Book Review. History of Legal Education

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HISTORY OF LEGAL EDUCATION


Reviewed by Gene R. Shreve2

Robert Stevens' book, Law School: Legal Education in America from the 1850s to the 1980s, is the closest thing to a history of modern American legal education yet to appear.3 Because of its thoroughness and scope,4 the book will doubtless dominate a literary field that has heretofore been a mosaic of generally self-congratulatory histories of individual law schools5 and analyses of particular developments in legal education,6 supplemented by Stevens' own preliminary work.7 But although Law School is well written and carefully documented, it is not a complete history of American legal education. Because the

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2 Associate Professor, New York Law School. University of Oklahoma, A.B., 1965; Harvard University, LL.B., 1968; L.L.M., 1975. I wish to thank Marguerite R. Shreve, who read and made thoughtful comments on the manuscript.
3 Stevens notes the work, now dated, of Alfred Z. Reed, see A. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (1928); A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) [hereinafter cited as A. REED, TRAINING], and Josef Redlich, see J. REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914). Stevens persuasively argues that the modern-day significance of these authors derives more from their role as historical figures than from their status as historians (pp. 112-30).
4 The author undertakes a description of law schools' "function in the social evolution of law, lawyers, and higher education" (p. xiii).
5 For a survey and critique of this branch of the literature, see Konefsky & Schlegel, Mirror, Mirror on the Wall: Histories of American Law Schools, 95 HARV. L. REV. 833 (1982). The authors bemoan the fact that most of these institutional histories follow the same formula:

Simply put, the school grows from humble, but auspicious, beginnings to early triumphs and then through occasional hard times, though with never more than a momentary temptation to backslide from fixed and noble goals, to a place — if only a small place — in the sun.

Id. at 836.

In his book, Stevens has made use of even the least scholarly examples of the genre by drawing liberally from law school histories as sources of illustrative material.
7 The author notes two articles that laid the groundwork for the book: Stevens, Two Cheers for 1870: The American Law School, 5 PERSP. AM. HIST. 405 (1971) [hereinafter cited as Stevens, Two Cheers], and Stevens, Law Schools and Legal Education, 1879-1979: Lectures in Honor of 100 Years of Valparaiso Law School, 14 VAL. U.L. REV. 179 (1980). Of his other writings, Stevens, Democracy and the Legal Profession, LEARNING & L., Fall 1976, at 12 [hereinafter cited as Stevens, Democracy], is particularly revealing of attitudes about legal education that Stevens, in his role as historian, seems reluctant to express: in Democracy, Stevens characterizes the legal profession as a monopoly in need of drastic reform.
book's discussion of events of the past thirty years tends to be unfocused, *Law School* is most effective as a history of legal education between 1850 and 1950.\(^8\)

*Law School* provides historical data on such aspects of legal education as curriculum, legal scholarship, admissions, and law school economics. But the book is not simply an arid presentation of facts. It tells the story of the growth of institutional (usually university) law schools and the decline and near extinction of two competing approaches to legal education — proprietary law schools and law office apprenticeships. This narrative is central to the book, and it is when Stevens relates it that his history works best.

Although privately controlled proprietary law schools initially dominated American legal education, "the pendulum began to swing back" in the 1850's as institutional law schools emerged and the bar became more organized (p. 10). By 1950, institutional law schools nearly monopolized the means of entry into the legal profession. In *Law School*, Stevens captures this dramatic shift in American legal education. He demonstrates that the struggle of institutional law schools for supremacy was long and difficult. Despite the institutional law schools' assault on the alternative legal training offered by law office apprenticeships, as late as 1922 not one state required attendance at law school for admission to the bar (p. 172). Similarly, the universities' war against proprietary schools met with only mixed success until the Depression years (p. 177). The ultimate ascendancy of institutional law schools, Stevens' history suggests, was less a triumph of the ideals of professional competence than a result of tenacity, opportunism, and advantageous alliances.

I.

Because few events that occurred before 1850 are important to Stevens' portrayal of competing modes of legal education, this early period receives only introductory treatment (pp. 3–10).\(^9\) Stevens writes of the failure of attempts to accommodate law teaching within the American university structure soon after the Revolutionary War: the egalitarian sentiments of Jacksonian democracy eventually reversed the nascent trend toward institutionalized legal education. The most significant law schools of the early 1800's were not closely affiliated branches of established universities, but rather proprietary law schools, such as Litchfield Law School in Connecticut, which were outgrowths of the law offices of practitioners who had shown them-

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\(^8\) The book's sketchy treatment of the years before 1850 detracts little from the book's completeness, because developments in American legal education before 1850 were relatively insignificant.

selves to be particularly accomplished teachers (pp. 3–4). With the decrease in or disappearance of requirements for admission to practice — requirements that had essentially mimicked the profession's requirements in Europe — the profession during the Jacksonian period attached relatively little importance to formal legal training of any kind.11

The 1850’s brought renewed interest by universities in legal education. The book does not make the reason for this interest clear but suggests that it might have stemmed from dissatisfaction among lawyers with the effects of the Jacksonian era's lowered requirements for admission to the bar.12 The aspirations of university law schools in the 1850's were demonstrably elitist. Such elitism, Stevens suggests, would thereafter remain a constant in the institutional law school outlook, though the expression of elitist notions would become more sophisticated.13

Under the leadership of Theodore W. Dwight, the Columbia Law School became the first of the university law schools to reach a position of prominence in legal education, and it remained the leading school until it was “ultimately overshadowed by the rise of the Harvard Law School in the decades after 1870” (p. 36). Stevens attributes Harvard's rise to President Charles Eliot and Dean Christopher Columbus Langdell, both appointed in 1870.14 Although Stevens may overstate Har-

10 But see McManis, supra note 9, at 609–20 (finding a more significant role for university professorships in American legal education during this period and attributing less importance to proprietary schools).

11 The author reviews this trend (pp. 3–8) but suggests that it did not produce the erosion of professional standards of bench and bar that previous commentators have perceived. He also notes that the levelling effect of Jacksonian democracy on the profession varied by region.

12 Many members of the bar had become concerned about the number of attorneys admitted to practice after little or no training (p. 24). Stevens suggests that at about the same time there was developing a “middle-class urge to get ahead through structured education,” and that law was beginning to provide the opportunities of a “boom industry” (p. 22).

13 The unvarnished appeals to elitism made by law schools in the 1850's may jar the modern reader. Quoting from admissions recruitment literature, Stevens discloses that the University of Georgia Law School sought “young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers,” (p. 21) (quoting LAW DEPT, UNIV. OF GA., ANNOUNCEMENT (Athens, Ga. 1859) and that New York University Law School sought a “class of young men, who are hereafter to control the mercantile and commercial interests of our country” (p. 21) (quoting LAW DEPT, N.Y. UNIV., ANNUAL ANNOUNCEMENT OF LECTURES, 1858–59, at 9–10 (New York 1858)).

14 Langdell was the first dean of Harvard Law School, and probably the first dean of any law school. The CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817–1917, at 27 (1918). He is easily the most controversial figure in the history of American legal education. Portraits vary from the reverential view in the Centennial History to Holmes' wry description of Langdell as the “greatest living legal theologian” (p. 142 n.1) (quoting Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880)) to Grant Gilmore's depiction of Langdell as a “crude and simplistic” thinker (p. 71 n.88) (quoting G. GILMORE, THE AGES OF AMERICAN LAW 56 (1977)). Stevens' own view is somewhat equivocal. On the one hand, he gives Langdell considerable credit for refining (if not originating) the revolutionary case method (p. 36). But he also suggests
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Langdell’s contribution to the development of legal education, he correctly observes that it was in part through Harvard’s influence and example that institutional law schools achieved two important, permanent gains in their struggle for supremacy. University law school training “was established as de rigueur for leaders of the profession,” and “law was accepted, finally and irrevocably, as an appropriate study for university education” (p. 36) (footnote omitted).

Langdell’s insistence upon teaching law as a science was to some extent a reaction to the slipshod pedagogy of his time. For those seeking entry to the profession through law office apprenticeship, training in legal theory — and even clinical experience — was usually minimal or nonexistent (p. 24). Those choosing the pre-Langdellian law school alternative encountered a lecture system that emphasized passive learning and rote note-taking rather than analytical skills (pp. 54, 67 n.24). Langdell’s response was the so-called case method, which was built upon “the assumption that principles were best discovered in appellate court opinions” (p. 52), and which required the student to “find his way by himself” to the legal concepts underlying each case (p. 54). Despite opposition, the case method spread so rapidly that by the turn of the century it “was recognized as the innovation in legal education” (p. 63). Along with the new method came a new kind of law professor — a change epitomized by the 1873 appointment of James Barr Ames, “the first of a new breed of academic lawyer . . . who was appointed for his scholarly and teaching potential” (p. 38).

II.

The rise of institutional schools paralleled the efforts of academics and practitioners to form elitist organizations. In 1878, the practicing bar founded the American Bar Association (ABA), which by 1900 included most of the leading figures of the profession but only a small percentage of all practicing lawyers (p. 97). By recommending more formal training as a prerequisite to practice, the ABA attempted to disassociate itself from the incompetent and unethical practices it

that Langdell might have been a far less significant figure without the support of Eliot, “whose innovations on both the undergraduate and graduate level of the university had a powerful influence over Langdell. It was largely through Eliot’s efforts and his ‘social relations’ that the Harvard Law School method was accepted by other schools and scholars . . .” (p. 36) (footnote omitted).

15 Langdell contended that

[[law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . . (P. 52) (quoting C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (2d ed. 1879)).

16 In 1881, the ABA House of Delegates passed its first resolution on the standardization of legal education and thereby initiated “what was to be a century-long crusade” (p. 93).
regarded as rampant in the profession. Academic lawyers echoed these concerns by remaining aloof from "undesirables" and by urging the ABA to call for the creation of a "reputable" law school organization. The establishment of the Association of American Law Schools (AALS) followed in 1900 (p. 96).

Despite early differences, the academics of the AALS and the governing elite of the ABA had much in common, and from the 1920's onward they worked closely together to influence the direction of American legal education. They shared an "ideal of the perfect lawyer" — a college graduate trained in the case method tradition of the university law school. Stevens writes that their goal was to get rid of schools that did not follow orthodox methods or that admitted students who had not followed a conventional educational pattern. The professionals hoped to accomplish this by urging state legislatures to raise prelaw and law school structural requirements so high that these law schools would be deprived of their natural markets, the lower socioeconomic groups. (P. 102).

This attitude was similar to that of the medical elite toward what it regarded as marginal medical schools. But whereas the American Medical Association was able to eliminate such schools by 1917, the ABA and AALS would not achieve their aim until the late 1940's.

The second half of the 19th century saw great expansion of the law school industry. Many universities developed law schools or acquired proprietary law schools already in existence. Proprietary schools themselves rapidly proliferated during the same period, although they tended to specialize in part-time and evening education (pp. 74-79). States promoted the law school boom by tightening requirements for admission to the bar to include apprenticeship or, in the alternative, law school training. Law schools were largely free, however, to set admissions standards and to design programs of instruction as they saw fit (p. 76).

The AALS began with 25 member schools. Each school was required to meet standards similar to those the ABA — without success — had recommended that legislatures impose upon the training of all prospective lawyers. Thus, entering students had to be high school graduates, and programs of instruction had to be at least two years long. After the standards were first approved by the AALS in 1896, they were periodically raised (pp. 96-97).

In 1923, the ABA began listing "approved" law schools. Standards for ABA approval generally developed in tandem with standards for AALS membership, and "by 1927 the ABA list of approved schools was almost identical with the membership of the AALS" (p. 174). A law school's accreditation, though not yet a condition of the eligibility of the school's graduates to practice, nonetheless meant the difference between elite and nonelite status. In the late 1920's, about one-half of the country's law schools were in the elite category, yet these schools enrolled only one-third of the country's law students (p. 174).

Stevens' book provides a fascinating comparison of the contemporaneous offensives of the American Medical Association (AMA) and the ABA. Using the Carnegie Foundation's study of medical education and the resulting Flexner Report as a catalyst, the AMA enlisted the cooperation of states in raising standards and forced many medical schools either to upgrade admissions requirements and facilities dramatically or to close (pp. 102-03). The ABA's attempt to achieve similar aims was frustrated for several reasons. Two reports on legal education issued under the auspices of the Carnegie Foundation in 1914 and 1921, see J. Redlich, supra note 3; A. Reed, Training, supra note 3, undermined rather than reinforced the ABA's position. The authors of the reports, Alfred Z. Reed and Joseph Redlich, refused to support a single
Their eventual success, moreover, resulted in part from the pressures of larger events: the Depression and World War II. As financial fears during the Depression gave new force to arguments that the legal profession was overcrowded, states finally began imposing stiffer prerequisites to practice — requirements that cut into the market of schools not accredited by the AALS and the ABA (pp. 177-78). The further depletion of the student market caused by World War II and the draft also hit unaccredited law schools especially hard (pp. 198-99). The final blow was the enactment of federal and state programs to aid returning veterans. The government gave veterans the means to afford full-time day programs instead of the night or part-time legal education offered by unaccredited schools. In effect, this aid was a subsidy for the more prestigious law schools (pp. 205-06), which quickly expanded to absorb the new influx of students. Meanwhile, state legislatures continued to toughen standards for admission to the bar. The cumulative result of these forces was a dramatic decline in enrollment at unaccredited law schools by the late 1950’s (p. 207).

Stevens does not conclusively determine the extent to which the ascendancy of elite schools should be credited to the ABA-AALS alliance rather than to the force of outside events. But his narrative makes clear that the elite schools’ success would not have been possible without the untiring efforts of that alliance. Worth noting, therefore, are the mixed motives of the ABA and the AALS. On the one hand, both groups seemed consistently interested in elevating the competence and ethics of the legal profession. On the other hand, “the leaders of the bar shared the then-current assumptions about the ethnic superiority of native white Americans” (p. 100) and hoped to exclude

21 Between 1928 and 1932, the number of states requiring two years of prelegal college education for admission to the bar nearly tripled, from six to seventeen (p. 177). Between 1928 and 1935, the number of students in ABA schools increased by 5000, while the enrollment in unapproved schools fell by 10,000 (p. 177).

22 “What the ABA and the depression had begun, Hitler helped to complete” (p. 199).

23 State university law schools in particular were able to expand significantly as legislatures sought to provide places for returning veterans (p. 206).

24 Stevens takes somewhat inconsistent views of the matter. At one point, he notes that “just how much the decline in the number of unaccredited schools during the 1930s was due to the depression, and how much to the establishment’s continued raising of standards, still remains unclear” (p. 177-78). Elsewhere, he suggests that “the structure of American legal education” was “forged by the economic and social conditions of the Great Depression” (p. 279).

25 The author quotes numerous statements by leaders of the profession that reveal antagonism
Jews, blacks, and immigrants by raising admission standards; academic lawyers who assailed unaccredited law schools were also actuated by this bias (p. 109 n.67), as well as by a simple desire to reduce competition (p. 100). Stevens concludes that "the attack on night and part-time schools that opened the twentieth century seems to have been a confusing mixture of public interest, economic opportunism, and ethnic prejudice" (p. 101). Stevens describes the mixture of motives in 1929 as "[x]enophobia, economic concerns, and professional vanity, coupled with a genuine concern for the public interest" (p. 176). His interpretation of motives during the struggle is more balanced than that of recent commentators who have sharply criticized the victors. See J. AUERBACH, UNEQUAL JUSTICE (1976); First, supra note 6.

Stevens repeatedly emphasizes that upgrading and standardization tend to hinder professional entry by the economically disadvantaged in general (pp. 25–26) and by minorities in particular (pp. 195–96, 259 n.121), but he does not attempt to resolve any of the difficult issues. In Democracy and the Legal Profession, however, he notes that the "ABA deliberately drove out . . . the law schools which today would have produced the minority lawyers." Stevens, Democracy, supra note 7, at 68.

A few states, notably California, continue to permit graduates of unaccredited law schools to take the bar examination (pp. 208–09).
encyclopedic value, and several of them, particularly the examination of latter-day developments in legal scholarship, are quite effective.

The closing chapters of the book, however, are a disappointment. In contrast to his account of the rise of the university law schools between 1850 and 1950, Stevens' narrative of the last thirty years of legal education lacks a central theme. Instead, Stevens observes that law school methodology has lately become fragmented (pp. 212, 232), as the case method of teaching, for example, has yielded partly to clinical education, legal skills courses, and tutorials. It remains to be seen whether Stevens' perception of fragmentation is correct or whether his failure to provide a unifying theme for the events of recent decades is attributable simply to the increasing difficulty of organizing and appraising facts as the historian draws nearer to his own time.

To be sure, ending a history such as Stevens' is no easy matter. The author's solution is to reiterate the conclusions of an article he published in 1970. He suggests that students will continue to be interested in little but getting into practice as soon as possible, that law professors will continue selfishly to value above all their independence from the nonacademic world, that legal scholarship will continue to be of more interest to academics than to practicing attorneys, that legal education will remain seriously underfunded, and that "new" approaches to legal thinking and "fresh" criticisms of legal education will in fact repeat the tired old theories of earlier attempts at reform (pp. 278–79).

The first problem with these conclusions is that their pessimism is dated. Any appraisal of legal education's role and future made in 1970 is likely to be jaundiced by the despair that then pervaded law schools and the country as a whole. Although observers have not favorably regarded all developments in legal education since 1970, the rise of "critical legal studies" (p. 275), the attempted integration of law and economics (p. 272), and the "search for a new form of [unifying] faith" (p. 274) — each of which Stevens himself describes — suggest that reforms in legal education are not inevitably "cyclical"

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28 Stevens surveys the nature and influence of the work of such postwar academic figures as Lasswell and McDougal, Hart and Sacks, Calabresi, H.L.A. Hart, and the leaders of the critical legal studies movement (pp. 264–76). This material is insufficiently tied to the rest of the book, but the discussion has an elegance of its own, reminiscent of Grant Gilmore's history of legal thought, G. Gilmore, supra note 14.

29 One hopes that in his next work Stevens will grapple with the issue of democracy versus elitism in modern-day legal education. In particular, what are the consequences of elitism in legal education? Does elitism enhance or diminish the contribution of legal education to society?

30 See Stevens, Two Cheers, supra note 7, at 546–48.

31 On the effect of the war in Southeast Asia on legal education, see F. Allen, Law, Intellect, and Education 72 (1979).
The second problem with the book's closing assertions is that they imply that Stevens has treated the subject of American legal education more comprehensively than he actually has. For example, the book's failure to examine in detail the teaching of law is not in itself a great fault. But it is premature to make categorical judgments about legal education — especially judgments as negative as those advanced in the book's conclusion — without first considering either the satisfactions offered by law teaching as an intellectual and humane endeavor or recent developments likely to increase the value of law teaching.

Notwithstanding these flaws, Law School is an exceedingly useful work. Although Stevens suggests that his book is no more than "a tentative step" in the development of "[a] history of legal education as a whole" (p. xiv), the book is, as such a step, more than successful. Law School is rich in material that will help us see modern issues from a more philosophical and historical perspective. Stevens demonstrates that current criticisms of legal education usually have antecedents in (losing) arguments advanced when crucial decisions were being made in the past. He also demonstrates that earlier advocates

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32 Efforts to improve law teaching and to understand it more fully provide additional examples of the possibility of continued change. The most significant developments have been an attempt to use legal education to pose lifelong issues of lawyer identity and growth, and an investigation of the dynamics of teaching and learning theory.

The former is best represented in REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979) (the Cramton Report), and A. AMSTERDAM, REPORT TO THE LAW SCHOOL DEANS' WORKSHOP ON PROFESSIONAL SKILLS INSTRUCTION (1982). Stevens notes the Cramton Report (pp. 240, 256-57 nn.86-88) but misleadingly describes it as an attempt to offer the "panacea" of "clinical legal education" (p. 240). The great value of both the Cramton and Amsterdam reports is that they advocate a search for opportunities to probe intellectual, ethical, and interpersonal aspects of professional growth in all law school courses. See Shreve, Bringing the Educational Reforms of the Cramton Report Into the Case Method Classroom — Two Models, 59 WASH. U.L.Q. 793 (1981).


33 For example, although the author makes extensive references to the case method and predicts that it "will continue to dominate legal education" (p. 278), he never satisfactorily explains what case method teaching is. He makes no more than a cursory attempt to tie the so-called "Socratic method" to case method teaching (p. 53), and he overstates the present influence of the case method by observing — inaccurately, I believe — that "[l]ectures have not returned" to the law school classroom (p. xiv). Recent reports indicate that much if not most legal teaching is based not on the probing Socratic method associated with the paradigm of the case method, but on thinly disguised lecture — "the avuncular Socratic method." See Cramton, The Current State of the Law Curriculum, 32 J. LEGAL EDUC. 321, 328 (1982); see also T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 162-67 (1977) (noting that modern legal education has returned to text and lecture).

34 On the intellectual and spiritual pleasures of teaching, see G. HIGHET, THE ART OF TEACHING (1950).

35 See supra note 32.
of change had mixed motives and that their goals were often realized only through the fortuitous influence of outside events. If we already suspected that American legal education was not the best of all possible worlds, *Law School* helps us to understand why: it allows us to see the current system not as the product of a century's accumulation of the fairest and most enlightened ideals, but as the result of an almost accidental displacement of one approach to legal education by another. The book reminds us that in legal education, as elsewhere, we must be careful not to mistake power for wisdom.