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A Global Tour of Legal Education's Primary Teaching Methods

The Persistence of Tradition

[E]xperience may teach us to foretell that a lawyer thus educated to the bar [by apprenticeship], in subservience to attorneys and solicitors, will find that he has begun at the wrong end . . . And what the consequences may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure and illiterate men, is a matter of very public concern. The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education.

Blackstone's *Commentaries*, 1773[1]

But in point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing. This is particularly true of the American law schools . . . and it is more particularly true the more consistently the "case method" is adhered to. These schools devote themselves with great singleness to the training of practitioners, as distinct from jurists; and their teachers stand in a relation to their students analogous to that in which the "coaches" stand to the athletes. What is had in view is the exigencies, expedients and strategy of successful practice; and not so much a grasp of even those quasi-scientific articles of metaphysics that lie at the root of the legal system.

Thorstein Veblen, *The Higher Learning in America*, 1918[2]

[1] William Blackstone, *On the Study of Law*, *in Commentaries on the Laws of England* 6, 33 (5th ed. 1773); *see also* Albert J. Harno, Legal Education in the United States 13–14 (1953); *Blackstones's Commentaries on the Laws of England Introduction*, Yale Law Sch. Avalon Project, http://avalon.law.yale.edu/18th_century/blackstone_intro.asp#1 (last visited Jan. 25, 2017).

[2] Gilbert Geis, *Thorsten Veblen on Legal Education*, 10 *J. Legal Educ.* 62 (1957). *See generally* Thorstein Veblen, *The Higher Learning In America: A Memorandum on the Conduct*

These two statements, both from giants of that day in their fields, frame the central issues of this chapter: the where, or proper place, for legal education, and the how, or methods for teaching and learning law. These two questions are inextricably tied together for legal educators throughout the world, where virtually all legal training is done either by university study or apprenticeship, or by some combination of the two. If Blackstone, the jurist, was correct that the apprenticeship system could not effectively train lawyers, and Veblen, the economist, was correct that the university could not train lawyers effectively with the case method, formal legal education arguably had no place at all. William Blackstone, here speaking through his classic *Commentaries*, was making the case for university education in the England of his time, arguing against the apprenticeship system for training in law that prevailed then, and which still plays a role in legal training throughout most of the world. Blackstone made these arguments as the first university lecturer in law at Oxford, where he had begun teaching law in 1753. At the time, "legal education in England was at its nadir," and Blackstone was attempting to make the case for a university education of lawyers. His were the first lectures on English law ever given in a university.[3] Veblen, writing in the early twentieth century, was reacting to the rapid change then occurring in moving legal study into the university, powered, in the US context, largely by the case method of study. His iconoclastic views did not prevail, and university legal education became the norm.

Though Blackstone's treatise survives as one of the classics of the common law, he failed in his quest to draw legal education into the university, at least during his day.[4] England had trained its lawyers, and would continue to do so long after Blackstone wrote, through apprenticeship, focused primarily in the prestigious and elitist Inns of Court.[5] One can only wonder whether the lawyers of the Inns are the "obscure and illiterate men" to whom Blackstone refers. England had taken its own route – it had rejected the university tradition of legal education so prevalent in continental Europe. There, education of lawyers, it has been argued, began in universities as early as the late second or early third century. Beirut's law school was, at that time, "the

of Universities by Business Men, http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/veblen/higher (last visited Jan. 25, 2017) (clarifying that Veblen was a sociologist and economist, not a lawyer).

[3] Harno, *supra* note 1, at 11.

[4] Harno, *supra* note 1, at 8 ("Blackstone sought to establish a 'system of legal education,' and in that he failed."). Influence of the *Commentaries* was widespread among lawyers reading law prior to ascendance of the university, and within the early US law schools.

[5] *See, e.g.*, J. H. Baker, *The Third University of England: The Inns of Court and the Common Law Tradition* 1 (London: Seldon Society ed., 1990).

most renowned of all the law schools of the Eastern [Roman] Empire before Justinian."[6] That tradition continued through the establishment of the illustrious Bologna University, in the twelfth century, and on to the great universities of Germany and France during the Enlightenment and beyond. In Western Europe, that strong tradition of generally open, accessible, and publically supported university education continues today. Embedded in that tradition is a pedagogical method that is also as old as the Middle Ages. That method combines lecture, memorization, and rote recitation on exams; it has not varied, despite repeated calls to make law school education more relevant to beginning practitioners.

The same tenacity of tradition is true today for the primary method of legal education in the United States, although for reasons that have more to do with its distinctive history of the development of legal education, rather than its shared common law tradition with England. In England, Blackstone was eventually vindicated, and legal education moved into British universities. That move to formal university education was only fully accomplished, however, as recently as the 1970s.[7] In the United States, as in Britain, legal education evolved from the apprentice system to newly emerging universities. By the end of the second decade of the twentieth century, legal education in the university had virtually replaced the apprenticeship, but not without its caustic detractors, as Veblen's condemnation of university legal education so aptly demonstrates. Apprenticeship and university education are the historically competing contexts of legal education.

This chapter will broadly examine these two elements of legal education around the world, then turn to their development on the European Continent and in the United States. Legal education in the United States is a hybrid of both continental and English traditions, showing influence from both.

A THUMBNAIL SKETCH OF THE STRUCTURE AND METHODS OF GLOBAL LEGAL EDUCATION

This section does not purport to be a comprehensive overview of legal education. Instead, I focus very broadly and briefly on the core structures of legal education, and on its signature methodologies around the world. The core

[6] H. D. Hazeltine, *Ancient and Mediaeval Legal Profession and Legal Education*, *in* 9 *Encyclopedia of the Social Sciences*, 324, 327 (Edwin R. A. Seligman & Alvin Johnson eds., 1933).

[7] Andrew Boon & Julian Webb, *Legal Education and Training in England and Wales: Back to the Future?*, 58 *J. Legal Educ.* 79, 87 (2008) (noting that solicitors' study became a graduate-entry profession only after a Parliamentary report issued in 1971).

structure, with very few exceptions that include the United States, is undergraduate study of four or five years in duration, followed by a period of practical training varying in length from six months to three years, the former managed by the academy and the latter by the practicing bar. The core methods of law teaching are the lecture and the case method. There are, of course, variations of these methods, and some classroom teachers do not use them extensively or, rarely, at all. However, they are the signature structures and methods of law instruction in preparation for practice. They are key to our discussion here because clinical legal education can be seen either as a complement to them or a direct challenge to their core utility.

In the beginning, law belonged to the conquerors. Conquerors took their legal systems with them, and their law "either replaced indigenous law, or the latter was adapted to the purposes of the conqueror."[8] Part of that legal culture included structures for legal education, whether through formal classes or through the traditional apprenticeship to a practicing lawyer. The first great conquerors of the Common Era were the Romans, who spread law and legal education deep into most of Europe and Eurasia between 27 BC and AD 476.[9] European nations later took up the mantle of occupier and conqueror, both commercial and military, from the discovery of the Americas through the French Revolution and beyond. The map of what we could call the global south today was profoundly affected by the continental countries who conquered and colonized during the sixteenth through the nineteenth centuries: Italy, the Netherlands, Spain, Portugal, France, and Germany all had their turns as great colonial powers, with Great Britain taking over as reigning imperialist through much of the nineteenth century.

The great codifications of the civil law tradition – the Justinian Code of 534, the *Siete Partidas* (Seven Part Code) of Spain in 1265, and the Napoleonic Code of 1804 – all had their origins on the Continent, and all took root, in some places more than in others, throughout the global south: Latin America, Africa, and much of South Asia. These code-based countries broadly make up the civil law tradition, "the dominant legal tradition in Europe, all of Latin America, many parts of Asia and Africa, and even a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico),"[10] thus making it

[8] John R. Schmidhauser, *Power, Legal Imperialism, and Dependency*, 23 *Law & Soc'y Rev.* 857, 871 (1989).

[9] An alternative thesis for the origins of law's proliferation comes from the East, in the Indus Valley region, as set out in a book-length law review article on that topic. *See* Robin Bradley Kar, *Western Legal Prehistory: Reconstructing the Hidden Origins of Western Law and Civilization*, 2012 U. Ill. L. Rev. 1499. I will not rehearse that line of argument further.

[10] John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 3 (3d ed. 2007).

"the older, more widely distributed, and more influential" legal tradition, as contrasted with the common law.[11]

The common law tradition of Great Britain was widely adopted in the vast British Empire, reflected in today's fifty-three member countries of the Commonwealth,[12] and it still dominates the legal systems of Canada, India, Australia, some of southern Africa, and many of the Caribbean and South Asian islands. These two systems account for the structures of legal education in the vast majority of the world today. There are, to be sure, other legal structures and traditions, including those of Muslim law, or Sharia; customary tribal law in Africa and other traditional societies; law of the Far East and Hindu cultures; and a few countries, including China, that purport to practice a version of Socialist law.[13] The civil and common law, however, provide us with the vast majority of modern national structures for legal education. The United States presents its own unique history and will be discussed at the close of this chapter and in the four chapters that follow, particularly as the origins of that structure affect the pedagogy of practice.

Legal education, then, has broadly followed the colonizer's legal traditions, as will be amply documented throughout this volume. In the broad sweep of things, the teaching method of the university law school in the countries of the civil law tradition – Western Europe and its now-independent former colonies throughout the world – is the lecture. Code memorization and manipulation dominates the classrooms of these countries. University education in law is, despite some recent reforms in Europe, an undergraduate program controlled by universities, followed by a period of practical training controlled by the bar, as is also true for Britain and many of its former colonies, making US law study as a graduate program without the attendant apprenticeship the exception rather than the rule.[14] As any law student in the United States can

[11] *Id.* at 1.

[12] *See* Commonwealth, *Member countries*, http://thecommonwealth.org/member-countries (last visited on Jan. 25, 2017).

[13] *Compare* René David & John E.C. Brierley, Major Legal Systems in the World Today (3d ed. 1985), with Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, Comparative Legal Traditions: Text, Materials and Cases on Western Law (3d ed. 2007) (covering the civil law and common law traditions only).

[14] India provides another example where licensure can occur after a three-year postgraduate period of study followed by passage of a bar exam, with no apprenticeship. *See*, N. R. Madhava Menon, *The Transformation of Indian Legal Education: A Blue Paper*, Harvard Law Sch. Program on the Legal Profession (2012), https://clp.law.harvard.edu/assets/Menon_Blue_Paper.pdf. *But see*, A Handbook on Clinical Legal Education 238 (N. R. Madhava Menon ed., 1998) (describing the five-year undergraduate LL.B. program of the National Law School of India, founded in 1987 and including a strong component of clinical legal education). I have made efforts to document the role of practice in legal training as a rapporteur for the Congress of the International Academy of Comparative Law in 2012, held in Washington,

attest, the primary method of teaching in law schools, uniformly throughout its some 200 law schools, is the case-dialogue method, at least through the first year and often well beyond that. The case method is a system driven by published casebooks in which the student reads appellate judicial decisions and extracts general principles from them through a process of discussion with the teacher in the classroom. The method, together with its cadre of required first-year courses, has persisted since its origins around 1870, largely unchanged, in the vast majority of US law schools. Its dominance makes it the signature pedagogy of US legal education,[15] just as the lecture is the signature pedagogy of the continental countries and their colonial offspring.

While there are many distinct aspects to the two signature pedagogies of legal education – lecture and case method – for our purposes, there are four important common characteristics: both methods are generally taught in medium to very large classrooms; both methods purport to present organized principles of legal doctrine; neither method involves students in experiential learning; and student learning generally is tested through summative rather than formative assessment. The term "large" classroom is relative; a large classroom in a European law lecture hall might seat 1,000 students or more, while a large classroom in law schools of the United States seldom exceeds 150. The implications of the large classroom experience are at least threefold. First, a large space immediately puts distance, physical and emotional, between student and teacher. Second, by implication, the teacher is

DC. *See* Richard J. Wilson, *The Role of Practice in Legal Education, in General Reports of the XVIIIth Congress of the International Academy of Comparative Law* 57 (Karen B. Brown & David V. Snyder eds., 2012). The process again demonstrated to me how the academy and the practicing bar view their training roles – in the classroom and in practical training after graduation but prior to professional licensure – in radically different and isolated ways. The scholarship on practical training is almost non-existent, as the academy is uninterested and the bar is too busy.

[15] "For their part, [US] law schools use case-dialogue teaching almost exclusively in the first phase of doctrinal instruction." William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 50 (Carnegie Found. for the Advancement of Teaching ed., 2007) [hereinafter Carnegie Report]. The Report goes on to discuss the burdens of the case-dialogue method as the signature pedagogy of US law schools. *Id.* at 50–59. *See also* Robin L. West, Teaching Law: Justice, Politics and the Demands of Professionalism 184 (2014) ("Thus, there have been no significant reforms in the required first-year curriculum and no attempt to articulate a recommended curriculum for the upper-level years – although there have been scores of additions to that elective curriculum – since the Langdellian model was birthed at Harvard, almost 140 years ago."). Even a recent book reviewing the excellent teaching practices of twenty-six US law teachers never questioned the fundamental reliance by classroom teachers on the casebook as the primary source of teaching materials. *See* Michael Hunter Schwartz, Gerald F. Hess & Sophie M. Sparrow, What the Best Law Teachers Do (2013).

a distant authority figure who is often not seen or spoken to outside of the classroom. Third, large-classroom legal education is relatively inexpensive, if measured by student-to-faculty ratios.

Both methods are doctrinal in the sense that they do not purport to teach the student the skills of law practice itself; rather, they are intended to teach principles, rules, and sometimes policies, although they may use different techniques to achieve that end. Legal doctrine is said to be that rational, neutral set of principles that governs the operation of law. This kind of training aptly has been called the apprenticeship of thinking and is one of the three apprenticeships shared by all professional training, according to the Carnegie report: the apprenticeships of thinking, performing, and behaving like a professional.[16]

Finally, legal education generally tests for student comprehension in summative rather than formative ways. Summative evaluation is evaluation after a learning activity has been completed, while formative assessment measures comprehension throughout the learning process. Summative assessment is much more typical than formative in legal education, usually through a single examination at the end of the semester, though some few professors use mid-term exams as well. Formative assessment can involve periodic quizzes and continuous feedback in response to student performance, which allows the student to adjust and adopt new learning behaviors. While summative evaluation can effectively measure achievement, it cannot assess student comprehension and adjust course to ensure maximization of the learning process; a single exam at the end of the semester is simply too late for that.[17] In sum then, legal education worldwide generally focuses on the apprenticeship of thinking to the exclusion of the performance and behavioral apprenticeships.

There is precious little scholarship on the history of legal education, but it is not the primary goal of this chapter to summarize that scholarship. Instead, it argues that legal education within the academy, virtually everywhere, has stayed far away from focus on the apprenticeships of performance and behavior or professional conduct, both of which are essential elements of any profession. There are deep-seated historical reasons for the tenacity of tradition in legal education, both here and abroad, many of which can be found in their origins. The following sections, then, will explore the origins of modern university legal education in continental Europe and the United States.

[16] Carnegie Report, *supra* note 15, at 27–29.

[17] For an extended discussion and defense of formative versus summative assessment, *see id.* at 164–176.

The Lecture Method is Born in Europe: "Bologna 1.0"

The history of legal education in Europe, until well into the twentieth century, developed in two deeply different directions, both of which are relatively well-known and well-covered in legal scholarship. On the Continent, in the civil law tradition, legal education has been solidly controlled by public universities since the Middle Ages, and the academic scholar, supported by the state, still controls not only legal education but the "creation" of law itself.[18] As the renowned scholar of the civil law tradition John Henry Merryman has noted, it is not the lawyers or judges who are the most important actors of the civil law, but the professoriate: "The teacher-scholar is the real protagonist of the civil law tradition. The civil law is the law of the professors."[19]

Continental Europe's history of legal education spans close to a thousand years. A scholar of these origins calls the tradition of university instruction in law "the salient characteristic of the civil law tradition."[20] While there is some debate as to the origins of university legal education in antiquity,[21] there is general agreement that legal education has its modern roots in the twelfth century, when "Bologna began its brilliant career as a school of Roman law under Irnerius, its founder."[22] Professor Clark suggests that legal education of that era evolved from the more secular leanings of Bologna and the ongoing efforts of the Catholic Church to maintain control over canon law instruction consistent with church views.[23] Bologna's own seal indicates that it opened in 1088, but law offerings began later, after about 1130.[24] Bologna continued as one of the premier universities offering legal education throughout the Middle Ages and beyond and can be said to be the cradle of formal legal education in both Roman and canon law. Bologna's organization of law courses served as a model for universities that quickly proliferated in France, Germany, Spain, and England. I refer to the original Bologna innovations as "Bologna 1.0" to distinguish them from the contemporary Bologna Process, a European reform movement in legal education that I refer to as "Bologna 2.0" here and in later chapters.

[18] Merryman & Pérez-Perdomo, *supra* note 10, at 56 *et seq*. [19] *Id.* at 56.
[20] David S. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 *Am. J. Comp. L.* 653 (1987) [hereinafter Clark, *Medieval Origins*].
[21] *See* Hazeltine, *supra* note 6, at 324, 327 (suggesting the first law schools could be found scattered through the Roman Empire as early as the fifth century, in Rome, Beirut, Alexandria, Caesarea, and Athens).
[22] *Id.* at 329. [23] Clark, *Medieval Origins*, *supra* note 20, at 671, 675 *et. seq*.
[24] *Id.* at 681. This view is supported by the Yale historian Anders Winroth. *See* Anders Winroth, *Origins of Legal Education in Medieval Europe* 2 (unpublished manuscript) (on file with author).

Four dimensions to early legal education require development here. First, as with all aspects of life in the Middle Ages, legal education was closely related to developments within the church. Educated men (and *only* men) of the era were often churchmen, and the church controlled libraries and even literacy itself, providing advanced training to those who held religious posts.[25] Those issues took on sharper focus when universities began to secularize more aggressively over time. Second, and related, because of the need to travel to universities, and to pay for classes once there, students were often from wealthy or aristocratic origins.[26] This was true generally, but no place reflected this phenomenon more than the system of the Inns of Court in England, where students, "for the most part of noble birth, learned not only English law but history, Scripture, music, dancing and other noblemen's pastimes."[27] Over time, this contributed to the third noteworthy dimension: the development of two distinctly governed legal professions, with England controlled almost entirely by the lawyers themselves, within the Inns rather than the great British universities of Oxford and Cambridge, and with the European continent governed almost completely by the universities, which held the key to access to the profession through systems of examination.

The fourth dimension of the new university legal education in Western Europe during the Middle Ages requires more extended comment by virtue of its relevance to the topic at hand. This is the introduction of the concept of teaching method in university legal education. The classic university legal education was, at its birth, distinguished by rigid formalism through lecture unaccompanied by readings, as well as a relatively weak and ineffectual system of apprenticeships.

Bologna's law professors began their mornings with what were called "ordinary lectures," that is, lectures that contained the most essential materials from the highly structured readings, whether in Roman law or canon law. Much of the lecture consisted of simply reading the text, since most of the students did not have access to personal books. As Professor Clark explains in greater detail than necessary here, the glossator, a scholar of the texts in question, lectured following highly formal steps: title under consideration; summarization of each law under discussion; a reading aloud of the text (including, in some cases, its repetition); presentation of similar or contrary legal provisions; clarification of the text through formal arguments and pairings of opposing

[25] This is a central thesis of Professor Clark's article. Clark, *Medieval Origins*, *supra* note 20.
[26] *Id.* at 681. Books were rare and extremely expensive, although the great majority of the books of the time were law books. Books were more often rented than bought. *Id.* at 698.
[27] Hazeltine, *supra* note 6, at 332.

arguments; and finally the glossator's own interpretations. Only then could students offer questions or discussion.[28] This system carried forward into all of the universities of the day throughout the Continent, leading to a system "in which an enormous mass of doctrine must be learned by heart and retained in memory." Exact replication of the lecturer's statements represented then, and still represents today, "the standard of success in legal education."[29]

From the very beginnings of university legal education, distinctions emerged based on one's level of attainment in university, and distinctions developed between the *advocatus* and the *procurator*, with the *advocatus* claiming the higher level of formal university training.[30] These distinctions, though now slowly eroding, persist in the distinctions between barrister and solicitor in the English system, with variations maintained throughout much of Europe and its colonial empires in the New World, Africa and Asia.

But university education did not prepare the student for practice; such was not part of its design or goals. Complete legal training, even from the very beginning, required a period of practical training, called by one scholar a "more or less organized apprenticeship." These periods of practical training were often "no more than a close association with older adepts or the frequent observation of the conduct of legal business." Most, however, were compulsory, and occasionally, as in Paris, they were combined with lectures in the guildhall or its equivalent.[31]

Theory reigned supreme in the transmission of doctrine in the classroom. This formalism was explicable for one justifiable reason, central to the times: there were precious few books, and those that did exist lay well beyond the means of even the most affluent student. Law's teachers, in their formulaic lectures, replaced books with their textual recitations. Having established the tradition, the structured lecture – with the learned professor at center-stage, master and sole controller of sources – dominated legal education then as it does today in the region's universities.

I do not mean to imply that legal education's central method has remained unchanged on the Continent since the Middle Ages, but one must ask just how far it has come, and how educational methods have evolved, particularly with exploding knowledge of adult learning theory so prevalent in other arenas of teaching and learning. Legal education, uniformly and unfortunately, has failed to adapt based on new educational theory; most law teachers

[28] Clark, *Medieval Origins*, *supra* note 20, at 697.
[29] Max Radin, *Legal Profession and Legal Education: Modern Legal Education*, in 9 *Encyclopedia of the Social Sciences* 334, 336 (Edwin R.A. Seligman & Alvin Johnson eds., 1933).
[30] *Id.* at 334. [31] *Id.*