THE CYCLICAL NATURE OF INNOVATIONS IN AMERICAN LEGAL EDUCATION

By Ruth Tone*

Current trends in American legal education reveal both a uniqueness and a sameness to past concerns of law schools and accrediting institutions in the United States. A number of studies made during the past fifty years or so widely demonstrate that what constitutes a good legal education has been controversial throughout the entire history of the United States law school. In the early nineteenth century, the stage was already set for the prolonged battle between those who envisioned legal education as technical training and those who conceived of it as a liberal education.

This debate persists today in a number of different contexts. Skills needed in alternative dispute resolution, for instance, include not only the practical ones of law office work but also humanistic aptitudes. Esoteric courses like Southern Methodist’s “Lawyer as Reader and Writer” may not train lawyers to service the same segments of society as do the basic and clinical courses, but the question remains whether all law students could profit from such educational exposure.

No study explores the history of American legal education, especially its dualistic phenomenon or cyclical nature, more thoroughly than Robert Steven’s Law School: Legal Education in America from the 1850s to the 1980s (1983). It is based on his

* Attorney at Law, El Paso, Texas
1. A native of England, a graduate of Keble College, Oxford, Stevens is president of Haverford College. He was formerly on the law faculty of Yale University, where he had earned a Master of Laws degree, and Provost of Tulane University. President Stevens is also an authority on the English legal profession. His distinguished career includes the authorship of six other books and the chairmanship of the Rhodes Scholarship Committee, among other honors. Stevens’s Law School is
earlier work, "Two Cheers for 1870: The American Law School," which was quickly accepted by legal scholars as a major authoritative work on the history of the American law school. Stevens' new book encompasses a wide area, much like the profession of law itself and concomitantly, its professional school. Not only is the history of American legal education, of the professional training in law, discussed at length, but also the history of the profession, of bar admissions standards, and of the bar examination. The huge mass of information and comment assembled produces an amazing synthesis of material on the regional nature of legal education from the early expansion of the nation to the present state of things. That areas interlock shows the tangled web and complex nature of American legal education as it has been, and is being, wrestled with by scholars and professionals alike. Licensing standards complicate matters, as in the recent controversy over requirements by Indiana and South Carolina for specific courses as prerequisites for the taking of the bar exam.

Legal historians have traditionally attributed the rapid decline of university-affiliated law schools and apprenticeships during the 1930s and 1940s to the excesses of Jacksonian democracy. Stevens, however, finds the causes of this change in the differences in outlook and standards among emerging geographical regions. In the 1850s and the succeeding few decades, confrontations within the profession intensified as a result of new movements toward institutionalization and professionalism. Stevens attempts to analyze the developments in legal education in this era within the context of dynamic social and economic upheaval. Within the stratification ideal of a growing middle class, the law was recognized as suitable training for a gentleman, and new law schools in the East and the South correspondingly emphasized the values of formalism. Schools in other parts of the country followed. The University of Iowa is the best example. The law school was begun in 1865, became a part of the University in 1868, and began arguing in favor of higher standards within a decade later. Culmination of the foment for more rigorous standards was the founding of the American Bar Association in 1878.

The decades of the 1880s and 1890s are equally significant for

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a title in the prestigious Studies in Legal History series by The University of North Carolina Press in association with the American Society for Legal History.

2. 5 Perspectives in American History 405 (1970).
Stevens. Reactions to the entry of immigrant children onto the scene resulted in true stratifications. Law schools then began to differ radically. Some tried to make their programs as good as possible; schools at the other extreme did little more than provide the minimum training for passing the bar examination. In the 1920s, another focal period, the reports by Alfred Z. Reed commissioned by the Carnegie Foundation contended that institutionalizing types of lawyers and law schools was necessary and that a unitary bar whose members would have identical training and would attain the same status within American society was not practical.

Neither is the mushrooming of new law schools in the 1970s unprecedented. Law School makes a significant contribution in demonstrating that the part-time law schools which arose in the 1880s and 1890s expanded prolifically in the 1900s only to decline during the depression, war, and postwar years. As GI bill recipients flocked to approved schools, only ABA-approved schools flourished. By 1958, the unaccredited school movement was all but static, except in California. The urge to reform legal education in the 1960s and increased interest in law as a life’s work in the 1970s brought not only a new growth of unaccredited schools but also a new emphasis on clinical studies. Over-enrollments have not precluded the opening of new four-year night schools in the 1980s, as the opening of the Reynaldo G. Garza School of Law in Edinburg, Texas, attests.

The omnipresent case method, which was first introduced at Harvard Law School by Dean Christopher Langdell in 1870, has incited various controversies and arguments. During the 1920s and 1930s, for example, a group of Yale scholars known as legal realists challenged the structure and content of legal education dominated by the case method study of appellate opinions. Stevens documents both the positive and negative responses to the case method that have been exhibited cyclically from one period to another since its inception. In both the 1920s and the 1960s and into the 1970s, students decried its repetitious nature, in effect reflecting the restlessness of their eras. The case method, Stevens points out, was most universally accepted in the periods when the tensions between the opposing sides in American legal education had temporarily abated.

The book characterizes the ubiquitous phrase “thinking like a lawyer” as a pervasive advertising slogan for the case method. Although the author admits the case method to be the “only pedagogical breakthrough” in legal education and a “brilliant educational tool,” he condemns its implementation for teaching analytical skills rather than substance as inimical to democracy and only a luxury for students in unaccredited schools who were simply trying to get licensed and practice law. Northeastern University, Boston, considered itself at the top of the spectrum of night schools after adopting the case method and became the “working man’s elite law school.”

For our times, Stevens argues, the most serious drawback of the case method is its scientific or pseudo-scientific bias. In an age of popular science as a panacea, the lack of humanistic and moral training for lawyers is particularly distressing and can be laid at the feet of the case method, which gives a picture of the lawyer as an objective scientist and the law as a scientific pursuit, with the resulting deterioration of the common law. Stevens declares that the case method has virtually eliminated the common law emphasis on principles in favor of the precedent-hunting of case analysis.

The arguments for and against a unitary bar are involved in most of the movements and events in the history of the law school: the ABA’s drive for professionalism, the founding of the American Association of Law Schools by “academic lawyers,” Harvard’s proclaimed superiority as a legal training center, the uneven opportunities for minorities and women, legal education as big business. Stevens, for one, deprecates the unitary bar as a myth in a pluralistic society, drily entitling his first chapter “Once Upon a Time,” and in his last chapter he presents new information on the dichotomy between law school as a professional training ground and as an academic, scholarly institution. He not only brings his study up-to-date but also reinforces his historical purposes of understanding the present through the past. He concludes that the bar today is more diversified than ever before. The large firms in New York and other metropolitan centers make use of the kind of legal education garnered only in a few law schools: Harvard, Yale, and Columbia. Corporate work, itself, has little in common overall with the duties of the bulk of lawyers—the sole practitioners and small firms throughout the country, who are practicing in much the same ways as their predecessors have done since the 1880s.

The observations of John P. Heinz and Edward O. Laumann
in *Chicago Lawyers: The Social Structure of the Bar* seem to coalesce with these views. The authors found great discrepancies in autonomy and power between two classes of lawyers, the corporate and personal service bars. Although they discerned an inverse relation between prestige and professional autonomy, they concluded that the powerful corporate bar was seemingly immune to peer disciplinary action. Heinz and Laumann further emphasized the difference in activities of the two kinds of practitioners and the little contact that they presumably have with each other. Such findings no doubt reflect a national situation and belie a need for a unitary education, with rigid case method study for all students.4

It is too soon to analyze trends of the eighties within the cyclical pattern. Predictions about law school education cannot be made facilely. Movements of the past have reflected, as Stevens attempts to show, the social and economic environments of the times. Regardless of a perceived need for tighter standards, the directions of that reform are as confounding for this generation as for any other. Since law school changes still act as a barometer of social needs, predictions of things to come will have to recognize, to some extent, the directions society itself will take. During World War II and the Vietnam conflict, the increase in the number of women law students reflected the particular wartime conditions. Current near-equality in numbers between the sexes in some schools reflects a new norm in society rather than a special situation or crisis. Whether it becomes permanent depends naturally on society’s future course, but evidence in the mid-eighties points in several contradictory directions. Egalitarian acceptance of minorities in the 1970s would seem to augur a new stability in opportunity. A glut of practitioners, however, has tended to adversely affect minorities first, as was traditionally the case.

Presently, law school educators are perhaps more greatly influenced by larger educational and academic movements than in the past. Emphasis on writing and communication skills pervades the law school curricula today as it does the undergraduate scene, and continuing legal education writing conferences and writing columns in bar journals abound. The universal demand for the teaching of humanistic values in the midst of preparation for survival in a

techno-oriented world is paralleled in the call for ethics-laden courses in law school and in professional seminars. The contemporary emphasis on education for counseling and negotiation reflects this humanistic approach. One might wonder whether the new perspective of law office work as a teachable skill is not a partial return to apprenticeship. Will the 1980s' cycle look back to pre-law-school days for added cyclical and innovative vigor?