to predict. However, it is almost certain that the American legal community will continue to discuss and propose modifications while acknowledging the worth of maintaining those facets of the current law school system that remain effective and useful. In this way, the American law school, as a flexible, responsive institution, will continue its position in American society as the dominant training center for lawyers of the 21st century.¹⁰⁷

¹⁰⁴ “The second component of the problem-solving approach requires that we reach out to other disciplines for knowledge, advice, and instruction....” Reno, supra note 99, at 7.

¹⁰⁵ Paraphrasing Ralph Cagle, supra, note 102.

¹⁰⁶ Friedman at 635.

¹⁰⁷ See Legal Education for the 21st Century, supra note 97, for a variety of essays on the topic. The ABA and the AALS continue to play active roles in the life of American law schools. As for the state of legal scholarship, as long as the university community and its system of scholarship continues, law schools will be actively involved in legal research and study. This will be true, regardless of particular changes in the law schools’ course curriculum that may occur throughout the 21st century.

