TWO

Legal Education

In spite of their diversity, American law schools have as common characteristics their graduate level and professional objective and their use of the case method of instruction. Why did legal education take this form, and what is the role of the case method?

Diversity

The development of the American legal system has been influenced by the kind of education that lawyers have received, and legal education, in turn, reflects the diversity of that legal system. The study of law for more than one hundred and fifty thousand law students today means study in one of over two hundred law schools that have been approved by the American Bar Association.[1] Nearly all lawyers currently admitted to practice in the United States hold degrees from these schools. But because the number of

[1] The great majority of these schools have also met the somewhat stricter standards for membership in the Association of American Law Schools. The list of ABA law schools is available online *at* http://www.abanet.org/legaled/.

institutions is large and because there is no federal control of education, the diversity among these institutions is much greater than in countries where the number of law faculties is smaller or where there is some regulation by the national government. Most law schools are part of a university. The university may be private, with no state connection, as are Chicago, Columbia, Harvard, Stanford, and Yale; or it may be supported by one of the fifty states, as are California, Michigan, and Virginia. The school may be regarded as a "state" law school in the sense that its students come from and intend to practice in the state where it is located, and its curriculum emphasizes the law of that state, or it may be one of the "national" law schools which, like the ones just named, attempts to prepare its graduates more generally for practice in any state. It may have only a full-time program of study lasting for three years, or it may also have a part-time program, usually of evening study, requiring a longer time to complete the standard course.[2] It may be one of the few law schools with more than fifteen hundred students, or one of the handful with less than four hundred.[3] Yet in spite of the great variety in American law schools, there are several characteristics that they have in common, which distinguished them from their sister institutions in most of the rest of the world. The most striking of these are their graduate level and professional objective and the case method of instruction, each of which had its origin in the development of legal education during the nineteenth century.

Graduate Level and Professional Objective

It may seem surprising that legal education should be thought of as being on the university graduate level in a country where an established tradition of university education for the practice of law is only a century old.

[2] Less than a fifth of all law students study part time.

[3] Even among the schools named above, the enrollments of J.D. candidates vary. In 2010, they ranged from close to 2,000 for Harvard and between 1,200 and 1,500 for Columbia, Michigan, and Virginia to about 1,000 for California (Berkeley) and about 600 for Chicago, Stanford, and Yale. Tuition and fees range from about $10,000 a year (for state residents at some state schools) to more than $40,000 a year but may in case of need be more than offset by scholarship or loan aid. Most U.S. law students borrow the money to pay for tuition, books, and expenses.

After the Revolution, legal education deteriorated along with the bar.[4] Until well past the middle of the nineteenth century, it was principally in the hands of the practitioners, as at the Inns of Court in England and the accepted way of preparing for the bar was by "reading law." This usually meant a more or less casual apprenticeship, consisting largely of the performance of routine tasks in the office of a practicing lawyer, together with the reading of cases and statutes, as well as with whatever law books were in the office, initially Coke's *Institutes*, then likely an American edition of Blackstone's *Commentaries* and later, Kent's *Commentaries* or Story's *Treatises*, and by the end of the century, some of the more specialized treatises in narrower areas of practice.[5]

There were some exceptions. In 1753 at Oxford University, William Blackstone had begun the first university lectures on the common law in England and before the turn of the century, a small number of American universities had followed this example. A chair of law was established at the College of William & Mary in 1779; James Kent became professor of law at Columbia College in 1793; and there were a few others. In addition, independent schools of law, in which a lawyer undertook to instruct more students than could be accommodated in an office, grew up outside the universities as offshoots of the apprenticeship system. The most notable of these was the Litchfield Law School, which lasted from 1784 to 1833.

However the present-day American law school did not begin to take shape until Justice Joseph Story reorganized the Harvard Law School in 1829, twelve years after its establishment. Story helped to set the dominantly professional orientation of the American law school. The occupants of the early university chairs of law had, like Blackstone, regarded law as a part of liberal education. But under Story, legal and liberal education were divorced, and Law was taught on the assumption that the student had acquired a sufficient background in the liberal arts before commencing legal study. The idea took hold, and the number of such university law schools with one- or two-year courses had increased to thirty-one by 1870. However, these schools had no academic admissions requirements and few graduation requirements, and no attempt was made to ensure that the

[4] *See* Chapter 1, *supra.*

[5] Many lawyers, including President Abraham Lincoln, prepared for the bar largely by self-directed reading of such works, as well as preparing later lawyers by the same means.

students had the background of liberal education that Story had assumed. Most schools had faculties of from one to three professors. The first half of the century had been a period of rampant Jacksonian democracy,[6] marked by the exaltation of the common man and carrying with it the implication that one had an almost inherent right to practice law.[7] The legal profession in the United States has never been the province of a select elite, and egalitarian feeling ran especially high at this time. Even the general requirements of preparatory study or apprenticeship for admission to the bar that had existed in the early 1800s had been abandoned. The new law schools, in spite of their university connections, were vocational and lacking in distinction.

Beginning in about 1870, the expansion and industrialization that followed the Civil War gave new vitality to the training of the lawyers who were to practice the more complex law of this era. The American Bar Association was formed in 1878, and its section on legal education evidenced the interest of the organized bar in this field. From this group, the Association of American Law Schools was organized in 1900 for the improvement of legal education. By 1905, the association was able to require of its members the present minimum of three years of law study. By 1952, it had established three years of college education as a prerequisite for admission to law school, and most students today have completed the four years necessary for the college bachelor's degree.[8]

So it is that an American law student usually does not enter law school until the age of twenty-one or older, usually after at least four years of college. Many schools have several times as many applications as they have

[6] "Jacksonian democracy" took its name from Andrew Jackson, who was president from 1828 to 1836 and had as a premise that the popular mandate is the basis of all governmental activity.

[7] From 1851 to 1933, the Constitution of the State of Indiana provided that "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."

[8] The American student usually graduates from high school, the end of the tuition-free public school system, at the age of seventeen or eighteen. The student may then seek admission to a state or private college or university for a general college education, leading to a bachelor's degree at the end of four years, by the age of twenty-one or –two. An institution that includes several faculties, *e.g.*, an undergraduate faculty, graduate faculty, and professional schools, is usually called a "university"; while one with only an undergraduate faculty is ordinarily called a "college." A bachelor's degree is also commonly required for the study of medicine, which is itself a four-year course.

vacancies, and places are filled on the basis of the applicant's college record and a nationwide day-long examination used to test aptitude for law study. Where selection in law school admission is careful, fewer than one in a hundred will be lost because of academic failure; where it is not, the rate of failure will be higher. Although the typical law student was once a white male, recent decades have seen a dramatic increase in both women and students of many racial backgrounds in law schools. Women now account for nearly half of all law students, and students from the six groups defined by race or nationality studied by the ABA account for roughly one out of four law students.

The American law student is usually interested in some form of public or private law practice.[9] The three years at law school are devoted to such technical subjects as contracts, torts, real and personal property, trusts, evidence, procedure, criminal law, commercial law, corporation law, taxation, trade regulation, constitutional law, administrative law, labor law, family law, and conflicts of laws,[10] together with a few broader offerings such as jurisprudence, comparative law, law and economics, and legal history. It is assumed that the student has been exposed to such subjects as history, literature, art and music, economics, sociology, political science, and government before entering law school. The curriculum for the first year of law school is entirely or largely prescribed but in later years is mostly elective. The requirement of a college education as a prerequisite to the study of law, coupled with the disappearance of any requirement of an office apprenticeship, has increased the professional emphasis of law training in most law schools. During this three-year period of intensive professional training, the student is subjected to that peculiarly American method of instruction known as the case method.

Case Method

The introduction of the case method on a large scale in American law schools came with the appointment in 1870 of Professor Christopher

[9] Some law students pursue joint degree programs combining law with such fields as business administration or public administration. These programs generally require an additional year.

[10] These fields are described in Part Two, *infra*.

Columbus Langdell[11] as Dane Professor and then dean of the Harvard Law School. He taught his class on contracts not from a treatise but from a casebook, an ordered collection of cases—appellate court opinions—he arranged and published for the use of his students. He had concluded that the shortest and best way of mastering the few basic principles on which he thought the law to be based was by studying the opinions in which they were embodied. He also believed that the instruction should be of such a character that the pupils "might at least derive a greater advantage from attending it than from devoting the time to private study." Once law professors began to put collections of cases in the hands of their students, the next step was to abandon the traditional lecture method and to pose questions and discuss with the students the cases which they were to have read before class—the so-called Socratic method. Because the cases came from many jurisdictions, they were not always consistent, and the method took on a comparative aspect in which the student was required to evaluate conflicting rules in the context of an actual situation. By the end of the first decade of this century, these techniques had been generally accepted in law schools throughout the country.

But if Langdell thought that all of the law could be learned from cases, he was badly mistaken. Much of American law is found elsewhere than in cases, and the role of legislation, regulation, and academic commentary in the curriculum is increasing. Furthermore, the case method is inordinately time consuming if the objective is to learn all or even a substantial part of the law. In recent times, the case method has been justified on the ground that by requiring the student to state, analyze, evaluate, and compare concrete fact situations, to use sources as they are used by lawyers and judges, and then to formulate basic propositions, the method serves to develop the skills and techniques of the profession and to strengthen powers of analysis, reason, and expression. These goals are valued more highly than encyclopedic knowledge of legal rules.[12] Although the case method is suited to the

[11] Christopher Columbus Langdell (1826–1896) was a New York lawyer who became professor of law at Harvard Law School in 1870. His principal achievement as professor and later dean was the introduction of the case method of instruction.

[12] The case method is reflected in the typical law school examination question, which poses a hypothetical fact situation unfamiliar to the student, often based on a borderline case in which the law is not clearly settled. The question may ask the student to decide the case and present supporting reasons or perhaps to argue the case for one side or to advise a client in

peculiarly professional character of legal education in the United States, it has helped to isolate law from other branches of learning. An increasing awareness of this difficulty, of the limitations of appellate court opinions, and of a slackening of student interest, has lead to some diminution in the stress on cases, and the pure case method is now rare in classes after the first year of law school. The casebooks that once contained only cases now contain text, statutes, legal forms, and writings from other disciplines such as economics, philosophy, sociology, and history. Cases are often supplemented by problems that may call for counseling or drafting or that challenge the student to apply professional and personal ethics. Many courses seek to develop the abilities to analyze and to resolve questions of policy, as well as to impart the traditional skills of the lawyer. But the emphasis is still on development of the student's critical faculties by requiring preparation in advance of class and the exercise of independent judgment, as well as on the student's ability to engage publicly in the independent exercise of those faculties through a dialogue with the professor in the classroom.

So it is that the American law student still finds the case method the basic pattern in most large classes, especially in the first year. Because the class may number over a hundred students,[13] the student called on to speak at any given time joins in a dialogue with the professor, and the other students learn by both listening and imagining their own answers to the professor's questions. The student is expected to spend two hours reading casebooks and treatises or other readings in preparation for each hour of class, and there are usually twelve to fifteen hours of class per week. There is, to be sure, a wide variety of teaching styles in law schools today, especially in small classes and classes in the upper years, although the case method remains a hallmark of U.S. legal education.

A number of other activities are available to enrich this educational experience. In a small course or seminar, discussion is more collaborative and informal. In courses that emphasize legal practice, the student may get practice in research and writing[14] and perhaps also in advocacy, counseling,

the situation of one of the hypothetical characters. Emphasis is on analysis and reasoning rather than on a "correct" conclusion. Law school examinations are written.

13 In many schools, classes are often taught in sections so as not to exceed one hundred students.

14 Law students are required to make extensive use of the library for research, although great libraries support scholarship and archives for advanced consultation. Harvard holds more

negotiation, or drafting. In a clinical program, the participants may receive practical experience by doing supervised work on actual cases, often in cooperation with an organization that furnishes legal services to those in need.[15] In moot court, students participate as counsel, usually on appeal, in simulated cases that the students argue before judges who are drawn from the faculty, the bar, the judiciary, and the student body. And those students who are fortunate enough to succeed in a competition, usually based at least in part on first-year grades, are invited to help to write and edit the many law reviews published by nearly two hundred law schools. These periodicals include America's most distinguished legal journals and are traditionally run by students.[16] After three years of this kind of training,[17] the law student is awarded the degree of *juris doctor* (J.D.) and becomes a candidate for admission to the bar.[18]

Suggested Readings

The classic lecture on the modern law school is K. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (S. Sheppard ed., 2008). For a comprehensive history of U.S. law schools, see S. Sheppard, *The History of Legal*

than two million volumes (including microfilm) in its law library. Columbia and Yale have over one million each, and the libraries of other law schools are usually of well over one hundred thousand volumes.

15 Virtually all law schools offer some form of clinical legal education, often involving actual problems but sometimes, as in the case of instruction in trial practice, involving simulated problems. In addition to practical work of this kind, most law students are exposed to some aspect of law practice through summer or part-time employment.

16 Law reviews are discussed in Chapter 8, *infra.*

17 Periodic reexaminations of the curriculum are common in American law schools. The landmark study conducted by the Columbia Law School in the 1920s under the influence of the "legal realists" is described in Currie, *The Materials of Law Study* (pt. 2). 8 J. LEGAL EDUC. 1 (1955).

18 In spite of the graduate character of legal study, most law schools awarding the degree of juris doctor (J.D.) once awarded a bachelor's degree in law (LL.B.), which is still awarded by some schools for three years of graduate study. While some institutions offer additional work leading to the degree of master of laws (LL.M.) and doctor of the science of law (J.S.D. or S.J.D), these degrees are rarely taken as preparation for the practice of law. Candidates for the degree of doctor of the science of law usually intend to teach law. (The degree should not be confused with that of doctor of laws (LLD.), which is an honorary rather than an earned degree.)

Education in the United States: Commentaries and Primary Sources (2007). For a summary of the development of the case method, see W. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (1994). Current thinking in the field can be found in the Journal of Legal Education, the quarterly periodical of the Association of American Law Schools.

Some idea of nontraditional offerings in American law schools can be gotten from A. Polinsky, *An Introduction to Law and Economics* (4th ed. 2003); L. Freidman, S. MacAulay & J. Stookey, *The Law and Society Reader* (1995), and the schools of contemporary criticism of law and legal education derived from the critical movements of the 1970s and 1980s. Two books of readings on the feminist movement in legal thought are N. Levit, R. Verchik & M. Minow, *Feminist Legal Theory: A Primer* (2006). Critical Race Theory is described in K. Crenshaw, *Critical Race Theory: The Key Writings that Formed the Movement* (1996). On the critical legal studies movement generally, which stresses the internal contradictions in traditional legal thought, see M. Kelman, *A Guide to Critical Legal Studies* (1987), and D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (2007).

See G. Fletcher & S. Sheppard, *American Law in a Global Context: The Basics*, Introduction, and Chapters 1 through 4.

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