

LEGAL TRAINING IN THE UNITED STATES: A BRIEF HISTORY

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It is essential to have a historical context, even a brief one, to appreciate the current developments and concerns in the training of lawyers in the United States. This is especially the case at a gathering of those from different countries, where we cannot necessarily assume that all are familiar with each other's system of legal education. This overview of the legal training in the United States attempts to provide such a historical background.

What is the role of the lawyer in society, and by what means should the lawyer be trained to achieve this role? The changing answers to these questions underlie the varying models of legal training that America has used since its colonial period. Because most of the antecedents of early American legal training came from English legal culture, this overview begins, in Part I, by looking at the early English settlements on the eastern seaboard of what is now the United States. It continues into the period of the new republic of the United States of America and through about three-quarters of the nineteenth century. Part II starts with 1870, when the "case method" of instruction was introduced by Harvard Law School and when the modern American model of institutional legal education started to take shape. In looking at the modern law school, we will not view the establishment of

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institutional law schools as inevitable¹ but rather as part of the growth of the universities in the United States in the nineteenth century.

The U.S. system of legal education is well known for the “case method.” Indeed, for many, the case method conjures up *the* American model of legal education, even though the current American law school is multi-varied in its approaches to learning. Although the case method was introduced more than 130 years ago, remarkably it continues to be used in American law schools. Among legal historians and commentators, the case method is still a point of debate, research, and writing. Part III takes a closer look at the case method and how legal historians and scholars have interpreted it and reacted to it. Part IV concludes that the current system of legal training in the United States struggles to adapt the dominant model of curriculum and instruction derived from the elite law schools of the late nineteenth and early twentieth centuries with other models, all in an effort to train competent practitioners able to adapt to the changing role of lawyers of the twenty-first century.

I. FROM COLONIAL TIMES TO 1870

A. COLONIAL PERIOD: BEFORE 1776

The early English settlers who came to North America in the late seventeenth century brought with them a dislike of English law, a “legal system mired in precedent, antiquity, and corruption.”² For the colonies founded on religious principles, the “legal profession, with its special privileges and principles, its private, esoteric language, seemed out of place in a government that aimed to be both efficient and godly.”³ Legal historian and law

¹ In the late 20th century, it was stated that “most historians have viewed the emergence of . . . university-sponsored law schools as a logical, almost preordained event.” WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* xi (1978). Johnson noted that institutional law schools were an offshoot of “the growth of the American university” in the 19th century and resulted in large part from changes in the “intellectual outlooks of academics” that prompted associations with professional schools. *Id.*

² DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 201 (1963).

³ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 54 (3d ed. 2005) [hereinafter FRIEDMAN 3D]. Professor Friedman’s book remains the outstanding

professor Lawrence Friedman notes that lawyers were not favored, and frequently not welcome, in the colonies.⁴ Most telling is a quote from early Pennsylvania documents: “They have no lawyers. Everyone is to tell his own case, or some friend for him. . . . ’Tis a happy country.”⁵

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.⁶ This unfriendly and hostile attitude towards the few professional 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.”⁷ The training of lawyers was not an issue in the early colonial period because lay attorneys were able to handle most matters of that time.⁸

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. . . .” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 13 (2d ed. 1985). Professor Hurst was on the faculty of the University of Wisconsin Law School from 1937 to 1981; Professor Friedman, from 1961 to 1968.

⁴ See FRIEDMAN 3D, *supra* note 3, at 53.

⁵ FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHRASES* 13 (1940) (quoted in FRIEDMAN 3D, *supra* note 3, at 53 n.179).

⁶ See, e.g., FRIEDMAN 3D, *supra* note 3, at 53 (“The ‘attorneys’ in the early Virginia records were not trained lawyers, but attorneys-in-fact, laymen helping out their friends in court.”); see also PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 38 (1992) (“Colonial high-court judges were laymen of affairs and authority in their communities who were acquainted with law but rarely trained in it.”).

⁷ DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 197 (1958) (quoted in FRIEDMAN 3D, *supra* note 3, at 53 n.180).

⁸ In the 17th century, disputes were frequently resolved through arbitration or mediation, with “knowledgeable and respected neighbors” assisting. HOFFER, *supra* note 6, at 48. Courts were used to settle disputes, but in this period of “predominantly local economies, . . . neighbors dealt with neighbors” and “courts arranged for settlements within the intimacy of communal understandings.” *Id.* at 49. In 18th century colonial life, the “rise of . . . relatively impersonal commercial

Inevitably, as the complexity of daily interactions and commerce increased, it became clear that lawyers became a necessary part of life. As Friedman notes,

[L]awyers were, in the end, a necessary evil. When all is said and done, no colony could even try to make do without lawyers. The makeshift alternatives worked in the early days; but when society became more complex—and more commercial—the lawyers became essential. . . .

As soon as a settled society posed problems for which lawyers had an answer or at least a skill, lawyers began . . . to thrive, despite any lingering hostility.⁹

Moreover, lawyers served as part of the colonial governing apparatus. England had sent lawyers to the colonies to take care of the tasks of governing the individual colonies,¹⁰ and some lawyers came on their own, despite the chilling attitude.¹¹ Many colonial men, especially those from the Southern colonies, went to London for legal training at the Inns of Court, the long-standing English system that gave lawyers-to-be technical training as well as association with established lawyers.¹² 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.”¹³ They did, however, provide camaraderie and a place to eat and live for those of the legal profession,

centers increased the number and complexity of transactions among strangers,” resulting in an increase in lawsuits and need for lawyers. *Id.* at 53.

⁹ FRIEDMAN 3D, *supra* note 3, at 54-55.

¹⁰ *Id.* at 56 (“From the seventeenth century on, the British exported some lawyers to help them govern their colonies.”).

¹¹ *Id.* at 53.

¹² A far greater number [of American lawyers of the 18th century] than is generally known received their legal education . . . in the Inns of Court. . . . Probably from twenty-five to fifty American-born lawyers had been educated in England prior to 1760; and it has been stated that 115 Americans were admitted to the Inns, from 1760 to the close of the Revolution. . . .

CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 188 (1911).

¹³ MELLINKOFF, *supra* note 2, at 195.

and they gave the colonial lawyers-to-be a sense of English legal culture while they read law and observed English practice.¹⁴

During the colonial period, an apprenticeship or clerkship was essential for being admitted to the bar.¹⁵ 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 receiving instruction from the lawyer.¹⁶ The quality of the clerkship varied; as Friedman has noted, "At worst, an apprentice toiled away at drudgery and copywork, with a few glances . . . at the law books . . . [but] others . . . found the clerkship a valuable experience."¹⁷

It was not unusual for colonial men to attend college.¹⁸ While they might hear occasional law lectures as part of the general curriculum, these "were not meant to train lawyers at all . . . they were lectures on law for the general education of students."¹⁹ Although there were no law schools within the colonies, "a competent, professional bar, dominated by brilliant and successful lawyers . . . existed in all major communities by 1750."²⁰ Each colony set its own standards for entering the bar.²¹

¹⁴ FRIEDMAN 3D, *supra* note 3, at 56 ("The Inns . . . were educational in another sense . . . Americans could . . . look around them and see English law in practice, as a living system.");

[T]he influence, on the American Bar, of these English-bred lawyers . . . was most potent. The training which they received in the Inns, confined almost exclusively to the Common Law, based as it was on historical precedent and customary law, the habits which they formed there of solving all legal questions by the standards of English liberties and of the rights of the English subject, proved of immense value to them when they became later (as so many did become) leaders of the American Revolution.

WARREN, *supra* note 12, at 188.

¹⁵ FRIEDMAN 3D, *supra* note 3, at 56; *see also* MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 6 (1986) (noting that the apprenticeship system originated in New England and became firmly established there).

¹⁶ FRIEDMAN 3D, *supra* note 3, at 56.

¹⁷ *Id.* "Apprenticeship was a control device as well as a way of learning the trade. It kept the bar small; and older lawyers were in firm command." *Id.*

¹⁸ WARREN, *supra* note 12, at 194 ("In forming an idea of the Colonial lawyer's education, one . . . factor must be borne in mind, – the remarkable extent to which Eighteenth Century lawyers . . . were college-bred men.").

¹⁹ FRIEDMAN 3D, *supra* note 3, at 240.

²⁰ *Id.* at 55.

²¹ *Id.* at 57.

The bar requirements tended to include several years of practice in a law office; the number of years was reduced if the person had attended college.²²

During the colonial period, the role and place of the lawyer in society had gone through many changes. In the early colonial period, there were few lawyers, and they often practiced law part-time, in combination with another occupation.²³ By the eighteenth century, the bar had become much more professional, with bar associations to oversee legal education, “regulate practice, and control admission to the bar.”²⁴ There was stratification among lawyers—some were rich, some poor—but regardless “[t]here was a pride of profession among these men” who called themselves lawyers.²⁵

B. EARLY REPUBLIC

After the founding of the U.S., lawyers became essential to the running of the country.²⁶ “[T]he new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically.”²⁷ After the revolution, the numbers of lawyers swelled.²⁸ Despite continued ill-feeling towards the legal profession, as there had been in the colonial period, “[l]awyers were catapulted into a political and social prominence never enjoyed in England. . . .”²⁹ After visiting the United States in the 1830s, Alexis de Tocqueville referred to the bar and judicial bench as the “American aristocracy.”³⁰

²² *Id.*; see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 4 (1983) (“From an early stage . . . bar organizations gave preferential treatment to college graduates.”); *Id.* at 11 n.12 (“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.”).

²³ FRIEDMAN 3D, *supra* note 3, at 57.

²⁴ *Id.* at 58.

²⁵ *Id.* at 59.

²⁶ STEVENS, *supra* note 22, at 5-6.

²⁷ *Id.* at 7.

²⁸ FRIEDMAN 3D, *supra* note 3, at 227.

²⁹ STEVENS, *supra* note 22, at 6.

³⁰ *Id.* at 14 n.40 (quoting Alexis de Tocqueville).

Friedman notes that legal instruction in the early days of the republic continued to be provided by an apprenticeship, which tended to be uninspiring. He writes that “[f]or a fee, the lawyer-to-be hung around an office, read Blackstone . . . and copied legal documents. If he was lucky, he benefited from watching the lawyer do his work, and do it well. If he was very lucky, the lawyer actually tried to teach him something.”³¹

Some colleges had established professorships in the late 1700s and early 1800s through which they offered lectures on the law.³² However, these lectures were part of the student’s general liberal arts education, to prepare men to take their place as informed leaders in society. The lectures were not for professional legal training.³³ Nevertheless, as had been true in the colonial period, many states shortened the length of the apprenticeships if the bar-seeker had graduated from college.³⁴

Apprenticeship “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 . . .) badly needed copyists and legmen.”³⁵ The apprentice gained practical experience and frequently received excellent instruction in law by his supervising lawyer. Indeed, some of these supervising lawyers were so skilled that they gave tutorials and established their own private schools.³⁶ The schools that evolved from these apprentice-based

³¹ FRIEDMAN 3D, *supra* note 3, at 238. “Blackstone” is explained *infra* in the text accompanying notes 47 to 51.

³² The first chair of law in America was at William and Mary College and was held by Virginia appellate judge and classical scholar George Wythe from 1779-1790, at the recommendation of Thomas Jefferson. *Id.* at 240.

³³ *See id.*; MCKENNA, *supra* note 15, at 59 (“None of these professorships . . . attempted to offer a complete technical education for law students.”); *see also* STEVENS, *supra* note 23, at 3 (“legal training in the colleges was proposed . . . to provide liberally educated men with a necessary knowledge of the law for their roles as citizens . . .”).

³⁴ For example, in New Hampshire, college graduates were required to have three years of study in a law office before being admitted to the bar; non-graduates, five years. Vermont was similar. Rhode Island and Connecticut required two years of law office study for college graduates; three years for non-graduates. New Jersey: three years for college graduates and four years for non-graduates. New York: Seven years study in a law office, with possible credit of four years for “classical studies” (i.e., college). WARREN, *supra* note 12, at 200-02.

³⁵ FRIEDMAN 3D, *supra* note 3, at 238.

³⁶ *Id.*

lectures were the beginnings of institutional legal training in the United States.³⁷

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 for almost 50 years; over a thousand students were taught at the Litchfield School by the time it closed in 1833.³⁸ Continuing the format of the apprentices' tutorials, instruction at the Litchfield School was by lecture: "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."³⁹ In addition, there were several other private law schools, with 15 in existence by 1850.⁴⁰ These schools did not give degrees.⁴¹

Many early lawyers "read law" for the bar. Andrew Jackson, born in the backwoods of the Carolinas during the late colonial period, read law in his "late teens . . . for about two years, and he became an outstanding young lawyer in Tennessee."⁴² 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 any schooling whatever had

³⁷ *Id.* ("Legal education, in the more literal sense of training in a school, grew up out of the apprenticeship method.")

³⁸ *Id.* at 239. McKenna's book on Tapping Reeve, *supra* note 15, presents a fascinating picture of 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. Although not as comprehensive as McKenna, other sources of the first American law school are ARTHUR E. BOSTWICK, *THE OLD LAW SCHOOL BUILDING IN LITCHFIELD, CONN.* (1928) and SAMUEL H. FISHER, *THE LITCHFIELD LAW SCHOOL 1775-1833* (1933).

³⁹ FRIEDMAN 3D, *supra* note 3, at 239.

⁴⁰ *Id.* at 464.

⁴¹ JOHNSON, *supra* note 1, at 11.

⁴² FRANK FREIDEL, *THE PRESIDENTS OF THE UNITED STATES OF AMERICA* 21 (1982). Jackson was the seventh president of the United States, holding that office from 1829 to 1837.

made himself a successful lawyer.”⁴³ 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.”⁴⁴ 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.”⁴⁵

Blackstone’s *Commentaries* was the most popular legal text for self-study.⁴⁶ Blackstone, born in England in 1723, was educated at Oxford and got his legal training at the Middle Temple of the Inns of Court.⁴⁷ Blackstone lectured on law at Oxford during the middle of the eighteenth century (1753-63), bringing clarity to a complicated subject.⁴⁸ His *Commentaries* were based on these “innovative lectures.”⁴⁹ Historians Will and Ariel Durant wrote:

[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.⁵⁰

⁴³ THE HARVARD LAW SCHOOL 1817-1917, at 48-49 (1917).

⁴⁴ STEVENS, *supra* note 22, at 25 (emphasis in original).

⁴⁵ FRIEDMAN 3D, *supra* note 3, at 463 n.1, (referring to a letter Lincoln wrote in 1858, and citing Jack Nortrup, *The Education of a Western Lawyer*, 12 AM. J. LEGAL HIST. 294, 294 (1968)).

⁴⁶ See, e.g., I THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 9-12 (Steve Sheppard ed., 1999) [hereinafter I HISTORY] (describing the legal education of three colonial law students, including the future Supreme Court Chief Justice John Marshall: “[T]he bulk of their studies were in solitude, reading and copying from English law books.” All three read Blackstone. Blackstone’s *Commentaries* “were an immediate success in America. [A printer in Philadelphia] sold subscriptions for fifteen hundred copies throughout America, even though Americans had already bought more than one thousand copies of English editions.”).

⁴⁷ WILL DURANT & ARIEL DURANT, ROUSSEAU AND REVOLUTION 737 (1967).

⁴⁸ *Id.*

⁴⁹ MCKENNA, *supra* note 15, at 7.

⁵⁰ *Id.* at 16.

An American edition, printed in 1771 and 1772, was “ubiquitous on the American legal scene.”⁵¹ Not only did Blackstone’s *Commentaries* continue in the nineteenth century to provide legal content to those who read for the bar, as in the Lincoln example; they also provided the legal curriculum for the lectures at schools such as the Litchfield School and, in the early days, at Harvard Law School.⁵²

C. LEGAL TRAINING IN THE FIRST HALF OF THE NINETEENTH CENTURY

Around the 1820s and 1830s, proprietary law schools⁵³ such as the Litchfield School started to become absorbed by or affiliated with a university. Stevens comments that the reason for this movement is not clear; maybe it was so that the universities would have influence among the “powerful local elite—the lawyers.”⁵⁴ The relationship between law schools and universities

⁵¹ FRIEDMAN 3D, *supra* note 3, at 60.

⁵² STEVENS, *supra* note 22, at 47-48 nn.36 & 37. The areas from Blackstone were “The Law Merchant, Contracts, etc.; Equity; Pleading Practice and Evidence; Criminal Law; Real Property; Other Branches and Introductory.” These were the topics of instruction at the Litchfield School and at Harvard Law School, 1835-38. *Id.* at 48 n.37. By 1852, Blackstone’s *Commentaries* as well as Kent’s *Commentaries* were part of the law lectures at Harvard. Blackstone was dropped as a topic by around 1870. *Id.* at 48 n.39. “Blackstone’s American influence was long-lived. In the 1893 census of law schools performed by the ABA and the U.S. Bureau of Education, twenty-six schools reported assigning Blackstone in their mandatory curricula.” I HISTORY, *supra* note 46, at 13.

⁵³ Self-supporting law schools not connected with a university or college. Litchfield School of Law was the prototype of a proprietary law school. “Any income beyond actual expenses belonged to the school’s proprietors, who generally were its faculty.” SUSAN K. BOYD, THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR 2 (1993).

⁵⁴ STEVENS, *supra* note 22, at 5. Another reason posited is that the legal community would bolster the institution of the liberal arts college:

In the years between 1820 and 1860 friends of the American liberal arts college, often men . . . with some legal background themselves, . . . attempted to bring law schools into the institutional orbit of the antebellum [before 1860] college in order to create a strategic alliance with a powerful professional group. The support of the legal profession for the college-sponsored law school, they hoped, would strengthen the central college itself by enlarging the number of influential people who would defend and support the liberal arts.

JOHNSON, *supra* note 1, at 1.

during much of the nineteenth century was tenuous – an arrangement typically made in name only so that degrees could be awarded.⁵⁵ “These mergers . . . seemed to bode well for established institutions,” but because of the changes in society under the presidency of Andrew Jackson and those to follow, such arrangements between law schools and universities failed.⁵⁶

These societal changes, occurring from the 1830s to 1860, were part of a movement known as “Jacksonian Democracy” (from the influence of President Jackson) and resulted from an “upsurge of a new generation of . . . voters.”⁵⁷ The movement subscribed to equality, but only for white men.⁵⁸ It was a popular movement, that is, a movement of the general population, and had disdain for those viewed as elite, such as lawyers. In the viewpoint of historian Samuel Eliot Morison, the movement had a “contempt for intellect. . . .”⁵⁹ It “catered to mediocrity, diluted politics with the incompetent and the corrupt, and made conditions increasingly unpleasant for gentleman in public life.”⁶⁰

This popular movement created a difficult environment for “the natural aristocrat in America”—Tocqueville’s term for lawyers⁶¹—with attacks on lawyers peaking in the 1830s.⁶² Many local bar associations, which had existed since the colonial period and through the early years of the new nation, lost their appeal and “collapsed after 1800.”⁶³ The requirement of study in a lawyer’s office for admission to the bar became less strict. The numbers are revealing: compared to 1800, when fourteen out of

⁵⁵ STEVENS, *supra* note 22, at 5. There was no cost to the universities; these law schools continued to finance their existence from their own student fees. *Id.* “The relationship of law schools to their universities was . . . a far cry from what it became in the twentieth century. . . . [The] ‘university’ law schools . . . were by no means an organic part of [the] world of higher education.” FRIEDMAN 3D, *supra* note 3, at 465.

⁵⁶ STEVENS, *supra* note 22, at 5.

⁵⁷ SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 423 (1965).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 424.

⁶¹ STEVENS, *supra* note 22, at 7.

⁶² *Id.* at 6.

⁶³ *Id.* at 8.

nineteen jurisdictions had required an apprenticeship, by 1860, only nine of thirty-nine jurisdictions required one.⁶⁴

As for admission to the bar, the difficulty and formality depended on location and local custom, but generally the rules were not stringent.⁶⁵ New York in the 1850s, for example, had “only an erratic oral examination for applicants to the bar.”⁶⁶ Stevens notes that by 1860, “[p]rofessional standards . . . [were] largely nonexistent. . . . The bar examination, although required in all states but [two], was everywhere oral and normally casual.”⁶⁷ In a word, “requirements for admission to the bar were lax.”⁶⁸ These weakened standards reduced the perceived need for institutionalized legal education.⁶⁹ Many of the proprietary schools that had been absorbed by or affiliated with a college faded quickly.⁷⁰ Towards the middle of the nineteenth century, fewer than ten university-affiliated schools existed, with altogether only 345 students.⁷¹

⁶⁴ *Id.* at 7-8.

⁶⁵ FRIEDMAN 3D, *supra* note 3, at 237. 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 (quoting Joel Seligman, *Why the Bar Exam Should Be Abolished*, JURIS DR., Aug.-Sept. 1978, at 48).

⁶⁶ STEVENS, *supra* note 22, at 26.

⁶⁷ *Id.* at 25.

⁶⁸ FRIEDMAN 3D, *supra* note 3, at 236.

⁶⁹ STEVENS, *supra* note 22, at 8.

⁷⁰ *Id.* Stevens gives as one example Princeton University, which unsuccessfully tried to establish a law school in 1825 and again in 1835 before being successful in 1846. The school was run by “local practitioners and judges.” It closed in 1852. *Id.*

⁷¹ *Id.*

The “traditional interpretation” of the decline of the bar at the beginning of the nineteenth century puts the blame on Jacksonian Democracy,⁷² but Stevens comments that generalizations about lawyers in the first half of the 1800s are hard to make because of great variation in the country from the established east to the frontier west.⁷³ Even though formal restrictions might have declined, all ranks of people in the highly mobile society of the time needed lawyers, and market forces exerted control in maintaining some kind of standards.⁷⁴ Johnson notes that although there may have been minimal formal admission requirements, “discipline was maintained through the social life of the judicial circuit, and professional ability was certified in the oratorical contests of the courtroom.”⁷⁵ Starting gradually later in the century, the standards for legal training and admission to the bar became more institutionalized with the gradual movement towards formal law schools and the establishment of national associations for lawyers.

D. THE LATER NINETEENTH CENTURY AND THE NEW MODEL OF INSTITUTIONAL LEGAL TRAINING

In the nineteenth century, “apprenticeship continued to be the standard means of legal education and was defended vigorously even after formal law schools were available.”⁷⁶ Still, many lawyers began to believe that apprenticeships by themselves were not sufficient training grounds in light of the increasingly complex tasks lawyers faced in the expanding American society.⁷⁷

⁷² *Id.* at 6 (referring to WARREN, *supra* note 12).

The tone of the early studies of the legal profession was set by Charles Warren at the beginning of [the 20th] century as he traced the demise of the educated American bar at the hands of the barbarian hordes of Jacksonian Democracy, and this traumatic vision still characterized . . . standard history of the American bar written in the 1960s.

Id. at 6-7 (citations omitted).

⁷³ *Id.*

⁷⁴ *E.g., id.* at 10; FRIEDMAN 3D, *supra* note 3, at 237.

⁷⁵ JOHNSON, *supra* note 1, at 25.

⁷⁶ BOYD, *supra* note 53, at 1.

⁷⁷ *See* STEVENS, *supra* note 22, at 22 (“[T]he unleashing of the industrial might of the country and the resulting growth of large corporations . . . combined to promote the growth of a new type of law firm, with several partners and assistants,

Little by little, schools as a formal means of legal training gained proponents and began to replace the apprenticeship model.⁷⁸ Although law schools at universities were not generally found until the late nineteenth century, Stevens notes that in the mid-nineteenth century, there was interest in a more structured format of legal training. He writes that “[a]s early as the 1850s, the pendulum began to swing back, with the refounding of law schools and increased interest in the more organized side of bar life. Law was beginning once more to be seen as a learned profession.”⁷⁹

Friedman comments that law schools were prestigious in a way that apprenticeships were not, and that slowly students came to view law schools as a “more efficient” means of legal training.⁸⁰ Friedman notes that evidence shows that “the rise of the law schools was linked to a social change in the character of the bar—from strongly aristocratic to middle class in family background.”⁸¹ The consequence of these various factors was a skyrocketing number of law schools, especially from the late 1800s into the early 1900s, as shown by the following table:

Year	Total Number
1850	15
1860	21
1870	31
1880	51
1890	61
1900	102
1910	124
1920	146 ⁸²

catering to the needs of the developing corporations.”); *see also* FRIEDMAN 3D, *supra* note 3, at 483-98 (“The law itself was changing. Life and the economy were more complicated; there was more . . . to be done, in the business world especially; and the lawyers proved able to do it.”).

⁷⁸ STEVENS, *supra* note 22, at 22 (“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.”).

⁷⁹ *Id.* at 10.

⁸⁰ FRIEDMAN 3D, *supra* note 3, at 463-64.

⁸¹ LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 526 (1973). “There was another factor, too. . . . The law office of 1900 [with the use of the newly-invented typewriter] no longer needed copyists and drones in training.” FRIEDMAN 3D, *supra* note 3, at 464.

⁸² ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS

At the beginning of this era, the law school's program was generally a one-year course of study, with lectures on various legal topics;⁸³ the school later introduced a two-year program.⁸⁴ Part-time law professors, most of whom were practicing lawyers, presented the lectures.⁸⁵ Their lectures instructed the students on the various principles of law; students listened and took notes.⁸⁶ Textbooks were the basis for instruction, with the students being responsible for studying and committing to memory an assignment from the text. The teacher would then lecture on the assignment in the next class.⁸⁷

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 instructor.⁸⁸ There were certainly many inspiring teachers; one singled out during this period is Theodore Dwight, who seems almost single-handedly to have established Columbia Law School as the premier institution of legal training in this period of the "revival of law schools," 1850 to 1870.⁸⁹

OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 445 (1921) [hereinafter REED, TRAINING]; ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS: IN THE UNITED STATES AND CANADA 98 (1928) [hereinafter REED, LAW SCHOOLS]. For data on ABA-accredited law schools from 1947 to the present, see American Bar Association, <http://www.abanet.org/legaled/statistics/femstats.html> (last visited May 28, 2006). Currently, there are 191 ABA-approved law schools in the U.S. *Id.*

⁸³ FRIEDMAN 3D, *supra* note 3, at 466. 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 1, at 13. It provided a one-year program, the standard of the time, and its first graduating class was in 1869.

⁸⁴ FRIEDMAN 3D, *supra* note 3, at 466.

⁸⁵ *See id.* ("Prominent judges and lawyers constituted the faculty at most law schools. Full-time teachers were rare before the 1880s.").

⁸⁶ *See* I HISTORY, *supra* note 46, at 13 (describing the lectures at Litchfield which "established the framework for instruction in the professional law school. . . . Lectures covered one topic at a time . . . during which students took notes for later transcription.").

⁸⁷ FRIEDMAN 3D, *supra* note 3, at 466-67 (referring to JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 7-8 (1914)).

⁸⁸ *Id.* at 467.

⁸⁹ STEVENS, *supra* note 22, at 23.

Dwight, born in 1822, graduated from Hamilton College in New York in 1840, and then went to Yale for his law degree.⁹⁰ He returned, in 1847, to Hamilton to be professor of “law, history, civil policy, and political economy,” and taught in the law department, established around 1853.⁹¹ He became well-known in legal circles and, in 1858, he was invited to come to Columbia College (later Columbia University) to run its newly-established School of Jurisprudence,⁹² where he became the head of its law school, a position he held for thirty-three years. He was the sole professor of law at Columbia, as well as law school administrator, until 1873.⁹³ As one of his students wrote: “Professor Dwight for a long time WAS the Columbia Law School.”⁹⁴ Columbia was the preeminent law school for much of the 1860s and 1870s, primarily because of Dwight.

Dwight “became the foremost legal educator” during this period of law schools.⁹⁵ He was an advocate of formal law schools for legal training, unlike most lawyers who, after all, had trained through the system of apprenticeship or self-study. Goebel, who wrote a history of Columbia Law School, stated that

⁹⁰ Dwight came from a family with a tradition of learning and teaching. Dwight’s extended family had long-standing ties to Yale College (later Yale University), including an original founder (James Pierpont), three presidents, numerous professors, and many graduates. Members of his immediate family also had administrative (treasurer, president) and teaching ties to Hamilton College, Clinton, New York, the school that Dwight attended as an undergraduate. *See generally* The Dwights of Dwight Avenue, Clinton Historical Society, <http://www.clintonhistory.org/A007.html> (last visited May 28, 2006); Theodore Dwight and Timothy Dwight, LoveToKnow 1911 Online Encyclopedia (2004), http://39.1911encyclopedia.org/D/DW/DWIGHT_THEODORE_W and http://40.1911encyclopedia.org/D/DW/DWIGHT_TIMOTHY (last visited May 28, 2006).

⁹¹ STEVENS, *supra* note 22, at 22-23. “Dwight . . . extended Hamilton College’s course in law, and in 1853 obtained the recognition of a regular department of law.” JULIUS GOEBEL, JR. ET AL., FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 34 (1955).

⁹² STEVENS, *supra* note 22, at 23.

⁹³ George Chase, *Columbia College Law School: A Sketch of Its History*, in A TRIBUTE TO THEODORE WOOLSEY DWIGHT, LL.D.: PRESENTED ON HIS RESIGNATION FROM THE WARDENSHIP OF THE COLUMBIA COLLEGE LAW SCHOOL, 1891, at 1, 2 (Frederic J. Swift ed., 1891) [hereinafter TRIBUTE].

⁹⁴ Perry Belmont, *Tribute of Hon. Perry Belmont*, in TRIBUTE, *supra* note 93, at 47, 47.

⁹⁵ STEVENS, *supra* note 22, at 23.

“[M]ost of the leading lawyers had obtained their training in offices or by private reading, and were highly skeptical as to the possibilities of securing competent legal knowledge by means of professional schools.”⁹⁶ Stevens said that Dwight “sought to prove these lawyers wrong.”⁹⁷

Before Dwight’s arrival at Columbia, law instruction at the college had been either non-existent or erratic, as it was at other law schools.⁹⁸ Dwight developed a formal program of law, using lectures, examinations, recitations, quizzes, moot trials, and Socratic dialogue with the students.⁹⁹ A history of legal education in the United States refers to Dwight as the “acme of university lecturers.”¹⁰⁰ “By all accounts, [he] was a brilliant teacher; observers . . . thought his school the very best imaginable.”¹⁰¹ Columbia maintained this prominence as “the most important of the law schools . . . through the 1870s.”¹⁰²

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.¹⁰³ He was active during a period that saw significant attitude changes towards legal training as members of the bar

⁹⁶ *Id.* (quoting GOEBEL ET AL., *supra* note 91, at 34). For most of the 19th century, the majority of lawyers, trained through the apprenticeship system, were “indifferent to the fortunes of the few law schools in existence because such institutions served no important professional purpose. Law Schools were viewed . . . as a useful supplement to the apprenticeship experience.” JOHNSON, *supra* note 1, at 24.

⁹⁷ STEVENS, *supra* note 22, at 23.

⁹⁸ *Id.* at 24.

⁹⁹ *Id.*; GOEBEL ET AL., *supra* note 91, at 37; *see also* I HISTORY, *supra* note 47, at 20.

¹⁰⁰ I HISTORY, *supra* note 46, at 20.

¹⁰¹ FRIEDMAN 3D, *supra* note 3, at 467.

¹⁰² STEVENS, *supra* note 22, at 23.

¹⁰³ *Id.* Dwight also contributed the idea of the “diploma privilege” for entrance to the bar. When Dwight taught law at Hamilton College in the 1850s, no institutional legal training 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.” *Id.* at 26. The diploma privilege was adopted by some other law schools as well. *Id.* “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.” *Id.* Its use slowly waned. In 1928, thirteen states still had the diploma privilege, *id.* at 34 n.57, and by 1989, Wisconsin alone retained it. Moran,

wanted to raise standards to “make the bar more competent and more exclusive.”¹⁰⁴ This was also a time when members of the legal profession, although not abandoning the apprenticeship, endorsed the idea of a “structured legal education” that included substituting some of the apprenticeship years with time spent at law school.¹⁰⁵

A striking picture of the difference between the training in a law office and training in a law school in the 1860s is drawn by an attorney, Edmund Wetmore, who wrote about the law firm apprenticeship he had after graduating from Harvard College and before entering the relatively new Columbia Law College.¹⁰⁶ Wetmore wrote:

I . . . spent the . . . first year of my law studies . . . in the office of one of the leading lawyers of the city [New York], and . . . picked up as much as the average young man, just graduated from college, gathers from a year’s experience in a law office, and that was almost nothing. . . . I read . . . Blackstone doggedly; copied papers faithfully (it was before the days of typewriters and office stenographers); . . . collected some miscellaneous legal information, and obtained an uncertain grasp of a few disconnected principles. But at the end of twelve months little had been gained. . . . I floundered amid the vast body of learning that makes up the law. . . .¹⁰⁷

Wetmore then contrasts this with the experience, starting in 1861, of attending the Columbia College Law School:

In this state of mind I began my attendance at Dr. Dwight’s School. He was our sole instructor. He dictated

supra note 65, at 648. The statutory reference for the Wisconsin diploma privilege is found at Wis. Stat. §§ 757.28(1)(a),(b) and also Wisconsin Supreme Court Rule (SCR) 40.03.

¹⁰⁴ STEVENS, *supra* note 22, at 24.

¹⁰⁵ *Id.*

¹⁰⁶ Wetmore graduated from Harvard College with a bachelor’s degree in 1860 and began his formal legal studies at Columbia one year later, graduating with an LL.B. in 1863. *E.g.*, SurnameSite.com, Bachelors of Arts Harvard University 1860 Graduates, <http://surnamesite.com/harvard/harvard1860.htm> (last visited Apr. 12, 2006).

¹⁰⁷ Edmund Wetmore, *Tribute of Edmund Wetmore*, in *TRIBUTE*, *supra* note 93, at 13, 13.

to us from his lectures, we read about thirty pages a day in the text-book, and every day's exercises began with an oral examination of the work of the day before. To me, the effect of this method was like the sunshine dissipating a fog. Out of chaos arose order. . . .

The course was only two years, but . . . it resulted in laying a broad foundation, upon which . . . the experiences of actual practice could firmly rest.¹⁰⁸

This first-hand description is instructive and Wetmore's impressive legal credentials bring an authority to his recollections.¹⁰⁹ Still, Professor Friedman notes a basic deficiency of the legal education of the "monologue lecture"¹¹⁰ era:

Lawyers often remember their school days romantically and nostalgically. Law school teaching [of this time] was dogmatic and uncritical. . . . Law schools never conveyed a sense of connection between law and life; or even of the evolution of the common law. Even the most brilliant lectures were fundamentally hollow. The basic aim of the schools was to cram young lawyers with rote learning, of a more or less practical nature, as quickly and efficiently as possible.¹¹¹

II. THE BEGINNINGS OF THE MODERN AMERICAN LAW SCHOOL

A. THE INTRODUCTION OF THE "SCIENTIFIC METHOD" IN THE LIBERAL ARTS COLLEGES

In the late eighteenth and nineteenth centuries, the emergence of science and scientific studies became more strongly felt

¹⁰⁸ *Id.* at 13-14.

¹⁰⁹ Harvard College, B.A., 1860, LL.D. 1913; Columbia Law College, LL.B., 1863; Yale Law School, LL.D. 1906; Hamilton Law School, LL.D. 1912. SurnameSite.com, *supra* note 106. He was an early member of the American Bar Association (founded in 1878) and its Section on Legal Education and Admissions to the Bar (established in 1893), and a president of the ABA, BOYD, *supra* note 53, at 12, and of the New York City Bar Association (1908-09). The Association of the Bar of the City of New York - Presidents & Officers, <http://www.abcnyc.org/AssociationGovernance/Presidents&Officers.htm> (last visited Nov. 23, 2005).

¹¹⁰ I HISTORY, *supra* note 46, at 8.

¹¹¹ FRIEDMAN 3D, *supra* note 3, at 467.

in academic and intellectual thinking, and law was included as one of the areas that could lend itself to the “scientific method.”¹¹² The Litchfield School, 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.”¹¹³

The History of Legal Education in the United States explains that the idea of legal science

seems . . . to have been very much in the tradition of Newtonian observation and organization: there is a place for everything, and everything would be in its place when sufficiently understood. . . . Thus, the system of laws, like systems of biology and geology, could be catalogued once all of the laws were discovered. . . . All the science a student needed was to be exposed to the most complete articulation of the system of law and its catalogue of related principles, made to memorize it, and then taught to select the right principle for the right occasion.¹¹⁴

This source continues that Dwight was the “archetype” of instruction based on the idea of legal science, “with a system of legal principles for dictation into the pages of carefully kept student manuscripts.”¹¹⁵

Looking at the early teaching of Charles Eliot, who would later become the president of Harvard College, gives an excellent illustration of the introduction of scientific method into academia in general,¹¹⁶ As a young man and assistant professor of chemistry at Harvard, Eliot taught a chemistry course with Harvard

¹¹² STEVENS, *supra* note 22, at 52 (“Just as there was to be a ‘scientific’ base for history, the classics, and politics, the spirit of science was to invade the law.”); JOHNSON, *supra* note 1, at 9 (“Science in the eighteenth and early nineteenth centuries meant basically the orderly arrangement and the logical classification of a body of knowledge.”).

¹¹³ STEVENS, *supra* note 22, at 52.

¹¹⁴ I HISTORY, *supra* note 46, at 20.

¹¹⁵ *Id.* “Langdell shared with Dwight the assumption that law was a science.” STEVENS, *supra* note 22, at 52.

¹¹⁶ “Charles William Eliot was born in Boston in 1834 and graduated from Harvard in 1853. He was a mathematics tutor and an assistant professor of mathematics and chemistry at Harvard from 1854 to 1863 . . . [He was] a professor of Chemistry at MIT, a position he held until he became president of Harvard.” STEVENS, *supra* note 22, at 44 n.10.

Professor Josiah P. Cooke in which students for the first time had laboratory exercises, a “novel” addition to the course.¹¹⁷ Later, Eliot taught science courses at the Massachusetts Institute of Technology (M.I.T.), applying ideas for classroom instruction that included:

- Replacing the lecture method with a classroom laboratory during which students would make their own observations by inductive reasoning processes;
- Having the teacher and student work together in “developing general principles from concrete cases;”¹¹⁸
- Using a laboratory manual that Eliot compiled for purposes of the laboratory;
- Having the students develop an ability “to see for themselves” rather than simply memorizing the lecturer’s opinions.¹¹⁹

Eliot had many other ideas about education; these were published in 1869 in a two-part article in the *Atlantic Monthly*.¹²⁰ In the same year, Harvard College appointed him president of the college.¹²¹

These three points—the introduction of scientific methodology into classroom instruction, Eliot’s role as an innovator of educational practices and President Eliot’s appointment authority—are critical for appreciating the approach to legal instruction that was introduced at Harvard Law School in 1870.

B. THE INTRODUCTION OF THE CASE METHOD TO INSTITUTIONAL LEGAL TRAINING

Harvard Law School, founded in 1817, and established under the leadership of Justice Joseph Story in the 1830s, had

¹¹⁷ Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334 (1979).

¹¹⁸ *Id.* at 335.

¹¹⁹ *Id.*

¹²⁰ C.W. Eliot, *The New Education. Its Organization* (pts. 1 & 2), ATLANTIC MONTHLY, Feb. 1869, at 203, ATLANTIC MONTHLY, Mar. 1869, at 358.

¹²¹ STEVENS, *supra* note 22, at 35.

“entered what seemed to be a period of stagnation.”¹²² Friedman refers to this period, roughly 1846 to 1870, as “Harvard’s dark age.”¹²³ The mode of teaching was the textbook method; students were expected to memorize a section of a textbook and to be quizzed on it later.¹²⁴ Stevens comments that at this point, “the tone of the school was increasingly that of a trade school.”¹²⁵

In 1870, Eliot, the president of Harvard College, appointed a practicing lawyer named C.C. Langdell as a professor of law at Harvard.¹²⁶ Eliot had been an undergraduate student at Harvard College visiting a friend’s room when he first encountered the older Langdell. Eliot recalled:

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.¹²⁷

Shortly thereafter, Langdell was made dean of the Law School.¹²⁸

¹²² FRIEDMAN 3D, *supra* note 3, at 466.

¹²³ *Id.*

¹²⁴ *Id.* at 466-67.

¹²⁵ STEVENS, *supra* note 22, at 15 n.46.

¹²⁶ “Forced to employ men who had never taught, Eliot made some brilliant selections [in choosing new teachers for Harvard College], none of greater consequence than the appointing of Langdell, a virtually unknown lawyer who had impressed Eliot during their slight acquaintance in student days.” HUGH HAWKINS, *BETWEEN HARVARD AND AMERICA: THE EDUCATIONAL LEADERSHIP OF CHARLES W. ELIOT* 63 (1972).

¹²⁷ *THE HARVARD LAW SCHOOL 1817-1917*, *supra* note 43, at 25-26.

Langdell was born in . . . New Hampshire, in 1826. After working his way through Exeter, he attended Harvard College from 1848 to 1849, but he did not earn a degree. He returned to Harvard in 1851, this time entering the law school and working as a law school librarian while studying law. He received his LL.B. in 1853 and practiced law in New York City until Eliot offered him the Dane Professorship of Law in . . . 1870.

STEVENS, *supra* note 22, at 44 n.11. Langdell was an amateur botanist. LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 11 (1986). He “classified law much as he did plants.” *Id.*

¹²⁸ The position of dean at the time was an equivalent of secretary to the faculty. “Langdell made the deanship the significant post one that it is today,” another of

Langdell, trained at Harvard Law School under the lecture-textbook method, was a proponent of law as science. Eliot, in a speech of 1886, recalled that Langdell had told him that the way to study law was scientifically:

He told me, in 1870, . . . that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.¹²⁹

Langdell is now best known for instituting a method 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 that the student, guided carefully by the teacher, could draw out the principles of law through inductive, scientific reasoning through a study of the law's data—that is, cases. Langdell wrote that when he considered how best instruct his law students in his new role as teacher, only one way seemed to have “any reasonable prospect of success”¹³⁰ and that was to use a series of cases “carefully selected from the books of [case] reports.”¹³¹ But Langdell noted that it would not be feasible for each student to go to the library to read the case reports. Therefore, he decided to prepare a selection of cases and have them published for his students. Still, he was confronted with the problem of which cases to choose from the vast numbers of reported cases. He asked, in the *Preface* to his casebook on Contracts:

[W]as there any satisfactory principle upon which such a selection could be made? It seemed to me that there was.

his contributions to the changed law school model. STEVENS, *supra* note 22, at 44 n.12.

¹²⁹ I HISTORY, *supra* note 46, at 25 (quoting Charles W. Eliot, President, Harvard College, Speech at the Dinner of the Harvard Law School Association (Nov. 5, 1886), from 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 360-61 (1908)).

¹³⁰ C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS v (1871).

¹³¹ *Id.* at v-vi.

Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees . . . extending in many cases through centuries. . . . It seemed to me . . . to be possible to take . . . a branch of the law as Contracts, for example, and . . . to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.¹³²

Thus did Langdell dispense with the conventional law books of the time and prepare his own texts for students to use.¹³³ By the use of these “casebooks” composed of specially selected, mostly English, appellate-level cases,¹³⁴ 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.¹³⁵ Under this case method, “[t]here 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 inside the cases.”¹³⁶

Instead of telling the students the law, “Langdell doggedly refused to be their touchstone, making them take the measure of the cases for themselves, no matter how much they resented the lack of guidance.”¹³⁷ Langdell’s changes caused an outcry; Friedman said that “[t]he Langdell plan burst like a bombshell in the

¹³² *Id.* at vi-vii.

¹³³ [W]ith the opening of the first year of his service as professor, in the fall of 1870, he put [the new system] into operation. The 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!

THE HARVARD LAW SCHOOL 1817-1917, *supra* note 43, at 34.

¹³⁴ FRIEDMAN 3D, *supra* note 3, at 469. In addition to the English cases, there were a few American ones, mostly from Massachusetts and New York. There were not only cases; there were notes or other supplemental material as is found in the modern-day case book. *Id.*

¹³⁵ *See* I HISTORY, *supra* note 46, at 25 (“A student would thus read and consider case opinions on a given topic, and then class discussion of that topic would develop the relationship of the principles of law reflected in the case to other points of law.”).

¹³⁶ FRIEDMAN 3D, *supra* note 3, at 468.

¹³⁷ I HISTORY, *supra* note 46, at 26.

world of legal education.”¹³⁸ In 1917, the authors of Harvard Law School’s centenary overview wrote that students skipped his classes “in droves.” “To most of the students, as well as to Langdell’s colleagues, [the new method of instruction] was an abomination . . . only a few [students] remained. But these few were the seed of the new School.”¹³⁹ Indeed, one of those who remained in Langdell’s class was James Barr Ames, who would be hired as a professor at the law school in 1873, shortly after he graduated, and would later be dean.¹⁴⁰

Although most well-known for introducing the case method, Langdell also instituted other changes at Harvard; these eventually were adopted by many other law schools:

- an entrance requirement of a bachelor’s degree, or an entrance examination if the person had no bachelor’s degree;¹⁴¹
- extension of the length of study first to two years and then to three;¹⁴² an order to the curriculum, with basic (“core”) courses followed by advanced courses;¹⁴³ full-time teachers of law (most previously had been part-time only);¹⁴⁴ and
- final examinations such that the student had to pass the exams for the first-year courses before proceeding to the second-year courses.¹⁴⁵

Langdell had been in private practice; still, 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. He hired full-time professors of law at

¹³⁸ FRIEDMAN 3D, *supra* note 3, at 470.

¹³⁹ See also THE HARVARD LAW SCHOOL 1817-1917, *supra* note 43, at 35.

¹⁴⁰ E.g., Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST. REV. 277, 284 (2004); FRIEDMAN 3D, *supra* note 3, at 470.

¹⁴¹ STEVENS, *supra* note 22, at 36.

¹⁴² *Id.* at 37.

¹⁴³ *Cf. id.* at 36.

¹⁴⁴ FRIEDMAN 3D, *supra* note 3, at 466.

¹⁴⁵ *Id.* at 468.

Harvard who had had no actual experience in practicing law, such as Ames, his former student.¹⁴⁶

Langdell wrote:

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.¹⁴⁷

President Eliot continued to support Langdell, whose innovations eventually prevailed at Harvard;¹⁴⁸ gradually “Langdell's case method”¹⁴⁹ spread to many of the other university law schools.¹⁵⁰

By the early years of the twentieth century, the case method approach was adopted by one-third of the university-based law

¹⁴⁶ *Id.* at 470 (“This radical break with the past evoked strong opposition.”).

¹⁴⁷ Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, in HERBERT L. PACKER ET AL., *NEW DIRECTIONS IN LEGAL EDUCATION* 331, 360 (1972) (quoting Langdell in J. Ames, *Christopher Columbus Langdell*, in *LECTURES ON LEGAL HISTORY* 478 (1913)).

¹⁴⁸ THE HARVARD LAW SCHOOL 1817-1917, *supra* note 43, at 29 (“[President Eliot] stood behind him [Langdell] in the trying years of change. . . . Eliot helped and encouraged Langdell in the work of change.”).

¹⁴⁹ Some writers credited Ames, Langdell's successor, as the true promoter of the case method. *See, e.g.*, Woodard, *supra* note 147, at 343 n.25 (quoting THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 81 (1918), “It was Ames who really fixed the type of case book in American law schools.”). However, this viewpoint has been shown to be inaccurate by the recent methodical scholarship of historian Bruce Kimball. *See* Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 *LAW & HIST. REV.* 277 (2004). Langdell's name correctly is associated with the establishment of the case method in American legal education. *See* FRIEDMAN 3D, *supra* note 3, at 468; REED, TRAINING, *supra* note 82, 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.”).

¹⁵⁰ REED, TRAINING, *supra* note 82, at 380 (“[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. . . .”). 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.*

schools, and “[u]ltimately, every major and most minor law schools converted to case-books and the Socratic method.”¹⁵¹

Laura Kalman makes several points about why Langdell’s case method approach was adopted so widely by American law schools. One of the primary reasons was the influence of Harvard Law School. She states:

Langdell and his disciples were conceptualists—for them, the very fact that law was scientific meant that it could be reduced to a few fundamental rules and principles. . . .

Law professors did not adopt the case method overnight. . . .

Yet Langdell’s case method had the prestige of the nation’s largest and most powerful law school behind it. . . . Harvard already possessed a certain mystique; when its professors spoke, others listened.¹⁵²

Kalman also gives other reasons for the success of the case method. It was inexpensive – one professor could teach a class of 75 students.¹⁵³ It was “designed for the university,” making it less accessible to poorer students, and “may have proved attractive to an initially recalcitrant bar because of the opportunities . . . to preserve [the cultural status quo] by barring ‘undesirables’ from the practice of law.”¹⁵⁴ The “professional law teacher,” one (such as Ames) with little or no experience in practice but trained under the case method, was a product of the hiring practice of the time; law schools used recent graduates as well as practicing attorneys to teach. In addition, “the case method supported the status quo.”¹⁵⁵

¹⁵¹ FRIEDMAN 3D, *supra* note 3, at 471.

¹⁵² KALMAN, *supra* note 127, at 11-12.

¹⁵³ *Id.* at 12.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 12-13.

C. THE ESTABLISHMENT AND ROLES OF THE
ABA AND THE AALS

In the late nineteenth 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 without having a college degree,¹⁵⁶ although many lawyers had college training and several law schools required some college training, it was only much later in the twentieth century that a baccalaureate degree was a standard requirement for entrance to law schools.¹⁵⁷) Discussion about the makeup and quality of law schools started slowly at the end of the nineteenth century and prompted the founding of the American Bar Association (ABA) in 1878. It is telling that the ABA's first "section," established in 1893, was that of "Legal Education and Admission to the Bar," an institution still present today.¹⁵⁸

In 1913, the ABA's Committee on Legal Education, impressed by the Flexner Report, an evaluation of the status of U.S. medical schools made by the Carnegie Foundation,¹⁵⁹ requested that the Carnegie Foundation make a similar evaluation of U.S. law schools.¹⁶⁰ 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-

¹⁵⁶ 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." James Dao, *Gore Lavish with Praise as Mother is Given Degree*, N.Y. TIMES, Apr. 11, 2000, at A26.

¹⁵⁷ STEVENS, *supra* note 22, at 209.

¹⁵⁸ A short description of the Section's establishment in 1893 and its early meeting can be found in REED, LAW SCHOOLS, *supra* note 82, at 22-24; *see also* BOYD, *supra* note 53 (containing a history of the first one hundred years of the Section of Legal Education and Admissions to the Bar, 1893-1993).

¹⁵⁹ ABRAHAM FLEXNER & HENRY S. PRITCHETT, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA (1910) (noted in STEVENS, *supra* note 22, at 102).

¹⁶⁰ REED, TRAINING, *supra* note 82, at xvii.

based law schools over a period of two months in 1913.¹⁶¹ 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.¹⁶²

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:

[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?¹⁶³

D. CHALLENGES TO THE ESTABLISHED BAR

In the late nineteenth century and the first half of the twentieth century, there were many independent, proprietary law schools, including night schools and correspondence schools of law.¹⁶⁴ These schools, which focused on local law,¹⁶⁵ were "totally and exclusively trade schools. Their main merit was to open the door of legal training to poor, immigrant, or working-class students. . . . Lower-court judges and local politicians were drawn heavily from the graduates of these schools."¹⁶⁶

The existence of these schools "alarmed" the more established members of the bar, who worried about the increased

¹⁶¹ 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"). Kimball gives the fascinating circumstances of Redlich's visit to Harvard to conduct his survey there and the somewhat surprising conclusions he made as a result. See Kimball, *supra* note 140, at 290.

¹⁶² REED, *TRAINING* *supra* note 82; REED, *LAW SCHOOLS*, *supra* note 82.

¹⁶³ Woodard, *supra* note 147, 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 147, which was a 1972 Report prepared for the Carnegie Commission on Higher Education.

¹⁶⁴ FRIEDMAN 3D, *supra* note 3, at 473 & n.38.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 473-74.

numbers of lawyers, as well as their own income and prestige.¹⁶⁷ “In the first two decades of [the twentieth] 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.”¹⁶⁸

With the decline of apprenticeships and increasing importance of law schools as the training ground for lawyers, and perhaps in reaction to the success of the part-time and night schools, “[b]ar associations began taking an interest in legal education.”¹⁶⁹ The American Association of Law Schools (AALS), founded in 1900, with the ABA, began to set standards for law schools. Together they made university-based law schools the dominant institution for legal education.¹⁷⁰ By the middle of the twentieth century, “the [ABA] approved [university-based] law schools were fast becoming the principal gateway for entry into the profession.”¹⁷¹ Indeed, today when we think of American law

¹⁶⁷ *Id.* at 473. As Stevens points out, “The history of the United States has, in many ways, been the history of the tension between equality and excellence. The history of the legal profession – and inevitably of the law schools – has similarly reflected the clash between elitism and democracy.” STEVENS, *supra* note 22, at xiii.

¹⁶⁸ STEVENS, *supra* note 22, at 97-98.

¹⁶⁹ FRIEDMAN 3D, *supra* note 3, at 474.

¹⁷⁰ “The motives behind the urge of the AALS, eventually joined by the ABA, to reform legal education in the United States are complex,” STEVENS, *supra* note 23, 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, *LAW SCHOOLS*, *supra* note 82, 83-128.

¹⁷¹ AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 112 (1992) [hereinafter MACCRATE REPORT]. But not the exclusive gateway: There are states that allow “law readers” to take their bar examinations after an apprenticeship. The numbers are slim, however. “Fewer than 150 aspiring lawyers are getting their legal educations in programs that required no law school whatsoever. . . . By comparison, more than 140,000 students attend law schools approved by the American Bar Association, and thousands more attend schools not approved by the association.” *Skipping Law School. Lincoln Did It. Why Not the Valoises?*, N.Y. TIMES, Sept. 21, 2005, at A23 (referring to lawyers of the Valois family in Virginia who passed the bar without attending law school). The reference to Lincoln is an indication of his enduring image in American legal lore. See *supra* text at notes 44-45, 65.

schools, we think primarily of university-based law schools. This is another legacy of Langdell.¹⁷²

III. REACTIONS TO THE CASE METHOD

[F]rom that time [when the case method was introduced at Harvard, 1870] until now 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.¹⁷³

The above quotation was written in the lead article of the Harvard Law Review issued shortly after Langdell's death with remembrances of him written by his associates.¹⁷⁴ It could just as easily have been written today, as will become evident as we briefly look at the reactions to the case method since Langdell's time through the present day.

In his early twentieth century evaluation of American law schools conducted for the Carnegie Foundation, Alfred Reed said admiringly that Langdell's "originality and peculiar merit" lay in "having the ingenuity to devise . . . 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 nineteenth century, a phenomenon that has not abated in current times.¹⁷⁵ The method clearly 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

¹⁷² 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, for 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.

Woodard, *supra* note 147, at 359. Although this observation was published in 1968, the university-based law school is still predominant in American legal training.

¹⁷³ Eugene Wambaugh, *Professor Langdell—A View of his Career*, 20 HARV. L. REV. 1, 1 (1906).

¹⁷⁴ *Id.*

¹⁷⁵ REED, TRAINING, *supra* note 82, at 373.

of view which they never could have learned from textbooks and which often exceeded that to be found in the textbooks.”¹⁷⁶

Yet from the beginning, the case method was subject to criticism.¹⁷⁷ Stevens noted: “Schools that envied Harvard’s success hoped that the teaching system would be its Achilles’ heel and felt free to snipe. Dwight provided a particularly virulent example of this license, and he had been supported by various groups within the bar.”¹⁷⁸ Some sources noted that using cases was not especially innovative: a young Englishman had lectured on the importance of using cases 40 years before Langdell.¹⁷⁹ Pomeroy of New York University Law School is said to have used a case method in the 1860s, although he “did not ‘shape the whole program of a leading school’ with this technique.”¹⁸⁰ However, a more recent article, giving support to the proposition that the study of Langdell and the case method are alive and well, demonstrated that these early claims of other originators of the case method are not sustained under close scrutiny, and that

¹⁷⁶ STEVENS, *supra* note 22, 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)).

¹⁷⁷ One 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 3D, *supra* note 3, at 472. Also, American law has become highly statutory and administrative; Langdell’s approach does not address this.

¹⁷⁸ STEVENS, *supra* note 22, 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.

¹⁷⁹ REED, TRAINING, *supra* note 82, at 371-72 (referring to English barrister John Barnard Byles).

¹⁸⁰ FRIEDMAN 3D, *supra* note 3, at 468 n.23 (quoting JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950)). “Pomeroy anticipated, by several years, most of the essentials . . . introduced . . . by Professor Langdell. . . . The . . . first-hand study of . . . cases and their free discussion in the class room, were the important features of his [Pomeroy’s] system.” Chase, *supra* note 117, at 333 n.18 (quoting John Norton Pomeroy, Jr., *John Norton Pomeroy, in 8 GREAT AMERICAN LAWYERS: A HISTORY OF THE LEGAL PROFESSION IN AMERICA* 89, 99 (William Draper Lewis ed., 1909)).

Langdell can rightfully be credited with this innovation in the legal classroom.¹⁸¹ Still, due credit should be given to Harvard's President Eliot who has been called the "idea man" behind Langdell's innovations.¹⁸² This paper takes the view that Eliot's educational innovations were instrumental in Langdell's promotion of the case method as well as many of the other changes he instituted at Harvard.¹⁸³

The criticism of the case method came under fire in the 1920s and 1930s from legal scholars of the Legal Realist movement, even while it continued as a part of American law school training. The Legal Realist movement, "which burst on the scene in the 1920s, sneered at Langdell's idea of 'legal science.' Legal logic explained very little, they thought. Far more subtle factors were at work: economic factors, prejudices and personalities of judges, political winds and storms, general culture."¹⁸⁴

The Legal Realists attacked legal formalism—"the myth that law consisted of known rules that can be mechanically implied."¹⁸⁵ Stevens noted that the "major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based on the objectivity of black-letter rules."¹⁸⁶ Stevens continued:

When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed

¹⁸¹ See Kimball, *supra* note 140, at 335 ("Appendix 2. Popular Claims on Behalf of Originators of Case Method Antedating Langdell"). Kimball presents an insightful historical assessment of articles and attitudes about Langdell since his death in 1906. Kimball carefully researched the background for the early sources that evaluated Langdell's influence at Harvard and on legal instruction, and found that many of them were based on sources themselves incorrect. Several of these were nevertheless viewed as accurate and came to be accepted as credible sources in the legal literature, thus creating an "obscuring sedimentation of the literature" inevitably relied on by later researchers. *Id.* at 306.

¹⁸² Chase, *supra* note 117, at 332.

¹⁸³ See also STEVENS, *supra* note 22, at 66 n.21 ("Eliot's theories on legal education often provided a basis for or paralleled those of Langdell.").

¹⁸⁴ LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 490 (2002).

¹⁸⁵ *Id.* at 491, 668 n. 115 (referring to JEROME FRANK, *LAW AND THE MODERN MIND* (1930)).

¹⁸⁶ STEVENS, *supra* note 22, at 156. Two important writers from the Legal Realist movement, although holding differing points of view, were Jerome Frank and Karl Llewellyn.

to be value-free. This change inevitably caused the predictive value of doctrine to be seriously questioned. The vantage point of American legal scholarship was finally established as being process rather than substance. The Realist movement was a crucial . . . force in the development of the American legal culture.¹⁸⁷

Despite the realist critique, the use of the case method as a pedagogical tool for developing exacting analyses of a legal problem continued to be used throughout the twentieth century and remains a part of law school instruction.¹⁸⁸ Although the idea of legal science had waned, “Langdell’s system was repackaged as a superior kind of skills training; . . . the method taught the student how to ‘think like a lawyer.’ This meant mastering the law school brand of mental acrobatics, along with the fine art of argument.”¹⁸⁹

In the latter part of the century, those of the Critical Legal Studies school (CLS or “crits”) “attacked the . . . high priests of formalism.”¹⁹⁰ They “‘jeered at the idea’ that law could be ‘neutral, objective, or apolitical.’”¹⁹¹ The CLS criticism of the case method is painted most vividly by Duncan Kennedy:

The classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college. The sense of autonomy one has in a lecture, with the rule that you must

¹⁸⁷ *Id.* The “Law and Society Movement” was a ‘descendant’ of sorts of the Legal Realists. The Law and Society movement looked at law as it interacts with other disciplines. Its origins were in the 1950s, and it continues to be another “force in the development of legal culture.” Professor Hurst was one of the key influences on the Law and Society movement and influenced many, including those on the faculty of the University of Wisconsin Law School, one of whom was Lawrence Friedman (who left Wisconsin for the sunnier climate of Stanford), an exemplar of the Law and Society movement, along with Stewart Macaulay and Marc Galanter. FRIEDMAN, *supra* note 184, at 502-03.

¹⁸⁸ See I HISTORY, *supra* note 46, at 24 (“Although classroom methods have become increasingly diverse . . . the casebook has now held its prime place for a century. Corresponding to the casebook is the dialogue as the principle mechanism of pedagogy, designed to elicit understanding of the cases from the students.”).

¹⁸⁹ FRIEDMAN, *supra* note 184, at 36.

¹⁹⁰ *Id.* at 494.

¹⁹¹ *Id.* (quoting LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 84 (1996)).

let teacher drone on without interruption balanced by the rule that teach can't *do* anything to you, is gone. In its place is a demand for a pseudoparticipation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you.¹⁹²

Kennedy stated that “[l]aw schools channel their students into jobs in the hierarchy of the bar according to their own standing in the hierarchy of schools.”¹⁹³ This standing begins in the first year, with the experience of the case method.

A novel study suggests that the law student's loss of autonomy that Professor Kennedy observed is brought about by the specialized use of language in first year law classes. The study reached the conclusion that “law professors rupture linguistic norms,” allowing “the reorientation toward text, authority, and morality that lies at the heart of first-year legal education.”¹⁹⁴

A recent article about the case method summarized the general criticisms that have been lodged against it:

[O]pponents [of the case method] view [it] as a way to instill a false ideology. . . . [Others] allege that the case method teaches neither the values nor the skills that are imperative to the practice of law. . . .

The case method is also criticized as being incapable of developing a theoretical understanding of the law, and the historic processes that shape it. . . .¹⁹⁵

The article also pointed out an additional criticism—that the case method is “outmoded” in dealing with international law.¹⁹⁶

Langdell and the case method thus continue to be fodder for commentary and research as legal scholars and historians try to understand the place of Langdell and his method in legal history

¹⁹² Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 56 (David Kairys ed., 3d ed. 1998) (emphasis in original).

¹⁹³ *Id.* at 64.

¹⁹⁴ Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 *J. MARSHALL L. REV.* 91, 98 (2000).

¹⁹⁵ Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL [Washington College of Law] Experience*, 17 *AM. U. INT'L L. REV.* 815, 820 (2002).

¹⁹⁶ *Id.*

and why the method continues to be used, seemingly effectively, even now in the twenty-first century.¹⁹⁷

IV. CONTEMPORARY AMERICAN LEGAL TRAINING: ONGOING CHANGE

Law schools in America serve a dual function. On the one hand, they are the place for the first stage of lawyer training (followed after admission to the bar by continuing legal education¹⁹⁸) and can be viewed as essentially a trade school.¹⁹⁹ On the other hand, they continue their 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.²⁰⁰

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, as well as 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.

¹⁹⁷ Elizabeth Mertz's article, referred to earlier, is just one example of the continued study of the case method. Mertz used her anthropological as well as legal training and conducted her study by taping first semester Contracts classes in eight different law schools to focus on the acquisition of the new legal language that law students must learn in their first year. Mertz, *supra* note 194, at 98.

¹⁹⁸ See MACCRATE REPORT, *supra* note 171, at 111, 305-17 ("Professional Development after Law School") for an overview of continuing legal education (CLE) issues.

¹⁹⁹ *E.g.*, STEVENS, *supra* note 22, at xv.

²⁰⁰ FRIEDMAN 3D, *supra* note 3, at 472.

The case method and Socratic approach to teaching are still used, especially in first-year courses, as tools for students to develop and sharpen analytic problem-solving skills.²⁰¹ However, the case method is only a small part of the picture of the instructional methods of the modern-day American law school. A wealth of other instructional formats exist, including lectures, seminars, group work, individual research, simulations, video conferencing, and clinical experiences.²⁰² Clinical education especially has a long tradition as part of American legal education.²⁰³ Perhaps clinical education can be viewed as incorporating aspects of the old apprenticeship method, this time as an integral part of the formal legal education model.²⁰⁴

In recent years, interest has been expressed by other countries in learning about the “American law school model.”²⁰⁵ However, painting a precise picture of this model is difficult to do. It is true that significant similarities exist among American law schools, especially those that meet the accreditation standards set by the American Bar Association.²⁰⁶ This results in an

²⁰¹ See I HISTORY, *supra* note 46, at 24 (“The essence of the case method . . . is to heighten student understanding of the nature of law, not just to train students in the content of the rules.”).

²⁰² *E.g.*, *id.* at 39 (“[I]n the midst of a continuing hegemony of the case method, there has been much experimentation.”).

²⁰³ See Cheryl Rosen Weston, *Legal Education in the United States: Who’s in Charge? Why Does it Matter?*, 26 WIS. INT’L L.J. 397, 408-10 (2006).

²⁰⁴ The clinical movement’s beginnings, in the 1970s, had success, in part, from critiques of the case method: that students “do not absorb moral values or that they absorb largely deleterious values” as a result of the case method form of instruction and that they “exit law school without adequate preparation for the practice of law.” Mertz, *supra* note 194, at 94-95.

²⁰⁵ Japan, Korea, Thailand and Taiwan have been especially interested in the US model - and for the most part they are not aware that there is no single US model. I have given a key note address in Bangkok sponsored by the Thai Ministry of Justice, I’ve given two weeks of demonstration classes at Osaka University, and I’ve participated in conferences on legal education reform in Japan, Korea, Taiwan, and other parts of Asia; and, at all of these events, the US model was thought to be very attractive and possibly suitable for adoption in the Asian countries. In participating at these events, I often spent much of my time explaining that there was no single model.

E-mail from Charles Irish, Professor of Law and Director, East Asian Legal Studies Center, University of Wisconsin Law School (Feb. 1, 2006) (on file with author).

²⁰⁶ See American Bar Association, Accreditation Information, <http://www.abanet.org/legaled/accreditation/acinfo.html> (last visited Dec. 18, 2005).

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.²⁰⁷ Adding to these differences, law schools tend to be engaged in ongoing 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 multiple law school models.

For the near term, it is most likely that the university-based post-baccalaureate law school will continue to be the mainstay of the legal training of lawyers. The law school will continue to have “core” courses in the first year—Civil Procedure, Criminal Law, Contracts, Torts, Legal Research and Writing—with later courses building on the foundation of general legal knowledge provided by the first year courses. The courses will continue to be taught mostly by full-time teachers of law, with practicing attorneys acting as adjunct lecturers. Almost all of the courses will continue to have final examinations or final papers, or both. Among the apparent stasis of these basic components will be ongoing modifications, refinements, and innovations. Innovations already include such instructional conveyances as distance education and video conferencing. These were hard to imagine only a short while ago.

Where do American law schools now stand? Since the end of the twentieth century, the trend in American legal education has been to focus on what lawyers really do. In this light, the

²⁰⁷ For example, a course in contract law taught using the text JOHN KIDWELL ET AL., *CONTRACTS: LAW IN ACTION* (2d ed. 2003) (authored with Stewart Macaulay and William Whitford), 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 ET AL., *CONTRACTS* (6th ed. 2001)).

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American Bar Association created a task force in 1989 to produce a report²⁰⁸ to “determine what skills, what attitudes, . . . what qualities of mind are required of lawyers today.”²⁰⁹ 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.”²¹⁰

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 approach, and she acknowledged its value in developing analytic skills.²¹¹ 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. . . .²¹²

²⁰⁸ The MACCRATE REPORT, *supra* note 171, at xi.

²⁰⁹ Robert MacCrate, *Legal Education and Conduct: Selected Observations*, in LEGAL EDUCATION FOR THE 21ST CENTURY 131, 132 (Donald B. King ed., 1999).

²¹⁰ *Id.*

²¹¹ Janet Reno, U.S. Attorney Gen., Lawyers as Problem-Solvers: Keynote Address to the AALS (Jan. 9, 1999), in 49 J. LEGAL EDUC. 5, 5 (1999) (“Let me hasten to add that I am a product of the case method. . . . I don’t take a thing away from it.”).

²¹² *Id.* at 5-6.

In addition, Attorney General Reno emphasized the need for lawyers to work cooperatively with other disciplines in approaching problems.²¹³

American law schools have thus been “rethinking and reconfiguring”²¹⁴ 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.²¹⁵ The 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.²¹⁶ There will be continued and increased emphasis in law school training on alternative dispute-resolution mechanisms, negotiations, simulations, and clinical legal education.²¹⁷

Professor Friedman commented about lawyers who practiced at the end of the nineteenth century, saying: “The lawyer’s role in American life had never been very clearly defined. What

²¹³ *Id.* at 6; *see generally* American Bar Association Multidisciplinary Practice, <http://www.abanet.org/cpr/multicom.html> (last visited Dec. 18, 2005).

²¹⁴ Interview with Ralph Cagle, Clinical Professor of L., U. of Wis. L. Sch. (Oct. 1999).

²¹⁵ 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 1, at 28; *see also* FRIEDMAN 3D, *supra* note 3, at 233-34 (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. *See, e.g.*, JOHNSON, *supra* note 1, at xiii; FRIEDMAN 3D, *supra* note 3, at 486-87.

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. The term “counselor” in the U.S. took on a more general meaning as a substitute for “attorney.” *See, e.g.*, FRIEDMAN 3D, *supra* note 3, at 235.

²¹⁶ Reno, *supra* note 211, at 7 (“The second component of the problem-solving approach requires that we reach out to other disciplines for knowledge, advice, and instruction.”).

²¹⁷ Paraphrasing from Interview with Ralph Cagle, *supra* note 214.

lawyers actually did constituted the definition of legal practice. This was a tautology; but it also expressed a truth.”²¹⁸ Even today, a lack of clear definition 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. No doubt there will continue to be changes in the American system of legal training; what the specific changes will be is hard to predict and is a “daunting,” if not impossible, task.²¹⁹ The case method seems to be entrenched in most law schools and no doubt will continue to be a characteristic of at least some law school instruction. Legal training in the United States will continue to balance the case method with many other methods of instruction as the law schools strive to train lawyers for the twenty-first century. The American legal community will continue to discuss, propose, and argue about changes, as it has done for well over a century. This constant “conversation,” and the actions taken in response, should ensure the American law school’s continuing function as a vibrant institution for the training of lawyers of the twenty-first century.²²⁰

²¹⁸ FRIEDMAN 3D, *supra* note 3, at 484.

²¹⁹ John Sexton of New York University School of Law presented a paper in 2000, published two years later, in which he took up the “daunting task” of trying to make predictions about legal education. John A. Sexton, “*Out of the Box*”: *Thinking About the Training of Lawyers in the Next Millennium*, 43 S. TEX. L. REV. 623 (2002). His predictions included continued use of the “traditional method [i.e., case method], albeit dispensed in smaller classes . . . to be used to teach rigorously the skills of legal reasoning and close analysis of text.” *Id.* at 638-39. Thus does the tradition of Langdell continue.

²²⁰ See LEGAL EDUCATION FOR THE 21ST CENTURY, *supra* note 209, 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, regardless of particular changes in the law school curriculum that occur.

