

Crossing the Bar: The
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Crossing the Bar--Not the Primrose Path: Educating Lawyers at the Turn of the Last Century

by Patricia Mell

Education in all its departments, nowadays, is the business of rapidly imparting universal knowledge to all mankind. The end sought is acquirement rather than strength, accumulation at the expense of understanding, quantity instead of quality. This can only be corrected, if it needs correction, by the experience which perhaps may disclose that such is not the way....¹

In making the above quoted statement in 1892, the Honorable Edward J. Phelps, Professor of Law at Yale University, reflected his uncertainty with the changes wrought in the legal education of his day. Post Civil War America had been witness to many innovations in industry, technology, economic, social, and government systems.² The changes in legal education lamented by Professor Phelps were made in response to those dramatic societal shifts.³

To adapt to the "new" society, significant changes were made in the training of lawyers. Two important innovations in legal education of this period were the establishment of formal legal training as a prerequisite for the practice of law and the adoption of the case method as the primary method of instruction for lawyers in law schools in the United States.

The requirement of formal school training for lawyers was a departure from more than a century of very informal legal education. During the 19th Century, an individual would be educated in the law by following the self-study of legal treatises, obtaining an apprenticeship with a practicing lawyer, or attending a proprietary law school.⁴

The case method of instruction was viewed with skepticism on the part of practicing lawyers and with apparent hatred by many of the law students first exposed to its rigors. In this respect, it may be that things have not much changed in 100 years.

Together, however, these changes constituted a revolution in the legal profession in that they wrested control of the substance of legal education from the practicing bar and ceded it to the law schools.⁵

At the beginning of the 21st Century, the innovations of the 1890s have become standard. The modern law school has significant admission and academic requirements. Almost every state requires completion of some undergraduate study before matriculation and requires a minimum of three years of law school before graduation. The case method of study is almost universal.⁶

After one century of experience, legal education has re-examined its mission. The 1992 report of the American Bar Association Task Force on Law Schools and the Profession identified several areas in legal education that could be improved.⁷ In addition, access to information through the World Wide Web, computer laptop casebooks, interactive class sections, and distance learning classrooms challenge both the law schools' choices of pedagogy and their perception of themselves as institutions. The easy accessibility of information through these new technologies raises issues about the propriety of using

them to the exclusion of the traditional methods of learning. These issues echo those of one hundred years ago.

To begin the inquiry as to how and why legal education might want to evolve in the 21st Century, this brief history describes the status of legal education at the turn of the last century.

Practicing Law in the 19th Century

In the 19th Century, there were three routes to the practice of law in the United States: self study, apprenticeship training under an experienced lawyer, and law study in a free-standing law school or at a university.⁸ Each path had its limitations.

The self-taught American lawyer honed his skills without the guidance of an experienced lawyer. Admission to the practice was irregular from state to state, with little or no review of the lawyer's prowess. Consequently, the self-taught lawyer's experience was gained at the possible expense of clients' cases.⁹

While the apprenticeship ostensibly provided guidance to the new lawyer, its effectiveness was severely criticized by the newly minted law schools. In the apprenticeship, both the sponsor's skill and willingness to teach limited the training received. A New York University official described the fallacy of the benefits of the apprenticeship in the following manner:

*The students "...generally pursue their studies unaided by any real instruction, or examination, or explanation. They imbibe error and truth, principles which are still in force with principles which have become obsolete; and when admitted to practice, they find, often at the cost of their unfortunate clients, that their course of study has not made them sound lawyers or correct practitioners."*¹⁰

The apprenticeship system had other problems as well. The practicing bar controlled admission. In some respects, this allowed for a very democratic entry into the law for white males since an interested individual need only secure an apprenticeship with a practicing lawyer to pursue the profession.¹¹ Unfortunately, the apprenticeship system was subject to the racial and gender prejudices of the time. Not many practicing lawyers would undertake the instruction of members of minority groups. As such, the legal profession largely excluded men of the working class, women, and minorities since these citizens often found it difficult to get a mentor in the practicing bar.¹²

Development of the Modern Law School

In the mid-1800s, the notion of formally studying the law in a college or university setting was still fairly new.¹³ The law schools themselves disagreed about what should be their mission. Should law be taught as an integral part of an undergraduate curriculum, as preparation for a life in politics or as a member of the bench,¹⁴ or should law teaching be aimed at training the lawyer to practice law?¹⁵

The first law schools were private. They developed in law offices in which the practitioners had demonstrated particular ability at training apprentices.¹⁶ By the 1820s, colleges began to affiliate with the private law schools. The arrangements had mutual benefits. Since only colleges could grant degrees, affiliation with a college gave the law school prestige and degree granting privileges. It has been speculated that for the colleges, affiliation with a law school gave the college more influence among the powerful local elite—the lawyers.¹⁷

The diploma privilege extended to law schools under the umbrella of a college was challenged on two fronts. The practicing bar felt that diploma privileges gave control of the bar to law schools and took it away from practitioners. Schools that could not get the diploma privilege resented the prestige of those that could.¹⁸ The result was that a number of states abolished the diploma privilege for law schools in the 1880s.¹⁹

Several factors combined to fuel the development of the modern law school and methods of instruction. However, the primary impetus was the desire of the bar to firmly establish the law as a respectable and learned profession. The self study and apprenticeship methods allowed fairly easy access to the legal profession. Since there were no uniform standards for the education of lawyers, legal services were rendered to the public by people with widely ranging abilities and understanding of the law.²⁰

Even though each state had a bar examination, none were considered to be significant impediments to entering the practice. Each state vested in its courts the duty of admitting persons as attorneys and would exclude those who had been convicted of serious offenses.²¹ Judicial oversight was said to be lax. Judges would designate two or three senior members of the bar to conduct oral examinations of the aspiring lawyer. Candidates would sometimes be required to "read" the law in a lawyer's office, "but this condition [was] easily evaded, and the examination, nowhere strict, is often little better than a form or a farce."²²

This problem was made more acute by the fact that the law had become an attractive and powerful profession. Due to the abolishment of the aristocracy by the American Revolution, an individual's occupation became the marker of the individual's status.²³ Being a lawyer meant financial security, if not wealth, education, and influence with the rich and powerful.²⁴ Due to the rapid changes in society, the lawyers became "the technicians of change as the country expanded economically and geographically."²⁵ Between 1850 and 1880, the number of lawyers in America nearly tripled, from 23,939 to 64,137.²⁶

This increase was fueled in part by the increase in the number of law schools. In the 30 years from 1870 to 1900, the number of law schools increased from 28, with 1,600 law students; to 54 law schools, with 6,000 students in 1890; to 100 schools, with 13,000 students by the turn of the century.²⁷

Concurrent with the growth of full-time law schools was the growth of night law schools. In 20 years, the number of night law schools increased 350 percent, from 10 to 45.²⁸

The disparate abilities of these new practitioners created a call from within the bar for higher professional standards based upon higher educational requirements in the form of law school training.

The push for higher standards had its dark side. In the late 1800s, the law was experiencing an increase in the number of lawyers from ethnic, racial, and religious minority groups. These groups had recognized the value of being a member of the legal profession and, being denied access to an apprenticeship, obtained entry to the bar by virtue of open admissions law schools.²⁹ For this reason, the perceived influx of minorities into the profession became an issue of social policy and access to power. One explanation for the heightened educational standards for admission to law schools was the attempt to restrict access to positions of power to members of these groups.

When an ambitious Italian, Jew or black vaulted the bar into the legislature, he often carried his group identity with him and found himself advantageously situated to serve the group's needs while advancing his career. Any movement to limit access to the bar might easily become (or indeed originate as) a device to deny political power to specific ethnic or religious groups.³⁰

The president of the American Social Science Association, Lewis Delafield, decried the open admissions policy of the day. He criticized the "prevalent notion among laymen, which is shared by many professional men and has found expression from certain judges, that the gates to the bar should be wide open, and easy admission allowed to all applicants."³¹ To Delafield, such policies suggested that the legal profession was a trade, not a "public calling."³²

It was the American Bar Association that pushed the movement of legal education from the law office to the law school. Addressing the group in 1888, Delafield delivered what became the current approach to the study of law.

*The best system would be...to require that all applicants should learn the principles of the law in a school, then apply them for at least a year in an office, and finally pass a public examination by impartial examiners appointed by the courts.*³³

Development of the Case Method of Instruction at Harvard

While law schools represented some formalization of the training process, they differed considerably from the late 20th Century law school. The Harvard Law School of the mid-1800s was typical of all schools in format and organization.³⁴ Professor Carter reported the state of legal education before the case method in her article, *Reconstructing Langdell*.³⁵

*At the time, law schools followed no uniform admissions process or curriculum. Instruction in these law schools followed the European pattern of treatise study by the student and lecture by the part time professor. The lectures were not differentiated by virtue of the student's level of understanding or experience. No examinations were given. For the majority of law students, law school was their first post-secondary educational pursuit. An individual graduating from law school would therefore receive a Bachelor of Laws and would complete the course of study in one and one half years. To graduate, the students merely had to establish that they had paid all of their fees and certify that they had attended the requisite number of lectures.*³⁶

The pattern changed with the introduction of the case method by Christopher Columbus Langdell, Dean of the Harvard Law School in 1870. Charles William Eliot, President of Harvard College, supported his efforts and used his social contacts to gain broad acceptance of Harvard's case method throughout the United States.³⁷

The method is too familiar to any lawyer or law student educated in the United States after 1900. It was first used in the fall of 1870 at Harvard. The students of Langdell's class had been provided with case reports from which "the only useful part—the headnotes, had been removed."³⁸ Professor Langdell opened his casebook and began with the now familiar law school dialogue: "Mr. Fox, will you state the facts of the case of *Payne v Cave*?...Mr. Rawle, will you give the plaintiff's argument?...Mr. Adams, do you agree with that?"³⁹

Even its early proponents recognized the difficulty of the method for both the student and the teacher.

*This method of studying law, by going to its original sources, is no royal road, no primrose path....If there is anything which is calculated to try the human faculties in the highest degree it is to take up the complicated facts of different cases; to separate the material from the immaterial...to assign to each element its due weight and limitation and to give to different competing principles and rules of law their due place in the conclusion that is to be formed....*⁴⁰

The law students of the "new" case method saw things very differently.

*They thought it absurd to undertake to give their thoughts about a subject of which they knew nothing....At the time, the general judgment of the students was that it was a childish performance....By far the greater number openly condemned the new way. They said there was no instruction or imparting of rules, that really nothing had been learned.*⁴¹

Another account of the early days of the case method is familiar to the modern law professor of frustrated first-year students. In the Centennial History of the Harvard Law School, the students of the late 1870s were reported as having complained bitterly about the case method of instruction.

*What do we care whether Meyers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: "What is the Law?"*⁴²

The new method was not generally accepted by the rest of the Harvard faculty for another 10 years.⁴³

Langdell's vision of legal education went beyond the case method to include a set two-year curriculum. These courses became known as the first and second year "graded curriculum." By 1899, the law degree had become a mandatory three-year course of study degree, even though it was not generally a post baccalaureate degree in the United States.⁴⁴

As the 20th Century began, the modern law school had begun to take shape. Admissions standards were tightened, although at the time, the primary change was to raise the admissions standards for law school to equal those of the other undergraduate colleges.⁴⁵ It was also during this period that law schools began to transform the study of law from an undergraduate pursuit to a graduate program. The law schools accomplished this by requiring the completion of at least some college study before entrance to law school.⁴⁶ This was more than was required by the Association of American Law Schools formed in 1900; it only required a high school diploma as a prerequisite to admission to law school.⁴⁷

It would take the first several decades of the 20th Century before most law schools were graduate programs.⁴⁸

Despite the initial controversy, the completion of formal training in law and the use of the case method in the classroom are currently the predominant roads to the practice in law in 2000. Technology, however, continues to change the American landscape. These changes present several challenges to the law, lawyers, and how lawyers are trained. As stated in 1892, "Institutions must meet the demands of their time, right or wrong, or they will soon cease to be institutions, for the lack of disciples...."⁴⁹

Footnotes

¹ Edward J. Phelps, *Methods of Legal Education*, 1 Yale Law Journal 139, 143 (1892).

² Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, The University of North Carolina Press, 23 (1983).

³ Jerald S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America*, 19 (1976).

⁴ Law schools were fairly late additions to the university setting. *The Centennial History of Harvard Law School, 1817-1917* (Harvard Law School Assoc. ed. 1918) 64. (Hereinafter, *The Centennial History*).

⁵ Stevens, *supra* at 35.

⁶ See generally, Official American Bar Association Guide to Approved Law Schools (1999 Edition).

⁷ See generally, American Bar Association, Section of Legal Education and Admissions to the Bar: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992). This report is also known as the MacCrate Report in reference to Robert MacCrate, Esq., Chairperson of the Committee.

⁸ W. Burlette Carter, *Reconstructing Langdell*, 32 Ga L Rev 1, 11 (1997).

⁹ *Id.*

¹⁰ Stevens, at 22.

¹¹ *Id.* at 21.

¹² It was difficult for Blacks in the North to get legal training, but Blacks were specifically barred from

pursuing professional education in the South. Edward Littlejohn & Donald Hobson, *Black Lawyers, Law Practice, and Bar Associations—1874 to 1970: A Michigan History*, 4-5 (1987)

¹³ The first professorship in law in the United States had been established at the College of William and Mary in 1779. Stevens, at 4.

¹⁴ Stevens, at 5.

¹⁵ *Id.* at 4.

¹⁶ The Litchfield School was the most influential of these early private law schools. Operated by Judge Tapping Reeve, it was formally established in 1784. The teachers at the Litchfield School are said to have been the first to divide the law into a number of topics and to devote a series of lectures on each of them. At this time, there was no discernable transition from law school to law office. *The Centennial History, supra*, at 1.

¹⁷ Stevens, *supra* at 5.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 27.

²⁰ James Bryce, *The American Commonwealth* 2:626 (1894).

²¹ *Id.* at 622.

²² *Id.* at 623.

²³ *Id.* at 626.

²⁴ *Id.*

²⁵ Stevens, *supra* at 7.

²⁶ *Id.* at 22.

²⁷ Auerbach, *supra* at 94.

²⁸ *Id.*

²⁹ *Id.* at 95.

³⁰ *Id.*

³¹ Stevens, *supra* at 27.

³² *Id.*

³³ Lewis Delafield, Report to the Committee of Admission to the Bar Made to the Association of the Bar of the City of New York 28-9 (1876).

³⁴ Carter, *supra* at 18.

³⁵ *Id.* at 18.

³⁶ *Id.* at 13.

³⁷ Stevens, *supra* at 36.

³⁸ *The Centennial History*, *supra* at 34.

³⁹ *Id.* at 35.

⁴⁰ Statement of James C. Carter, a leader of the New York Bar, in his address at Harvard College delivered on the 250th Anniversary of Harvard College. 1 Yale Law Journal 139, at 147.

⁴¹ Franklin G. Fessenden, *The Rebirth of Harvard Law School*, 33 Harv L Rev 493, 498-9.

⁴² *The Centennial History*, *supra* at 35.

⁴³ *Id.*

⁴⁴ Stevens, *supra* at 37.

⁴⁵ *Id.*

⁴⁶ *Id.* at 37.

⁴⁷ *Id.* at 96.

⁴⁸ At the beginning of World War I, only Harvard and Pennsylvania required college study as a prerequisite to law study. By 1921, they had been joined by Stanford, Columbia, Western Reserve, and Yale, each of which required a college degree. Stevens, *supra* at 37.

⁴⁹ Phelps, *supra*.



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