Early American Legal Education

Brian J. Moline*

I. INTRODUCTION

For many years, American legal education reflected two contrasting schools of thought. One held that the practice of law was primarily a craft to be learned like other crafts by the handing down of knowledge from master to apprentice. The other viewed law as a learned profession to be taught as a social science in a university setting. Both theories had vigorous partisans, and both have dominated or co-existed in uneasy compromise at different points in our history. Echoes of the dichotomy continue today in the debate over the proper role of the clinical experience in legal education.

American legal education, like American law, has roots deep in English history. Unlike the countries of continental Europe that viewed law as an academic discipline, English legal preparation stressed practical training. For centuries, English legal education relied exclusively on apprenticeship and affiliation with the venerable Inns of Court in London. The Inns of Court are a unique learning tradition, a combination of educational institution, boarding facility, and professional association. For almost eight hundred years the Inns have been the method of educating barristers — the litigation specialists with exclusive privilege to appear in the Royal Courts of Justice. Historically, the Inns were, in effect, a third university, with as much or more influence than Oxford and Cambridge. Perhaps as many as a third of the gentry of England passed through them. Often the sons of Peers of the Realm, who would become magistrates and members of Parliament, attended the Inns, not necessarily to become professional advocates but to gain a solid grounding in the law they would ultimately write and administer. To this day, barristers receive their training and maintain lifelong association with one of four Inns: Lincoln's Inn, Gray's Inn, Inner Temple, and Middle Temple.[1]

The conflicting views on legal education also reflected shifting public opinion on the proper role of law and lawyers in American society. There has long been an egalitarian dream that runs deep in the American culture of order without lawyers — a search for a simple, easily understood legal system that would once and for all abolish

* Brian Moline has been an Adjunct Professor at Washburn University School of Law for over twenty years, where he teaches Legal History and Insurance Law. He has practiced law in Kansas for over thirty years and currently serves as Chair of the Kansas Corporation Commission.

1. *See generally* J. H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 3 (2000).

the need for professional advocates and make justice cheaper and easily accessible for the ordinary citizen.[2]

II. The Legal Profession in Early Colonial Times

This sentiment traces back to early colonial times. There was no comprehensive legal system in colonial America and no need for lawyers. Each colony was founded separately and functioned independently. Each developed its own flexible and eclectic legal system, roughly drawn from English common law, but with an overlay of local custom, usages, and eccentricities considered necessary for the particular time and locale.[3] Lawyers were considered unnecessary and even detrimental to such a rudimentary system of justice. Merchants viewed them with suspicion as potential rivals for political power; the rural population regarded them with hostility as agents of the landlords. "[M]erchants and landlords, accustomed to handling their own legal affairs or to entrusting them to lay colleagues, protested the professionalization of the law into a 'Mysterious Business'; and they denounced it as a 'System of confounding other People and picking their Pockets.'"[4]

Most, if not all, colonies viewed advocacy for hire with hostility and distaste. Many colonists identified lawyers with the British Crown and, therefore, considered them instruments of oppression and undue privilege. In Virginia, incendiary political activists scorned "men of law" who seemed to represent British commercial interests. Other leading political figures feared a professional bar would strengthen the executive authority. In Article 26 of the Massachusetts Body of Liberties, the first indigenous American law book, attorneys were allowed to plead another's cause, but no fees were allowed[5] — a practice that understandably retarded development of the legal profession. In the Carolinas, it was considered "a base and vile thing to plead for money or reward."[6] Pennsylvania was said to have no lawyers: "'Everyone is to tell his own case . . . . 'Tis a happy country.'"[7] As late as 1706, the entire Bar of Pennsylvania consisted of no more than three or four English-trained lawyers.[8]

2. Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876, at 33-35 (1976).

3. 1 Anton-Hermann Chroust, The Rise of the Legal Profession in America: The Colonial Experience 17 (1965).

4. Milton M. Klein, *The Rise of the New York Bar: The Legal Career of William Livingston*, 15 Wm. & Mary Q. (3d ser.) 334, 334 (1958).

5. Francis R. Aumann, The Changing American Legal System: Some Selected Phases 17-26 (1940).

6. Lawrence M. Friedman, A History of American Law 81 (1973).

7. *Id.* (quoting Aumann, *supra* note 5, at 13).

8. Charles Warren, A History of the American Bar 107 (William S. Hein & Co. 1980) (1911).

Penn's Laws, the basic legal code of early Pennsylvania, embodied the Quaker dislike for formal law and litigation. The Quakers, who founded Pennsylvania, attempted to settle all disputes in their weekly and monthly meetings with "Gospel Orders." Penn's Laws called for three persons known as "common peacemakers."[9] The decisions of these three individuals were considered final and as valid as any court judgment. This early effort at replacing litigation with arbitration was also attempted in South Carolina, New Jersey, and Connecticut.[10]

The simplicity of life in colonial America in the early seventeenth century encouraged dispute resolution that relied primarily on the Bible, common sense, and notions of elementary fairness.[11] With the beginning of the eighteenth century, however, the American colonies began to grow in wealth and influence. A rapid extension of commerce, shipbuilding, and slave trading created a powerful mercantile class. Business contracts and commercial paper became important, as did stability and predictability in land transactions. It soon became evident that law and lawyers were a necessary evil to protect property and develop mercantile interests.

The beginning of the legal profession in America was not particularly auspicious. Thomas Morton, considered the first Massachusetts lawyer, arrived in Plymouth Colony around 1624.[12] His professional past was somewhat murky. He soon fell into official disfavor and was ultimately jailed and expelled to England for scandalous behavior. Apparently he set himself up as the Lord of Misrule and cavorted around a maypole with drunken companions and Indian women.[13]

A decade later, an English solicitor named Thomas Lechford arrived in Massachusetts. He practiced as a courtroom pleader and document drafter. Lechford got into trouble because of his unorthodox views and for "pleading with [a jury] out of Court."[14] Lechford soon returned to England. Another early Massachusetts lawyer, Hudson Leverett, was described as a lawyer of "indifferent character" and given to "rash indiscreete [sic] and dangerous speeches."[15] In 1672, Peter Goulding was "disinabled" from pleading in court as an attorney; he was ordered not "to draw up any writings for others without allowance from Authority" because it was claimed he had been "antedating Writings & stirring up persons to goe [sic] to law."[16] Richard

9. FRIEDMAN, *supra* note 6, at 39.
10. *Id.* at 39-40.
11. *See id.* at 82.
12. *Id.* at 81.
13. *See* 1 CHROUST, *supra* note 3, at 72.
14. 1 *id.* at 73.
15. 1 *id.* at 80.
16. 1 *id.*

Wharton, already "under bond for good behavior, likewise was 'disbarred' in 1673 for fomenting unnecessary and reckless litigation."[17]

The first known woman lawyer in America arrived in Maryland in 1638. Her name was Margaret Brent. She was an accomplished litigator who apparently tried 124 cases in eight years.[18] Shortly after arriving in Maryland, Brent was appointed legal counsel to the Governor. Because of the conflict between her gender and status, people in the community were unsure how to address her. Consequently, she was commonly referred to as "Gentleman Margaret Brent."[19] Her professional recognition and standing in colonial America is particularly interesting in light of the widespread hostility to women when they attempted to enter the profession two hundred years later.

Initially, the only lawyers in colonial America were Crown appointees who had trained at the Inns of Court. An example was Nicholas Trott, who in 1699 came to Charleston, South Carolina, with an appointment as Attorney General.[20] A clear indication that trained lawyers were in short supply is demonstrated by the fact that Trott, by 1703, simultaneously held the posts of Chief Justice of the Colony, member of the Court of Chancery, and judge of the Courts of Admiralty, Common Pleas, and King's Bench.[21] He also codified the laws of South Carolina. Another was Matthias Nichols, a barrister at Lincoln's Inn and Inner Temple, who arrived in New York in 1664 and was quickly appointed to the bench.[22]

As the colonies developed and prospered, the Inn-trained lawyers found an expanding market for their services, and the demand for lawyers soon outstripped the supply. An underground industry of amateurs and part-time lawyers, often untrained and even uneducated, filled the void. Up to the time of the Revolution, these self-styled lawyers formed a substantial portion of the bar. Usually, they simultaneously pursued careers as merchants, soldiers, planters, and innkeepers. Gradually, however, an indigenous bar evolved of full-time, more- or less-trained lawyers. By 1750, notwithstanding hostility and opposition, all major communities had a competent, professional bar.[23] Thus, by Independence Day in 1776, there was a trained bar in virtually every colony.

17. 1 *id.* at 81.

18. DAWN BRADLEY BERRY, THE FIFTY MOST INFLUENTIAL WOMEN IN AMERICAN LAW 3 (1996).

19. *Id.* at 2.

20. FRIEDMAN, *supra* note 6, at 85.

21. *Id.*

22. *Id.* at 85-86.

23. *Id.* at 84.

III. Early Legal Training & Bar Admission

In the eighteenth century, little existed in the way of formalized training for the would-be lawyer. There were no collegiate lectures on law before 1780 and no law schools before 1784. Early attempts to promote the scholastic method of legal training were unsuccessful. Harvard College, as early as 1642, offered a course titled "Ethicks and Politicks."[24] Other colonial colleges offered courses in natural law, moral philosophy, and government theory.[25] But these offerings were of little value to young men anxious to learn the rudiments of practical law, such as the intricacies of "special pleading," creative conveyancing technique, and the fine art of fee extraction.

Some aspirants, mostly from the southern colonies, traveled to England to study at the Inns. One of the first American-born lawyers to study law in England was Benjamin Lynde of Massachusetts, who was admitted to the Middle Temple in 1692.[26] Other distinguished luminaries included John and Edward Rutledge and Charles Cotesworth Pinckney of South Carolina, John and Peyton Randolph and Richard Henry Lee of Virginia, and John Dickinson of Philadelphia.[27] The Inns had little to offer in the way of practical training for a colonial legal career, and the effort was expensive and time-consuming. But the influence of the Inn-trained lawyers was powerful, and they greatly improved the quality of the colonial bar. They frequently became the mentors of the next generation of lawyers and established a tradition of professional excellence and accomplishment.

For the other aspirants, there were basically three options. The first was a reading program of self-study. The student read whatever law books he could borrow and picked up what practical law he could on his own. Second, he could serve as a scribe or assistant in a government or judicial office. Third, the aspirant could serve as an apprentice to an established lawyer.[28]

The admission of Patrick Henry to the Virginia Bar is an example of the self-study method of preparation and is instructive as to the casual colonial approach to admission. After six weeks of glancing through a borrowed copy of *Coke on Littleton* and the Virginia statutes, Henry presented himself to the Bar examiners.[29] Virginia's court

24. Charles E. Consalus, *Legal Education During the Colonial Period, 1663-1776*, 29 J. Legal Educ. 295, 307 (1978).

25. *Id*.

26. 1 Chroust, *supra* note 3, at 33 n.89.

27. *See* Warren, *supra* note 8, at 46-47.

28. Consalus, *supra* note 24, at 308 (citing 1 Chroust, *supra* note 3, at 30-37; 2 Anton-Hermann Chroust, The Rise of the Legal Profession in America: The Revolution and the Post-Revolutionary Era 173 (1965)).

29. Clement Eaton, *A Mirror of the Southern Colonial Lawyer: The Fee Books of Patrick Henry, Thomas Jefferson, and Waightstill Avery*, 8 Wm. & Mary Q. (3d ser.) 520, 521 (1951).

system greatly resembled the English model. There were two classes of trial lawyers in colonial Virginia, those who practiced in the county courts and those who practiced in the General Courts.[30] The General Court was where important litigation began and where county court judgments were appealed. Typically, the county court lawyer would practice in several contiguous counties. The requirements to be admitted to county court were mandated by statute, which specified that the General Court should appoint examiners from among the practicing attorneys to "truly examine into the capacity, ability, and fitness of all such persons as shall make application to them for a license" and to deny licenses to unqualified applicants.[31] The candidate was required to present a "certificate of good character" from a county court where he intended to practice and also had to pass an examination.[32] Admission to the General Court was possible one year after admission to a county court, after the new lawyer had proved his ability.[33] A candidate could choose his own examiners, and Henry chose Robert Nichols, John and Peyton Randolph, and George Wythe. The examiners did not sit as a board, and there was no written test. Instead, each examiner interviewed the applicant in his chambers. At least two examiners had to sign the certificate of admission.[34]

After asking a few basic questions, Wythe refused to sign Henry's certificate. Nichols agreed to sign only after extracting a solemn promise from Henry that he would study more law. Henry's fitness also troubled another examiner, John Randolph, who reluctantly signed the certificate, but commented that he considered Henry to be a "young man of genius [but] very ignorant of [the] law."[35] Nevertheless, Randolph believed Henry "would soon qualify himself."[36]

The most common method of legal preparation in America was the clerkship system, modeled after the apprentice method of training for trade and craft. The system was basically a contract whereby a practicing lawyer agreed to provide instruction in the law, and perhaps board and lodging, in return for a negotiated fee and the student's services as clerk and general assistant. The student was supposed to learn both the theoretical and practical aspects of law by individual study, by observing his mentor and other lawyers in action, and, hopefully, by direct instruction and supervision. Most importantly, the mentor was supposed to guide the student through a carefully selected

30. *Id.* at 523-24.
31. *Id.* at 522-23.
32. *Id.* at 523.
33. *See* FRANK L. DEWEY, THOMAS JEFFERSON LAWYER 2-5 (1986).
34. Eaton, *supra* note 29, at 522-23.
35. WARREN, *supra* note 8, at 165.
36. *Id*.

reading program to absorb the literature necessary for a mastery of the law.[37]

The student was expected to take copious notes and alphabetically abridge everything he read in his "commonplace book" — a sort of journal made up of the student's personal annotation of texts, statutes, and cases.[38] It was an article of faith that this repetitive process would enable the student to comprehend all aspects of the law.

Unfortunately, the reality differed greatly from the theory. Many of the clerks found themselves too bogged down in tedious routine for any serious, systematic study. The typical apprentice spent long days on a high stool, endlessly copying deeds, wills, mortgages, and other legal documents. He was also expected to gather fuel and sweep the office. Moreover, the availability of law books varied greatly. At the time of the Revolution, only about thirty of the 150 English reports then published were in common use.[39] So few copies of colonial statutes were printed that it was rare for any lawyer to possess a complete set of the local laws of his colony. What books existed were owned by the richer lawyers, most of whom were Tories, who took their books with them when they fled to England during the Revolutionary War.[40]

James Otis, Sr. was the father of James Otis, Jr., who would gain fame as an ardent patriot in the Writs of Assistance cases.[41] Before 1750, when the senior Otis studied law, the only books available to him were Coke's *Institutes*, Brownlow's *Entries*, and Plowden's *Commentaries*.[42] Oliver Ellsworth, a future Chief Justice of the United States Supreme Court, had only Bacon's *Abridgment* and Jacob's *Law Dictionary* to assist him.[43]

Also, most of the mentors were busy practitioners who often left pupils to their own devices. James Wilson, another future United States Supreme Court Justice, was apparently notorious for being of little help to his students.

> [H]is intercourse with them was rare, distant, and reserved. As an instructor he was almost useless to those who were under his direction. He would never engage with them in professional discussions; to a direct question he gave the shortest possible answer and a general request for information was always evaded.[44]

37. Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 126-27 (1976).

38. *Id.* at 127.

39. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 19 (1953).

40. WARREN, *supra* note 8, at 163.

41. In a landmark 1761 case, Otis made his famous attack on general warrants permitting customs officers to search shops, homes, ships, and warehouses for suspected smuggled goods without specification or cause. *See* STEPHEN PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 55-81 (4th ed. 2000).

42. WARREN, *supra* note 8, at 169.

43. *Id.* at 169-70.

44. *Id.* at 167.

William Livingston was a member of a wealthy, socially prominent New York family. He apprenticed with James Alexander and William Smith, Sr., two of the most prominent attorneys in the colony. After beginning his clerkship under Alexander's tutelage, Livingston was summarily discharged for sending two intemperate letters to New York newspapers.[45] The first letter amounted to a scathing indictment against the apprentice system then in use for training lawyers. The second severely criticized Mrs. Alexander "for her social pretentiousness."[46] After Alexander dismissed him, Livingston completed his legal studies in William Smith's office.[47] In 1745, Livingston wrote a letter detailing the drudgery many law clerks endured. Most mentors "have no manner of concern for their clerk's future welfare . . . . '[T]is a monstrous absurdity to suppose, that the law is to be learnt by a perpetual copying of precedents."[48]

Peter Van Schaak, a 1767 graduate of King's College (later Columbia), clerked in Albany with his brother-in-law. Of his clerking experience, he later observed,

> Believe me, I know not above one or two lawyers in town that do tolerable justice to their clerks. . . . [H]ow many hours have I hunted, how many books turned up for what three minutes of explanation from any tolerable lawyer would have made evident to me! It is in vain to put a law book into the hands of a lad without explaining difficulties to him as he goes along.[49]

However, other mentors performed their task admirably. In his diary, John Quincy Adams described his experience with his senior, Theophilus Parsons, one of the most learned and admired lawyers in Massachusetts:

> [H]is chief excellence is, that no student can be more fond of proposing questions that he is of solving them. He is never at a loss, and always gives a full and ample account not only of the subject proposed, but of all matters which have any intimate connection with it.[50]

Parsons was in such demand as a mentor that in 1800 a special rule of court was enacted, aimed specifically at him, which limited the number of students in any law office to three at a time.[51] Conscientious mentors like Parsons began to spend less time practicing law and more time educating their students. It was from such specialized law offices that the first law schools evolved.[52]

45. Klein, *supra* note 4, at 336-37.
46. *Id.* at 337.
47. *Id.* at 336-37.
48. WARREN, *supra* note 8, at 168.
49. 1 CHROUST, *supra* note 3, at 32 (quoting THE LIFE OF PETER VAN SCHAACK 9 (1842)).
50. *Id.* at 33 (quoting *Diary of John Quincy Adams*, 16 PROC. OF THE MASS. HIST. SOC'Y 351 (1902)).
51. FRIEDMAN, *supra* note 6, at 278.
52. *Id.* at 279.

The readings assigned to law clerks varied from mentor to mentor, not only because of the scarcity of law books, but also because lawyers often disagreed on what reading was required to master the subject.[53] Moreover, much of the older material was written in Latin or the obscure Anglo-Norman dialect that became known as Law French. William Smith of New York designed one of the more comprehensive reading lists for his students. The course began with Wood's *Civil Law* and Puffendorf's *De Officio Hominis et Civis*.[54] Additionally, Smith assigned Hale's *History of the Common Law*, Fortesque's *Pruises of the Law of England*, St. Germain's *Doctor and Student*, Bacon's *Elements*, Wood's *Institutes of the Common Law*, Grotius' *Of War and Peace*, and Domat's *Civil Law*.[55]

John Adams, three years out of Harvard College, studied with James Putnam, a leading lawyer in Worcester, Massachusetts.[56] Massachusetts suffered from a serious shortage of law books for most of the eighteenth century due to the high cost of importation from England.[57] Most lawyers' libraries could be carried in their saddlebags.[58] Putnam's library of about fifteen volumes was one of the largest private collections in the colony.[59] Harvard College only owned about twenty law books, and most of them were over one hundred years old, written by English judges who had sat on the bench before Oliver Cromwell's time.[60] Putnam's method of instruction was highly permissive. A busy practitioner, Putnam usually left Adams to his own devices. Adams later advised a student that the most common writs could be mastered in half an hour, and the more difficult elements of practice were never learned in an office, but rather were "the result of experience and long habits of thinking."[61] "'Depend upon it,' he concluded, 'it is of more importance that you read much than that you draw many writs.'"[62]

By his own account, Adams read too quickly and understood too little. "I have read a multitude of law books — mastered but few — *Wood*, *Coke*, two volumes of Lillies' *Abridgment*, two volumes *Salkeld's Reports*, *Swinburne*, Hawkin's *Pleas of the Crown*, *Fortescue*,

53. McKirdy, *supra* note 37, at 129.

54. *Id.*

55. *Id*.

56. *Id*. at 124.

57. *Id.* at 130.

58. *Id.*

59. CATHERINE DRINKER BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 142 (1950); McKirdy, *supra* note 37, at 130.

60. BOWEN, *supra* note 59.

61. McKirdy, *supra* note 37, at 128.

62. *Id.* (quoting *Letter of John Adams to Jonathan Mason, July 18, 1776*, *in* 9 THE WORKS OF JOHN ADAMS 423-24 (C.F. Adams ed., 1854)).

Fitzgibbon. . . . [M]y Lord Coke's *Commentary on Littleton* I never read but once."[63]

Thomas Jefferson was a product of the apprentice system and studied with one of the most learned lawyers and committed teachers in the colonies, George Wythe of Virginia. Nevertheless, Jefferson became a vocal critic of the apprentice system. He firmly believed that the best preparation for a legal career was to encourage an independent course of study. He had followed a merciless, sixteen-hour daily reading program and prescribed it for a young friend. The regimen "included a liberal education in the Greek and Roman classics, world history, the physical sciences, and philosophy."[64] The law books he recommended included Coke's *Institutes of the Laws of England*, Matthew Bacon's *Abridgments*, Lord Kame's *Principles of Equity*, and Blackstone's *Commentaries*.[65]

By Independence Day, every colony had fairly stringent requirements for admission to the bar.[66] Four to seven years of apprenticeship, depending upon prior "classical studies" (college), was the normal requirement.[67] One consequence of the Revolution was a serious depletion in the ranks of qualified advocates and an enhanced need for lawyers. Many prominent lawyers had remained loyal to the Crown and either returned to England or were forcibly retired from practice by subsequent legislative acts or court rulings. The number of New York lawyers who were unable to comply with the "loyalty test" imposed in 1779 was so great that the bar nearly ceased to exist.[68] "It would not be extravagant to estimate that 150 leading lawyers and another 200 lawyers of lesser standing left the country or retired from active [legal] practice. Perhaps one-fourth of the former colonial legal profession became political 'refugees' on account of the Revolution . . . ."[69]

The combination of increased demand and reduced supply made the law attractive and promising to young men seeking a profession, such as Alexander Hamilton, Aaron Burr, and John Marshall. In January 1783, the apprentice requirement was temporarily suspended in New York for veterans who had interrupted their legal studies for service in the Patriot cause. The opportunity was limited and expired with the April term of court.[70]

63. WARREN, *supra* note 8, at 171-72.
64. Eaton, *supra* note 29, at 522.
65. *Id*.
66. *See* HARNO, supra note 39, at 33.
67. *Id.*
68. 2 CHROUST, *supra* note 3, at 10.
69. *Id.* at 11.
70. ROBERT A. HENDRICKSON, THE RISE AND FALL OF ALEXANDER HAMILTON 157 (1981).

Hamilton had no prior training and only five months to study for an examination that would ordinarily take five years of preparation.[71] He plunged into an intensive reading program. Hamilton's Federalist essays indicate a prior knowledge of Montesquieu, Puffendorf, Blackstone, and Coke. But he knew nothing about New York practice and procedure. Such matters were generally not written down but committed to memory and passed from master to apprentice. As a way to cram for his bar exam, Hamilton wrote a 177-page practice and procedure manual known as *Practical Proceedings of the Supreme Court of the State of New York*.[72] It was the earliest treatise on practice and procedure in New York and the direct ancestor of all subsequent volumes on state practice and procedure.

When Hamilton's deadline for admission under the veteran's preference passed, he was apparently granted an extension. In those days, the New York bar was bifurcated in imitation of the British system. Attorneys, or solicitors, were credentialed to prepare cases for submission to court. Barristers, or counselors, were privileged to actually appear and plead in court. Unlike in England, an aspirant could become both attorney and counselor if found duly qualified, although it was not a matter of right. The rules required two years of experience before an attorney could become a counselor. Nevertheless, after a scant five months of preparation, Hamilton was admitted as an attorney in July and as a counselor in October of 1783.[73]

Aaron Burr was one of those "young gentlemen" the rule referenced who had interrupted their legal studies for military service.[74] Burr entered the office of his brother-in-law, Tapping Reeves of Litchfield, Connecticut, after his graduation from King's College. He studied with Reeves for no more than twelve months before hostilities broke out. After leaving the army, Burr renewed his legal studies with Judge William Paterson of New Jersey.

In New Jersey, a candidate for admission to the practice of law had to be recommended to the governor by the judges of the Supreme Court. The governor issued the license, provided the candidate had served a clerkship of three years.[75] The candidate also had to pass an examination before a committee of three of the twelve serjeants[76] who

71. *Id.*

72. Then, as now, the court of general jurisdiction in New York State was called the Supreme Court.

73. HENDRICKSON, *supra* note 70, at 157-58.

74. *See* MILTON LOMASK, AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT 1756-1805, at 35 (1979).

75. *See* 1 CHROUST, *supra* note 3, at 200-01.

76. *See* JULIUS J. MARKE, VIGNETTES OF LEGAL HISTORY, SER. NO. 2, at 184-94 (1977). Serjeants-at-law and their exclusive organization, the Order of the Coif, were a distinctive English legal institution from the twelfth to the early nineteenth century. Only the most learned and successful barristers were eligible, and selection to the order was a cherished and envied

composed the uppermost level of the New Jersey Bar. When Burr heard about the New York veteran's preference, he hastened to Albany and was immediately admitted as an attorney in January and as counselor in April 1782 — five months before Hamilton.[77]

John Marshall spent even less time in preparation for his legal career. Marshall returned to Virginia during a lull in his military service and entered the College of William and Mary in 1780.[78] He spent only two or three months at the college, but fragments of his college notes survived, including a compilation of notations on legal topics "from Abatement to Limitation of Actions."[79] They also included notes taken from Blackstone's *Commentaries* and from Matthew Bacon's *New Abridgment of the Laws*, *The Acts of Assembly Now in Force in the Colony of Virginia.*

Virginia required that candidates for admission to practice be "learned in the law" and produce certification of "probity, honesty, and good demeanor."[80] After no more than two or three months of study, Marshall produced a certificate to practice at the Fauquier County Courthouse signed by Governor Thomas Jefferson.[81] It is ironic that Marshall's certificate was signed by the man with whom he would later be involved in titanic conflict.[82]

IV. Early Legal Writings

The principal textbooks of the colonial lawyers were Sir Edward Coke's *Institutes on the Laws of England* and Matthew Bacon's *A New Abridgment of the Law*. Some students were also exposed to the medieval commentators — Bracton, Glanvil, and St. Germain. Blackstone's *Commentaries*, the supreme authority for later generations of lawyers, was not published until 1765-1769. But by far the most studied text in colonial America was the first volume of Coke's *Institutes*. The *Institutes* and thirteen volume *Reports*, a compilation of medieval and Tudor cases, were Coke's great contribution to the common law.

honor. Serjeants enjoyed exclusive practice in the Court of Common Pleas, and judges were chosen solely from their ranks. In England, no more than ten serjeants existed in practice at the same time. New Jersey soon abandoned the serjeant designation, but clung to the attorney-solicitor classification much longer.

77. *See* Lomask, *supra* note 74, at 75-78.

78. *See* Leonard Baker, John Marshall: A Life in Law 57-61 (1974).

79. *Id*. at 65.

80. 1 Chroust, *supra* note 3, at 275 (quoting 5 Hening, Statutes at Large . . . of Virginia 345-46 (1819)).

81. Baker, *supra* note 78, at 65-66.

82. In the aftermath of the election of 1800, Marshall and Jefferson would come to symbolize the defining political issue of the early American republic. Jefferson viewed America as a decentralized polity, with each state exercising political and legal autonomy. Marshall envisioned the nation as evolving to a strong, centralized entity, with one basic legal code interpreted by federal courts, with the United States Supreme Court as the final arbiter of both federal and state statutes. *See* Louis H. Pollock & Sheldon Hackney, *Remarks on the 200th Anniversary of the Accession of John Marshall as Chief Justice*, 27 J. Sup. Ct. Hist. 3, 3-7 (2002).

Coke is regarded as the originator of the doctrine of stare decisis. Bracton, Fortesque, and the other medieval commentators seemed to have intended citations to be illustrative rather than authoritative. But because of their antiquity and because he approved of them, Coke cited thousands of decisions over several centuries as authoritative and binding.[83]

The *Institutes* were four great discourses that researched and codified the medieval law of England. The first volume, Coke's commentary on Sir Thomas Littleton's definitive work on land tenure, was published in 1628. *Coke on Littleton*, as it became known, was the basic legal text in early colonial America. If a lawyer had no other law book, he invariably owned a well-thumbed copy of *Coke on Littleton*. Students were expected to read the book two or three times and "commonplace" the basics.

Coke's commentary on Littleton was an attempt to update and modernize an earlier work. Unfortunately for generations of law students, the author seemed to lose all sense of proportion.

> He could not resist bringing his entire life as a student, counsel, and judge into play. Nothing escaped his sight. He went to great pains to explain in depth every word, every doctrine, every institution. Coke's thoroughness was matched by his lack of proportion and organization. The reader finds the most esoteric technicalities sharing the same page with basic legal principles. There was no index to light the way, no abstract to ease the pain.[84]

Adams referred to Coke as "the oracle of the law" and claimed that whoever mastered Coke "was master of the laws of England."[85] Mastering Coke, however, or even understanding him, was a daunting task. *Coke on Littleton* has justifiably been called "[that] disorderly mass of crabbed pedantry that Coke poured forth as Institutes of English Law."[86] Coke forced James Madison to abandon the study of law entirely. Although he labored industriously to understand the crabbed, dry text, Coke bored Madison, and he abandoned his uncongenial law studies.[87] Although he managed to persevere and eventually master Coke, Jefferson shared Madison's frustration. "I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life."[88] On the other hand, Jefferson admired Coke's "uncouth but cunning learning,"[89] and he appreciated his spir-

83. CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 1552-1634, at 436-38 (1957).

84. McKirdy, *supra* note 37, at 133.

85. *Id.* at 131.

86. HARNO, *supra* note 39, at 19 (quoting Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 179 (1895)).

87. *See* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 149-50 (1990).

88. WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 53 (1993).

89. *Id.*

ited defense of freeborn Englishmen when Coke challenged the Stuart dynasty's concept of Royal prerogative in eighteenth-century England.[90]

Reading Coke reduced future United States Supreme Court Justice Joseph Story to tears:

> I . . . was hurried at once into the intricate, crabbed, and obsolete learning of *Coke On Littleton*. . . . [N]othing was presented but dry and technical principles, the dark and mysterious elements of the feudal system, . . . and the repulsive and almost unintelligible forms of processes and pleadings. . . . [A]fter trying [to read Coke] day after day with very little success I set [sic] myself down and wept bitterly.[91]

Another source further reveals Story's frustration in reading Coke: "My tears dropped upon the book, and stained its pages."[92] Daniel Webster's autobiography detailed his struggle to master Coke:

> I was put to study in the old way, that is, the hardest books first, and lost much time. I read *Coke-Littleton* through without understanding a quarter part of it . . . .
>
> . . . I thought I could never make myself a lawyer and was almost going back to the business of school teaching.[93]

Colonial law students were not alone in their exasperation with Coke. Contemporary students of his work are just as critical. "Coke shovelled out his enormous learning in vast disorderly heaps . . . . He delighted in wandering off at tangents, and in doing so covered many aspects of the common law which Littleton never hinted at. Coke seems to have been oblivious to the disorder . . . ."[94]

The grueling and tedious nature of legal study was graphically summarized by James Kent in two letters to a fellow student. "The study of law is so encumbered with voluminous rubbish and the baggage of folios that it requires uncommon assiduity and patience to manage so unwieldy a work."[95]

At its best, apprentice training provided a basic grounding in procedural law, instruction in how to read a case, and some introduction in the relevant law of the jurisdiction. What it could not do was inculcate any sense of the history and scope of the law, or an appreciation for the law as a science and a system. What was needed, of course, was a clear, comprehensive, and organized taxonomy of the law of

90. *Id.* at 52-53.

91. WARREN, *supra* note 8, at 175-76 (quoting Justice Story).

92. Gerald T. Dunne, *The American Blackstone*, 1963 Wash. U. L.Q. 321, 323 (quoting 1 W.W. STORY, LIFE AND LETTERS OF JOSEPH STORY 74 (1851)).

93. WARREN, *supra* note 8, at 176-77 (quoting DANIEL WEBSTER, AUTOBIOGRAPHY OF DANIEL WEBSTER (1829)).

94. Thomas G. Barnes, *Notes from the Editors* of 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Legal Classics Library 1985) (1823) (quoting J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 165 (2d ed. 1979)).

95. McKirdy, *supra* note 37, at 136 (quoting Letter from James Kent to Simeon Baldwin (Oct. 10, 1782), *in* MEMOIRS AND LETTERS OF JAMES KENT 16 (W. Kent ed., 1898)).

England. Efforts were made by scholarly successors to Coke to upgrade his work, as Coke had upgraded Littleton. Sir Matthew Hale, Chief Justice of King's Bench (1674-1676), in his *History of the Common Law,* and Hineage Finch, Lord Chancellor of England (1674-1682), in his *Law or a Discourse Thereof*, attempted to update Coke. But it would fall to Sir William Blackstone to produce the first real, systemic overview.

William Blackstone was a little-known academic lawyer in 1753 when a vacancy occurred in the Regis Professorship of Civil Law at Oxford.[96] Although well qualified for the post, Blackstone was disappointed in his quest. At the time, English universities taught only canon or Roman law. Any student wishing to prepare for a legal career or even desiring just an exposure to the law of the realm had to enroll at one of the four Inns of Court.

Blackstone determined to fill the educational void at Oxford by marketing a series of lectures on the common law outside the official curriculum, and he publicly advertised his product:

> [I]t is proposed to lay down a general and comprehensive plan of the laws of England; to deduce their history; to enforce and illustrate their leading rules and fundamental principles; and to compare them with the laws of nature and of other nations; without entering into practical niceties or the minute distinctions of particular cases.[97]

Blackstone's lectures were popularly received. In 1758, the Vinerian Chair at Oxford was established, the first professorship in English law. The benefactor, Charles Viner, was a wealthy legal publisher.[98] Blackstone was appointed as the chair's first incumbent.[99] Blackstone's lectures eventually evolved into his monumental work, *Commentaries on the Laws of England*. Hale and Finch's earlier works, as well as Thomas Woods' *An Institute on the Laws of England*, were the foundation of much of Blackstone's work and models for his achievement.[100]

However, unlike the works of Coke and the other commentators, lawyers and laymen alike could understand and appreciate Blackstone's work because it required no previous legal study.[101] Indeed, the whole point was "to introduce the English gentleman to the science of the law."[102] Blackstone defined law as a "rule of civil conduct

96. John V. Orth, *Sir William Blackstone: Hero of the Common Law*, 66 A.B.A. J., 155, 156 (1980).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 736-37 (1976).
102. *Id*. at 736.

prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[103] It was around this simple distinction that the *Commentaries* were arranged. Volumes I and II concern the rights of persons and things, mostly real property. Volumes III and IV address private and public wrongs — torts and crimes.[104]

For the first time, the continuity, unity, and reason of the common law was clearly and comprehensively detailed. Blackstone accomplished what Coke, Hale, Finch, and Wood had attempted with varying degrees of success. He organized the common law as an organic whole, capable of being studied systematically. The *Commentaries* were not perfect, of course; there were gaps and defects in the work. Blackstone's book described the law of the eighteenth century. But even as it was being written, the eighteenth century was passing. New economic conditions and new political ideas were producing an irresistible demand for extensive reform of the law. Like Coke, Blackstone expounded on land law extensively, but contract was barely mentioned as a subset of assumpsit, and commercial law was practically ignored. The greatest weakness in the *Commentaries* was a total lack of critical analysis. Like Coke, Blackstone unquestioningly accepted the common law as the perfect embodiment of reason. He carried his veneration "to a length which blinded him to its defects,"[105] and the extent of his deference seems absurd to the modern reader.[106]

The *Commentaries* were particularly well received in the American colonies. Close to 2500 copies were purchased in America prior to the Revolution. The first American edition, published by Robert Bell in Philadelphia in 1771-1772, was the first general law book published in the colonies. The names of the initial subscribers constitutes a virtual "who's who" in colonial political and judicial leadership, including John Adams, John Jay, Governeur Morris, Nathanial Green, James Wilson, and St. George Tucker.[107] Tucker would succeed George Wythe as Professor of Law at the College of William and Mary, and his 1803 edition of Blackstone contained one of the most important commentaries on the new American Constitution.[108] Of the initial subscribers, sixteen would become signatories to the Declaration of Independence; six were delegates to the Constitutional Convention in 1787; another became Chief Justice of the United States

103. Orth, *supra* note 96, at 157.
104. MARKE, *supra* note 76, at 140.
105. HARNO, *supra* note 39, at 10.
106. *Id.* at 9-10.
107. MARKE, *supra* note 76, at 156.
108. *See* HARNO, *supra* note 39, at 23.

Supreme Court; and one was elected President.[109] John Marshall's father was also one of the original subscribers.[110]

Blackstone's *Commentaries* quickly became obsolete in England, but the work retained its authority in America much longer. In nineteenth-century America, Blackstone was cited as authority in all courts, especially in private law disputes. Blackstone was so ubiquitous and readable that he made it appear easy to learn law. Many nineteenth-century lawyers relied exclusively on the *Commentaries* to the exclusion of any other authorities and obtained only a condensed and superficial knowledge of the law. Ironically, it was the very lucidity and conciseness of Blackstone that concerned the advocates of more comprehensive legal education. Eminent lawyers from William Wirth of Virginia to Abraham Lincoln cautioned aspiring lawyers that there was no easy road to legal learning and to avoid over-reliance on Blackstone.

> St. George Tucker derisively called them "Blackstone lawyers." Jefferson said in 1813 that Blackstone should be "uncanonized," for although his book was "the most elegant and best digested of our law catalogues [it] has been perverted more than all the others to the degeneracy of legal science. A student finds there a smattering of everything and his indolence easily persuades him, that if he understands that book, he is the master of the whole body of the law.[111]

Indeed, Jefferson denounced "'the substitution of Blackstone for my Lord Coke'" as monarchial and too pro-British.[112]

V. Birth of American Law Schools

Although much of Blackstone's *Commentaries* became obsolete as a legal authority, his ideas on legal education initiated a reappraisal of the way law was taught in England and America. All the early law schools included some exposure to Blackstone, at least as an introduction to the curriculum. But educators such as David Hoffman, the first systemic advocate of legal education in this country, worried that Blackstone might be read first and exclusively before the student gained the knowledge of history and moral philosophy necessary for true legal learning. Whether as a short cut or introduction, Blackstone remained an essential component of legal training, in both academia and law offices, for a century and a half after its first publication.

In his initial lecture, Blackstone deplored the chaotic state of legal education in England. The Inns of Court had degenerated into

109. Nolan, *supra* note 101, at 743-44.
110. *Id*. at 757.
111. Marke, *supra* note 76, at 159.
112. Randall, *supra* note 88, at 56.

little more than living and dining clubs where the student "occasionally recited some meaningless exercises."[113] Theoretically, a man could be called to the Bar in England during this period without reading a single page of a law book. The only requirements were to complete the terms, eat the requisite dinners,[114] and, of course, pay all the fees. The student could, if he chose, pursue an independent program of study, but no assistance was given him and no examination required.

In the latter part of the eighteenth century, registration at the Inns often became coupled with the practice of "pupiling" — office apprenticeship with a distinguished practitioner. According to Lord Chief Justice Reeves, the appropriate course of reading for a pupil in 1787 was as follows,

> Read Wood's *Institutes* cursorily and for explanation of the same, Jacob's *Dictionary*. Next strike out what lights you can from Bohun's *Institutio Legalis*, and Jacob's *Practising Attorney's Companion*, and the like, helping yourself by Indexes. Then read and consider Littleton's *Tenures* without notes and abridge it. Then venture on Coke's *Commentaries*. After reading it once, read it again, for it will require many readings. Abridge it. Commonplace it. Make it your own, applying to it the faculties of your mind. Then read Sergeant Hawkins to throw light on Lord Coke. Then read Wood again to throw light on Sergeant Hawkins. And then read the statutes at large to throw light on Mr. Wood.[115]

In addition to this elaborate reading program, the pupil was expected to spend long hours observing barristers in action at the Royal Courts.

Blackstone expressed his concern about lawyers trained solely in the office: "If practice be the whole he is taught, practice must also be the whole he will ever know."[116] Blackstone insisted that the study of law should be university based. Only at university could the curriculum be based on principles and first questions rather than mere detail and procedure. One effect traceable to Blackstone's influence was the establishment of chairs of law at several American colleges and universities.

As a traditionalist and a monarchist, Blackstone was no friend to the cause of American liberty, which caused Jefferson to view him with suspicion. While Blackstone and Jefferson shared few political values, they had similar views on legal education. In 1779, the year

113. Orth, *supra* note 96, at 157.

114. In a curious custom, the reasons for which are lost in antiquity, terms were kept by the number of dinners the student consumed in the hall of his Inn during each "dining term," of which there were four each year. The student was required to dine six times each term. Thus, the student was required to eat at least seventy-two dinners over three years, the minimum time elapsing between admission and call to the bar. JAMES DERRIMAN, PAGEANTRY OF THE LAW 19-20 (1955).

115. WARREN, *supra* note 8, at 155.

116. Orth, *supra* note 96, at 158.

after Blackstone published the eighth and final edition of his lectures, Jefferson established a "professorship of Law and Police" at the College of William and Mary, one of his first acts as Governor of Virginia.[117] It was the first law professorship in the United States and was modeled after Blackstone's chair at Oxford. The first incumbent was Jefferson's old law instructor, George Wythe.

Jefferson once described Wythe as "the Cato of his country, without the avarice of the Roman."[118] Wythe was Judge of the Court of Chancery at the time of his appointment and was considered the ablest lawyer in the colonies. Like most colonial lawyers, Wythe was largely self-taught, and he never ceased the process of self-education.[119] He pursued his most serious studies after the age of twenty, when he received his law license.[120]

> He is said to have exhausted the Greek and Roman classics without a guide or tutor. He studied thoroughly the origins of English law. To the dismay of opposing lawyers, he used his vast knowledge in the courtroom, supporting arguments with scholarly quotations. . . . [In] one minor case . . . [h]e cited Virginia and British statutes, decisions of the British courts, sections of Justinian's *Roman Code*, and Cicero's *Orations*.[121]

Wythe taught at William and Mary for ten years. He used the lecture method begun by Blackstone, as well as moot court and moot legislation exercises. The College of William and Mary maintained the chair until 1861.

Similar chairs were established at other American colleges. In 1798, James Wilson was appointed Professor of Law at the College of Philadelphia, but after two years his lectures were discontinued. Although a brilliant lawyer, Wilson's temperament was that of an advocate rather than a judge and scholar. His ultra-Federalist views were manifest in both his judicial opinions and law lectures. William Rawle, who had practiced with Wilson, observed,

> Mr. Wilson on the bench was not the equal of Mr. Wilson at the bar, nor did his law lectures entirely meet the expectations that had been formed. . . . It seems that his violent criticisms of Blackstone, and his ultra-Federalist views as to the powers of the National Government, did not commend themselves to the lawyers or to the public. . . . [His] lectures, though scholarly and elegant essays on general jurisprudence, embellished with historical allusions, were not useful as practical instruction in Common Law.[122]

117. BERNARD SCHWARTZ, THE AMERICAN HERITAGE HISTORY OF THE LAW IN AMERICA 37 (Alvin M. Josephy, Jr. ed., 1974).

118. *Id.* at 36.

119. Lewis F. Powell, Jr., *George Wythe*, 1990 J. SUP. CT. HIST. 25, 26.

120. *Id.*

121. *Id.*

122. WARREN, *supra* note 8, at 347-48.

In 1812, the University of Maryland established a law faculty of six members. David Hoffman was appointed to the faculty in 1816. He immediately began to organize an ambitious curriculum, which took him four years to prepare. In 1817, he published his proposed program for an all-inclusive law curriculum under the title, *A Course of Legal Study*. The course was organized under thirteen separate titles including *Moral and Legal Philosophy*, the *Law of Nations*, and *Political Economy*. Students were encouraged to delve deeply into the Bible, Cicero, Seneca, Aristotle, Adam Smith, Montesqieu, and Grotius.[123] The plan impressed Joseph Story, but he expressed doubt that the curriculum could be taught in an efficient manner in fewer than seven years.[124]

Hoffman's perspectives on legal education were far ahead of his time.[125] He discouraged rote memorization and emphasized an analytical approach to the general principles of law. He also stressed a careful study of statutes. "Hoffman established a 'Maryland Law Institute' — an elaborate system of moot courts — and/or 'Rota' or legal debating society."[126] Unfortunately, the school was continually challenged by poor attendance, and this ambitious attempt to singlehandedly "reform 'the whole of legal education came to an end in 1832.'"[127] The early law professors taught the subject primarily from a political science viewpoint. The aim of the school seemed more focused on preparing students to be statesmen rather than preparing them for careers at the bar.

In 1793, James Kent was appointed Professor of Law at Columbia University. A 1781 graduate of Yale, Kent had a relatively small practice in Poughkeepsie, but had been very active in Federalist politics. "It was the character I had insensibly acquired as a scholar, and a Federalist, and a presumed (though it was not true) well read lawyer, that the very first year that I removed to New York, I was appointed a Professor of Law in Columbia College."[128]

Kent resigned his professorship in 1797 to embark on a judicial career that would include service as Justice and Chief Justice of the New York Supreme Court and as Chancellor of New York. He resumed his professorship in 1823 on his retirement from the bench. Like Blackstone, Kent gathered his lectures and published them between 1826 and 1830 under the title *Commentaries on American Law*. Kent's *Commentaries* dominated legal thinking in this country for

123. HARNO, *supra* note 39, at 24-25.
124. 2 CHROUST, *supra* note 3, at 203.
125. 2 *id.*
126. 2 *id.* at 205.
127. 2 *id.* at 205-06.
128. WARREN, *supra* note 8, at 350 (quoting WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT (1898)).

many years and was listed by Alexis de Tocqueville as one of the primary sources for his classic work *Democracy in America*.[129]

In many ways Kent's career paralleled Blackstone's. Both were towering figures in their day, both were judges as well as teachers, and both utilized their law lectures as a basis for their multi-volume *Commentaries* that influenced and molded Anglo-American law. Kent was a great admirer of Blackstone. He modeled his work on that of the "Great Commentator" and credited Blackstone with kindling an interest in law.

> When the college [Yale] was broken up and dispersed in July, 1779, by the British, I retired to a country village, and, finding Blackstone's *Commentaries*, I read the four volumes. . . . [T]he work inspired me, at the age of 15, with awe, and I fondly determined to be a lawyer.[130]

Kent's *Commentaries* stressed the English common law foundation of American law, but emphasized that it was to be followed only to the extent it would prove suitable for American conditions. Kent drastically modified English land law, for example, declaring much of it inapplicable to America. Feudal land law, with its complicated doctrines of estates tail, primogeniture, and other medieval rules that restricted transfer and descent of real property, had no place in American law.[131]

The establishment of the early chairs in law at American universities indicated a tentative departure from the ingrained belief that law was a craft to be trained through apprenticeship, to at least partial recognition of law as a learned profession requiring a broad and liberal preparation. Before the university law courses evolved into full law departments, there was an intermediate development — the emergence of the independent law school with no university affiliation.

The Litchfield School of Connecticut was a classic example of the independent law school.[132] Similar privately operated law schools emerged after the Revolution, but they were usually short-lived. The Litchfield School was in existence for nearly fifty years, from 1784 to 1833. Litchfield granted no degree and for the most part was unconcerned with historical development or philosophic formulation. It was, first and last, an entirely practical program designed solely to teach the student what he needed to know to practice law. The Litchfield School is of interest not only because it was the first Ameri-

129. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 189-90, 270, 690 (Harvey Mansfield & Debra Winthrop eds., trans., 2000).

130. HARNO, *supra* note 39, at 25-26.

131. *See* FRIEDMAN, *supra* note 6, at 210-11.

132. *See* WARREN, *supra* note 8, at 357-61.

can law school, but also because of the many alumni who later gained fame and distinction.

Of the 903 men identified in a biographical catalogue who attended Litchfield, "28 became United States senators; 101 members of Congress; 34 state supreme court justices; 14 governors of states and 10 lieutenant governors; 3 vice presidents of the United States; 3 United States Supreme Court justices; and 6 members of the Cabinet."[133] Former students estimated that approximately 1015 students studied there over the existence of the school.[134] It is unlikely that any other law school ever had such a large percentage of its students who would become citizens of distinction.[135]

The school was created by Tapping Reeves, a Princeton graduate who started his law practice in Litchfield in 1772. In 1774, his brother-in-law, Aaron Burr, entered the office briefly as a pupil. Other students also chose to study in Reeves' office. Fortunately for his pupils, Reeves was a conscientious master who took his responsibilities seriously. He prepared a series of formal lectures for his charges that ultimately evolved into the Litchfield School. When Reeves was appointed to the bench in 1798, a partnership was created between Reeves and James Gould, whereby Gould continued operation of the school.

Attendance usually varied between nine and thirty students at a time. Completion of the course required from fourteen to eighteen months of intensive study.[136] Instruction was through lectures. Students were required to take careful notes and transcribe them into notebooks. Extensive collateral reading and optional moot courts were conducted. Examinations were held every week. The comprehensive curriculum comprised forty-eight titles or subjects. Although students could enter at any time, they were advised to begin law study by taking one of the major offerings, such as municipal law.[137]

Litchfield used Blackstone as a text, and the curriculum was loosely structured around the taxonomy suggested by the *Commentaries*. Student notes from around 1803 show that Judge Reeves followed Blackstone's methodology by explaining the reasons for the rules of law and supporting the rules with case citations.

> The whole course of instruction, omitting Connecticut practice, could be covered in about one year. Of the five notebooks, representing a year's classwork of a Litchfield student in 1813, one con-

133. HARNO, *supra* note 39, at 31.
134. WARREN, *supra* note 8, at 358.
135. *Id.* at 359.
136. Samuel H. Fisher, *The Litchfield Law School 1775-1833*, at 1-11 (1933), *reprinted in* DENNIS R. NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 205, 207 (1941).
137. *Id.* at 207.

> tained notes on real property; one, notes on forms of action, pleading and procedure; about three-fourths of one, notes on commercial law, including bills and notes as well as insurance; and about one-third of one, notes on contracts. The remainder of these notebooks was made up of a variety of briefer notes on a number of legal subjects, such as municipal law, master and servant, agency, bailments and equity.[138]

The Litchfield School and its imitators were the first step into a slow and somewhat reluctant recognition that law was a learned profession and not simply another craft to be learned through self-education or apprenticeship. By the same token, colonial universities were unable and often unwilling to incorporate legal education into their curricula. In addition, much of the practicing bar was resistant to both admission standards and professional credentialism. Slowly but surely, however, the transition to university-based legal education began.[139]

In 1779, Isaac Royall bequeathed property to Harvard College to establish a professorship in law. Isaac Parker, Chief Justice of the Supreme Judicial Court of Massachusetts, is generally credited with founding the first law school with university affiliation. Parker was the first incumbent of the Royall Chair at Harvard College. In his inaugural address, Parker spelled out his vision of a program for legal education that would combine theoretical and practical training. "For the first century of our history . . . [the legal profession] was probably followed by men of low minds and lower reputation, whose efforts were limited to the mechanical drudgery of the craft."[140]

Law, Parker emphasized, was "a comprehensive system of human wisdom . . . [a] science . . . worthy to be taught, for it cannot be understood without [university] instruction."[141] He suggested grafting "a school for the instruction of resident graduates in jurisprudence" onto his Harvard professorship.[142] Parker spoke admiringly of the Litchfield School and hoped to combine the practical and the theoretical into a program that would "tend greatly to improve the character of the Bar of our State."[143]

Parker proposed an ambitious plan for the new professorship, which included creation of a separate law school. The curriculum would require eighteen months of intensive study to attain the degree of bachelor of laws. Three years were required for students without an undergraduate degree. The plan called for the law students to be

138. 2 CHROUST, *supra* note 3, at 211-12.
139. HARNO, *supra* note 39, at 32-40.
140. *Id.* at 36 (quoting 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 299-302 (1908)).
141. *Id.*
142. *Id.*
143. *Id*. at 37.

fully integrated into the graduate school community with free access to all university facilities and lectures, and creation of a law library as soon as possible.[144]

As early as 1777, Yale College developed a plan for a professorship in law, but the proposal was not adopted until 1801. Elizar Goodrich was appointed Yale's first Professor of Law and served until 1810. In 1800, an independent law school opened in New Haven, Connecticut, which operated until 1824, when Judge David Dagget was appointed its head. Dagget was also appointed to the vacant professorship at Yale, and in 1826, the private institution was absorbed by Yale as its law school. When Dagget transferred to Yale, he brought thirteen of his students with him, along with some of the instructional methods that had been successfully employed at his own school.[145] Beginning in 1826, Yale offered a complete "practitioners' course" requiring attendance for two years. The course included practice in the drafting of legal documents.[146]

Other universities followed and founded law schools, but their growth and development were slow. Office apprenticeship continued to be the preferred method of preparation. Apprenticeship dovetailed nicely with notions of Jacksonian democracy, which had no patience with formal educational requirements for public office or the practice of law. In some jurisdictions, any knowledge of the law at all was considered suspect. For example, Indiana amended its constitution in 1851 to permit "every person of good moral character being a voter" to be admitted to the bar and practice in all Indiana courts of justice.[147] At that time, twenty-two percent of the Indiana population was illiterate.[148] Lawyers clung to the idea that legal practice was nothing more than the mastering of a specialized craft, the skills for which should be passed on from practitioner to student. Even the law professors seemed to concede that a blending of scholastic and practical training was the best way to prepare for a legal career.

In the first twelve years of its existence, Harvard Law School averaged fewer than nine students a year, and even they attended irregularly. Judge Parker resigned in 1827, apparently by request. The Harvard Corporation decided to reorganize the school, and one fortuitous consequence of the change was the appointment of United States Supreme Court Justice Joseph Story as Dane Professor of Law. In 1829, Nathan Dane, an admirer of Blackstone and author of his own *General Abridgment and Digest of American Law,* established a

144. 2 CHROUST, *supra* note 3, at 193.
145. 2 *id.* at 190.
146. 2 *id*. at 190-91.
147. Harry J. Lambeth, *Practicing Law in 1878*, 64 A.B.A. J. 1015, 1016 (1978).
148. *Id.* at 1016.

professorship in law at Harvard that would bear his name. He specifically requested that Story be appointed the first Dane Professor. At first, Story declined the appointment, but finally relented when Dane twice personally requested he serve. As a well-known and respected jurist, Story was able to dictate the terms under which he would accept the appointment. Since he expected to continue on the Court, he declined to be a resident professor or assume any administrative duties. Rather, he would visit the school from time to time to lecture occasionally and direct student readings. He was to be paid at least $1,000 annually from the Harvard Corporation, which was the income from the Dane trust, and use of a house in Cambridge.[149]

Story is one of the towering figures in American legal history. He was part of the brilliant group of post-Revolution lawyers, including John Marshall and James Kent, who are justly regarded as the architects of American law. Story lived from 1779 to 1845.[150] He was the youngest man ever appointed to the United States Supreme Court, serving for thirty-four of his sixty-six years, and he was a prolific scholar.[151] Almost immediately after his appointment, he began work on the first of his Commentaries, *Commentaries on the Constitution*. Story wrote a total of fourteen legal commentaries and annotated three more on the Blackstone model, addressing all facets of the common law. Story's *Commentaries* were a basic staple of legal education in America for many years.[152]

There were many similarities between Story and Blackstone. Both had an aptitude for and a love of poetry, which they abandoned only reluctantly. Both considered their legal apprenticeships in large part distasteful[153] and were shocked on their first encounter with Coke. "Blackstone found *Coke upon Littleton* 'too much for Hercules,'"[154] and "Story actually wept in attempting to understand it."[155] Both men wrote and taught law as a set of general principles rather than unconnected rules for practitioners. And, both became judges after rather lackluster careers as legislators.[156]

Although he was a product of the apprentice method, Story was a strong advocate of improving legal education. He wrote to the principal of the Dublin Law Institute:

149. Ronald D. Rotunda & John E. Nowak, *Joseph Story: A Man for All Seasons*, 1990 J. SUP. CT. HIST. 17, 20.

150. *Id.* at 17.

151. *See id.* at 20.

152. Dunne, *supra* note 92, at 322.

153. *Id.* at 323.

154. *Id.* (quoting LOCKMILLER, SIR WILLIAM BLACKSTONE 15, 191-94 (1938)).

155. *Id.*

156. *Id.*

> I have been long persuaded that a more scientific system of legal education . . . is demanded by the wants of the age and the progress of jurisprudence. The old mode of solitary, unassisted studies in the Inns of Court, or in the dry and uninviting drudgery of an office, is utterly inadequate to lay a just foundation of accurate knowledge in the learning of the law. It is for the most part a waste of time and effort, at once discouraging and repulsive. It was, however, the system in which I was myself bred; and so thoroughly convinced was I of its worthlessness, that I then resolved, if ever I had students, I would pursue an opposite course.[157]

In 1835, Benjamin Butler organized the Law School at the City of New York, now New York University. Butler initiated the course method. The material was broken down into specific areas — equity, pleading, and evidence — taught separately, but integrated into a systemic whole. When William Kent, the Chancellor's son, was invited to leave his post at New York University to join the Harvard staff, he brought with him the course method as it had been established by Butler. The course method has continued as the basis for the law school curriculum to the present day.

In the years following the organization of Harvard Law School under Story, law schools gradually increased in number. By 1870, thirty-one law schools had been established. Of those, twelve were one-year programs, two required one and one-half years, and seventeen required two years.[158] For the most part, the schools had no entrance requirement beyond a vague maturity and good moral character test, and there was often no examination for the degree. Instruction was by lecture, supplemented by treatise assignment, until the advent of Christopher Columbus Langdell as Dean of Harvard Law School in 1870. Langdell is credited with introducing the case method of legal education.[159]

Although it was a distinct improvement over the apprenticeship and independent law school models, the university law school, pioneered by Story and his predecessors, still maintained a basic trade school approach. Blackstone, Jefferson, and Kent had envisioned the study of law as part of a liberal education. But the early law schools maintained no connection between liberal and legal education. Harvard Law School did not require any preliminary education, not even the basic requirements for admission to college. Not until the 1870s did the law schools begin to establish liberal education requirements,[160] and not until after World War II were any serious efforts

157. HARNO, *supra* note 39, at 43.
158. *Id*. at 51.
159. *Id*. at 53-54.
160. *Id.* at 50.

undertaken to adopt a comprehensive legal education system, integrating theory and practice.[161]

Despite the movement towards more formalized legal education, "reading law" continued to be an acceptable and to some even preferable method of training for a career in law. Since territorial days, requirements to be admitted to practice in Kansas had been minimal. It was required only that the candidate be of good moral character and well qualified in knowledge of the law. The extent of the candidate's knowledge was invariably determined by the several district judges and was notoriously desultory. There was no statewide examination until 1903. Anyone admitted to practice at the district court would, on motion, be admitted to the Kansas Supreme Court.[162]

Law office study was a viable option to law school in Kansas until well into the twentieth century. Although statutory authority was not repealed until 1968, the Kansas Supreme Court gradually tightened the rules to the point where reading law became a difficult and unattractive option.[163] After July 1, 1926, prospective law office apprentices were required to devote at least twenty hours weekly to their studies for at least thirty-six weeks per year. In addition, they were required to pursue the course of study prescribed by the University of Kansas Law School, including the same books. The rules required students and their "preceptors" to report to the Board of Law Examiners twice a year, reporting the time devoted and the studies undertaken by the student during the preceding six months.[164]

The Kansas Supreme Court revised its rules in 1939. The amended rules required a preceptor to spend at least one hour a day with his students discussing the subjects being studied. At the end of each eighteen-week period, the student was to be given an examination composed of at least fifteen questions. The questions and answers were sent to the Clerk of the Kansas Supreme Court, and the Board of Law Examiners graded them. Upon failing the examination in any subject, a student was required to repeat the examinations until he successfully passed the subject.[165]

As of 1900, more than half of American lawyers had not attended law school or even college. Indeed, as late as 1904, only half the nation's law schools had a minimum age for admission, and only seven required a high school diploma.[166] The law school at the University of

161. *Id*.
162. John J. Fontron, *The KBA Story*, *in* REQUISITE LEARNING AND GOOD MORAL CHARACTER 10-11 (Robert W. Richmond ed., 1982).
163. *See* James M. Concannon, *The Other Law Schools of Early Day Kansas*, J. KAN B. ASS'N, Nov. 1996, at 24.
164. Fontron, *supra* note 162, at 11.
165. *Id*.
166. Concannon, *supra* note 163, at 25 & n.4.

Kansas resisted an imposition of admission standards for many years on populist grounds.[167]

When Washburn Law School opened in 1903, the Washburn Bulletin Announcement declared,

> It is not deemed advisable to require a college degree for admission, as such requirement would exclude many who are abundantly qualified to pursue the study of law and to become practitioners, who cannot afford to spend the time and money required to complete the college course before beginning their professional study . . . . Students are urged, however, to preface their legal study with a college course wherever practicable.[168]

VI. CONCLUSION

American legal education has evolved considerably from the days when colonial aspirants endlessly copied papers and struggled to master medieval legal texts. Despite the advent of university-based legal education, the notion that law was primarily a craft and that practical training trumped theory persisted for many years.

Overtones of the dispute of law as a science or an art continue today in the debate over the value of clinical programs. Although legal clinic in some form is offered as an elective in almost every law school today, it was not always so. Clinical education represents a compromise between those who believe some sort of apprenticeship should be required before certification and those who think the scholastic method should be pristine. The history of early American legal education suggests that the practice of law is actually both: a science that can and should be taught and an art that can only be learned by doing.

167. Paul D. Carrington, *Legal Education for the People: Populism and Civic Virtue*, 43 U. KAN. L. REV. 1, 17 (1994).

168. WASHBURN COLL. SCH. OF LAW, WASHBURN COLLEGE BULLETIN: ANNOUNCEMENTS FOR THE ACADEMIC YEAR 1903-1904, at 5 (June 1903).