

# Michigan Law Review

---

Volume 82 | Issue 4

---

1984

## Legal Education: Its Causes and Cure

Marc Feldman

*Rutgers University School of Law, Camden*

Jay M. Feinman

*Rutgers University School of Law, Camden*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Society Commons](#), [Legal Education Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Marc Feldman & Jay M. Feinman, *Legal Education: Its Causes and Cure*, 82 MICH. L. REV. 914 (1984).

Available at: <https://repository.law.umich.edu/mlr/vol82/iss4/36>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# LEGAL EDUCATION: ITS CAUSE AND CURE†

Marc Feldman\*  
Jay M. Feinman\*\*

LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S. By Robert Stevens. Chapel Hill: The University of North Carolina Press (Studies in Legal History). 1983. Pp. xvi, 334. \$19.95.

Until recently, lawyers and legal scholars<sup>1</sup> neglected the history of American law and its interaction with other forms of social process.<sup>2</sup> That neglect is being corrected. But the surge of interest in American legal history generally is only beginning to produce a similar interest in the history of legal education.<sup>3</sup> Now, Robert Stevens, proceeding with perspective gained by withdrawing from direct participation in the law school process,<sup>4</sup> has written the first comprehensive account of the development of legal education in America.

Among other goals, the new legal history attempts to reconstruct

---

† See Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981).

Parts II and III of this review are condensed from a manuscript entitled "Pedagogy and Politics" that we are now preparing. The manuscript presents a conceptual approach to law, lawyering and learning and discusses as a case study our course in Contorts (Contracts, Torts, and Legal Research and Writing).

\* Associate Professor of Law, Rutgers University School of Law, Camden. B.A. 1970, Washington University; LL.M. 1981, Harvard University. — Ed.

\*\* Associate Professor of Law, Rutgers University School of Law, Camden. B.A. 1972, American University; J.D. 1975, University of Chicago. — Ed.

1. The differentiation of academic law and legal practice makes the differentiated form of reference almost irresistible, although the two groups do overlap. See pp. 38-39.

2. The definitive historiography is Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9 (1975).

3. Notable exceptions are Stevens' earlier work and the research of Anthony Chase on the origins of modern legal education. Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSP. AM. HIST. 405 (1971); Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979). See also First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978). Other important contributions include relevant portions of Jerold Auerbach's book on the legal profession and John Henry Schlegel's research on legal realism. J. AUERBACH, *UNEQUAL JUSTICE* 74-87, 88-94, 108-11, 166-67, 275-77 (1976); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1981).

A genre of the history of legal education more notorious than notable is the institutional history of an individual law school. See Konefsky & Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982).

4. Formerly on the faculty of Yale Law School, Stevens is now president of Haverford College.

the way lawyers and judges in different periods thought about legal doctrine, legal institutions, and their own place in society; that is, their attempts to situate themselves, their actions, and their beliefs in a coherent social vision.<sup>5</sup> Stevens' *Law School* chronicles the development of beliefs about law, lawyering, and learning held by the bar and the professoriate and the legacy of those beliefs in shaping the law schools of today. His account provides the material for a description of the social vision of those engaged in legal education, although Stevens does not himself describe that vision. Indeed, because the book uses traditional approaches to traditional themes in thinking about legal education, it is itself an example of that vision.

In Part I of this review we discuss the book, its considerable strengths, and its limits. In Part II we explicate and criticize the premises of modern legal education — the vision of law, lawyering, and learning upon which it is based. In Part III we offer a brief statement of a countervision that describes both lost historical opportunities and imaginative possibilities for the improvement of legal education.

## I. LEGAL EDUCATION

The greatest strength of *Law School* is its comprehensiveness. This is as encyclopedic an account of the topic as could be contained within a single 300-page volume. Stevens begins by describing the apprenticeship system in colonial America (p. 3) and concludes by considering the effects of the jurisprudential movements of the 1970's on curricular and pedagogical reform (p. 275). In between, he relates the early preeminence of the Columbia Law School (p. 23), the formation of the American Bar Association (p. 92) and the Association of American Law Schools (p. 96), the founding of the Johns Hopkins Institute (pp. 139-40), and Princeton's recurrent interest in establishing a law school (pp. 73, 197, 236) (with a suggestion that on this subject Princeton may have been "mesmerized by the view of its most illustrious president," Woodrow Wilson (p. 250 n.31)). There are accounts of the claim that law was science (pp. 52-56), of legal realism (pp. 155-63), Columbia's functional curriculum project (pp. 137-38), 1960's student activism (p. 234), and 1970's anti-intellectualism (p. 269). We also read of emerging patterns of professional self-regulation (pp. 94-95), compulsory bar examinations and school-based training (p. 174), the increasing economic attractiveness of state law schools (pp. 197-98), and the "disheartening" development of curricula in the post-1945 era (pp. 210-11).

---

5. See generally Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281 (D. Kairys ed. 1982) (reviewed in this issue); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 *RESEARCH L. & SOC.* 3 (1980).

Some of the characters and events in Stevens' account are familiar — Langdell's deanship (pp. 35-36), Ames' appointment as the first full-time law teacher with little practice experience (p. 38), Alfred Z. Reed of the Carnegie Foundation (pp. 112-16), and the enigma of Roscoe Pound (pp. 136-37) — but Stevens also describes the contributions of less well known but no less important figures: Theodore W. Dwight of Columbia (pp. 22-24), Gleason Archer of Suffolk Law School (pp. 80, 175-76), Edward T. Lee of John Marshall Law School (p. 130 n.62), and John Bradway of the University of Southern California and Duke Law Schools (p. 162).

Stevens provides a spectacular array of statistics on the legal profession and the law schools in different periods, such as the percentage of bar applicants with college degrees (p. 45 n.18), faculty salaries (pp. 71 n.89, 88 n.44), law school enrollment figures (pp. 75, 90 n.84), and the bar examination pass rate of correspondence school graduates (p. 221 n.33). We learn, among other things, of the increasing urbanization of law school populations in the early twentieth century (p. 76), tuition costs of private versus state schools (p. 197), the proportion of women in the law school population during World War II (p. 199) (and that Harvard did not admit women at all until 1950 (p. 203 n.63)), and the effect of the G.I. Bill in swelling law school ranks after the war (p. 205). The sources for this wealth of data appear to include all the available published materials on legal education, including law school histories, commentary, and primary sources.<sup>6</sup>

Fortunately, Stevens is not content simply to present a mass of facts. The book is usefully organized into thematic chapters presented chronologically. Thus, a chapter or group of chapters both advances the story in time and focuses on a particular issue. The prologue to the main story is presented in the first two chapters, which discuss the forms of legal education in the colonies and the early republic, as well as the expansion of the bar, the growth of law firms, the institutionalization of legal education, and the initial affiliation of law schools and universities after the mid-nineteenth century. Stevens suggests that professional decline in the early nineteenth century should not be explained as "an excess of Jacksonian democracy" but was, rather, part of a longer history of anti-lawyer sentiment beginning in the colonial period (p. 8). Here Stevens introduces the recurrent theme of democracy versus elitism in the control of admission to law practice and in the question of "professional standards" (pp. 5-8, 24-26): "[T]he concept of providing part of legal training through an institution known as the law school had become associated with the parallel aspect of institutionalization

---

6. A 26-page bibliography supports the extensive footnotes, which for some chapters exceed the text in length.

— the urge to raise standards and so make the bar more competent and more exclusive” (p. 24, footnote omitted).

The central educational theme of Stevens' account is the Harvardization of legal education. Chapters 3 and 4 describe the partnership of Eliot, Langdell, and Ames in establishing the style, structure, and content of modern legal education. The most famous Harvard innovation is the case method (pp. 52-56), but the trio are also attributed with responsibility for the professionalization of law teaching, higher admission requirements, the sequential three-year program, and a curriculum of “pure law,” excluding such topics as international law, jurisprudence, and legal history (pp. 36-40). Stevens describes the slow but ultimately successful process by which the case method, and all that attended it, overcame its competitors. “Theodore Dwight refused to concede that the case method was better ‘for any student,’ but he was clear it was ‘inferior to true teaching in its effects upon those of average powers’ ” (p. 57, footnote omitted). “Law decisions are but a labyrinth,” wrote Dwight. “Woe to the man who busies himself with them without a clue . . .” (p. 67 n.27). Dwight and his followers felt compelled to resign from the Columbia faculty in 1891 to protest the introduction of the case method; eight days later Columbia formally adopted the case method and a three-year curriculum (p. 45 n.19). Contrary to the common view, many schools, elite and nonelite, resisted the case method until well into the twentieth century. Its eventual triumph was based as much on the financial attractiveness of the large classes and high faculty-student ratios it permitted as on its pedagogical effectiveness or intellectual power (pp. 63-64). Nevertheless, by the 1950's, the institutional and curricular patterns established at Harvard came to dominate the approach of nearly every law school in America.

A related theme concerns the often-turbulent relations between the law schools and different segments of the organized bar:

With the development of part-time and evening schools, for the first time the stratification of the profession was linked to an unacknowledged but obvious hierarchy developing among the law schools. It was impossible for the ABA to ignore the situation; indeed, it had been formed in 1878 primarily to “improve” the profession. The association might have opted for institutionalizing diversity, although that would have run counter to the egalitarian ethos of the nation. It would have seemed even more un-American in the last part of the nineteenth century, a period when standardization was a national watchword, not only in the profession but throughout industry and commerce. Whatever doubts members had about the case method, almost all were adamant that a uniform type of law school should control entry to the profession. [P. 92, citations omitted].

Similarly, with the establishment of the Association of American

Law Schools in 1900 — an organization of “reputable” law schools — all member schools were required to meet minimum standards. These homogenizing requirements dictated student admission profiles, three-year programs, full-time faculties, and night programs of greater length than day sessions (pp. 96-97).

But neither the bar nor the academy was unitary. Stevens details the many conflicts among elite and nonelite bar and elite and non-elite schools. He relates in detail and in admirably evenhanded fashion the complex elements of the story, from the racial (p. 81), sexual (pp. 82-84), class (pp. 97-100), and religious (pp. 101, 176) prejudice of the leaders of the bar to the struggles of the defenders of proprietary and evening law schools, such as Lee and Archer, against the “educational racketeers” — the “deans and professors . . . of ‘case law’ schools” (p. 175). This is a story of bitter controversies, shifting alliances, and uneasy compromises.

The character of this latter theme suggests an important element of the book’s approach. In large measure *Law School* is political history, not intellectual or educational history. In Stevens’ account, the story of legal education in America is a story of institutional rivalry and the eventual dominance of the bar elite.<sup>7</sup> In the process of securing their role and, thus, their view of legal education, the full-time professoriate enlisted the assistance of the bar elite in the form of the ABA. While the AALS was victorious over the proprietary, evening, and part-time infidels, it is the elite bar, as accreditors and employers, that calls the tune.<sup>8</sup>

Stevens evidently believes that the history of legal education and the rivalry between professors and practitioners have been so self-contained that they can be recounted with only occasional reference to economic and political events and social movements and almost no reference to the broader intellectual life of the nation. The Great Depression put marginal law schools under financial stress (pp. 177-78), and activism associated with the Vietnam War placed students on faculty committees at Yale (p. 235), but by and large in Stevens’ account the law schools are isolated from the currents of their times. It seems as if events must assume the proportion of world wars, gen-

---

7. At first it might seem more accurate to describe the story of legal education as an uneasy partnership between the elite bar and elite professoriate. But a look at the life of the law school and, in particular, contemporary developments in curricula and placement activities suggest that the organized bar is increasingly imposing its will. This is in part explained by the recent near-monopolization of law school accreditation and attorney licensure by the ABA. See note 8 *infra* and accompanying text.

8. While each association has promulgated standards and accredited law schools, only the ABA has successfully tied its accreditation process to the licensing of attorneys. Today, graduation from an ABA-approved law school is required as a prerequisite for a bar admission in some forty states. As to member schools, the AALS seeks to exercise prescriptive authority only in the form of broad, generally consensual principles. And in the last few years, there has even been discussion of the AALS “going out of the accrediting business” altogether. P. 245.

eral economic disaster, or national political scandal before they have an impact upon legal education.

Similarly, Stevens accurately if unconsciously reflects the intellectual insularity of legal thought and legal education. So far as this book is concerned, law schools have neither influenced nor been influenced by the intellectual climate of the larger university. In discussing at some length the development of the case method and the rise to preeminence of the Harvard Law School (pp. 36, 38, 52-55 and accompanying notes), Stevens notes that "[m]uch of the credit (or responsibility) for this ought to belong not to Langdell . . . but to Eliot, whose innovations on both the undergraduate and graduate level of the university had a powerful influence over Langdell" (p. 36, footnote omitted). But what were these innovations? Their origins? How widespread their application? Their fate in other non-law settings?

Stevens does not tell us of Eliot's travels to Europe in 1863 to observe educational systems on the Continent and, in particular, medical education and its clinical paradigm. We are not told of Eliot's educational reforms carried out at M.I.T. on his return or his earlier proposals for the Lawrence Scientific School. Eliot's educational theories had been put into practice by 1869 and the structural similarity of these theories to Langdell's "innovations" (after his appointment as Dean in 1870) is striking. Nor does Stevens describe the situation at Harvard University more generally when, after 1870, similar innovations were employed at the medical school, in the undergraduate science programs, and in other departments of the university.<sup>9</sup>

This insularity, this notion of autonomy, appears frequently throughout the book. As additional examples, one would not know from Stevens that legal realism was part of a much larger intellectual tradition influencing not only law but also art, architecture, sociology, anthropology, political science, history and literature. And only the most perceptive reader would be able to catch the quickly passing reference to bar control of the content of legal education (p. 270) and to understand contemporary curricular developments in law as parallel to those in other professions, such as medicine, and as part of a larger culture of professionalization (p. 238). Professional specialization cannot be meaningfully understood by reference only to legal actors and sources. In his Prologue, Stevens describes the book as a "tentative step" in "linking [the history of legal education] to intellectual, political, and social trends" (p. xiv). In practice, the step is so tentative as to be indiscernible.

The book is limited in another respect. Although *Law School*,

---

9. Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334, 336, 343 (1979).

more than any previous work, considers law schools that are not among the high and mighty as something other than potential converts or victims, Stevens' work is still to a considerable extent "winners' history." The dominant educational theme is the success of the Harvard method, and the story of resistance is resistance at Columbia, Yale and Chicago.

Stevens asserts that the "case method showed itself . . . to be a brilliant teaching device" (p. 57), but is this an evaluation of its educational power or simply an expression of its durability? The case method is so firmly established that Stevens finds no need to describe in any detail what it is like in a classroom in which the case method is employed. For one who has not been to law school, this book is of little assistance in imagining and understanding daily educational practice. Stevens is no more helpful in offering a picture of educational practice in nonelite schools. The absence of any meaningful picture of the classroom mirrors the invisibility of students and teachers more generally in this book.<sup>10</sup> There are descriptions of individual professors, sometimes quite lengthy, but those profiled are either "big names" or referred to for their participation in notable events. Stevens does not even begin the task of constructing an account, for any historical period, of the daily lives of law students or law teachers.

Equally absent is any sense of the practice of law school graduates — who were their clients, what were their problems, what was the quality of the work product and the work place? There are occasional provocative references: we learn that the government agencies of the New Deal were attractive to recent graduates and professors from Harvard and Yale (pp. 137, 141, 160, 168-69 nn. 44 & 45) and we learn from recent bar studies that "the bulk of lawyers [are] still serving essentially as social workers, or at least business managers, to the middle-class and established communities" (pp. 267-68). But the references go no further. Stevens does not enable us to picture, with any texture or depth, learning or lawyering. Admittedly, imaginative reconstruction is one of the historian's most difficult tasks, but it is also one of the most important.

Even on the institutional level, one can imagine a very different emphasis in the story of legal education were Suffolk, Marquette, and John Marshall to figure as prominently as Harvard, Yale, and Chicago. Dean W.M. Lile of the University of Virginia resisted the Harvard system; it was not until 1932 when Mason Dobie succeeded Lile as dean that the case method became generally accepted in Charlottesville (p. 192).<sup>11</sup> At the University of Montana, there was a "battle between the president who wanted to appoint Harvard men

---

10. See Konefsky & Schlegel, *supra* note 3.

11. See generally W. BRYSON, LEGAL EDUCATION IN VIRGINIA 1779-1979 (1982).

to the law school faculty and the State Board of Education who wanted local practitioners" (p. 191). In 1926, Vanderbilt and the University of Mississippi were expelled from the AALS because they would not require two years of college work before admission (p. 195). Wisconsin Law School had been run as an "ideal law office" prior to adoption of the case method (p. 61). John Pomeroy evidently developed at Hastings a case method quite different from that of Langdell (pp. 61, 66 n.14), and Richard H. Thornton established the University of Oregon Law School as a proprietary school but defied many of the weaknesses typically associated with such an arrangement.<sup>12</sup> Stevens notes these many cross-currents in the development of legal education, but fails to provide the detail necessary to understand and assess them.

Stevens tells us of the persistence and ingenuity of proprietary schools in responding to the "improving standards" of the ABA and AALS. "When Illinois demanded graduation from high school before studying law, the John Marshall Law School established its own high school for prelaw students. When Colorado decided to require one year of college, the state's largest . . . law school — Westminster University School of Law — responded by opening its own one-year junior college, available only to potential law students" (pp. 193-94, footnotes omitted). We also know that these "cut price" schools were economically attractive particularly before the advent of governmental aid programs, such as the G.I. Bill (p. 205). But can nothing more be said of these "marginal schools"? Is it really the case, despite their numbers and long history, that they were without educational and other value? In noting the fate of three of the four black schools mentioned by Reed in his 1928 study, Stevens characterizes the stories as "pathetic" (p. 195). Indeed, that these important sources of training for minority students were being eliminated was lamentable, but preliminary evidence suggests that while they were in existence at least some of the teaching was dedicated, demanding, and compassionate.<sup>13</sup> An exploration by Stevens would have been welcome.

Apprenticeship and clinical education suffer the same neglect. For much of the history of American legal education, apprenticeship was the exclusive or favored route for admission to the bar. In 1947, thirty-four states permitted one to enter the profession via apprenticeship (p. 217 n.9). And as late as 1966, thirteen jurisdictions permitted admission through law office study exclusively, and five more

---

12. See Lawrence, *The University of Oregon School of Law 1884-1903: The Thornton Years*, 59 OR. L. REV. 249 (1980).

13. See W. BRYSON, *supra* note 11, at 399-402 & 553-56. These passages are brief biographies of Clarence McDonald Maloney and Spottswood William Robinson, Jr., both of whom taught in the short-lived law department at Virginia Union University.

states permitted a mixture of school and practice (p. 219 n.24). As originally conceived by Eliot, sound legal education required a clinical methodology and legal clinics were associated with law schools beginning about the same time that Langdell's model began to be widely copied. The University of Denver in 1904 was apparently the first law school to try a clinic as part of its education program.<sup>14</sup> John Bradway wrote extensively about the educational aspects of clinical work beginning in the 1930's (p. 165 n.14) and established a long-standing program at Duke, as did Charles Miller with his admirable program at Tennessee, which continues to this day. By 1968, there was an unexpected and dramatic confluence of forces: consumerism and citizen activism, elite bar interest, law student activism and demands for relevance, and the funding of the Council on Legal Education for Professional Responsibility by the Ford Foundation. The result of this confluence was the rise of contemporary clinical legal education. The profound educational and social concerns embodied by clinical legal education cannot be explored fairly in the space of three pages. Yet, Chapter 12 concludes with just such an effort (pp. 213-16).

"Some worried that an 'educational octopus' [the case method and Harvard] had achieved far too firm and pervasive a grip on the system" (p. 41). Rather than take these concerns seriously, by considering the possibility that there was something of value in the hold-outs and innovations, Stevens is content merely to catalog the instances of nonconformity. Unfortunately, in the process, he makes them seem more like short-lived aberrations than serious educational alternatives. Especially for a book the purpose of which is to enlighten our understanding of the law schools' "function in the social evolution of law, lawyers, and higher education" (p. xiii), the discussion of alternatives lost or foregone is inadequate.

In short, *Law School* is a well-executed project of limited scope. Exhaustively researched and documented, as well as highly readable, it may well preempt the field for years to come as the basic institutional history of American legal education. The limits of the work are really the limits of traditional legal education itself — limits of breadth, depth, and imagination. Both legal education and *Law School* are limited in breadth because they fail to consider the intellectual and political world outside the law schools. They are limited in depth because they do not provide a meaningful account of what

---

14. Stoltz, *Clinical Experience in American Legal Education: Why Has it Failed?* in *CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE* 54 n.1 (E. Kitch ed. 1970). Citations describing early efforts are collected in A. REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 220 n.1 (1928). Later citations are collected in D. ALSPAUGH, *BIBLIOGRAPHY OF MATERIALS ON LEGAL EDUCATION* 29-30 (1967).

For a comprehensive history of clinical legal education in the United States, see Grossman, *Clinical Legal Education: History and Diagnosis*, 26 *J. LEGAL EDUC.* 162 (1974).

it has been like to teach and learn in law schools over the past one hundred years. And they are limited in imagination because they are unable to recapture or conceive of opportunities for teaching and learning in different ways.

These limits are not unrelated or accidental. Instead, they grow out of a particular vision of law as a discipline and an institution, of how lawyers practice, and of how students learn to become lawyers. Stevens' book is both source and illustration for the explication of that vision.<sup>15</sup>

## II. LEGAL EDUCATION: ITS CAUSE

Without a monarch or a clearly defined aristocracy, with a practical utilitarian outlook, with little by way of competing professions, the new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically, a development that partly explains why even today lawyers play a more significant role in the United States than in any other developed society. [P. 7].

Crucial to the social vision of legal education is a belief in the necessity of law and the importance of what lawyers do. Stevens' conclusion of near inevitability is an expression in historical terms of the prevalent belief that law is indispensable to the economy, polity, and society.<sup>16</sup> Lawyers are doers, facilitators, advocates, and wise men. And as law is necessary, so it is imperialistic. The expansion of curriculum reported by Stevens (pp. 159-60, 168 n.40, 213, 222

---

15. After we had completed the manuscript of this review, there appeared in print Robert Stevens' article, *American Legal Scholarship: Structural Constraints and Intellectual Conceptualism*, 33 J. LEGAL EDUC. 442 (1983). The article is an edited text of a presentation at the Annual Meeting of the Association of American Law Schools held in Cincinnati on January 7, 1983.

In his presentation Stevens offers an approach to legal education that anticipates some of our criticisms about his book and legal education more generally. He notes, for example, that "the structure of legal education . . . was created on the assumption that we have a monolithic legal profession" and that the law schools have become mere "schools of procedure, rhetoric, and process." *Id.* at 443. He criticizes the AALS for having "been used to control entry to the profession," as the "handmaiden . . . of the ABA," at the risk of "neglecting the vital issues of academic scholarship." *Id.* at 444. Commenting that "[e]ducation in its broader sense has moved on, and for the most part law schools are not involved in it," he criticizes legal education for having "missed the wider opportunities for legal training," for having "not been seriously involved in skills training outside the analytical skill of 'thinking like a lawyer.'" *Id.* at 445.

If it were not for the consistency of wit and style, we might find it hard to believe that the same Robert Stevens was the author of both the article and the book. We applaud many of the insights contained in the article, and only wish that they had been employed in the writing of the book.

16. See J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (reviewed in this issue). Auerbach describes a surprisingly rich tradition of resolving disputes and seeking justice without the involvement of lawyers and courts. This book articulately refutes, at least historically, notions of the inevitability of law and the indispensability of lawyers.

n.43, 271) is evidence of the extent to which lawyers consider every form of social intercourse at least potentially within their purview. As the nation has become larger, more diverse, and more complex, lawyers and law schools have viewed themselves as more, not less, important.

How is it possible that lawyers could play this central role for such a socially diverse, politically contentious people? Only because they have claimed to be above the fray throughout history. Much of the book gives an account of the attempts by legal theorists and practitioners alike to conceive of law as a system of thought and practice independent of social forces and political influence.<sup>17</sup> The history of the case method of law teaching is illustrative of this attitude. As originally conceived by Eliot and implemented by Langdell, the case method had the virtue of emulating the then-fashionable scientism and Darwinism. “[L]aw, considered as a science, consists of certain principles or doctrines. . . . [T]he number of legal doctrines is much less than is commonly supposed” (p. 52, footnote omitted). “Self-contained” and “value free,” a set of consistent legal principles would remedy “judicial deviations” of the past and could be applied to each new case (p. 53). Langdell’s hope that the method could reveal the few basic principles of law faded, however, as law’s complexity became apparent, but the method was transformed rather than abandoned. Under the direction of Ames and Keener,<sup>18</sup> the emphasis shifted to process rather than substance and, as today, the case method was glorified as the ideal vehicle for teaching students to “think like a lawyer” (pp. 55-56). Thus, though law might not have an obvious objective content, it did offer a formal method for making decisions.

Even the case method’s establishment critics shared the assumption about the autonomy of law. They might attack the case method on practical grounds, but they agreed on the existence of “settled principles of law upon which so much of the lawyer’s reasoning depends” (p. 59).<sup>19</sup> The great failure of the Realist critics, in the eyes of many, was their inability to posit an alternative method of analysis which preserved the objective vision of law (p. 156).

---

17. For a brief discussion of the professional and ideological demands for creating a “buffer zone” between the claims of politics and those of law, particularly as revealed in legal historiography, see Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 278-83 (1973). Horwitz notes that “what specially characterizes the profession’s conception of modern law — that is, law since the beginning of the seventeenth century — is the insistence on a radical separation between law and politics.” *Id.* at 281.

18. William Keener’s appointment to the Columbia Law faculty in 1890, from Harvard, and his advocacy of the case method were factors leading to Dwight’s resignation in 1891. P. 60.

19. Quoting *Report of Committee on Legal Education*, 15 ABA PROCEEDINGS 317, 340-41 (1892).

There are other examples of the dominance of this notion of autonomous law. In not considering the impact of historical events and movements, Stevens reflects the general belief that law simply is not shaped by such external forces. In legal theory, from formal legal reasoning to late nineteenth-century classicism (p. 131) to atomistic legal reasoning (p. 133) to Lasswell-McDougal policy science (pp. 264-66), law and lawyers are seen as independent of society but useful to it. Throughout, the emphasis is on the process of lawmaking rather than its substantive effects on and its difference from other systems of social, political and ethical judgment.

All of this has had a significant impact on the conception of appropriate forms of legal theory and the relation of theory to legal practice. Legal scholarship has overwhelmingly meant the production of articles engaging in doctrinal problem-solving (pp. 270-71). Legal scholars focus on extremely narrow topics within well-accepted doctrinal categories; their sources and modes of analysis are exclusively legal. This is their appropriate activity because of the divorce of legal theory from either more abstract or more concrete conceptions. Neither grand theorizing nor the actual workings of the legal system or lawyers' practice fit within this limited notion of legal scholarship. The occasional exceptions to this pattern, dalliance with social science or an empirical version of "law in action," are so exceptional and usually so unsuccessful as to be noteworthy. Law teachers are really neither "authentic academics" nor "Hessian-trainers;"<sup>20</sup> they have neither full status within academe nor real standing and independence within the profession. Extensive contact either with other disciplines or practice is unnecessary.

There is a paradox here. Law is celebrated as being highly functional for the operation of society, but legal theory and legal scholarship are not at all concerned with how that function is really carried out by lawyers in practice. The paradox is largely unrecognized or unaddressed, in part because of the divorce of legal academics from legal practitioners.

Another aspect of the social vision that underlies legal education, in addition to the autonomy and objectivity of law, is the prevailing conception of lawyering that regards the bar as hierarchical but unitary. The importance of this unitary conception is evident in the history of professional self-regulation. A crucial episode in the regulation of the bar was the almost uniformly negative reaction to Alfred Reed's proposal, for the Carnegie Foundation, that the heterogeneity of the bar be formally recognized in the establishment of a differentiated bar (pp. 113-17). Despite considerable evidence that

---

20. These terms are from Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968).

the bar was not unitary (pp. 267-68)<sup>21</sup> and despite Reed's suggestion that the profession's public responsibility could best be served by differential training, licensing, and practice, leaders of the bar and the academy insisted on maintaining the image that all lawyers were equal.

But some were more equal than others. In the predominant social vision the model lawyer was and is an idealized image of the corporate lawyer.<sup>22</sup> The model lawyer was the facilitator of commerce and the ally of the dominant institutions of society, the large concentrations of wealth. He — until recently, always a he — was relied on for his skill in legal reasoning (the stuff of legal theory) and his judgment (his ability to think like a lawyer). While engaged intimately in his client's affairs, he maintained a cool professional detachment from them. Not for the model lawyer were fact-intensive and emotionally charged areas of practice (criminal law, personal injury litigation, domestic relations), the intense human contact of law for the poor, or involvement with political causes.

Because the profession was unitary, and because there was a model lawyer, those who did not conform to the model *a fortiori* should not belong to the profession. Thus, there was a continuing effort by the bar and the schools to "raise standards"; that is, to exclude from the profession those who could not be expected to emulate the ideal. Training too closely tied to actual practice — apprenticeship, night schools, and proprietary schools — became the institutional target of this effort. The aspirants who relied on these routes to the bar, often women, blacks, and ethnics, were the ultimate victims.

These visions of law and lawyers mandated the content and method of teaching in law schools. In all but a few law schools, both content and method were largely copies of the Harvard style.<sup>23</sup> Since Ames's conversion of the case method, the model professor has

---

21. Reed's conclusions about the nature of law practice, the functions of lawyers, and the role of law schools in preparing (or failing to prepare) those practitioners have been confirmed in two recent studies of the bar in Chicago: J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION (1981).

22. The basic source on professional ideology in the twentieth century is J. AUERBACH, *supra* note 3. See also Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

23. Harvard's influence was even more far-reaching. As Donna Fossum documents, "[t]he teachers who constituted the faculties of almost 160 law schools were graduates in disproportionate numbers of a small, select group of law schools. . . . 33.2 percent of all full-time law teachers received their J.D. degrees from one of a group of only 5 law schools." Harvard headed the list producing over twice the number of graduates in law teaching as Yale, which was second on the list. Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RESEARCH J. 501, 507. Thus, the Harvardization of American legal education was accomplished via program imitation and the dominance, numerically, of Harvard graduates in the teaching ranks.

taught process more than substance, the process of engaging in the single activity from which lawyers laid claim to their professional position: the analysis of cases and statutes. The unarticulated methodology of "thinking like a lawyer" rather than the communication of information or the development of other lawyerly abilities is the nearly exclusive aim of legal education.<sup>24</sup> Varied forms of pedagogy are little used at all. In the contemporary classroom, Socratic dialogue is interspersed with lecture and discussion, but these are minor variations considering the full range of pedagogical possibilities. Huge classes, authoritarian teaching, and final examinations as the exclusive evaluation device predominate. The learner who is disadvantaged by this peculiar form of instruction falls by the wayside, as he or she should. The novice lawyer who leaves law school unprepared for almost anything real lawyers do is no longer the law school's responsibility.

This, then, is the social vision inherent in the history of legal education presented by Stevens: autonomous but certain (or ascertainable) law, elite but democratic lawyers, and narrow but demanding training. Trenchant criticism of the way law schools have developed dictates dramatic reform of the way they operate today. To conclude, we offer a summary of such an alternative — an alternative based upon an analysis of how law works, of what lawyers do, and of how law students should be educated.

### III. LEGAL EDUCATION: ITS CURE

In the social vision of traditional legal education, law is determinate and apolitical. In the countervision, law is irrationally indeterminate and contingent upon the social world. This alternative view suggests attributes of a new model lawyer quite different from the elite picture in the traditional vision, and those attributes require a different approach to law school learning.

Stevens notes the effect of the Realist revolution on American legal thought:

The Realists went a long way toward killing the idea of "the system" altogether. All legal logic came under suspicion. American law became increasingly purposive, increasingly secularized, and increasingly atomized. [P. 156].

What the Realists began, their successors have completed. Both critics of the legal system<sup>25</sup> and its defenders (by their failure to meet

---

24. The dominance of the case method has been so great that Stevens devotes a paragraph to the Legal Realists' modest innovation of introducing "Cases and Materials on . . ." (as opposed to "Cases on . . .") books. P. 158.

25. *E.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

the Realist challenge)<sup>26</sup> have shown us that law is neither an objective decisionmaking process nor capable of being made so. We understand law to be a system of ethical and political discourse and, like other discourse in ethics and politics, it is a vehicle for argument and analysis but not for certain decision.

If law is indefinite, it cannot function in the manner imagined by the traditional vision.<sup>27</sup> The variety of social forces influencing the making of a given body of law or even a particular legal decision cannot be reduced to simple notions such as "facilitating commerce" or "punishing wrongdoers," and their interaction cannot be predicted reliably or assessed accurately in particular circumstances. Conversely, the social impact of a rule or body of law is not subject to secure calculation.

The new model lawyer can function with neither the detachment nor the limited skills of the elite corporate lawyer. This new lawyer needs cognitive, affective, and performance capabilities of an entirely different order. Law demystified places an emphasis upon particular, identifiable lawyer competencies. The first of these competencies is the ability to "think like a lawyer" in something like the traditional sense. As Stevens documents, from Langdell onward that phrase has been embodied with mystical power but has not been given explicit meaning. Practically nowhere in the legal literature is there a definition of "thinking like a lawyer."<sup>28</sup> Thinking like a lawyer, in our view, constitutes a limited but definite set of cognitive skills associated with legal reasoning. These include the acquisition of a legal vocabulary, the ability to generate broad and narrow holdings of judicial decisions and thereby to argue precedents, an understanding of the nature of legal rule systems and the ability to manipulate rule systems in particular cases, and an understanding of the systematic nature of legal argumentation and the ability to make arguments in the typical patterns of legal discourse.

This process of thinking like a lawyer is primarily concerned with legal doctrine and legal forms. But the new model lawyer must do more. No lawyer practices without interacting with other people;

---

26. A concise introduction is Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 5, at 18, 26-37.

27. See generally Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829, 847-57 (1983).

28. So far as we know, the few attempts to give content to the phrase are limited to discussion of case skills. *E.g.*, K. LLEWELLYN, *THE BRAMBLE BUSH* (1951). Other attempts to define what skills law schools should teach tend to be too vague to be of programmatic utility. See, *e.g.*, Summers, *The Future of Economics in Legal Education: Limits and Constraints*, 33 *J. LEGAL EDUC.* 337, 355-58 (1983). Our list of the components of "thinking like a lawyer" draws heavily on the analysis of legal education by Duncan Kennedy. See, *e.g.*, Kennedy, *Legal Education As Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 5, at 40, 44-46. For a similar enumeration, see Kennedy, 1 *Torts Syllabus* 3 (Sept. 5, 1980) (on file with authors).

lawyering requires a variety of interpersonal skills for collaborative, consultative, and competitive relations. Nor do legal problems present themselves abstractly; the lawyer must have the ability to deal with facts, the capacity to discover and analyze both the facts of particular matters presented and the contextual facts that shape the legal decisions to be made. Finally, the lawyer must be able to execute the decisions that are made on the basis of law, fact, and interpersonal contact. This involves the ability to exploit the appropriate legal forms and procedures as well as the ability to implement nonlegal strategies in furtherance of client goals.

The malleability and caprice of legal doctrine and legal process constantly place the lawyer in a position of uncertainty. Throughout a legal career, a lawyer is faced with new or changed situations for which he or she could not have been adequately prepared by education or prior experience. One of the key attributes of the new model lawyer is a high tolerance for this uncertainty. But tolerance is not acceptance. In a number of ways the lawyer can begin to master uncertainty. One is through a perspective on the larger legal environment, a perspective that places an uncertain situation in a broader context. The lawyer also reduces uncertainty by making an unfamiliar situation more familiar. Lawyers must be competent at learning autonomously and learning with others. It is in this way that practitioners can constantly reeducate themselves. Autonomous learning, in turn, is furthered by and requires critical self-reflectiveness. It is critical self-reflectiveness that permits a lawyer to know of his or her need for further learning, it is critical self-reflectiveness that provides the means of judging one's own performance as a legal practitioner (rather than simply adopting prevailing standards), and it is through critical self-reflectiveness that one evaluates the operation of law in society more generally.

In addition to thinking like a lawyer, the other performance competencies, and the processes of coping with uncertainty, there is at least one additional, essential requirement of the model professional: judgment. The lawyer must apply legal ideas to factual problems, must deliberate by positing alternatives, considering options, and rehearsing consequences, must implement the choice, and must then accept responsibility for the choice made. In sum, the lawyer's basic duty is to perform in the absence of certainty.

In the countervision, the role of law school is to prepare the student to be a model lawyer, to assist the student in acquiring and practicing the capabilities discussed above. In the new law school, these essential lawyer competencies are the basis for planning the educational program. Of necessity then, the crucial element in the new law school is a concern for the education of students. In the

traditional law school vision, the focus is on teaching, not learning.<sup>29</sup> For reasons economic, social, and historical — but not educational — the dominant style of teaching, the case method, is centered on the professor rather than the students. In the new law school, learning objectives are achieved by a variety of student-centered approaches and environments such as structured individual and group learning, team teaching, formative evaluation, and mastery learning, that address the individual needs of the individual learner.<sup>30</sup>

Students in the new law school are provided explicit delineation of the competencies to be learned and the processes by which they will be taught. And in the new law school, the only acceptable level of student performance is the mastery of the knowledge and skills required of the novice lawyer. Unlike the traditional law school, in which student performance is widely distributed and mediocrity is accepted as inevitable, the new law school is premised on the conviction that nearly all students can perform at a high level if provided with the proper instructional environment.<sup>31</sup> Given the law schools' informal but important position as gatekeeper for the legal profession, no lower standard is tolerable.

Learning in the new law school must include active learning — the opportunity for students to perform in role.<sup>32</sup> Law school must prefigure the dilemmas and opportunities of law practice in an educational setting that minimizes the potential harm to students and clients. This is, of course, clinical education, but not merely the performance of lawyerly tasks under occasional supervision, as is the norm in many clinical programs. Role performance here inculcates the critical self-reflectiveness to be exercised in law practice. Role performance in the law school of the countervision implies a relationship between legal scholarship and legal and educational practice very different from that which is currently prevalent. It assumes, in law as elsewhere, that the immediate and the remote, the concrete and the general, are intertwined and can only be understood together through the interpretation of experience.

Thus, the cure for legal education. Stevens offers an account which testifies to the schizophrenia of law schools, comfortable

---

29. Thus, Stevens' failure to refer to any advance in educational theory or practice outside the law schools is a wholly appropriate reflection of the view commonly held by law teachers that professors of education or educational psychology are either primitives or charlatans. The different approach of the countervision of legal education requires openness to educational theory. An example of educational theory that is both provocative and especially useful is found in B. BLOOM, *HUMAN CHARACTERISTICS AND SCHOOL LEARNING* (1976).

30. Readers interested in one application of such methods are invited to contact us for information about our experience in teaching Contorts.

31. See *MASTERY LEARNING: THEORY AND PRACTICE* (J. Block ed. 1971); B. BLOOM, *supra* note 29.

32. See Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in *CLINICAL EDUCATION FOR THE LAW STUDENT* 374 (1973).

neither in the academy or the profession. We propose an alternative in which law schools merge theory and practice and, in the process, present the opportunity for reconstructing both.