THE HISTORY OF FIRST CENTURY AMERICAN LEGAL EDUCATION: A REVISIONIST PERSPECTIVE

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With little apparent fanfare, American legal education is entering its third century.[1] The lack of fanfare is hardly surprising, for contemporary legal educators seem only dimly aware of the first century of American legal education. The irony of this state of affairs is that the third century of American legal education will likely bear a greater resemblance to the broad model of legal education that held sway at the beginning of the first century than to the narrow model that came to predominate in the second.

In order to create and maintain a rigorous system for training lawyers, legal educators during the past century have felt obliged to take a narrow view of legal education. The subject-matter of law study has primarily been case law and the judicial process, with less concern for legislative or administrative law and processes or the study of extra-legal materials. Likewise, the methodology of law study has consisted primarily of analyzing appellate judicial decisions in order to inculcate basic analytic skills, with far less concern for either applied skills training or the empirical or humanistic study of law. Finally, the objective, and hence the structure, of American legal education has been devoted largely to providing training for those seeking to enter the private prac-

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1. Whether American legal education has already or is merely about to enter its third century depends on how one chooses to define the term "legal education." The first academic law professorship, providing general as well as professional legal education, was established in 1779. *See* text accompanying notes 74-77 *infra*. The first proprietary law school, devoted solely to the training of lawyers, began in 1782. *See* text accompanying notes 128-34 *infra*.

Thus far, the bicentennial of American legal education has received little notice. For one of the few explicit references to the coming third century of American legal education, see McKay, *Legal Education*, in AMERICAN LAW: THE THIRD CENTURY (B. Schwartz ed. 1976). The McKay article, however, was marking the bicentennial of the American Revolution, not the bicentennial of the founding of American legal education.

tice of law, with far less concern for the training of public officials and administrators and virtually no concern at all for nonprofessional legal education. Law schools in the United States, in short, are not "law schools" at all but "lawyer schools," whose curricula are heavily weighted in the direction of providing basic analytic skills training for those who intend to engage in the private practice of law and, more specifically, to represent private interests before judicial tribunals.[2]

Credit—or blame—for the development of the narrow professional model of American legal education has traditionally gone to Christopher Columbus Langdell, Dean of the Harvard Law School from 1870 to 1895, who at the outset of the second century of American legal education introduced what eventually became its hallmark—the "case method" of law study. While the case method has been the subject of constant criticism and debate since its introduction in 1870, Langdell's innovation is generally viewed as "the most significant event in the evolution of American legal education."[3]

One unfortunate consequence of the prevailing narrow model of American legal education, however, is that legal educators have tended either to neglect their own history[4] or to perceive it "largely through the lens of present professional concerns and assumptions."[5] A careful examination of the first century of American legal education will reveal that the narrow view of academic legal education was in fact developed

2. The narrow professional model of American legal education stands in marked contrast to continental European legal education. *See, e.g.,* Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 865-66 (1975): "[L]egal education in the civil law world is, at bottom, general education, *not* professional education. . . . Law is merely one of the curricula available to undergraduate students. . . . The professional side is taken care of after the university."

3. A. HARNO, LEGAL EDUCATION IN THE UNITED STATES 59 (1953). A similar view is implied in the title of a more recent history of American legal education. Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY (D. Fleming & B. Bailyn eds. 1971).

4. Robert Stevens noted as recently as 1971 that little has been written about the evolution of American legal education. That hiatus, Stevens points out, is but one aspect of a phenomenon many have noted—the absence of a developed literature on American legal history. Stevens, *supra* note 3, at 406. *See also* D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 444 (1965); G. GILMORE, THE AGES OF AMERICAN LAW 102-03 (1977); Murphy, *The Jurisprudence of Legal History: Willard Hurst as a Legal Historian*, 39 N.Y.U. L. REV. 900 (1964).

5. W. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES xi (1978). *See also* D. BOORSTIN, *supra* note 4, at 444 (noting that one explanation for the lack of a solid body of historical writing about the American legal past is the increasing professionalism of American law schools and their "myopic pre-occupation with what is in current demand by practitioners").

by legal educators at Harvard well before Langdell introduced the case method in 1870. The advent of Langdell and the case method in the early 1870s, far from being a "dramatic and revolutionary movement" that "ushered in a new era in legal education,"[6] is more accurately viewed as the culmination of an era in which a narrow model of legal education had gradually gained predominance. If Langdell can be said to have ushered in a new era in legal education at all, it is only because he and his successors at Harvard gave academic respectability to a model of legal education that originally was adopted largely as a matter of practical necessity.[7]

Examination of the first century of American legal education will also reveal an earlier and broader model that, by comparison, *was* revolutionary; so revolutionary, in fact, that it retains considerable currency today. The person ultimately responsible for that broad model of legal education, as we shall see, was the founder of academic legal education in Virginia (and the fomenter of other revolutions as well): Thomas Jefferson.[8]

Finally, examination of the broader political and educational conditions that led to the abandonment of the broad model of American legal education in favor of the narrow model that has dominated the second century of American legal education will reveal that those conditions have themselves been reversed.[9] A number of developments in the second century of legal education, moreover, foretell a return to a broad model as we enter the third century of American legal education.[10] For that reason, the time is particularly ripe to examine the history of American legal education from a revisionist perspective.[11]

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6. A. HARNO, *supra* note 3, at 16.

7. *See* notes 142-268, 306-31 *infra* and accompanying text.

8. *See* notes 74-87, 156-90; 265-73 *infra* and accompanying text.

9. *See* text accompanying notes 269-333 *infra*.

10. *See* text accompanying notes 333-402 *infra*.

11. As Grant Gilmore has pointed out, history is a "systematic distortion of the past, designed to tell us something meaningful about the present." Gilmore, *Law, Anarchy and History*, U. Chi. L. Sch. Record, at 2 (Autumn, 1966), *cited in* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 9 (1976). Revisionist history, for its part, points out the distortion (and no doubt creates new distortions of its own) in order to tell us something equally meaningful about the present.

I. PROLOGUE: PRE-REVOLUTIONARY LEGAL EDUCATION

While the "Dark Continent"[12] of American legal history has been the subject of a remarkable amount of scholarly exploration in the past fifteen years, the work remains patchy, particularly with regard to the history of legal education. Pre-revolutionary legal education, for example, appears to have received more attention than the first century of post-revolutionary legal education.[13] A review of the colonial system of legal education is instructive, however, for the light it sheds on post-revolutionary developments.

For a considerable part of the American colonial period the colonists had little use for lawyers and hence little concern for professional legal education as such.[14] This is not to say that law was of no concern to the early colonists; rather, it was simply that they saw no reason to segregate law and its administration or study from the rest of human existence. Law was perceived as being inseparably bound up with politics and religion.[15] Consequently, the administration of colonial law tended to be vested in various colonial hierarchies rather than in a pro-

12. D. BOORSTIN, *supra* note 4, at 444 refers to American legal history as a "Dark Continent."

13. *See* Consulus, *Legal Education During the Colonial Period, 1663-1776*, 29 J. LEGAL EDUC. 295 (1978); McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124 (1976). For an earlier history of colonial legal education, see P. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK (1939).

14. Lawyers were not among the most popular colonial settlers, despite the fact that few of the early colonists were lawyers. Massachusetts, Virginia, Connecticut, and the Carolinas all prohibited lawyers from practicing in court until the end of the seventeenth century. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 81 (1973). Distrust and unpopularity of lawyers is attributable to several causes. First, the Puritan Revolution was in principle hostile to lawyers. Puritans and Quakers who suffered under the prevailing laws of England blamed their plight in part on the legal profession not only for alleged inequities of the law, but also for the harshness with which law was often applied. *See* 1 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 27 (1965). Second, many colonists identified the law with officers of the crown, including the Royal Justices who were suspected of having perverted English justice and English liberties. *Id.* Third, many persons who presented themselves as lawyers in the colonies had little or no professional training, and were both unethical and incompetent. Those who acted as lawyers were often outright sharpers, spellbinders, or pettifoggers, instigating litigation solely to collect exorbitant fees. *Id.*

Roscoe Pound divided pre-Revolutionary development of the legal profession into four periods. The first was the attempt to get along without any lawyers. The second was the stage of irresponsible practice by petty court officials and pettifoggers. Third was the era of admitted practitioners in permanent judicial organizations, and the last was the era of trained lawyers and organized bars. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 138 (1953), *cited in* Consulus, *supra* note 13, at 297.

15. *See* H. REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS 5-17 (1951).

fessional cadre of lawyers.[16] Likewise, the study of law at any of the nine American colleges established during the colonial period[17] tended to be in extricably intertwined with the study of political philosophy, ethics, and theology.[18]

As the colonial period wore on, however, the rise of a propertied class with rapidly expanding land holdings and commercial interests created the need for a professional corps of lawyers.[19] Together, these lawyers and their clients, the landowners and merchants, came to constitute the governing oligarchy in the colonies.[20] The influence of the law and lawyers during the period immediately preceding the American revolution is evidenced by the extent to which members of that oligarchy fanned revolutionary sentiment with distinctly legalistic references to the "immemorial rights of Englishmen" and the "natural and inalienable rights of men."[21] Not surprisingly, Edmund Burke noted on the eve of the revolution that "in no country perhaps in the world, is the law so general a study."[22]

Prior to the American Revolution, three principle methods for studying law existed in the colonies: (1) study in England at the Inns of

16. Friedman notes that the more theocratic colonies, in particular, "were committed to a social order closely directed from the top. The legal profession . . . seemed nothing so much as an obstacle to efficient government." L. FRIEDMAN, *supra* note 14, at 82.

17. Among these were Harvard, 1636; William and Mary, 1693 (or 1696); Yale, 1701; College of New Jersey, now Princeton, 1746; King's College, now Columbia University, 1754; College of Philadelphia, now University of Pennsylvania, 1756; Queen's College, now Rutgers University, 1766; and Dartmouth College, 1769. *See* 1 A. CHROUST, *supra* note 14, at 37.

18. *See* A. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW 112-14 (1921).

19. H. REUSCHLEIN, *supra* note 15, at 18. *See also* J. HURST, THE GROWTH OF AMERICAN LAW 253 (1950). Hurst points out that the growth of commerce and land speculation provided the basis for a full-time, professional bar. *Id.*

20. The association between great landholders and lawyers was often cemented through family ties. H. REUSCHLEIN, *supra* note 15, at 18. The close ties between landholders and lawyers created what has been described as a government by "Junto." *Id.* at 18, *citing* HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 49 (1917).

21. *See generally* H. REUSCHLEIN, *supra* note 15, at 17-23. This is not to suggest that all colonial lawyers were revolutionaries. According to one scholar, the legal profession was sorely depleted by the revolution, which caused the bar to lose many prominent members who remained loyal to the British crown. *See* 2 A. CHROUST, *supra* note 14, at 5. These loyalists either left America, retired from practice, or were forcibly excluded from the profession by legislative acts or rulings of the courts. *Id. See also* L. FRIEDMAN, *supra* note 14, at 88; J. HURST, *supra* note 19, at 253; C. WARREN, A HISTORY OF THE AMERICAN BAR 212-13 (1911).

22. E. Burke, Speech on Conciliation with America (March 22, 1775), *in* 3 THE WORKS AND CORRESPONDENCE OF THE RIGHT HONORABLE EDMUND BURKE 256 (1852), *quoted in* H. BERMAN, ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM 9 (1956).

Court;[23] (2) self-education by reading one or more books on law;[24] or (3) apprenticeship with a member of the legal profession or in the clerk's office of a court.[25]

For a time, studying at the Inns was considered the most prestigious way to gain entry to the legal profession.[26] However, many of the years during which students from the colonies went to the Inns were years of decadence in the Inns. In fact, the requirement of "keeping terms" at the Inns could be satisfied by eating a certain number of dinners there, and any other requirements for entrance were a mere sham.[27] The students, it would seem, occasionally attended court, taught each other, and enjoyed the pleasures of London society. The only real legal education was through unguided attendance at the various courts, since the mootings and readings had died out. The main tradition that was inculcated in the colonies by those returning from the Inns was that legal education and practice were independent of university influence. By the time the Inns returned to education strength, students from the United States were no longer interested in going to them.[28]

A much less prestigious and less expensive way to "learn law" was to buy or borrow a book and begin reading for self-education. Requirements for admittance to the bar[29] were scant enough that if one could find a copy of *Coke Upon Littleton*[30] (or, later, Blackstone), engage in a

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23. *See* notes 26-28 *infra* and accompanying text.

24. *See* notes 29-32 *infra* and accompanying text.

25. *See* notes 33-53 *infra* and accompanying text.

26. Despite considerable expense and the difficulties of travel, many young men who later became the most widely known lawyers in the colonies traveled to London to receive the benefits of association in the Inns of Court. Between 1760 and the close of the revolution, 115 Americans were admitted to the Inns. *See* Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 175, 178 (1918-19).

Studying at the Inns was socially desirable. Once in London, the law student could attend the courts at Westminister and meet some of England's leading lawyers and judges. Upon return to the colonies, English-trained lawyers enjoyed considerable professional influence, frequently becoming mentors of the next generation of colonial lawyers. *See* 1 A. CHROUST, *supra* note 14, at 33, 36.

27. 1 A. CHROUST, *supra* note 14, at 33, 36. *See also* A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 20 (1921); Stevens, *supra* note 3, at 410-11.

28. *See* J. HURST, *supra* note 19, at 151-52.

29. As early as 1642-43, Virginia had passed an act "for the better regulating of attorneys and the great fees exacted by them" to control the lower class of petty attorneys. C. WARREN, *supra* note 21, at 41. In 1686 the colony of Massachusetts established a table of attorneys' fees, and attorneys were obliged to take an oath upon admission to the Bar. *Id.* at 72-73.

30. E. COKE, INSTITUTES OF THE LAWS OF ENGLAND (1628) (Lord Coke's First INSTITUTION or COMMENTARY UPON LITTLETON).

study of that single book, and learn enough to be examined thereon, one could be admitted to practice—as was Patrick Henry in 1760 after six weeks of solitary study of Coke and the Virginia statutes.[31]

Finding a book to buy or borrow sometimes proved difficult, since practically all the law books used in the colonies were imported from England, were expensive, and were constantly in use by the owners and their apprentices or other members of the bar. There were, of course, no public libraries from which books could be borrowed.[32]

It is not difficult, then, to understand the attractions of apprenticing oneself to a member of the bar, if one had the money to pay the fee, for that provided access to the master's private library, which typically included such books as *Coke Upon Littleton*,[33] Comyn's *Digest*,[34] Bacon's *Abridgement*,[35] Hale's or Hawkins' *Pleas of the Crown*,[36] Blackstone,[37] Lilly's *Entries*,[38] Saunders' *Reports*,[39] and perhaps some brief book on pleading and practice.

For a broader understanding of law, a colonial reader of law, whether self-tutored or apprenticed, might resort, as young John Adams did, to the study of continental legal materials such as Justinian's Digest and *Institutes*[40] and such continental scholars as Grotius,[41] Pufendorf,[42] and Burlamaqui.[43] While Adams' original motive appears simply to have been to distinguish himself from other students of the law by such erudition and thereby gain favor with Boston lawyer Jeremiah Gridley[44] (to whom Adams was seeking to apprentice him-

31. One of Henry's three examiners, George Wythe, refused to sign his license. Henry was admitted upon approval of his other examiners, who conceded that he was ignorant of the law, but felt he would soon qualify himself. *See* C. WARREN, *supra* note 21, at 165.

32. *See generally* 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 126-28 (1908). *See also* P. HAMLIN, *supra* note 13, at 73.

33. *See* note 30 *supra*.

34. J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND (1740).

35. M. BACON, A GENERAL ABRIDGEMENT OF CASES IN EQUITY (1667).

36. M. HALE, PLEAS OF THE CROWN (1736).

37. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

38. J. LILLY, A COLLECTION OF MODERN ENTRIES (5th ed. 1791).

39. T. SAUNDERS & H. COLE, BAIL COURT REPORTS (London 1847-49) (in two volumes).

40. Justinianus I, CORPUS JURIS CIVILIS. Digester.

41. H. GROTIUS, INSTITUTES OF NATURAL LAW (1712).

42. S. PUFENDORF, OF THE LAW OF NATURE AND NATIONS (1729).

43. J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW (1748).

44. Gridley graduated from Harvard in 1725, studied for the ministry and later became "the father of the Boston Bar." He was also Attorney General in 1742 and again in 1761, and has been described as the great legal scholar of the 18th century. *See* C. WARREN, *supra* note 21, at 81.

self), Gridley ultimately supplied Adams with more practical reasons for such study. Gridley pointed out that, unlike an English lawyer, a lawyer in America could not specialize, but must study common and civil law, natural law, and admiralty law and must act as proctor, advocate, solicitor, barrister, attorney, conveyancer, and special pleader.[45]

Certainly, little reason existed for apprenticing oneself other than for the use of the lawyer's books, because as a rule the practicing lawyer was far too busy to pay much, if any, attention to an apprentice.[46] Thomas Jefferson, among others, voiced strong criticism of the apprentice system of legal training in which he had been schooled, even though Jefferson as an apprentice had more attention than most from his master, George Wythe.[47] Jefferson retained a life-long admiration for Wythe who, at Jefferson's behest, ultimately became the fledgling republic's first law professor.[48]

Jefferson's views on the apprenticeship system are well set out in a letter to Thomas Turpin in February, 1769, concerning the legal education of the latter's son:

> I always was of opinion that the placing a youth to study with an attorney was rather a prejudice than a help. We are all too apt by shifting on them our business, to incroach on that time which should be devoted to their studies. The only help a youth wants is to be directed what books to read, and in what order to read them. I have accordingly recommended strongly to Phill to put himself into apprenticeship with no one, but to employ his time for himself alone. . . . One difficulty only occurs, that is, the want of books.[49]

The typical relationship between master and apprentice is perhaps epitomized in the following appraisal by a former apprentice of James Wilson, a New York lawyer (and eventual Supreme Court Justice), who, though he later took a lively interest in the development of academic legal education and for a time lectured on law, apparently contributed little as a master:

> Mr. Wilson devoted little of his time to his students in his office . . . and rarely entered it except for the purpose of consulting books. . . . As an

45. *Id.* at 83.

46. *See generally id.* at 166-69.

47. *See* J. BLACKBURN, GEORGE WYTHE OF WILLIAMSBURG 33 (1975). *See also* notes 70-82 *infra*.

48. J. BLACKBURN, *supra* note 47, at 102.

49. 1 THE PAPERS OF THOMAS JEFFERSON 23-24 (J. Boyd ed. 1950-1974) [hereinafter cited as PAPERS].

> instructor he was almost useless to those under his direction. He would never engage with them in professional discussions; to a direct question he gave the shortest possible answer and a general request for information was always evaded.[50]

For the privilege of being apprenticed, the student, after paying his fee,[51] laboriously copied out and synthesized his readings and copied down documents for his master. The readings were generally as dull[52] as the clerical work itself—at least until Blackstone provided the up-to-date shortcut to basic English law in his *Commentaries*.[53]

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50. C. WARREN, *supra* note 21, at 167, *quoting* J. SANDERSON, BIOGRAPHY OF THE SIGNERS (1820-27). Wilson later took an interest in the development of academic legal education, and briefly lectured in law. See text accompanying notes 98-103 *infra*.

51. This fee provided a substantial sum for some attorneys who had several apprentices at once—no doubt one reason why many lawyers opposed an academic course of law study. Fees in 1780 typically ranged from $100-$200, but sometimes went as high as $500 for admission to the office of a prominent attorney. *See* Gewalt, *Massachusetts Legal Education in Transition*, 17 AM. J. LEGAL HIST. 27, 34 (1973).

52. The universal text for "reading at law" was COKE UPON LITTLETON, considered valuable training by Jefferson in later years because of its sound Whig tone. *See* Didier, *Thomas Jefferson as a Lawyer*, 15 GREEN BAG 153-54 (1903). Jefferson the student, however, considered Coke to be dull reading. He said, "I do wish the Devil had old Cooke [Coke], for I am sure I never was so tired of an old dull scoundrel in my life." *See* PAPERS, *supra* note 49, at 5. John Quincy Adams also considered Coke rather dull, and stated in 1788 that Coke's work was "such an incoherent mass that I have derived little benefit from it." *See* C. WARREN, *supra* note 21, at 177. Daniel Webster read Coke-Littleton through "without understanding a quarter part of it . . . . There are propositions in Coke so abstract and distinctions so nice, and doctrines embracing so many distinctions and qualifications . . . . Why disgust and discourage a young man by telling him he must break into his profession through such a wall as this?" *See id.* at 176. For Story's sad account of his bout with Coke, see 1 LIFE AND LETTERS OF JOSEPH STORY 74 (W. Story ed. 1851).

53. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND [in four volumes] (2d ed. Thomas Cooley 1872). *See also* W. BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND (5th ed. 1762), to which is prefixed a DISCLOSURE ON THE STUDY OF LAW (1758). The *Commentaries* were first published in England in 1765. An American edition was published in 1772, and by 1776 nearly 2500 copies of Blackstone were in use in the colonies. Of the 2500 copies, 1500 were the American edition. *See* Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 630 (1932-33). Reed relates that Blackstone provided a comprehensive, unified, up-to-date systematization of the English common law when he produced his COMMENTARIES; it was a work "suitable as a reference for the courts and as a textbook for students." Further, it is hardly an exaggeration to say that what the United States actually took over from England was simply Blackstone, in that

> [p]rior to 1789, no American law reports had been published, and for many years after this there was no great body of strictly American precedents, published or unpublished. The judges were thus driven back upon English precedents. Had these not been recently systematized, it is possible that, in our early patriotic reaction against everything English, the codifying spirit, already expressed in state constitutions would have produced also statutory codes, beyond which judges would not have gone.

A. REED, *supra* note 27, at 111.

The *Commentaries* were the direct result of Blackstone's academic lectures at Oxford, beginning in 1753, and of his appointment in 1758 as Vinerian Professor at Oxford. These lectures were themselves unique—the first lectures on English law ever given in a university.[54] Prior to that time, only Roman and canon law were taught at English universities.[55]

Blackstone's lectures were aimed specifically at the squirearchy, merchants, and law students of eighteenth century England.[56] Blackstone believed that each English gentleman had to be familiar with law in order to fulfill his duties, either in the House of Commons, as a justice of the peace, or in his daily affairs, and that to these ends the study of law should be a part of his general education.[57]

Notwithstanding Blackstone's ultimate influence on American legal education, however, the *Commentaries* were only beginning to have an impact at the time of the revolution. After the break with the mother country, the *Commentaries* stood in need of "republicanizing"[58] before they could have their greatest impact. By then, an indigenous system of academic legal education was already beginning to develop.

II. THE FIRST CENTURY OF AMERICAN LEGAL EDUCATION

A. *The Development of Academic and Professional Legal Education: 1779-1829*

In the period preceding the American Revolution, no academic legal education existed as such—no lectures to compare with those of Blackstone in England. Immediately after the revolution, however, two additional avenues for law study came into being. These were the early law professorships and the early proprietary law schools.

Before examining these developments themselves, however, it is instructive to look at the way they have been perceived in the course of

54. *See* A. HARNO, *supra* note 3, at 11. In Blackstone's initial lecture, *On the Study of the Law*, he described the then deplorable condition of legal education, and set forth his conception of a sound system. Although much of Blackstone's *Commentaries* is now obsolete, this lecture is as relevant today as when originally delivered. *Id.*

55. Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 346-47 (1950).

56. D. BOORSTIN, *supra* note 4, at 5. Blackstone's treatise "used the prevailing ideas and assumptions of his day so as to prevent questioning of the existing social arrangements, and to demonstrate the acceptability of the society in which he believed." *Id.* at 6.

57. A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 7 (J. Goebel, Jr. ed. 1955) [hereinafter cited as COLUMBIA].

58. Currie, *supra* note 55, at 331, 360.

the second century of American legal education. Roscoe Pound, dean of the Harvard Law School from 1916 to 1936 and a major figure in the second century of legal education, dismissed the early law professorships by saying that these lectures "were not and were not meant to be professional training in law. They were part of the general education of gentlemen, not part of the professional education of lawyers. They were lectures for college students generally and for the community at large."[59] For Pound, law teaching in this country began, rather, with the expansion of apprenticeship training, which gradually produced "the first American law school," the famous proprietary law school founded by Judge Tapping Reeve in Litchfield, Connecticut.[60]

James Barr Ames, Pound's predecessor and Langdell's successor as dean of the Harvard Law School, concluded that "the hopes that may have been entertained of developing schools of law out of the early law professorships were in the main doomed to disappointment."[61] The private law school at Litchfield, according to Ames, "had for nearly twenty-five years no competitor, and throughout the fifty years of its existence was the only law school that could claim a national character."[62]

Having thus dismissed the early law professorships as not being law schools in the proper sense of the word and, at any rate, as experiments that were ultimately doomed to failure, Ames and Pound concluded, respectively, that Litchfield was the "birthplace of the American Law School"[63] and that the "first *university* school of law in the English-speaking world"[64] was the Harvard Law School, which was founded in 1817.[65]

As early as 1921, a monumental study on legal education which had been prepared by nonlawyer Alfred Z. Reed for the Carnegie Foundation for the Advancement of Teaching disputed the foregoing interpre-

59. Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 160 (1926-27).

60. *Id.* at 160-61. *See also* R. Pound, The Evolution of Legal Education 7 (Inaugural Lecture delivered September 19, 1903 while Professor of Law and Dean of the College of Law in the University of Nebraska).

61. J. AMES, LECTURES ON LEGAL HISTORY 359 (1913).

62. *Id.*

63. *Id.* at 354.

64. Pound, *supra* note 59, at 161.

65. *Id. See also* J. AMES, *supra* note 61, at 359. A later Harvard law school dean endeavored to set the record straight. *See* note 127 *infra*. The effort, however, was apparently in vain. *See* notes 67-72 *infra* and accompanying text.

tation of events in the first century of American legal education.[66] According to Reed, the first century of legal education produced two distinct models of legal education, one of which may be characterized as a broad academic model, the other as a narrow professional model. Such was the stature of Ames and Pound and the pervasiveness of their own narrow view of legal education, however, that their interpretation of origins of American legal education, and not Reed's, became the conventional view. Latter-day historians of legal education, citing either Ames and Pound[67] or no one at all, have variously proclaimed that the first American law schools "grew out of law offices";[68] that "overall, the efforts by the colleges to develop law as a scholarly study were not a success";[69] that "none of these professorships attempted to afford a complete or practical education for law students";[70] that none of the early law professorships "was significant in terms of modern legal education";[71] and that "such success as American legal education had before the Civil War was achieved through the proprietary law schools."[72]

Given the conventional view on the origins of American legal education, it is hardly surprising that Langdell's innovations at Harvard are viewed as the most significant event in the evolution of academic legal education. The conventional view, however, stands in need of revision. There is little room for debate, in any event, about the bare chronology of events. The first academic law professorship was established in 1779 shortly before the Litchfield Law School evolved out of the apprenticeship system.[73] The more pertinent question, however, is whether these professorships should be described as "law schools" and, if so, whether they are to be characterized as successes or failures. For an answer to those questions, one must look at the individual professorships.

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66. A. REED, *supra* note 27.

67. *See, e.g.*, A. HARNO, *supra* note 3, at 27. As recently as 1974 the Encyclopaedia Brittannica repeated the Poundian version of the first century of American legal education. *See* Legal Education, ENCYCLOPAEDIA BRITTANNICA (15th ed. 1974).

68. L. FRIEDMAN, *supra* note 14, at 279.

69. Stevens, *supra* note 3, at 415. *See also* Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. Rev. 695, 725-26.

70. C. WARREN, *supra* note 21, at 357.

71. Stevens, *Law Schools and Legal Education, 1879-1979: Lectures in Honor of 100 Years of Valparaiso Law School*, 14 VAL. U.L. REV. 179, 189 (1980).

72. *Id.*

73. *See* Devitt, *William and Mary: America's First Law School*, 2 WM. & MARY L. REV. 424 (1960).

1. *The Early Law Professorships*

The academic study of law in the United States owes its origin to Thomas Jefferson, who, upon being appointed Governor of the Commonwealth of Virginia in 1779[74] and being elected a visitor to William and Mary College, promptly established a "Professorship of Law and Police" and appointed his former teacher, George Wythe, to that position.[75] The course of study offered by Wythe in and after 1779 was the first academic course of law having a discernible relation to practical training in law.[76] Earlier "law" professorships were inspired by theological influences and focused primarily on ethics and political theory.[77]

Wythe's approach to legal education at William and Mary was pragmatic and experimental. Of particular note was the breadth of instruction. The term "police" in the title of Wythe's professorship, for example, covers what we would currently speak of as public administration.[78] Wythe's lectures, we are told,

> touched not only on municipal and commonwealth law, but on constitutional law as well. The new written constitutions in America had opened up a field of study unexplored by Coke, Blackstone and other commentators of the unwritten constitution of the British monarchy. Wythe was the first scholar in the United States to make American constitutional law the subject of regular instruction.[79]

Instruction was given not only by lectures, but also by moot courts—a concept Wythe revived after a century and a half of disuse at the Inns of Court in England[80]—and by mock legislative sessions in which committees drew up bills and debated them, with Wythe presiding as Speaker of the House and teaching parliamentary procedure in a simulated real-life atmosphere.[81] Practical law, in other words, was combined with practical politics.[82]

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74. A. DILL, GEORGE WYTHE, TEACHER OF LIBERTY 41 (1979).

75. *Id.* at 42. *See generally* J. MORPUGO, THEIR MAJESTIES' ROYALL COLLEDGE 189-98 (1976).

76. Devitt, *supra* note 73, at 426.

77. A. REED, *supra* note 27, at 113-14.

78. Currie, *supra* note 55, at 350-51 & n.41. *See also* A. DILL, *supra* note 74, at 42.

79. A. DILL, *supra* note 74, at 43. *See also* D. SHEWMAKE, THE HONORABLE GEORGE WYTHE 35 (1921). The volume in which Wythe recorded his lectures and essays on law is, unfortunately, lost. *Id.*

80. A. DILL, *supra* note 74, at 44.

81. *Id. See also* J. BLACKBURN, *supra* note 47, at 103.

82. A. HADDOW, POLITICAL SCIENCE IN AMERICAN COLLEGES AND UNIVERSITIES 1636-

The study of law was not limited to prospective practitioners, however, for Wythe's lectures were open to undergraduates, aspiring attorneys, and civilians alike. Indeed, Wythe provided a still broader form of community legal education by opening the moot courts and mock legislatures to the public.[83] In Wythe's model of legal education, in short, the processes of all three branches of the newly established government, and not merely its judicial department, were deemed appropriate subjects for study. His methodology included simulation of each of those processes and not merely lectures on the substance of the law, and the objective and structure of the system of law study he offered was to provide training for citizenship and public service as well as for the private practice of law.

In a letter to James Madison dated July, 1780, Jefferson spoke of the new professorship in glowing terms—"our new institution at the college has had a success which has gained it universal applause." Jefferson went on to remark that "this single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value."[84] Although that view is superficially reminiscent of Blackstone's view of the value of his own lectures for English gentlemen,[85] Jefferson's ideas on legal education in fact differed significantly from Blackstone's. Indeed, Jefferson viewed Blackstone as an enemy of the American Revolution who threatened to make Tories out of young American lawyers. Jefferson did not believe that the traditional liberal education of an English gentleman should be a prerequisite to studying and practicing law. He saw the basic function of academia itself, moreover, to be one of public service, training men for duties of citizenship and government.[86] In place of the traditional lib-

1900, at 88 (1939). A measure of Wythe's bipartisan influence on politics is readily apparent from the fact that in the course of his career as an educator he taught mentors of all three of the major pre-Civil War political parties. Jefferson, his first student/apprentice became, a leading anti-Federalist (or Republican); Marshall, one of his first students at William and Mary, became a leading Federalist; and Henry Clay, his clerk after Wythe became Chancellor of Virginia, became a leading member of the Whig Party.

83. J. BLACKBURN, *supra* note 47, at 102-03; A. DILL, *supra* note 74, at 42-43; D. SHEWMAKE, *supra* note 79, at 17.

84. 3 PAPERS, *supra* note 49, at 506-07.

85. *See* note 56 *supra* and accompanying text.

86. In 1810, Jefferson wrote to Judge Tyler:

> I have indeed two great measures at heart without which no republic can maintain itself in strength. 1. That of general education, to enable every man to judge for himself what will secure or endanger his freedom. 2. To divide every country . . . that all the children of each will be within reach of a central school . . . .

eral arts college, with its prescribed classical curriculum and aristocratic overtones, he proposed to substitute the concept of the university, with its broader curriculum and alternative programs, which would give the student a choice of schools.[87] He thus advocated parallel professional and liberal studies. It was that concept that Wythe implemented at William and Mary.

Wythe resigned his professorship in 1789[88] and was succeeded by St. George Tucker, a former student of Wythe's, who remained at William and Mary until 1804.[89] Ironically, Tucker was to produce in 1803 an edition of Blackstone with notes adapting it to American usage (the "republicanized version" of which Jefferson approved), which made self-education and apprenticeship so practicable that the organization of law schools everywhere would eventually be discouraged.[90]

Even so, the law professorship at William and Mary remained in continuous operation until the onset of the Civil War.[91] During the term of St. George Tucker and his immediate successors the course of law study at William and Mary appears to have been fairly rigorous.[92] The college laws listed degree requirements for two degrees, "Batchelor of Arts" and "Batchelor of Law." For the latter, the student was to have the requisites of the "Batchelor of Arts"; in addition, "he must . . . be well acquainted with civil History, both Ancient and Modern, and particularly with municipal Law and Police."[93] Thus, the instruction in law seems to have been a kind of graduate work, even though it was open to those who were not degree candidates. If the course of study had ever been more politics than law, by 1801 that was no longer true. A letter written in that year by Joseph Cabell observed that

> a notion formerly prevailed here that a student of Law should make the study of his profession subservient to that of politics. This opinion however serves not to prevail here this course, but has yielded to one perhaps more rational. The general opinion at this time appears to be that students of Law should devote their time partly to legal acquirements, partly

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Waterman, *supra* note 53, at 639 n.69.

87. R. HOFSTADTER & C. HARDY, THE DEVELOPMENT AND SCOPE OF HIGHER EDUCATION IN THE UNITED STATES 22-27 (1952).

88. A. DILL, *supra* note 74, at 71.

89. 2 A. CHROUST, *supra* note 14, at 178; A. DILL, *supra* note 74, at 42.

90. Currie, *supra* note 55, at 360.

91. A. REED, *supra* note 27, at 44, 423.

92. 2 A. CHROUST, *supra* note 14, at 178. *See also* text accompanying note 145 *infra*.

93. A. HADDOW, *supra* note 82, at 45.

to the pursuit of general Science, and but partially to the Science of Government.[94]

So successful was the broad Jeffersonian approach to legal education that it not only thrived at William and Mary, but it also eventually spread to other schools as well. Wythe's methods were first transported over the Appalachian mountains, where George Nicholas, a William and Mary graduate, in 1799 became the first "Professor of Law and Politics" at Transylvania University in Lexington, Kentucky.[95] That professorship, too, remained in continuous operation until 1861. For over thirty years it was the only law professorship west of the Alleghenies, and at one time (1842-43) its enrollment was second only to that of the Harvard Law School.[96] The most profound influence William and Mary was to have, however, would be in the founding of the law school at the University of Virginia in 1826. That event, as we shall see, marked the culmination of the Jeffersonian model of legal education.[97]

Other early attempts to establish law professorships were less successful than Jefferson's. Ten years after Jefferson established the chair of law at William and Mary, the College of Philadelphia appointed James Wilson[98] as Professor of Law. Wilson, a Scot with little love for English legal institutions, had been a signer of the Declaration of Independence. He was also an avid Federalist (a term that would not become synonomous with pro-British sympathies until after Wilson's death in 1798), and at the Constitutional Convention he had favored a strong federal executive and an independent federal judiciary. He became an Associate Justice of the Supreme Court, where his views on judicial review served as a herald of the era in which John Marshall would put his lasting imprint on the Court.

Though Wilson differed with Jefferson on the balance of federal and

94. *Id.* at 88-89.

95. *See* A. REED, *supra* note 27, at 118; Currie, *supra* note 55, at 351. George Nicholas was the first Professor of Law and Politics. The professorship remained in existence until 1879. Among its early incumbents was Henry Clay.

96. A. REED, *supra* note 27, at 423, 450-51.

97. *See* notes 154, 156-65 *infra* and accompanying text.

98. James Wilson was born in 1742 in the Scottish Lowlands and came to New York in 1765; he went immediately to Philadelphia to serve as a tutor at the College of Philadelphia. He later arranged to read law under the supervision of John Dickinson, and he began practice in 1767 in Reading. He was a delegate to the Second Continental Congress in 1775. Wilson was an Associate Justice of the U.S. Supreme Court at the time of his appointment to the chair at the College of Philadelphia. He died in 1798.

state power, he was equally committed to representative government as it was then understood and had an equally broad view of legal education. However, Wilson's lectures were not meant to provide lawyer training at all but rather to provide useful general education for gentlemen of all professions.[99] The lectures provided an exposition of Wilson's views on the Constitution and the federal government, as well as a thorough-going critique of Blackstone.[100] They "spelled out in detail his view of the nature of law, a view so broad that it encompassed philosophy, psychology and political theory."[101] Wilson's lectures were delivered in a scholarly and elegant style and were scheduled to be given over a three-year period, but they were discontinued after only two years because of lack of interest both on Wilson's part and apparently on the part of his audience.[102] Reed comments that Wilson wasted the entire first year of his lecture course on introductory generalities and spent most of the second year on governmental organization.[103] Wilson's attempt to be erudite appears to have marred the utility of his lectures.

An equally staunch advocate of the broad view of legal education was the young James Kent,[104] who, in 1793, was elected to fill a chair of law at Columbia College. Kent, a conservative Federalist of the Hamiltonian circle in New York, had been profoundly influenced by Blackstone and early viewed the courts as a bulwark for the protection of the propertied minority against the legislative excesses of popular assemblies.[105] While in his lectures Kent professed no love for English legal institutions, he cautioned his students of law to shun equally the revolutionary ideas of the French. His law lectures, though open to all, were attended mainly by those who were already members of the bar and who wanted help "in reducing to coherence and order the miscellaneous scraps of information that would be picked up in a period of

99. L. FRIEDMAN, *supra* note 1, at 280.

100. Waterman suggests that it was from Wilson that Jefferson got his anti-Blackstonian ideas. *See* Waterman, *supra* note 53, at 649-52.

101. C. SMITH, JAMES WILSON 341 (1956).

102. C. WARREN, *supra* note 21, at 348-49.

103. A. REED, *supra* note 27, at 122. His introductory generalities included international law.

104. James Kent was born on July 31, 1763 in New York. He went to Yale College and was a member of Phi Beta Kappa. He read law under the supervision of the Attorney General of New York, Egbert Benson, in the town of Poughkeepsie. He became a member of the bar in 1785. He died in 1847.

105. C. WARREN, *supra* note 21, at 352 n.1.

clerkship."[106]

Kent's own view of what he was about can be discerned from his Introductory Lecture, in which he stated:

> It is intended to explain the principles of our constitutions, the reason and history of our laws, to illustrate them by a comparison with those of other nations, and to point out the relation they bear to the spirit of representative republics. Nothing I apprehend is to be taught here, but what may be usefully known by every gentlemen of polite education, but is essential to be known by those whose intentions are to pursue the science of the law as a practical profession.[107]

Kent, however, enjoyed no greater success than Wilson. The initial set of lectures began in 1794 and was attended by approximately forty-five people, but by the winter of 1797 and 1798 the number of people interested in hearing his lectures dwindled to six or eight. Kent finally resigned in April, 1798, and went on to fame as Chancellor Kent.[108] It has been noted that his students' patience was wearied by the dreariness of Kent's style, so that they mostly vanished after the first term.[109]

Kent, however, would again be elected to be Professor of Law of Columbia College in 1823, when in his sixtieth year he was compelled by a provision of the New York State Constitution of 1821 to step down from the bench.[110] In 1826, the last year of his life, his son persuaded him to "employ the lectures as the basis of systematic exposition of the common law of the United States just as Blackstone had used his lectures to expound the law of England."[111] By 1830 the four volumes of

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106. COLUMBIA, *supra* note 57, at 18.

107. Kent's Introductory Lecture is reprinted in 3 COLUM. L. REV. 330, 341 (1903). John Adams, who attended this inaugural lecture, commented on it in a series of letters to Charles Adams:

> I am much pleased with the Lecture and esteem the talents and Character of the Professor . . . .
>
> We are told further that 'the free Commonwealth of the United States offers the highest rewards to a successful cultivation of the law, and utmost encouragement to Genius.' Whether this is true or not and in what degree it is true or otherwise, deserves your serious consideration. The purest Spirit of Popularity that we have in this Country is adulterated if not poisoned with the ancient mawkish prejudices against the profession and Professors of Law, which it is difficult to overcome.

This comment is from a series of letters written by John Adams to Charles Adams on Kent's Introductory Lecture and is reprinted in W. KENT, MEMOIRS AND LETTERS OF CHANCELLOR KENT 64, 68 (1898). *See generally id.* at 64-73.

108. C. WARREN, *supra* note 21, at 350-52.

109. COLUMBIA, *supra* note 57, at 17.

110. W. KENT, *supra* note 107, at 189.

111. COLUMBIA, *supra* note 57, at 22.

Kent's *Commentaries* had appeared,[112] and they competed with Tucker's republicanized version of Blackstone as a self-help alternative to academic legal education.

The main thought firmly established as a result of the early law professorships was that the training of the lawyer should be broad and occur in an academic setting and that the study of law was of vital importance to civilians as well as practitioners. As one commentator remarks, the work of Wythe, Tucker, and Kent "was marked by a breadth of treatment which did not appear again until the 1920's."[113]

Law professorships created after 1800 were likewise characterized by the breadth with which they treated the subject of law. The first Royall Professorship of Law at Harvard, for example, was established in 1815 for the benefit of college seniors and was designed to appeal to undergraduates, lawyers, and citizens alike.[114] The first Royall Professor was Issac Parker, Chief Justice of the Massachusetts Supreme Judicial Court and a Federalist.[115] In his inaugural address in 1816, Parker, though foreseeing a need for a separate course of professional education in law for those who intended to practice, approved of the idea of a course of preparatory study in law in which general principles would be "exhibited to the advantage, not only of those who are destined to the profession, but of young men of all professions; for to all will the knowledge of the fundamental principles of government and the theory of jurisprudence be necessary to complete a liberal education."[116] In his inaugural reference to a separate course of professional training, Parker was proposing what in fact was to become, in 1817, the Harvard Law School. As we shall see, however, that fledgling institution, after only one decade of operation, would very nearly collapse.[117]

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112. C. WARREN, *supra* note 21, at 542-43.

113. J. HURST, *supra* note 19, at 258.

114. A. SUTHERLAND, THE LAW AT HARVARD 46-49 (1967); 1 C. WARREN, *supra* note 32, at 290-91.

115. 1 C. WARREN, *supra* note 32, at 290-91. John Lowell, Esq., a fellow of the Harvard Corporation, was initially chosen for the position. Lowell was widely admired throughout New England for his personal integrity and community involvement. He was one of the founders of the Provident Institution for Savings in Boston, the Massachusetts General Hospital, the Boston Athenaeum, and the Botanical Garden at Harvard and was President of the Massachusetts Agricultural Society. Lowell lobbied persistently to establish a law professorship, but declined to accept the position once it was established. Instead, he urged the appointment of fellow Harvard classmate Issac Parker. *Id.* at 286-91.

116. A. SUTHERLAND, *supra* note 114, at 51; C. WARREN, *supra* note 21, at 299-302.

117. *See* text accompanying notes 198-202 *infra*.

The most comprehensive law curriculum developed during this time was that which David Hoffman attempted to implement at the University of Maryland after 1816. Preparation of the curriculum alone took him four years.[118] Published in 1817, it was declared by Joseph Story, who would later shape the course of Harvard Law School along entirely different lines, to be "the most perfect system for the study of law which has ever been offered to the public."[119] The law curriculum at the University of Virginia was to be patterned after it.[120] The curriculum included not only private law but also moral and political philosophy, international law, Roman law and political economy. Hoffman, with a doctorate from Gottingen, was particularly aware of the English common law's unacknowledged borrowings from the civil law, and he consequently recommended study of the latter, if only in order to understand the former.[121] Perhaps likewise due to his educational background, Hoffman appreciated Bentham's views on codification of English law, stressed the careful study of statutes, and was deeply interested in professional ethics. So ambitious and all encompassing was his course of study, however, that, as with the lectures of Wilson and Kent, the course proved impossible for Hoffman to cover completely or for the thoroughly practical American study of law to absorb in a suitably short period of time.[122] Story estimated that it would take seven years to complete the course.[123]

The early law professorships, in short, varied significantly both as to their educational objectives and as to their success in fulfilling those objectives. Most of the professorships were broad in their treatment of the subject matter of law study but were narrowly concerned with providing a general academic exposition of the law. At William and Mary, however, "it seems quite clear not only that the purpose was to supplant law office study, but also that . . . the school could and did furnish the whole of professional training for many of its students."[124] Practical professional training in law and politics, however, was not

118. A. SUTHERLAND, *supra* note 114, at 55-56.

119. *Id.* at 56.

120. *See* note 162 *infra* and accompanying text.

121. Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 423 (1966).

122. A. SUTHERLAND, *supra* note 114, at 55-56. *See* A. REED, *supra* note 27, at 124-25; Currie, *supra* note 55, at 362.

123. A. REED, *supra* note 27, at 124.

124. Currie, *supra* note 55, at 356-57.

segregated from general academic education in law and politics. The readiness of latter-day historians to paint all of the early law professorships with the same nonprofessional brush is but one illustration of their tendency to filter history "through the lens of present professional concerns and assumptions."[125] As Brainerd Currie has pointed out, characterizing the early law professorships as nonprofessional "tends to explain away, as having 'cultural' value only, the elements of broad, non-technical treatment which characterized the first university law courses; and thus indirectly to justify the absence of those elements from the modern curriculum."[126]

If the early law professorships cannot all be characterized as nonprofessional, neither can they all be described as failures.[127] The professorships at William and Mary and Transylvania University, as we have seen, were on the whole quite successful. Indeed, they were to outlive the most successful of the early proprietary law schools.

2. *The Early Proprietary Law Schools*

Not surprisingly, just as the historians of the first century of American legal education have tended to neglect the early law professorships, so have they too tended to over-emphasize the significance of the early proprietary law schools. The first and most enduring of these, as we have seen, was the Litchfield Law School at Litchfield, Connecticut.[128] Ames and Pound repeatedly speak of it as America's first law school.[129] A number of later legal historians have followed suit.[130]

Litchfield grew out of the exceptional personal interest that Tapping Reeve,[131] a practicing lawyer and later a judge, took in the men—

125. *See* note 5 *supra* and accompanying text.

126. Currie, *supra* note 55, at 356.

127. A latter day dean of the Harvard Law School eventually conceded both points. In his Hamlyn Lecture, Dean Erwin Griswold stated that:

> Though Wythe and Tucker were professors in a University, without being set up as a separate "law school," the difference is simply one of definition. There can be no doubt that Wythe and Tucker . . . were engaged in a substantial, successful and influential venture in legal education, and that their effort can fairly be called the first law school in America.

Griswold, Law and Lawyers in the United States, Hamlyn Lectures, at 39 (16th Series 1974).

128. *See generally* THE LITCHFIELD LAW SCHOOL 1775-1833 (S. Fisher ed. 1933) [hereinafter cited as LITCHFIELD].

129. J. AMES, *supra* note 61, at 354, *cited in* A. HARNO, *supra* note 3, at 28; R. Pound, *supra* note 60, at 7.

130. *See, e.g.,* A. HARNO, *supra* note 3, at 28; Gee & Jackson, *supra* note 69, at 726.

131. Tapping Reeve was born in October, 1744. He studied at the College of New Jersey for

mostly college graduates—who came to be apprenticed to him after 1775. By 1782, Reeve was delivering formal and connected lectures which "in the absence of readily accessible textbooks and reports, were intended to embrace the whole field of law and become veritable mines of legal lore for the would-be attorneys."[132] The number of students grew so steadily that by 1784 Reeve had to build a separate building near his house to hold classes and contain his law library.[133] In 1798, he hired James Gould, a former student, to share the teaching load.[134]

At Litchfield, the students could devote a major part of their time to studying in the library and listening to lectures that took an analytical and systemized approach to law. They were examined on these lectures weekly and could also participate in weekly moot courts.[135]

Perhaps the fairest appraisal of Litchfield's contribution to legal education is that it "offered a good narrow course in which the common law was taught as a 'system of connected rational principles' rather than as a 'code of arbitrary, but authoritative, rules and dogmas.' "[136] As such, the school represented a distinct advance over the apprentice system out of which it grew. Its course of study, however, was narrower than that of William and Mary; it covered approximately the same ground as Blackstone, except that Blackstone's discussion of governmental agencies and criminal law was omitted.[137] Nor did the course of study at Litchfield "undertake to do for a student everything of a practical nature that needed to be done."[138] Most of its graduates went on to engage in an abbreviated apprenticeship before being admitted to the bar.

The proprietary schools were narrow in another sense as well. Tucker, Kent, and Story were quick to publish the systematized results of their lecture courses, which benefited the legal profession and the public at large,[139] even though it undermined the public interest in the lec-

four years, graduating at age 19 as the first scholar of his class. Reeve studied law under Judge Root in Hartford, and was admitted to the bar. In 1772 Reeve settled in Litchfield and built a house from which he laid the groundwork of the school. *See* LITCHFIELD, *supra* note 128, at 12-14.

132. *Id.* at 3.
133. *Id.*
134. *Id.* at 4.
135. *Id.* at 8.
136. A. REED, *supra* note 27, at 131-32.
137. *Id.* at 131.
138. *Id.* at 132.
139. *Id.* at 131.

tures themselves. Reeve and Gould, on the other hand, "preserved their system of lectures as a jealously guarded asset of their school."[140] Their proprietary approach to legal education stood in marked contrast to the "free democracy of learning" envisioned in Jefferson's concept of the university.[141]

The success of the Litchfield school naturally spawned many competing ventures, but these tended on the whole to be evanescent affairs that rarely outlived their founders. Of the private schools strictly contemporary with Litchfield, only the Staples-Hitchcock-Daggett School at New Haven survived as long, and this was only because Yale College took it over in 1824 and continued to operate it as a practitioner's course.[142] The reorganization of Harvard in 1829, as will be discussed later, involved a somewhat similar absorption of an existing proprietary school.[143]

As important an advance as the proprietary schools were over the apprenticeship system, Reed described these schools as "a more primitive type of educational organization" than the early southern college law schools.[144] According to a later historian, who regretably does not provide us with his source, "[i]t was said that during these years [circa 1800] the law course at William and Mary was superior to that at Litchfield."[145]

One reason that Litchfield Law School has tended to overshadow William and Mary and Transylvania in subsequent histories of the era is that Gould was an unusually able administrator, who maintained detailed records for the school. Thus, we not only know exactly how many students attended Litchfield during each year of its existence, but also who they were.[146] The recordkeeping at William and Mary and Transylvania, on the other hand, was much more spotty. What little we do know, however, tends to confirm that William and Mary and Transylvania held their own in the rivalry with Litchfield. Such enrollment figures as exist suggest that all three schools were approximately the same size.[147] Litchfield's own enrollment figures hint of competi-

140. *Id.*
141. *Id.* at 115, 154. *See* text accompanying notes 86-90 *supra*.
142. A. REED, *supra* note 27, at 132-33.
143. *See* text accompanying notes 202-03 *infra*.
144. A. REED, *supra* note 27, at 128.
145. 2 A. CHROUST, *supra* note 14, at 178.
146. LITCHFIELD, *supra* note 128, at 25-31.
147. *See* A. REED, *supra* note 27, at 450.

tion from the two southern schools. Although Litchfield drew as many as 35 students from Georgia and 27 from South Carolina during the fifty years of existence, it drew only nine from Kentucky and six from Virginia.[148]

Litchfield Law School closed in 1833 due to a steady drop in attendance.[149] This was said to be partly due to first Reeve's and then Gould's withdrawal from direct participation in the school and partly due to the availability of training at other private schools and academic institutions.[150] Perhaps equally important was the increasing availability of good texts such as St. George Tucker's republicanized version of Blackstone and Kent's *Commentaries*, which made self-education more feasible, and the contemporaneous reduction of bar admission standards (including the reduction and outright abolition of required periods of apprenticeship), which made self-education more attractive.[151]

The early proprietary law schools, in short, were no more an unqualified success than the early law professorships were an unqualified failure. More to the point is the fact that success in both types of legal education seemed to result from the systematic attempt to blend academic instruction and practical training. Conversely, the failure of the majority of the early law professorships appears to have resulted from the attempt to divorce legal theory from practice, just as the eventual failure of the apprenticeship system would result from the attempt to divorce practical legal training from legal theory.

B. *The Broad and Narrow Views of Academic Legal Education: 1829-1879*

It has been estimated that at the time Litchfield closed its doors, only 150 students were being instructed in law in any kind of academic setting throughout the country.[152] It is important to note, however, where these students were. The largest number of law students was at the Harvard Law School, which had been founded in 1817 and was reorganized in 1829 after nearly collapsing.[153] Slightly fewer, in roughly

148. *Id.*

149. LITCHFIELD, *supra* note 128, at 20. By the time the school closed, it had graduated over one thousand students. A. REED, *supra* note 27, at 130.

150. A. REED, *supra* note 27, at 130.

151. *Id. See* text accompanying note 206-08 *infra*.

152. J. AMES, *supra* note 61, at 359-60.

153. A. REED, *supra* note 27, at 450-51. *See* text accompanying notes 198-201 *infra*.

equal numbers, were attending four other schools. These were the former Staples-Hitchcock-Daggett proprietary school, which had become loosely affiliated with Yale College in 1824, William and Mary, Transylvania, and a newcomer on the academic scene: The University of Virginia School of Law, established in 1825. For all practical purposes these five schools *were* academic legal education for the next twenty-five years. More important than their individual contributions to legal education was the fact that together they presented two distinct models of academic legal education.

The one model of legal education, having roots in the Jeffersonian experiment at William and Mary and reaching full flower at the University of Virginia, combined general and professional legal education in a dual effort to provide training for citizenship and public service. This "academic" model strongly influenced the shape of legal education in southern and some western law schools and for a time gained considerable currency even in the Northeast.[154] It embodied a decidedly broad view of academic legal education, placing equal emphasis on the study of public and private law and on the training of citizens and professionals.

The other model, which was first introduced in Parker's inaugural suggestion that a separate professional school be established at Harvard, in effect advocated bringing the then thriving private professional law school under the loose auspices of the university in an effort to provide professional post-graduate training for the private practice of law.[155] This "professional" model, which slowly took root in the Northeast, embodied a decidedly narrow view of academic legal education, placing major emphasis on the training of private practitioners and the study of judge-made law.

1. *The Virginia Model: Practical Training for Citizenship and Public Service*

Jefferson's contribution to American legal education culminated with the opening of the University of Virginia in 1825 and the simultaneous establishment there of a professorship in law and politics. Although filling the chair was delayed for a year by the hunt for a person com-

154. A. REED, *supra* note 27, at 118, 155-56. *See* text accompanying notes 171-184 *infra*.

155. A. REED, *supra* note 27, at 138-39. *See* note 192 *infra*.

bining the requisite legal and academic qualifications,[156] sound republican political views,[157] and religious beliefs acceptable to the Virginia clergy,[158] John T. Lomax ultimately accepted the position, and from 1826 on the law school of the University of Virginia espoused a distinctly broad view of academic legal education.[159] Jefferson's conception of legal education, according to Currie, had two aspects: (1) Law is to be treated as a branch of government, with curriculum embracing constitutional law, political economy, and legislation; and (2) the study of law is to be pursued as a field of special interest concurrently with other university studies.[160]

This concept of legal education is said to be the result of Jefferson's conviction that the function of the university is one of public service, namely, training the citizenry for the duties of citizenship and self-government.[161] To that end, the curriculum—closely following Hoffman's plan—was to include "the common and statute law, that of the Chancery, the laws Feudal, Civil, Mercatorial, Maritime, and of Nature and Nations; and also the principles of Government and Political Economy."[162]

Given the high mortality rate of law professorships and schools during the first century of American legal education, the success rate of the Jeffersonian concept of legal education was remarkable. As had been the case at William and Mary and Transylvania, the law school at the University of Virginia immediately took hold and became such a success so quickly that a scant three years after it opened, Professor Asahel Stearns, the first professor in Justice Parker's post-graduate law school at Harvard, attributed the virtual failure of his own school in 1829 in large measure to the ruinous competition of Virginia.[163]

Just as Virginia and Transylvania were the result of the seed initially

156. H. ADAMS, JEFFERSON AND THE UNIVERSITY OF VIRGINIA 119 (1888).

157. *Id.*

158. *See* note 161 *infra* and accompanying text.

159. A. REED, *supra* note 27, at 155.

160. Currie, *supra* note 55, at 353-54.

161. *See* A. REED, *supra* note 27, at 118-19 & n.1; Currie, *supra* note 55, at 355. Dr. Thomas Cooper in 1819 became the first appointee to the professorship of law at the as yet unopened University of Virginia. Cooper was forced to resign in 1820 because of his religious views. He then went to South Carolina College where he taught natural science, politics, and economics until 1836. *See* notes 167-69 *infra* and accompanying text.

162. A. REED, *supra* note 27, at 118-19 n.3.

163. Currie, *supra* note 55, at 360 n.91. *See also* 1 C. WARREN, *supra* note 32, at 365-70.

planted by Jefferson at William and Mary,[164] so the concept of legal education fostered at Virginia eventually became a model for law schools throughout the South. The decade between 1840 and 1850 saw legal education expand principally in the South, and the influence of Jefferson was discernible throughout.[165] By 1845, both Harvard and Yale, on the other hand, were entering into a period of decline.[166]

The Jeffersonian influence may even have been responsible for one decision *not* to found a law school in a pivotal southern state. In 1823, South Carolina College, then largely under the control of the judges of the state, declined to follow the suggestion of the legislature that it start a law school that would be dependent upon tuition fees for financial support.[167] Rather, the college retained the services of Dr. Thomas Cooper, who had been Jefferson's first choice for the law professorship at Virginia but was rejected because he was a religious free thinker.[168] At South Carolina College, Cooper taught natural science, politics, and economics until 1836, when he was succeeded by Francis Lieber.[169] Lieber taught there until 1858, when he joined the faculty, and later the law faculty, at Columbia University as Professor of History and Political Science.[170]

The University of Virginia exercised at least some influence even beyond the South. The influential *North American Review*, a publication that was founded in Boston and tended to reflect the influence of Harvard—and more particularly that of Joseph Story—in jurisprudential matters, expressed considerable interest in Jefferson's plans for the University of Virginia.[171] The editor of the *North American Review*, Edward Everett, who was himself a product of continental university education, observed that whereas English legal education was essentially private (similar to the then flourishing proprietary law schools), continental legal education was university based, "and it is a fair question which is the best method, and which is best adapted for

164. *See* notes 95-97 *supra* and accompanying text.

165. A. REED, *supra* note 27, at 153 & n.3.

166. *Id.* at 153. *See also* Stevens, *supra* note 3, at 425.

167. A. REED, *supra* note 27, at 152.

168. Currie, *supra* note 55, at 358 & n.74. *See also* note 161 *supra* and accompanying text.

169. *Id.*

170. *Id.* at 378. *See also* A. REED, *supra* note 27, at 158. Lieber was Professor of History, Political Economy, and Political Philosophy at South Carolina College from 1835 to 1856.

171. *See* Stein, *supra* note 121, at 418.

America."[172]

The Harvard Law School itself was no doubt influenced to some extent by Jefferson's ideas on legal education, for Joseph Story, who was largely responsible for reviving Harvard's faltering narrow view of legal education between 1829 and 1845, was a Republican, as his father had been.[173] While Story was at once more conservative and more federalist in his jurisprudence than Jefferson, having championed Marshall's federalism during his term on the Supreme Court, he was not entirely hostile to Jefferson's educational ideas. With respect to at least one facet of Story's reorganization of Harvard Law School—the establishment of an elective system of courses—Story is said to have been simply applying a principle "which in its essential spirit dates back to Jefferson and Virginia."[174]

Indeed, the educational philosophy of Jefferson to some extent invaded even Columbia University, formerly the very bosom of Hamiltonian Federalism.[175] After 1858, with Theodore Dwight's reestablishment of a law school at Columbia University,[176] events there were said to show a "marked resemblance to Jeffersonian ideas."[177] One reason for that resemblance was that Dwight arranged the transfer of Francis Lieber to the law faculty.[178] Lieber, though no Jeffersonian in politics, held similar views as to the place of history, political theory, legislation, and public law in legal education[179] and, until his death in 1872, served on the law faculty as professor of political science.[180]

Another reason the revived law school at Columbia displayed certain Jeffersonian characteristics was the influence of Theodore Dwight himself. Prior to coming to Columbia, Dwight had served as Maynard Professor of Law, History, Civil Polity, and Political Economy at Hamilton College, having gone to Hamilton as a tutor without finishing his law school studies at Yale.[181] Dwight's aim as a teacher was to give his

172. Stein, *supra* note 121, at 419.

173. 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 52, at 96.

174. A. REED, *supra* note 27, at 307.

175. Currie, *supra* note 55, at 378.

176. COLUMBIA, *supra* note 57, at 42.

177. Currie, *supra* note 55, at 378. Currie believes this is so even though it would be difficult to establish a direct connection. *Id.*

178. *See* notes 169-70 *supra* and accompanying text.

179. Currie, *supra* note 55, at 379.

180. *Id.* at 378-79.

181. COLUMBIA, *supra* note 57, at 34.

students "a systematic and coherent view of the law as a whole,"[182] an aim he achieved through a combination of textbook assignments, "oral colloquy" in class, and weekly moot courts with students, as well as Dwight, as judges.[183] Consisting as it did of Lieber and Dwight, the Columbia law faculty was thus for the first time composed entirely of academics, neither of whom had been private practitioners. Perhaps that alone explains why Columbia seemed to replicate the "academic" tradition of the University of Virginia.[184]

Of course, much has been made of the fact that during the 1840s and 1850s, the Jeffersonian "broad view" of legal education at the University of Virginia was itself becoming progressively narrower.[185] To be sure, the law school at the University of Virginia deemed it expedient in 1829 to narrow and professionalize the focus of law training by grouping technical "municipal law" subjects in a single year and the broader subjects in a second year.[186] (A single year of study had previously been the standard at William and Mary and Transylvania and would remain the standard for legal education in general until after the Civil War.) Significantly, however, John Davis, who succeeded John Lomax as professor of law in 1830, continued to advertise the year of broad liberal studies as the *junior* year of law study, while the year of technical studies was termed the *senior* year.[187] Students who wished to graduate from the law school were required to complete both years.

The emphasis on a broad course of law studies continued throughout the long career of John B. Minor, who succeeded to the law professorship at Virginia in 1845 and continued in that position until 1895.[188] Particularly significant was Minor's conviction that practical training not only could, but should, be blended with rigorous academic instruc-

182. *Id.* at 35. Although Dwight could not give a student more than an outline of the law in two years of school, he believed that by confining his attention mainly to broad principles and paying comparatively little heed to the details of local practice he could provide his students with a logical framework into which all subsequently acquired legal knowledge would fit. *Id.*

183. *Id.* at 35-38. The Dwight method of teaching prescribed that students read textbooks in which the principles of law were drawn by persons better qualified for the task, rather than requiring students to read cases. The student was thereby presented with a proper and systematic arrangement of rules in their philosophical relationships as part of an orderly whole. Dwight's oral interrogation of students then luminously analyzed the law. *Id.*

184. Currie, *supra* note 55, at 378.

185. A. REED, *supra* note 27, at 155.

186. Currie, *supra* note 55, at 360-61.

187. J. RITCHIE, THE FIRST HUNDRED YEARS 19-20 (1978).

188. *Id.* at 35.

tion so that each might be enriched.[189]

By 1851, such nontechnical courses as history and political economy had been crowded out of the law curriculum, but when the rapid expansion of case law threatened to crowd out politics, statutes, and international law as well, the University in 1851 appointed a second professor rather than allow this to happen.[190] (A single professor had been standard at most schools prior to 1840.) The University also continued to allow its students to take courses in other departments.[191]

It would hardly be accurate, in any event, to attribute the narrowing trend in the subject matter of law study at the University of Virginia to the success of the narrow professional approach to legal education being developed at Harvard. So checkered was the career of Harvard Law School during this period, in fact, that one must ask how the Harvard model of legal education ever came to triumph at all.

2. *The Harvard Model: Professional Instruction in Private Judge-Made Law*

As we have seen, Judge Issac Parker, the First Royall Professor of Law at Harvard, though espousing a broad view of legal education in his 1816 inaugural address, nevertheless foresaw that

> at some future time, perhaps, a school for instruction of resident graduates in jurisprudence may be usefully ingrafted on this professorship; and there is no doubt, that when that shall happen, one or two years devoted to *study only*, under a capable instructor, before they shall enter into the office of a counsellor, to obtain a knowledge of practice, will tend greatly to improve the character of the bar of our state.[192]

Parker was in effect proposing to his audience the rather novel idea of a professional school (much like Litchfield) but to be connected with a university (unlike Litchfield, which was, by the way, still flourishing at this time, as were a number of other independent law schools). Parker's school was *not* to attempt to educate civilians and lawyers at the same time (as had been attempted by Blackstone, Wilson, and Kent, and as was being accomplished at William and Mary). The school was to cover only the academic part of professional training;

189. *Id.*

190. A. REED, *supra* note 27, at 155.

191. J. RITCHIE, *supra* note 187, at 35, 36.

192. 1 C. WARREN, *supra* note 32, at 302. The complete text of Parker's inaugural address appears in NORTH AMERICAN REVIEW, May, 1816, at 25.

office training was still to be obtained in a later, if shorter, apprenticeship.[193] Parker saw Harvard Law School as a local school intended to improve the Bar of Massachusetts. It was to be a school for those who had some previous college training, preferably for those who were college graduates.[194]

In 1817, Parker's inaugural suggestion was implemented with the naming of Asahel Stearns as University Professor of Law.[195] A course of study was devised consisting of readings from Blackstone and other common-law texts, supplemented by lectures, a moot court, and debating clubs.[196]

A number of Parker's suggestions in his inaugural address had to be discarded immediately. It *was* to be a professional school intended primarily for the future practitioner, but it was *not* to be a school keyed to the needs of Massachusetts students, nor was it to be open only to college graduates. Harvard still needed to be able to attract as many paying students to the school as possible, since it was to be the students' fees that in the main supported the law school; therefore, college students of Harvard or any other school, as well as those who had been apprenticed for five years or more in a law office, were to be allowed to matriculate.[197] Further, students could come and go at all times during the year, availing themselves of the organized study as long as they thought necessary to enable them to better cope with their practical duties.

Even with all these compromises, Parker's law school did not prosper. The year 1820 saw the largest enrollment in any one year of the Parker-Stearns era: twenty-four men spent at least part of 1820 at the School.[198] Probably there were never more than twelve men in residence at any one time, and in 1829 there was only *one* student in residence.[199] Contributing to the failure was the relentless competition of

193. A. SUTHERLAND, *supra* note 114, at 51-52, 54.

194. *Id.* at 58; 1 C. WARREN, *supra* note 32, at 301-02.

195. A. SUTHERLAND, *supra* note 114, at 58. Stearns graduated from Harvard College in 1797, and began acquiring legal knowledge in Timothy Bigelow's office in Groton. Stearns practiced law in Massachusetts and was district attorney for Middlesex County. Prior to assuming the Professorship, he was a member of Congress. *Id.* at 58-59. *See also* 1 C. WARREN, *supra* note 32, at 312-13.

196. J. RITCHIE, *supra* note 187, at 34-35.

197. A. SUTHERLAND, *supra* note 114, at 58, 60.

198. *Id.* at 63.

199. 1 C. WARREN, *supra* note 32, at 364; Currie, *supra* note 55, at 360.

the apprentice system, the private law schools, and—as Stearns himself was to concede—the recently established law school at the University of Virginia.[200]

After the resignations first of Parker in 1827 and then of Stearns in 1829, the Harvard Law School for a fleeting moment seemed on the verge of extinction.[201] The appointment of Justice Joseph Story of the United States Supreme Court to the newly established Dane Professorship of Law, however, ushered in a new era at Harvard Law School and marked the actual beginning of the narrow professional law school as we know it today.[202] It should be noted in passing, however, that at least part of the explanation for the remarkable turnaround at Harvard after 1829 was due to the fact that Story's appointment to the Dane professorship was accompanied by the less heralded, but equally judicious, appointment of John Ashmun to the Royall Professorship. Ashmun had previously taught at a proprietary school at Northhampton and simply brought his students with him.[203]

Harvard began its new era at a most unpropitious time for a school devoted exclusively to professional training. The 1830s were a time when the outward manifestations of professionalism appeared to collapse. While recent historians have contended that the collapse was more apparent than real,[204] Jacksonian democracy unquestionably launched a frontal assault on the judiciary and organized bar, which de Toqueville described as the country's natural aristocracy.[205] State legislatures began reducing or abolishing the apprenticeship requirement for entering the practice of law. As a consequence, while de facto apprenticeship training continued, local bar organizations, which had existed largely to control the de jure apprenticeship system, soon crumbled.[206] Often the only formal professional standards that regulated the legal profession were the bar examinations administered by the judges.

Similarly, those who attended law school at all seemed increasingly

200. 1 C. WARREN, *supra* note 32, at 366-70; Currie, *supra* note 55, at 360. *See* note 163 *supra* and accompanying text.

201. A. SUTHERLAND, *supra* note 114, at 81-89.

202. *Id.* at 86; 1 C. WARREN, *supra* note 32, at 416-24.

203. Stevens, *supra* note 3, at 415-16.

204. *See, e.g.,* M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 136 (1976).

205. Stevens, *supra* note 3, at 416 & n.42. *See also* B. SCHWARTZ, THE LAW IN AMERICA 53 (1974).

206. *See* M. BLOOMFIELD, *supra* note 204, at 140.

intent upon avoiding the kind of rigorous, sustained legal education prescribed by men like Jefferson and Wythe, leading John T. Lomax, the first professor of law at the University of Virginia, to complain in 1830 that "the day has gone by when any person was ashamed to appear at the bar under a period of less than three years study."[207] Students were merely looking for a crash course in the law in order to prepare them for the bar examination. Said Lomax, "Their demand for the law is as for a trade—the means, the most expeditious and convenient, for their future livelihood."[208]

Maxwell Bloomfield, one of the historians who attacks the conventional notion that the middle decades of the nineteenth century marked the actual collapse of professional standards, points out that with the onset of Jacksonian democracy, conservative legal spokesmen did not remain passive in the face of what they considered a serious threat to their professional status.[209] Instead, they set about modifying the public image of the lawyer in two important respects: First, they sought to dissociate the lawyer from politics (which were becoming increasingly democratized and corrupt),[210] and, second, they sought to dissociate the practice of their craft "from mere dilettantism or an undue reliance on book learning"[211] (which was a traditional mark of aristocracy).[212] The image to be established, rather, was that of a "benevolently neutral technocrat."[213]

It was to this new self-image of the lawyer that Story's reorganization of the Harvard Law School catered. As a matter of expediency Story allowed students not even qualified for admission to Harvard College to study at the Law School.[214] Further, the formal plan of studies, which Parker and Stearns had devised, was largely abandoned; examinations were abolished, and those courses not directly related to the practice of law were dropped.[215]

Currie calls it one of the paradoxes of legal education that Story,

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207. Shepard, *Lawyers Look at Themselves, Professional Consciousness and The Virginia Bar, 1770-1850*, 25 AM. J. LEGAL HIST. 1, 14 (1981). *See* J. RITCHIE, *supra* note 187, at 15.

208. J. RITCHIE, *supra* note 187, at 15.

209. M. BLOOMFIELD, *supra* note 204, at 142.

210. *See* note 295 *infra* and accompanying text.

211. M. BLOOMFIELD, *supra* note 204, at 145, 148.

212. *See* note 87 *supra* and accompanying text.

213. M. BLOOMFIELD, *supra* note 204, at 142.

214. Currie, *supra* note 55, at 362-63, 367.

215. *Id.* at 362-67.

who had a "lively appreciation of the professional relevance of non-technical studies,"[216] who echoed Blackstone in his inaugural address,[217] and who greatly admired David Hoffman's comprehensive *Course of Legal Study*,[218] should be the person who "gave currency to the idea that university law training could proceed without the benefit of other university disciplines."[219] In fact, however, the purpose of Story's law school was not so much the development of American lawyers as the development of American law. Scholarship had been the primary purpose behind the endowment of the Dane professorship, and Story's extensive commentaries were the result.[220]

The particular function of the law school as Story saw it was to study the increasing flood of judicial decisions. There was no room in his plan for the study of government, philosophy, politics, or local law.[221] In fact, Sutherland tells us that nowhere in Story's plan for Harvard Law School nor in his own systematic, regular, and prolific publications, did he make a place for theoretical jurisprudence. Rather, Story dedicated his efforts to bringing order in the judge-made law governing the American economy.[222] Likewise, though Story was aware of the evils of hastily drafted legislation, he had persuaded himself that if the law student thoroughly studied and understood the common law, then it would follow *a priori* that he could draft good statutes.[223]

Currie comments that it was Story's reputation as a jurist and successful teacher that gave currency and respectability to the idea that academic law training could proceed without the benefit of other university disciplines.[224] The characteristic of academic legal education for generations to come was thus shaped by his reorganization at Harvard. Currie concludes that "not even Langdell's case method, the best known of Harvard influences, has had a more pervasive and significant effect on legal education."[225]

Even so, Story's success at Harvard appears in retrospect to have

216. *Id.* at 362.
217. *Id.* at 362 n.108.
218. *Id.* at 362.
219. *Id.* at 362-63.
220. A. REED, *supra* note 27, at 143-44.
221. *Id.* at 146-49; Currie, *supra* note 55, at 363-65.
222. A. SUTHERLAND, *supra* note 114, at 136.
223. A. REED, *supra* note 27, at 148.
224. Currie, *supra* note 55, at 362-63.
225. *Id.* at 366.

been due as much to Story himself as to his model of legal education, for upon Story's death in 1845, Harvard Law School went into a period of decline.[226] At the same time a similar decline occurred at the Yale Law School,[227] which, as we have seen, had begun in 1824 as a virtually literal response to Judge Parker's inaugural suggestion at Harvard that proprietary law schools such as Litchfield should be brought under academia's roof.[228]

The decline at Harvard and Yale after 1845, together with the prior closing of Litchfield Law School itself in 1833, suggests that the narrow professional model of legal education, far from being an immediate triumph during this period, was struggling simply to stay alive. When legal education did begin to revive in the Northeast, moreover, it was first apparent not at Harvard or Yale, but at Columbia University, where events, as we have seen, bore more similarity to the Virginia model of legal education than to the Harvard model.[229]

In view of this state of affairs, it is all the more curious that the Story model of legal education, which "slight[ed] everything except the general principles of the common law and American decisions developing this and the Federal Constitution," should emerge triumphant in the second century of American legal education.[230] The conventional view, of course, simply assumes that the triumph of the Harvard model was due to Christopher Columbus Langdell. His introduction of the case method at Harvard in 1870 is described as "the most significant event in the evolution of American legal education"—a "dramatic and revolutionary movement" that "ushered in a new era in legal education."[231] In a less complimentary vein, Langdell is said to be responsible "more than any other man for confining legal education in a strait mold which was for years to dissociate it from the living context of the world around it."[232] Even Langdell's most ardent detractor, Jerome Frank, who was a principal spokesman for Legal Realism in its revolt against Langdellian formalism in the 1930s,[233] concluded that the case method was an expression of Langdell's "peculiar temperament" and

226. A. REED, *supra* note 27, at 153, 186; A. SUTHERLAND, *supra* note 114, at 137-39.
227. A. REED, *supra* note 27, at 450-51.
228. *See* 1 C. WARREN, *supra* note 32, at 301.
229. *See* notes 176-84 *supra* and accompanying text.
230. A. REED, *supra* note 27, at 148; Currie, *supra* note 55, at 366.
231. A. HARNO, *supra* note 3, at 16. *Compare id. with* note 225 *supra* and accompanying text.
232. A. HARNO, *supra* note 3, at 59.
233. *See* note 385 *infra* and accompanying text.

that his personal idiosyncracies had been responsible for the shape of American legal education for more than half a century.[234]

Admirers as well as detractors, however, have acknowledged that "one of the most striking facts in the life of Professor Langdell is the deep silence which surrounds his work."[235] With the exception of the introduction of his contracts casebook and a brief address in 1886, "Langdell virtually did not defend his system at all."[236]

Certainly, nothing about the events of the year 1870 at the Harvard Law School would suggest the onset of an educational revolution. Rather, events there, if anything, suggested an academic Rip Van Winkle just awakening from a twenty-five year nap. The school had just abandoned its long-standing practice of conferring degrees on the basis of class attendance alone, without any examinations whatsoever. In the October, 1870 issue of the *American Law Review*, the editors—one of whom was a young Harvard graduate named Oliver Wendell Holmes, Jr.—described the condition of Harvard Law School as "almost a disgrace to the Commonwealth of Massachusetts" and little better than the English Inns of Court, which allowed members to be called to the bar purely on the basis of having eaten a certain number of dinners in chambers.[237] The *Review* expressed satisfaction that the faculty had voted to abandon the practice and went on to predict that its labors would "make the Harvard Law School what it ought to be."[238]

What the editors thought Harvard ought to be, however, is notable not only for its variance with what Harvard had been but also for the source of inspiration on which the editors relied. The editors found their views to be well-expressed in a report of Dr. E.O. Haven, a non-lawyer and then president of Northwestern University, to his board of trustees:

> The object of a law department is not precisely and only to educate young men to be practising lawyers, though it will be largely used for the purpose. It is to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought.[239]

234. Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 330 (1979).
235. *Id.* at 339.
236. *Id.* at 338.
237. 5 AM. L. REV. 177 (1870-71).
238. *Id.*
239. *Id.*

Beyond this decidedly broad statement of the objective of academic legal education, the only suggestion of revolutionary activity at Harvard in 1870 was the reaction of students to the teaching methods of their new contracts professor. The students were, in a word, revolted, most of them seeing nothing in Langdell's approach but "mental confusion and social humiliation."[240] Attendance fell precipitously, and Langdell was left with but seven students.[241] A common enough experience for an inept new professor so naive as to experiment in his first year of teaching, Langdell's introduction of the case method at Harvard was hardly auspicious. Nor was his method wholly original. During the time Langdell was in practice in New York, John Norton Pomeroy was using a similar method at the New York University School of Law.[242]

Historians have also noted that the case method was actually made to work at Harvard not by Langdell himself, but by one of the original survivors of Langdell's first year contracts class, James Barr Ames.[243] Invited to join the Harvard faculty upon his graduation in 1873, Ames proved to be a gifted teacher and scholar.[244] In the process of making the case method work, Ames and another Langdell protégé, William Keener, who joined the Harvard law faculty in 1883, also profoundly modified its purpose.[245]

Langdell himself originally believed that the method would lead to the scientific discovery of a discrete number of substantive principles of law and would thus respond to Story's concern with bringing order to the burgeoning corpus of judge-made American law.[246] As such, Langdell's case method was simply the culmination of Parker's and Story's narrow model of legal education. Parker conceived the graduate structure and professional objective; Story had defined the narrow subject matter. It remained for Langdell to provide a methodology.

Ames and Keener, however, came to recognize that case study was

240. 2 C. WARREN, *supra* note 32, at 373.

241. *Id.*

242. A. HARNO, *supra* note 3, at 54. Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 546 & n.46.

243. A. SUTHERLAND, *supra* note 114, at 180; Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 26-27 (1980).

244. A. SUTHERLAND, *supra* note 114, at 180.

245. Holmes, *supra* note 242, at 557.

246. A. SUTHERLAND, *supra* note 114, at 174, 175. *See* notes 219-21 *supra* and accompanying text.

less a means for teaching substantive principles of law than a means, when combined with a Socratic teaching technique (which, it will be recalled, Dwight was already using at Columbia in conjunction with textbook study), for teaching legal reasoning skills.[247] Langdell's successors thus shifted the focus of the case method of law study from substance to process; from an inductive search for a system of legal principles to a honing of certain professional skills, from what judges said to what judges should have said, from a dogmatic teaching tradition to a critical one.[248] That was the "revolution" that Langdell's method inadvertently sparked. To characterize Langdell as the founder of a revolutionary movement merely because of what his successors did, however, would be no less ironic than characterizing Louis XVI as a revolutionary merely because he inadvertently sparked the French revolution.

Even as modified by Ames and Keener, the case method of study tended to appeal only to a minority of the very brightest students—particularly at the time of its adoption, when Harvard had just ceased conferring degrees on the basis of law school residence alone and still had virtually no minimum admissions requirements.[249] Nor was the case method designed for any but the most skilled teacher; in the hands of a mediocre teacher, as Langdell himself apparently was, it proved to be "the very worst of all possible modes of instruction."[250] The success of Langdell's method ultimately depended not only on the modifications worked by Ames and others but also on two reforms that Langdell himself accomplished, not in 1870, but in 1875. The first of these was establishing entrance requirements for incoming students, which improved the quality of the student body.[251] The other was achieving, for the first time at Harvard, a faculty composed exclusively of full-time teachers, which improved the quality of teaching (although a number of those teachers, notably John Chipman Gray, continued for some time to employ the time-honored text-lecture method of teaching).[252]

Harvard, however, was not the only school to establish entrance re-

247. Holmes, *supra* note 242, at 557.

248. *Id.* at 557, 558.

249. 2 C. WARREN, *supra* note 32, at 380; Speziale, *supra* note 243, at 17.

250. A. REED, *supra* note 27, at 382.

251. 2 C. WARREN, *supra* note 32, at 394-95.

252. *Id.* at 398.

quirements (Columbia and Yale having both announced similar admission requirements at about the same time),[253] just as it was not the only school to have created a faculty composed of full-time scholars (Columbia having done so in 1857).[254] Indeed, the entire quarter century after the Civil War has been described as a period of vital growth for academic legal education as a whole.[255] The decade of 1870-1880 in particular witnessed a remarkable proliferation of law schools—the number of new law schools founded in that decade (twenty-eight) nearly equalling the total number of law schools (thirty-one) operating in 1870.[256] While conventional historians of American legal education make little effort to explain this phenomenon, not even the most extravagant admirer of Langdell attempts to credit him for the explosion in academic legal education.

A number of developments during the 1870s demonstrate just how independent of Harvard the other leading law schools were. Notwithstanding Langdell's conscious decision to maintain the narrow focus of law study at Harvard, for example, the law schools at Columbia, Northwestern, Michigan, and Yale were attempting in 1875 or shortly thereafter to broaden its focus.[257] At Columbia University, the vacancy created by Lieber's death in 1872 was finally filled in 1876 by the appointment of John W. Burgess,[258] a young academic who had been educated in Germany and thereafter taught political science at Amherst.[259] While his appointment included teaching duties in the undergraduate school, Burgess accepted the position with the avowed purpose of expanding the study of political science, constitutional law, and international law in the law school.[260]

At about the same time, the Yale Law School, through the efforts of Dean Francis Wayland, son of a Brown University president whose ideas on university education had been influenced to some extent by the Virginia system, announced a broad course of studies, which included lectures in medical jurisprudence, English and American constitutional law, Roman and canon law, international and comparative

253. A. REED, *supra* note 27, at 318.
254. *See* text accompanying note 184 *supra*.
255. A. REED, *supra* note 27, at 273.
256. *Id.* at 442.
257. *Id.* at 302-03.
258. COLUMBIA, *supra* note 57, at 68-69.
259. Currie, *supra* note 55, at 379 n.168.
260. *Id.* at 380.

law, history of american law, and political economy.[261] In addition, two years of graduate work in such varied subjects as political science and history, railroad law, railway management and the economics of transportation, and taxation and public finance were offered.[262] On a lesser scale, Northwestern and Michigan were also making an effort to "restore government from the place from which the growth of technical law had dislodged it."[263]

As the foregoing events suggest, Harvard's impact on other schools, important though it might become, was something short of revolutionary. Indeed, Harvard only began to exert a direct influence on other schools as Langdell's career at Harvard came to a close in 1895. Not until 1890, with the appointment of William Keener as Dean of the Columbia Law School, was the case method adopted at Columbia, the first school after Harvard to use it.[264] Only after Ames succeeded Langdell as Dean at Harvard was the method adopted elsewhere. In fact, just as Ames, the professor, deserves much of the credit for popularizing the method at Harvard before 1895, so Ames, the dean, deserves much of the credit for promoting its adoption at the leading law schools after that date.[265] Not until Ames was dean, moreover, did Harvard at last implement Parker's proposed structure for academic legal education by requiring a college degree for admission to the law school.[266]

In sum, while the contributions and careers of Ames and Keener are well documented, Langdell remains a paradoxical and enigmatic figure in the history of American legal education. Some writers have ridiculed him,[267] while others have attempted to rehabilitate him,[268] but few have attempted to explain how a person who wrote so little and remained so silent and about whom so little is known could be responsible for so much. The fact of the matter is, however, that much of the explanation for the triumph of the Harvard model is to be found not in

261. *Id.* at 381.

262. *Id.*

263. *Id.*

264. COLUMBIA, *supra* note 57, at 135-58.

265. O. KRAINES, THE WORLD AND IDEAS OF ERNST FREUND: THE SEARCH FOR GENERAL PRINCIPLES OF LEGISLATION AND ADMINISTRATIVE LAW 191 n.276 (1974); Stevens, *supra* note 3, at 438 n.56.

266. Stevens, *supra* note 3, at 431-32.

267. Chase, *supra* note 234, at 329-31.

268. *See* Speziale, *supra* note 243.

the enigmatic character of Langdell, nor in the model itself, but in events outside the law schools altogether.

C. *Outside the Law Schools*

Conventional legal historians have tended to overlook two particularly important external influences on the shape of American legal education during its first century. Not surprisingly, both of these influences are from the very quarters that the narrow professional model of legal education has subsequently tended to ignore—namely, the broader arenas of politics and higher education.

1. *The Influence of American Politics*

As for the political influences on legal education during the early part of its first century, it should be remembered that the legal profession, like the country as a whole, tended after 1787 to divide into quarreling factions of Federalists and anti-Federalists (or Republicans). These groups tended to be pro-British and pro-French, respectively, in their international outlook. It is thus not surprising that the early nineteenth century likewise produced two competing conceptions of American public law and, consequently, two competing models of legal education.[269] The broad Virginia model of legal education was closer to academic law training of continental Europe and in accord with the pro-French sympathies of the anti-Federalists (or Republicans), while the narrow Harvard model was closer to the professional training once provided by the English Inns of Court and in accord with the pro-English sympathies of the Federalists.

It would be inaccurate, of course, to attribute the competing models of American legal education to nothing more than the pro-French or pro-British cultural preferences of the earliest legal educators. As we have seen, between 1775 and 1825, Jeffersonian and Federalist law professors alike held a decidedly broad view of academic legal education.[270] Similarly, members of both political factions seemed to agree that the private law of the new republic should steer a middle course between common-law and civil-law extremes,[271] and there were very practical reasons for doing so. The continuing influence of English law

269. *See* notes 154-55 *supra*.
270. *See* notes 79, 99, 104-07, 161-62 *supra* and accompanying text.
271. *See* notes 104, 162 *supra* and accompanying text.

was, of course, pervasive. On the other hand, the civil-law tradition held out a number of attractions for both Federalists and Republicans. As Professor Peter Stein has pointed out, the branch of substantive law in which English common law offered least to this new nation was commercial law, and on that subject American jurists accordingly turned to French writers on the civil law.[272] Two of the most notable conservatives of the period, James Kent (a Federalist) and Joseph Story (a conservative Republican) have been described as "enthusiastic civilians."[273] Civil law likewise held out a number of attractions for reform-minded Republicans. Its emphasis on codified law coincided with the Republican revulsion against English common law, the Republican emphasis on legislative hegemony, and the Republican enthusiasm for the Benthamite reform movement then gathering force in England.[274]

As Professor Stein has pointed out, however, reception of civil law depended on legal education.[275] Had the development of an American system of private law been all that were at stake, the task of developing a distinctive American system of legal education might have provided a common ground for Federalists and Republicans. It will be recalled, for example, that even during this era of fractious political debate, the *North American Review* expressed interest in Jefferson's plans for his university and wondered aloud whether the continental or English system of legal education was best adapted to America.[276]

Given the degree of openness over the shape of academic legal education, it is thus less than inevitable that two competing models should have emerged. The explanation is to be found not merely in the English or French sympathies of various founders of academic legal education, but in a genuinely domestic difference of opinion over the shape of the country's public law. Early legal educators seemed to agree that citizens of a republican form of government needed training in its laws, but they differed as to the shape of that training no less than they differed as to the shape of those laws and the republic itself.[277]

While Federalist conservatives and Republican reformers both pro-

272. Stein, *supra* note 121, at 412.
273. *Id.* at 427.
274. *Id.* at 452.
275. *Id.* at 418.
276. *Id.* at 418-19.
277. *See generally* R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1939).

posed a hybrid system of *private* law, they differed fundamentally on questions of *public* law and policy. The difference is best illustrated by the contrasting views of Kent and Jefferson, leading exponents of federalism and republicanism. For the conservative James Kent, who retired from the bench and resumed his law professorship at Columbia in 1824, the chief value of civil law was as a source for judicial development of private law.[278] However, "[i]n everything which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law."[279] As a pillar of the judiciary, apologist for the rights of property, and an admirer of the aristocratic Blackstone, moreover, Kent was vociferiously opposed to the clamor for codification, entailing as it did explicit recognition of the hegemony of the law-making functions of popularly elected legislatures.[280]

Thomas Jefferson, by contrast, maintained that the American revolution had involved the invocation not of "the rights of Englishmen" but of "the rights of man."[281] Far from viewing the common law as the source of civil and political liberty, Jefferson viewed the common law and its then-current expositors, Blackstone and Mansfield, as anathema to American law and legal training. Blackstone's "wily sophistries" in Jefferson's view threatened to make Tories of young American lawyers.[282] Mansfield's judicial activism in particular was viewed by Jefferson, who had no use for judicial law-making, as "sly poison."[283]

Nor were these differences over the shape of the American system of public law merely philosophical. For after Jefferson's republican victory over John Adams in 1801 expelled the Federalists from the executive and legislative branches of government, the Federalists and their Whiggian successors flocked to the judiciary for the protection of private property rights and expanding commercial interests.[284] Marshall's opinion in *Marbury v. Madison*,[285] which withheld judicial review of

278. Stein, *supra* note 121, at 427.

279. *Id.*

280. 2 A. CHROUST, *supra* note 14, at 51.

281. "I deride with you," wrote Jefferson to a federal judge, "the ordinary doctrine that we brought with us from England the Common Law rights. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. The truth is that we brought with us the rights of men." B. SCHWARTZ, *supra* note 205, at 10-11.

282. J. RITCHIE, *supra* note 187, at 3; Waterman, *supra* note 53, at 634-35.

283. Waterman, *supra* note 53, at 642 n.82b.

284. A. KELLY AND W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 212-33 (1976).

285. 5 U.S. (1 Cranch) 137 (1803).

executive action only to assert what was at the time a far more sweeping judicial power to review legislative acts, was but the opening salvo in what Pound has described as "a contest between courts and legislatures . . . in our formative era which is comparable to the contests between courts and crown in seventeenth-century England . . . ."[286] As the contest between the courts and legislatures went, so went the contest over the shape of American law—and American legal education.

The contest between the courts and legislatures, however, was for a time overshadowed by a more immediate crisis in American polity. By mid-century it was beginning to be apparent to all concerned, as the country struggled to reconcile its republican ideals with the South's "peculiar institution," that the republic and its public law had unfortunately been built on sand. So overwhelming was the disparity between the republican ideal and the reality of slavery that the only way to avoid dissolution of the union had been to reach political compromises and otherwise avoid discussion of the issue.[287] Once the possibility of political compromise was upset (as it was, ironically, by a judicial decision designed to settle the matter once and for all), only a resort to arms could resolve the conflict which the law proved unable to settle.[288]

The outcome of the conflict undoubtedly had a great deal to do with the decline of the southern academic tradition in legal education. All law schools except the University of Virginia closed during the Civil War.[289] Quite apart from the deleterious effects of the Civil War and its aftermath, however, there was a more fundamental reason for the decline of the Jeffersonian view of university-based legal education. Though obscured by the controversy over slavery, the second long-debated question of national polity, whose consequences were no less far-reaching than the slavery controversy itself, had in the meantime quietly been resolved. This was the contest between the courts and legislatures over the shape of the American legal system.[290] Although before the Civil War neither side could claim victory, the courts were clearly beginning to prevail in the struggle to shape the nation's public and private law.[291]

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286. R. POUND, *supra* note 277, at 51.

287. B. SCHWARTZ, *supra* note 205, at 49-51.

288. *Id.*

289. A. REED, *supra* note 27, at 193.

290. B. SCHWARTZ, *supra* note 205, at 67-71.

291. *Id.*; G. GILMORE, *supra* note 4, at 14-15, 60-61.

Story's model of legal education was to a large extent simply an extension of his preoccupations as a Supreme Court Justice. At the time Story was appointed to the bench, the federal republic, although already caught up in a second revolution (this one industrial), still had not worked out a unified system of private law to govern its expanding national economy. To that task, Story devoted himself, the federal judiciary, and, in no small measure, the legal profession. While Story voiced qualified support for a limited program of codification as a way of bringing coherence to a rapidly fragmenting body of private judge-made law, he ultimately resorted to an expansive reading of the federal judicial power and to the production of his own prolific commentaries on American law as a better means for accomplishing his objective. As a result of Story's opinion in *Swift v. Tyson*,[292] which has been described as reversing for all practical purposes the outcome of the constitutional debate which had allocated the bulk of substantive law making to the states,[293] both the Supreme Court and those distinguished members of the bar who had previously fashioned the nation's public law now preoccupied themselves with its private law.

As Pound has pointed out, "the very enthusiasm for legislation that came in the wake of the French Revolution could not help but bring about a reaction."[294] The reaction was in part due to very real abuses of legislative power, particularly after the adoption of universal white manhood suffrage during the era of Jacksonian democracy. Bernard Schwartz observes that, notwithstanding such legally trained legislative giants as Clay, Calhoun, and Webster, the quality of popular representation "seemed to sink as the effects of manhood suffrage were felt," and over it all began to hang a "cloud of corruption."[295]

The judicial assault on legislative hegemony was not limited to, nor even principally spearheaded by, the Marshall Court's constitutional decisions (which, after all, were concerned more with establishing the power of the federal government over the states than with establishing the law making hegemony of the courts). During the formative era of American Law, the principal check on legislative abuse was not the judicial power to interpret the Constitution but rather "the common law tradition . . . that all official action was subject to the law and was

292. 41 U.S. (15 Pet.) 1 (1842).
293. G. GILMORE, *supra* note 4, at 30.
294. R. POUND, *supra* note 286, at 49.
295. B. SCHWARTZ, *supra* note 205, at 70.

not to be arbitrary and unreasonable."[296] Even the Court's declared power to review the constitutionality of acts of Congress was in a real sense merely applying doctrine previously developed at common law.

Quite apart from specific abuses, however, the legislatures of the early nineteenth century were simply not equal to the task of day-to-day policy making, even with the able assistance of such notables as Jeremy Bentham, Edward Livingston, and, later, David Dudley Field.[297] The legislatures met only infrequently and, since the executive branch of government was itself still in its infancy, had little in the way of supporting administrative services. As a result, the state supreme courts "were the only ongoing political institutions in the state capitals."[298] The same was true of the lower courts at the local level.

The influence of the judges of this era extended far beyond their activities on the bench, for they shaped not only the nation's emerging legal system but its emerging system of legal education as well. The commentaries of Kent and Story trained generations of American lawyers and have been credited with precluding an American embrace of civil law,[299] for "as the bench came to be manned by trained lawyers and their training came to be in the common-law tradition," the hope for legislative reform was narrowed, and American lawyers "ceased to believe creative legislation was possible."[300] That political view gained academic support and respectability from Savigny's historical school of jurisprudence, which was "skeptical of legislation and opposed to codes."[301] That school of thought established a foothold in the United States with the appointment of one of Savigny's students to the Harvard faculty in 1848.[302]

While moves to transform judgeships into elective positions ultimately had as debilitating an effect on the state judiciary as Jacksonian democracy had on state legislatures, the reform effort merely served further to enhance the dominance of the federal courts.[303] The federal judiciary, in turn, would continue to preoccupy itself with promoting a strong central government in order to protect the rights of property and

296. R. POUND, *supra* note 286, at 57.
297. B. SCHWARTZ, *supra* note 205, at 71-75.
298. Stevens, *supra* note 3, at 424.
299. R. POUND, *supra* note 286, at 144, 154.
300. *Id.* at 46, 50.
301. *Id.* at 50.
302. *Id.*
303. *See generally* B. SCHWARTZ, *supra* note 205.

to encourage the rapid commercial development of the country. The Civil War and radical reconstruction saw the temporary eclipse, but not any lasting diminution, of the federal judicial power. The post-war period of federal legislative dominance was soon spent on bringing the upstart executive branch and the rebellious southern state governments to heel. The federal judiciary ultimately overturned the legislative program of radical reconstruction and thus emerged more dominant than before.[304]

These public law developments were to have fateful consequences for academic legal education. Judges not only dominated the faculties of a number of academic law schools, but also were their chief rivals, both in their doctrinal writing, which was used as the basis of self study or apprentice training, and in their own private law schools (which, notwithstanding the demise of Litchfield, continued to proliferate in the West and South, where the apprentice system was not so strong).[305] If, after all, the law is what judges say it is, what better place to learn the law than from the person who purported to discover it—who also, incidentally, continued to exercise control over admissions to an ostensibly democratized bar.

Thus, the decline of the broad view of academic legal education after the midpoint of the nineteenth century may be attributed not so much to the triumph of the Harvard model of legal education as to the triumph of the judiciary. Given that triumph, law schools modeled along the lines of the University of Virginia, and even the University of Virginia itself, had little choice but to narrow the scope of legal education. Notwithstanding its academic orientation, the Jeffersonian concept of university legal education also emphasized practical training—otherwise, the university law school could not hope to be of public service but would lapse into the arid type of legal scholarship that had characterized law studies in the English universities. As lawmaking power increasingly became concentrated in the judiciary, training for public service increasingly became synonymous with training in private law for those preparing to practice before the courts. Academic legal education could no longer aspire to provide any broader training for citizenship and public service when citizenry and legal profession alike were preoccupied with the pursuit and protection of private gain.

304. *Id.*

305. A. REED, *supra* note 27, at 131-33.

2. *The Influence of American Higher Education*

A second external influence on the shape of American legal education was that of the very academic institutions to which legal education ultimately became attached. A critical fact, about which historians of legal education are said to have demonstrated virtually no interest, was that the period following 1870 was a watershed period, not just for law schools, but for all American education.[306] A recent case study of the history of legal education in Wisconsin during the nineteenth and early twentieth centuries takes the unorthodox position that American institutions of higher learning had a more decisive impact than did the legal profession itself on the eventual configuration of the twentieth century law school.[307]

The initial influence of higher education on academic legal education, however, was largely negative. The pre-Civil War period of American higher education has been described as the age of the college, just as the post-Civil War period became the era of the university.[308] Jefferson's concept of academic legal education, it will be recalled, was but a part of his broader concept of the university.[309] Yet in the early nineteeth century, the very time during which the broad view of legal education was most in vogue, few such universities existed.

The colleges of the early nineteenth century were generally narrow sectarian institutions with a prescribed classical curriculum seemingly impervious to change.[310] The initial hurdle for academic legal education, in fact, was in "justifying to a hostile academic world the inclusion of law in the college curriculum."[311] Where institutional support for the academic law professorships was forthcoming, the academic professorships thrived. But such support was slow in coming. Little wonder, then, that proprietary law schools sprang up.

Academic legal education, however, was indirectly helped by the reaction of Jacksonian democracy to higher education, consisting as that reaction did of a widespread revulsion against the classical college cur-

306. Chase, *supra* note 234, at 336.

307. W. JOHNSON, *supra* note 5, at xii.

308. R. HOFSTADTER & C. HARDY, *supra* note 87, at 30.

309. *See* notes 86-87 *supra* and accompanying text.

310. *See generally* THE COLLEGES AND THE PUBLIC 1787-1862 (T. Crane ed. 1963).

311. Currie, *supra* note 55, at 356.

riculum and a demand for practical vocational education.[312] So intense were the demands for practical education that the colleges felt compelled to demonstrate that vocational training was indeed available. What better way to do so than by opening a law school? And what better way to do that than by absorbing one of the many proprietary schools that kept springing up from time to time? Not surprisingly, a number of the academic law schools that came into being between 1825 and the Civil War were the result of the absorption of a proprietary school by a private or publicly run college.[313] Still others used the proprietary law school as a model.[314] Supporters of the American liberal arts college "expected that law schools would shelter the central college by providing a veneer of practical training and that they would broaden the base of college support by erecting a bridge to a powerful professional group."[315]

The development of the American university was given added impetus by the federal policy of setting aside part of the public domain for the support of education. By 1857, over four million acres of land had already been granted to fifteen states for the endowment of state universities.[316] The greatest of these grew up in the Middle West, where legal education would experience its most dramatic growth after 1870.

Meanwhile, a new generation of American educators, schooled in the leading European universities, where they learned to appreciate the value of scientific research, began to replace the clergy as the leaders of American higher education.[317] This new generation of educators sought, in turn, to replace the sectarian college and its antiquated classical curriculum with the secular university, whose curriculum, methodology, structure, and objective would be devoted to the study and progress of "science."[318] Because these educators were still influenced to some extent by the eighteenth century concept of science as embracing all human knowledge, the attempt to be "scientific" spread from the natural sciences themselves into every sphere of intellectual life.

Nowhere is the drive toward scientism in higher education better il-

312. *See, e.g.*, F. WAYLAND, THOUGHTS ON THE PRESENT COLLEGIATE SYSTEM IN THE UNITED STATES 9-17, 38-41, 108-12, 132-49 (1842).

313. A. REED, *supra* note 27, at 423-33; W. JOHNSON, *supra* note 5, at xii.

314. W. JOHNSON, *supra* note 5, at xii.

315. *Id.* at 20.

316. R. HOFSTADTER & C. HARDY, *supra* note 87, at 38.

317. W. JOHNSON, *supra* note 5, at 84.

318. R. HOFSTADTER & C. HARDY, *supra* note 87, at 32-36.

lustrated than in the career of Harvard's president in 1870, Charles W. Eliot. Although in conventional legal history Eliot is merely remembered as the man who appointed Christopher Columbus Langdell to the Harvard law faculty,[319] his contributions to the second century of American legal education were in fact far more comprehensive.

A recent article enumerates the fundamental changes in legal instruction and institutional organization that are usually attributed to Langdell and concludes that the conventional attribution overlooks the more significant role of Eliot.[320] The author finds an obvious structural similarity between Eliot's educational theories, all of which Eliot had himself put into practice by the time he became president of Harvard in 1869, and those that, in the law schools, would later come to be called Langdell's system.[321] Equally noteworthy is the fact that Eliot, far more than Langdell, was the chief defender of the case method of instruction during the first critical years of its life.[322] Nor was the system one that needed no defense. It faced considerable opposition from students, law professors, and members of the bar. When by 1894 the Harvard Law School was finally beginning to achieve preeminence, a long time supporter of the school said of Eliot, not Langdell, that "[h]is brain conceived, his hand has guided, his prudence has controlled, his courage has sustained, this great advance."[323]

The "great advance," however, was not limited to the law school. Eliot was simultaneously engaged in initiating and supporting similar

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319. *See* B. SCHWARTZ, *supra* note 205, at 146.

320. Chase, *supra* note 234, at 329, 332.

321. Chase lists the following fundamental changes in legal instruction and institutional organization as those usually attributed to Langdell:

> (1) Displacement of the lecture method of instruction by the case method (2) which, modeled on a "scientific" or inductive process, moved from the analysis of a series of concrete cases to the elaboration of general principles of law (3) worked out or discovered jointly by instructor and student as co-researchers (4) with the aid of home and classroom research manuals called "casebooks," and (5) emphasizing development of the student's capacity for legal reasoning even at the expense of the acquisition of legal knowledge or skills. (6) Establishment of law school entrance examination, (7) the three-year degree curriculum, (8) examinations regulating student movement from one grade to the next, (9) formal and written final examinations upon which turned graduation, and (10) an overall improvement in the quality of legal education adequate to secure the long-term financial credibility of law schools as economic institutions.

Id. at 332. Chase goes on to show that Eliot had proposed or carried out similar institutional and instructional reforms as head of the Laboratory of the Lawrence School (1861-63) and as a member of the faculty of Massachusetts Institute of Technology (1865-69). *Id.* at 334-36.

322. *Id.* at 336.

323. *Id.* at 340.

reforms in the undergraduate science curriculum and in the medical school.[324] Eliot is described as a man of considerable self confidence and achievement who could afford the luxury of modesty.[325] There were also sound strategic reasons for his avoiding too close an identification with any one project. Thus "it is not difficult to understand why Eliot might be willing to confuse at times exactly who was responsible for what."[326] Ironically, those schooled in the narrow professional model of academic legal education that Eliot's "great advance" did so much to institutionalize have by the very narrowness of their view of legal education remained confused over Eliot's pivotal role at Harvard for over a century.

One remark of Eliot's is particularly revealing: In 1920 he would recall that "Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin and Montessori; yet his method of teaching was a direct application . . . of their methods."[327] Eliot himself, on the other hand, had personally travelled to Europe to study in the most exhaustive possible way the educational systems of the Continent. A particular object of Eliot's study in Europe was French medical education, where Pestalozzi's idea that the aim of teaching was to develop the student's own powers and faculties rather than to impact facts had earlier gained acceptance.[328]

Eliot's remark suggests that he had a broader idea of what Langdell was about than did Langdell himself. One comes away with the feeling that notwithstanding the conventional view, which credits Langdell with having launched a new era in legal education, much of the credit should actually go to Eliot. Certainly Eliot "saw the changes which took place in legal education around 1870, and which are associated with Langdell's name, as part of something rather more complex" even if latter-day historians and theorists of legal education "have generally been unwilling to do so."[329]

Eliot's heavy involvement in the shaping of academic legal education was by no means atypical of university presidents of his day. We have already seen, for example, that the *American Law Review* looked to Dr.

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324. *Id.* at 342.
325. *Id.* at 345.
326. *Id.*
327. *Id.*
328. *Id.* at 343.
329. *Id.* at 346.

E.O. Haven, president of Northwestern University, for a statement of what a law department of a university ought to be.[330] The new leaders of American higher education were not content with reforming the traditional classical college curriculum; they also "took the initiative in reforming the professional schools attached to their institutions and, in the case of the law schools, that meant that the influence of the university administration would be thrown on the side of those who promoted the scientific model for organizing law schools."[331]

Thus, it is not surprising, as American legal education entered its second century, that the Harvard model of academic legal education, with its newly acquired "scientific" method, would begin to find favor at the nation's leading universities. The only real surprise to unfold in that second century would be the extent to which legal education, even at those law schools that had begun with an avowedly vocational purpose, would become homogenized along the lines of Harvard's "scientific" model. That startling development in the second century of legal education, however, should not overshadow the larger fact that, as a result of the dual impulses toward vocationalism and scientism in American higher education, the Jeffersonian concept of the university was at last being realized. If the immediate impact on legal education was to institutionalize a narrow "scientific" model of legal education, the longer term impact was that the task of providing legal education was passing out of the hands of the bench and bar and becoming firmly rooted in the university.

III. EPILOGUE: THE SECOND CENTURY OF AMERICAN LEGAL EDUCATION AND BEYOND

The history of the second century of American legal education, unlike that of the first, has been recounted in rather extensive detail.[332] All that is missing from these accounts is the perspective that an appreciation of the first century of legal education would bring to them. For

330. *See* note 239 *supra*.

331. W. JOHNSON, *supra* note 5, at 84.

332. A. HARNO, *supra* note 3; Gee & Jackson, *supra* note 69; Stevens, *supra* note 3; Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review reprinted in* AALS CURRICULUM STUDY PROJECT COMMITTEE, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971 [commonly known as the *Carrington Report*], 1971 AALS PROCEEDINGS, Pt. 1, Sec. II, 142 app., *reprinted in* H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 227-68 (1972).

that reason, we need summarize only as much of that history as is necessary to link the first century of legal education to the third.

The second century of American legal education has witnessed the gradual substitution of academic and proprietary law school education for the apprentice system of lawyer training, the gradual ascendancy of academic legal education over the proprietary law schools as the primary avenue for entry into the legal profession, and the gradual elevation of academic legal education from trade school to graduate professional school status. Outside the law schools, the judicialization of American law has been checked, if not reversed, by the vast expansion of legislative and administrative law, while the university has become firmly fixed as the predominant model for American higher education.

These developments in the second century of American legal education represent a reversal of virtually all of the conditions that spawned the narrow Harvard model of legal education in the first century. Accordingly, one might expect to see, and there have in fact been signs as the second century of American legal education has worn on, that a broader model of academic legal education is re-emerging, albeit haltingly and in virtual ignorance of its first century antecedents.

As legal historians have duly noted, however, the most startling feature of the second century of American legal education is how much took place before Alfred Reed published his report on legal education in 1921 and how little has happened since then.[333] The history of the first fifty years of American legal education's second century has been described as a battle between those who agreed with the limited bounds that Langdell had placed on the "science" of law and those who favored an infusion of extra-legal disciplines."[334] This was essentially a contest between the Harvard and the Virginia models of academic legal education. That same period has also been described, however, as one in which the view that law must be studied as a science competed with the view that the law school ought to function as an "ideal law office."[335] This was essentially a contest between Harvard's academized version of the proprietary law school and the more vocational version, that had only recently been brought under the roof of colleges and

333. Stolz, *supra* note 332, at 228.

334. Stevens, *supra* note 3, at 436-37.

335. W. JOHNSON, *supra* note 5, at 83.

universities.[336]

In his 1921 report to the Carnegie Foundation, Alfred Reed concluded that the tension between the Harvard model and its disparate competitors was one of depth versus breadth.[337] Reed identified three component parts of an ideally complete preparation for law practice: (1) general education; (2) theoretical knowledge of law; and (3) practical training.[338] While Harvard concentrated on intensifying the prospective lawyer's theoretical knowledge of law by providing basic analytic skills training, the other two trends in post-Civil War legal education sought to broaden the training of prospective lawyers by providing some modicum of general education and practical training, respectively.

The primary function of every law school, however, had become that of coping with the increasing volume of judicial decisions.[339] The question was not whether the law schools should depart from that primary mission, but whether they should do more than that and, if so, what.[340] The Harvard model provided an academically respectable method for performing the primary mission well, and it incidently allowed one professor to teach a large number of students—an educational economy not lost on university administrators.[341] Efforts to broaden legal education in either the direction of general education or applied skills training, on the other hand, failed to produce equally effective and economical methodologies[342] and served only to distract attention from what was rapidly becoming the paramount threat to academic legal education as a whole: namely, the emergence of part-time propriety night law schools.

With the invention of the typewriter, secretaries had begin to replace clerks in urban law firms, thus undermining the longstanding de facto apprenticeship system and creating a pool of potential part-time law

336. *See* notes 312-15 *supra* and accompanying text.

337. A. REED, *supra* note 27, at 275.

338. *Id.* at 276.

339. *Id.*

340. *Id.*

341. Stevens, *supra* note 3, at 444.

342. Those who sought to broaden the subject matter of legal education generally relied on the lecture method. *See, e.g.,* Stevens, *supra* note 3, at 439. Those who sought to transform the law school into an ideal law office relied on the same close personal supervision that in theory characterized the apprenticeship system. *See* W. JOHNSON, *supra* note 5, at 94.

students.[343] Gas and electric lighting, in turn, allowed the proprietary night schools to capitalize on that pool.[344] These night schools appealed particularly to recently arrived immigrant groups and thus threatened to transform the myth of the democratized bar into a reality.[345] They also called attention to the fact that the university-sponsored law schools were themselves only loosely connected with the university and in many respects resembled the purely proprietary schools.

Accordingly, academic legal education found it more expedient to pursue certain common goals in order to meet the immediate threat posed by the night law schools than to fragment over the debate concerning the ideal scope of academic legal education.[346] In 1900, the Association of American Law Schools (AALS) was formed and thereafter functioned for all practical purposes as a trade association for academic legal education.[347] Its charter members, a small percentage of university law schools, identified themselves as the "progressive" element in legal education and organized a package of reforms designed to promote adoption of the case method.[348] Over the next twenty-five years, the AALS gradually upgraded its membership standards and simultaneously pressured a related trade association, the American Bar Association (ABA), to promote stricter education standards for admission to the bar.[349] The AALS, particularly its charter members and the self-defined elite schools, are described as having developed a kind of cartel that tended to standardize legal education in order to advance certain "elitist preferences."[350] In the process, however, academic legal education was transformed into a "nondynamic industry, slow to change and short on innovation."[351]

The homogenization of academic legal education, however, did not

343. Stevens, *supra* note 3, at 428.

344. *Id.*

345. J. AUERBACH, *supra* note 11, at 106-07.

346. W. JOHNSON, *supra* note 5, at 84.

347. First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 333 (1978); Stevens, *supra* note 3, at 456.

348. W. JOHNSON, *supra* note 5, at 121.

349. First, *supra* note 347, at 351-60; Stevens, *supra* note 3, at 456.

350. First, *supra* note 347, at 332. First identifies the following essential characteristics of the elite-model law school: (1) A three-year course; (2) university affiliation; (3) a full-time faculty; (4) an increasingly lengthy pre-admission educational requirement; (5) day-only instruction; and (6) a not-for-profit requirement. *Id.* at 342.

351. *Id.* at 314.

go unquestioned. The ABA had instigated a Carnegie Foundation study of legal education, which ultimately resulted in Alfred Reed's 1921 report, entitled *Training for the Public Profession of Law*. In his report, Reed concluded that the night law school met a critical need in a pluralistic democratic society by providing lawyers with differing skills and specialties to serve different functions and different elements in society. In a view remarkably reminiscent of the Jeffersonian view of law and legal education, he concluded that lawyers provided more than a valuable community service; they were in fact a part of the governing mechanisms of the state, and their function was in a broad sense political.[352] Thus, in order to strengthen democratic values, Reed proposed the institutionalization of a stratified bar.[353]

Reed was also concerned over the distorting effect the case method was having on the training of a "public" profession, given the method's tendency to perpetuate "an exaggerated devotion to common or judge-made, as distinguished from legislative or popular law."[354] In slighting everything but the general principles of common law, the Harvard model effectively consigned the study of public law to the merging departments of political science and public administration.[355]

As Reed pointed out, the narrowing of the law school curriculum proved to be "bad for the Lawyer, and perhaps even worse for the politician,"[356] for prospective politicians continued to flock to the law schools, which had functioned as "the nearest thing to a training ground for the profession of politics that the country had."[357] The law schools, however, turned out a disturbingly one-sided product. Not only had the study of politics been excluded from professional training, but what *was* included, *i.e.*, the intensive study of private law and preparation for the representation of private interests, tended to predispose students "to identify the interests of the community with those of some special party or part, rather than subordinate special interests to the common welfare."[358]

For that very reason, however, the ABA would have none of Reed's

352. A. REED, *supra* note 27, at 3.
353. *Id.*
354. *Id.* at 380.
355. The first school of political science was established at Columbia as an outgrowth of the law school. *Id.* at 334.
356. *Id.* at 296.
357. *Id.*
358. *Id.* at 297.

specific proposals. His concept of a public profession was completely at odds with the practitioner's own professional training, which concentrated on the representation of private (and increasingly corporate) interests. In order to preserve the practicing and academic elites within the ABA and AALS, moreover, it was necessary to preserve the egalitarian myth of the unitary bar.[359] From 1921 onward, the AALS, the ABA, and local and state bar associations proceeded in a slow but steady lock-step to promote increasingly stringent standards for admission to law school and to the bar. Though they never completely succeeded in eliminating proprietary legal education, they did establish academic legal education as the primary avenue for entry into the legal profession.[360]

Once the responsibility for training practicing lawyers was placed firmly in the hands of full-time "academic lawyers," the subject matter and methodology of law study and the type of lawyers it produced underwent a corresponding change.[361] While in an immediate sense the study of law became more abstract, giving rise to complaints in the practicing bar that law school graduates were not equipped to practice law, in a broader sense legal education became more critical and less willing to accept the assumptions about the role of law and lawyers that had led to the triumph of the Harvard model in the first place. Thus, when reaction to the Harvard model of legal education ultimately set in, it initially occurred in the law schools at the instigation of academic lawyers rather than in the bar associations at the instigation of the practicing bar.[362]

Culminating in the late 1920s was what was described by Currie, writing twenty-five years later, as the only development in legal education in the twentieth century that could compare in significance with those "epochal events" that shaped the Harvard model in the latter part of the nineteenth century.[363] Inspired by the realist jurisprudence of Holmes[364] and the sociological jurisprudence of Roscoe Pound,[365] the

359. J. AUERBACH, *supra* note 11, at 112.

360. *Id.* Auerbach notes that the legislature presented an insurmountable obstacle.

361. Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 717 (1968).

362. *Id.* at 717.

363. Currie, *supra* note 55, at 331-32.

364. Stevens, *supra* note 71, at 480.

365. Ironically, while the scholarship of Pound inspired curricular reform elsewhere, Pound as dean doggedly maintained the narrow Langdellian model at Harvard. *See* W. JOHNSON, *supra*

law faculty at Columbia undertook to study law as a means of social control, organizing it in terms of the areas of social life affected by the law rather than in terms of abstract legal doctrine and drawing on non-legal materials in order to understand the social structure in which the law operates.[366] The legal realism of these academic lawyers has been described as a many-layered attack on formalism in legal education, empirical ignorance, doctrinal abstraction, and oppressive social values.[367] While the realists began with the vocational purpose of improving the lawyer's prediction of outcomes of litigated cases, the more radical among them gradually shifted from a concern with vocational skills training to the academic study of law, either for its own sake or for law reform purposes.[368]

Notwithstanding the intellectual excitement generated by the Columbia law faculty, the formal curriculum reform effort there ultimately failed.[369] The law school, it came to be recognized, has two not altogether compatible functions: first, to train law students so that they may become successful practitioners and, second, to study and reform the law by research and publication. To fulfill both functions, the more radical of the reformers proposed a bifurcation of legal education into professional schools for the training of practitioners and academic institutions principally devoted to research.[370] The majority of the faculty at Columbia, however, was ultimately unwilling to relinquish its professional function. The center of legal realism thereafter shifted to Yale Law School, where the realist movement eventually spent itself on empirical studies of dubious value and spirited, but generally unconstructive, criticism of existing legal institutions.[371]

In one very practical sense, the Columbia reform effort did prove to be a resounding success. The most significant result of the attempt to integrate law and the social sciences was the development of new teaching materials. During the 1930s, "the gospel of functionalism was

note 5, a 119; W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 72-73 (1973); Currie, *supra* note 55, at 335.

366. Currie, *supra* note 55, at 336-37.

367. Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153, 1159 (1970).

368. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 640-41 (1968).

369. Stevens, *supra* note 3, at 474.

370. *Id.* at 475.

371. W. JOHNSON, *supra* note 5, at 168-69; Stevens, *supra* note 3, at 478-79.

spread through casebook production."[372] By 1937, of the forty courses offered at Columbia, thirty-six were taught with materials prepared by the Columbia faculty within the past ten years—twenty-six of them published casebooks, many of which had been widely adopted at other schools.[373] These materials differed from previous casebooks in two significant respects. First, they were no longer strictly casebooks but rather "Cases and Materials." The "materials" consisted primarily of statutory and administrative materials but included nonlegal materials as well.[374] Second, the cases and materials were organized functionally, that is in terms of social and economic problems rather than of abstract legal doctrine.[375] In both respects, this new generation of teaching materials represented a reversal in the century-long narrowing trend in legal education.

Currie points out that although the Columbia faculty members thought of themselves as innovators, their efforts were in fact simply "a return to the principles of the professorships of the late eighteenth and early nineteenth centuries; to the ideas embodied in the curricula of Yale and Columbia in the last quarter of the nineteenth century."[376] Implicit in the Columbia curriculum proposals was a conception of the relevance of nontechnical studies to the training of lawyers, which differed fundamentally from the view that had dominated legal education for the past fifty years. The prevailing wisdom had been that although liberal education may be desirable as a cultural and humanizing experience, it had little or nothing to do with a lawyer's professional training.[377] Even Reed, who might be expected to have been on the side of breadth in legal education, had taken the position in his 1921 report that "Harvard was right and Virginia was wrong" in their respective approach as to law study, given the "fundamental distinction between cultural and professional education."[378]

The Columbia reformers, on the other hand, called for an approach to law study that would provide the student with "a thorough-going knowledge of the social functions with which the law deals."[379] In their

372. Stevens, *supra* note 3, at 484.
373. Currie, *The Materials of Law Study (Part Three)*, 8 J. LEGAL EDUC. 1, 70 (1955).
374. Stevens, *supra* note 3, at 483.
375. Currie, *supra* note 373, at 1-2; Stevens, *supra* 3, at 483.
376. Currie, *supra* note 373, at 18-19.
377. *Id.* at 19.
378. A. REED, *supra* note 27, at 154-55.
379. Currie, *supra* note 373, at 12.

view, such knowledge was not an educational luxury but an educational necessity for an adequate understanding of an increasingly complex body of technical law. It was thought that a broader base for legal studies would simplify law study by integrating its technical components into fewer courses. As Currie put it, "just as the Jonah of non-technical studies had been cast aside in Story's time at Harvard to lighten and preserve the ship, so its presence on board was now earnestly desired—also to save the ship."[380]

If the Columbia reformers were simply returning to the principles of the late eighteenth and early nineteenth century law professorships, however, they were also proceeding to make some of the same mistakes. In their preoccupation with the subject matter of law study, they, like Wilson and Kent before them, seriously neglected the coordinate question of methodology. Notwithstanding their call for an integration of law and the social sciences, they remained largely unaware of the potential contribution of educational theorists to the methodological problems confronting legal education.[381] An immediate methodological problem, for example, was that the gradual increase in standards for admission and the length of law school had merely served to heighten student dissatisfaction with the case method, particularly beyond the first year of law school.[382] To that problem, the new generation of casebooks and the academic functionalists who created them did not effectively speak. They were concerned, after all, with broadening the subject matter of law study, not its methodology.

Methodological reform was initiated, rather, by a band of "professional" functionalists. In contrast with the academic functionalists, who focused on the role of *law* in society, the professional functionalists focused more on the role of *lawyers* in society. With that shift in emphasis, the attempt to integrate law and the social sciences gave way for a time to an attempt to integrate theoretical and applied skills training.

The professional functionalists credited Langdell's method with having shifted the emphasis in legal education from acquisition of knowledge to training in analytic skills, but they believed that the case method was no longer efficient and that it failed to do a comprehensive

380. *Id.* at 17.

381. E. BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE 228 (1948).

382. Stevens, *supra* note 3, at 489-90.

job of skills training.[383] They pointed out other skills, such as statutory construction, appellate advocacy, drafting, counselling, and certain not very clearly defined "public law" skills that could more effectively be taught by other means.[384]

For all of their criticism of the narrowness of the case method, however, the professional functionalists themselves tended to advocate models of legal education that were almost as narrow. The main criticism of some professional functionalists was that legal education had been preoccupied with the appellate process, where in reality the law is played out in the trial setting and in law offices. In their view, the law school should resemble a sort of "sublimated law office."[385] This branch of professional functionalism, of course, culminated in the clinical law "explosion" of the 1960s,[386] which occurred as legal education experienced a period of growth rivalling that of a century earlier.[387] Although described as the "first significant innovation in legal curricula since the hegemony of the case method,"[388] clinical legal education, like the case method before it, has nevertheless tended to focus primarily on the role of the lawyer in the representation of private interests. While other professional functionalists, struck by the growing role of lawyers in all levels of government service, have argued for more systematic training in policy making,[389] policy analysis, and problem solving[390] and have renewed the call for an integration of laws and the social sciences,[391] they too have tended to limit their concern to the professional training of lawyers.

Thus, notwithstanding the efforts of the functionalists over the past fifty years to broaden the subject matter and methodology of law study, the structure and objective of present-day academic legal education can only be described as an embodiment of the narrow professional model envisioned by Judge Parker in his inaugural address at Harvard in

383. W. TWINING, *supra* note 365, at 353-56.

384. *Id.* at 354-55.

385. Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723 (1933).

386. Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L. REV. 1025, 1026.

387. Gee & Jackson, *supra* note 69, at 758-59.

388. Meltzner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 582 (1976).

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

390. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943).

391. Lasswell & McDougal, *supra* note 389, at 204.

1816.[392] A recent report on the demand for legal education in the 1980s, however, suggests that law schools may soon be forced to broaden the structure and objective of academic legal education as well.

The report, sponsored in part by the AALS,[393] concludes that it is likely, although not at all certain, that overall demand for legal education will decrease during the next decade,[394] and it points out that if a decrease in demand does occur, some schools, at least, will be compelled for financial reasons to maintain the size of their present student body.[395] This may necessitate admitting students who have not demonstrated the ability to do acceptable law school work[396] or, in the alternative, expanding placement efforts to include areas outside of the traditional law-practice mold.[397] These nontraditional areas would need to include not merely positions in the legal departments of business and government, which may not be available in sufficient numbers to absorb those earning law degrees, but also a broad range of opportunities for which persons with legal education are suited, including management positions in the public and private sectors.[398]

The report concedes that for all the recent emphasis on skills training in law schools, "the managerial and other skills of those with a legal education have not been in the forefront of our thoughts."[399] While persons with legal education have well-developed analytical skills, they may lack the information about budgeting process, finance, and management techniques that would be helpful in obtaining positions outside the law-oriented world. Courses in these areas will thus need to be made available to law students, either through the business school or school of public administration affiliated with the university of which the law school is a part, or perhaps even in the law school itself.[400]

What the AALS report glosses over, of course, is that it is in effect

392. *See* text accompanying note 192 *supra*.

393. AALS, Report of Joint Committee on the Demand for Legal Education in the 1980s, July 10, 1980.

394. *Id.* at 1.

395. *Id.* at 15.

396. *Id.*. The report warns of the continuing obligation on the part of law schools to assure competence of those earning law degrees but, at the same time, expresses doubt that "the mores of our society will permit a return to the high failure rates of the 1950's." *Id.*

397. *Id.* at 16.

398. *Id.*

399. *Id.*

400. *Id.* at 17.

advising law schools to invade the traditional province of other professional schools. These schools can hardly be expected to react positively to such a course of action as long as the students being trained and placed remain identified exclusively with the law school. In order to implement this proposal on any wide scale, therefore, law schools may well find themselves far more heavily involved with other disciplines, through joint degree programs or otherwise, than they have been in the past.

In addition to the recommendation that the scope of professional training be broadened, the AALS report notes that relatively few law schools have developed nonprofessional programs designed to provide undergraduate and graduate students with an understanding of the legal process and the role of law in society.[401] Moreover, although many law faculty members participate in continuing legal education programs and some also participate in various extension programs sponsored by the university, such participation has not been considered a part of the regular teaching load of the law faculty. In order to take advantage of these previously neglected markets, law schools are thus urged to consider developing an undergraduate curriculum, continuing legal education programs, and perhaps even some adult education courses as a part of the school's regular offerings.[402]

In a word, American legal education may shortly find that it can no longer afford to remain narrowly preoccupied with providing professional training for lawyers. Jarring as that prospect may be to legal educators accustomed to the narrow professional model of Parker and Story, it is but a portent that the third century of American legal education may indeed witness a return full circle to the broad academic model envisioned by Jefferson and Wythe.

401. *Id.* at 18. To the extent such programs are available at all, they are normally offered by other departments in the university. *Id.* Likewise, the enrollment of graduate students in law school courses, although possible at many schools, often tends to be tolerated rather than encouraged.

402. *Id.*