Origins of Modern Professional Education: The Harvard Case Method Conceived As Clinical Instruction In Law

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Abstract

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KEYWORDS: harvard, clinical, law
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INTRODUCTION

The following analysis attempts to resituate discussion about legal education within the context of modern professionalism and the social history of American education.¹ Particular focus is given to the rise of clinical instruction in legal education during the period after 1870.²

Section One reviews the genesis of clinical education at the Harvard Medical School after 1870. Section Two reveals how the case method of legal instruction was introduced as a clinical form of education at the Harvard Law School during the same period. Section Three confronts the reasons why the case method of law teaching has failed to be designated "clinical" instruction during the past fifty years. Section Four demonstrates the close relationship between the rise of the case method law school and the modernization of professional culture. Section Five displays the dynamic self-consciousness of Harvard's leadership in creating the new model law school which set an example for all others. Section Six concludes with an evaluation of the need for regarding legal education as a social relation.

* B.A., Wisconsin, 1972; J.D., Wayne State, 1978; LL.M. Harvard Law School, 1979; Assistant Professor of Law, Nova University Center for the Study of Law. I would like to express my appreciation to Professors Elizabeth Mensch, Morton Horwitz, Duncan Kennedy, John Schlegel, and Robert Gordon for encouragement and criticism, and to Professor William Nelson and the Northeast group of the American Society for Legal History for an opportunity to present some of the ideas in this essay to a regional meeting in New Haven. I would like to thank Ms. Robin Hornstein for typing the manuscript.


I. MEDICAL EDUCATION

In his outline history of the Harvard Medical School, published in 1930, Dr. Frederick C. Shattuck indicates that up until Charles W. Eliot's appointment as President of Harvard University in 1869, the lectures offered to students at the Harvard Medical School were essentially designed to supplement the prevailing practice of apprenticeship "whereby a student attached himself to an older physician and thus learned the art from practical training." Although most historical writing on medical education at Harvard immediately after 1870 constitutes, in essence, a catalogue of the dramatic changes which Eliot brought about in the school, it can be fairly stated that his whole reform program represented a kind of compromise between the lecture and treatise method and the autonomous apprentice system. The result was the first modern professional school of medicine in America. 4

Drs. Henry K. Beecher and Mark D. Altschule, in their recent history of medicine at Harvard, characterize the situation confronted by Eliot:

Until Eliot arrived on the administrative scene in 1869, the Harvard Medical School was a poor thing, unworthy to be associated with Harvard College... Each candidate for a degree was obliged to buy tickets to each of the courses for at least one year. Twice a week there was a 'clinical medical visit' at the Massachusetts General Hospital for one hour, and on Saturday morning an operative session. (Of the 127 students attending, 31 held a college degree.) There was no gradation of studies, no laboratories, no private courses, no individual instruction. There were two courses of lectures of four months each. The remainder of the students' work was, theoretically at least, supervised by the outside instructors to whom the students were apprenticed, more or less, for three years. How much this apprenticeship amounted to depended upon the habits and inclinations of the instructor involved. It might be great or it might be essentially useless. Some students were able to see many cases of disease, and some none at all. In the crucial year of 1871 the three-year graded course was adopted and the apprenticeship


terminated.  

Rather than constituting a stride away from the concrete and the practical in medical education, however, Eliot’s termination of the apprentice system revealed his desire to bring direct experience with patients within the controlled and regularized structure of university medical education where it could be made systematic and could also be guaranteed. Just as the lecture and treatise method of teaching gradually lost force in the Harvard Law School during Eliot’s presidency, the same method was gradually cut back in the medical school as well. It is precisely the bringing of direct and practical experience with patients from the realm of informal apprenticeship into the controlled environment of university professional education which constitutes the genesis of clinical instruction in American pedagogy. Apprenticeship is uneven and mundane while clinical education is sophisticated and special.

Addressing the Medical Society of the State of New York in 1896, Eliot commented on the instructional changes which he brought about in the Harvard Medical School:

Thirty years ago there were only two laboratories in the Harvard Medical School - a dissecting-room, in which the manners and customs were as rough and unwholesome as the room and its accessories, and a little chemical laboratory in which no one was required to work. A small minority of the students voluntarily sought some laboratory training in chemistry. In our present medical school laboratory work of many sorts demands a large part of the student’s attention. There are laboratories in anatomy, medical chemistry, physiology, histology, embryology, pathology, and bacteriology; and in all these some work is prescribed, and additional work is done by many. In clinical teaching, moreover, the change is great. Formerly a large group of students accompanied a visiting physician on his rounds at the hospital, and saw what they could under very disadvantageous conditions. Now instruction has become, in many clinical departments, absolutely individual, the instructor dealing with one student at a time, and personally showing him how to see, hear, and touch for himself in all sorts of difficult observation and manipulation. Much instruction is given to small groups of students, three or four at a time - no more than can actually see and touch for themselves. A four

years' course of training such as I have described has a high degree of training-power both for the senses and the reason. The old medical teaching was largely exposition; it gave information at long range about things and processes which were not within reach or sight at the moment. The new medical education aims at imparting manual and ocular skill, and cultivating the mental powers of close attention through prolonged investigations at close quarters with the facts, and of just reasoning on the evidence. 6

This long statement of Eliot's pedagogical faith in the concrete and the practical as the basis of true education reveals his hostility to the lecture and treatise method ("the old medical teaching") which be sought to undercut throughout university instruction. Even in the college, Eliot replaced the "plain lecture, without carefully organized aids," 7 with one supplemented by prescribed reading, periodic written examinations, frequent recitations, and careful surveillance of student production and performance by younger faculty.

"While some spoke nostalgically of training systems that prevailed in the early nineteenth century," writes historian James Gilbert

not every observer had the same feelings. As Charles Eliot of Harvard noted, the fashion of studying medicine by caring for the doctor's horse and buggy or the study of law by copying deeds was, happily, gone forever. There were "better ways of studying medicine or law, namely, by going to professional school, where progressive, systematic instruction rapidly developed is to be had." 8

Thus Eliot's contribution to modern professional education consisted of a struggle on two fronts: against the expository lecture tradition in the schools, on the one hand, and against the independent apprenticeship outside the schools, on the other. The development of laboratory, clinical, and case method instruction in the professional schools ("cultivating the mental powers of close attention through pro-

7. C. Eliot, University Administration 180 (1908).
longed investigations at close quarters with the facts, and of just rea-
soning on the evidence")9 dealt a fatal blow to both the lecture and
treatise academies and the apprentice system. Neither of the latter
could guarantee direct student participation in the professional project
as well as systematic and comprehensive instruction.

As Eliot knew, clinical education had developed within French
medicine during the Revolution of 1789 as a compromise between the
"Gothic universities and aristocratic academies" whose lecture system
had trained French doctors under the ancient regime, and the tempo-
rary experiment in total liberty under which there was no organization
of or control over professional education in medicine.10 In a very inter-
esting passage concerning the birth of the clinic, Michel Foucault
points out:

On what was the distinction based among those practising the art of
healing? The most important part of the training of an officer of health
was his years of practice, which might be as many as six; the doctor, on
the other hand, complemented his theoretical training with clinical expe-
rience. It was no doubt this difference between the practical and the
clinical that was the most innovatory factor in the legislation of the Year
XI. The practice required of the officer of health was a controlled empir-
icism: a question of knowing what to do after seeing; experience was
integrated at the level of perception, memory, and repetition, that is, at
the level of the example. In the clinic, it was a question of a much more
subtle and complex structure in which the integration of experience oc-
curred in a gaze that was at the same time knowledge, a gaze that exists,
that was master of its truth, and free of all example, even if at times it
had made use of them. Practice would be opened up to the officers of
health, but the doctors would reserve the initiation into the clinic to
themselves.11

Thus, marvellously Janus-faced since its inception within the Eu-
ropean bourgeoisie's struggle against the older order, the clinic
presented itself as practical and popular in relation to the old lecture
academies as well as transcendent and knowledgable when confronted
by the radically democratic effort to completely destroy restrictions

9. See note 6 supra and accompanying text.
10. See Chase, supra note 2, at 343-44.
upon professional entry. It was just this sort of passage which Charles Eliot attempted to steer for clinical medicine through the competing obstacles of the entrenched lecture faculties in the schools and the surviving apprentice tradition among practitioners of the art. Against apprenticeship, the contrast would be drawn between art and science, between artisans and professionals. Against the established schools, the contrast was between mental laxity and rigour, between abstract theory and the kind of judicious reasoning courted by practical men.\textsuperscript{12}

Although the early victories won by clinical instruction at the Harvard Medical School made it the model for all subsequent medical education in the United States, the medical school never achieved during the nineteenth century or early twentieth the kind of preeminence secured by the Harvard Law School. The reason was simply that the medical school failed to develop its own teaching hospital (or relations with Boston medical facilities) which would have permitted the clinical program to fully blossom.

Dr. Shattuck observed at a meeting of the Boston Society for Medical Improvement in 1900 that “(t)he fact that the Harvard Medical School has no hospital of its own, not even an out-patient clinic, is an obtrusive fact. However welcome, the school is still a guest of the hospitals and must adapt itself to rules and regulations which are not necessarily uniform.”\textsuperscript{13} Thirty years later, after favorable relations had been developed with the Massachusetts General Hospital and Boston Children’s Hospital, and an Out-Patient Department was set up in one of the school buildings, Shattuck remarked that the construction of Peter Bent Brigham Hospital signaled the eventual resolution of the clinical teaching problem at Harvard. The school’s potential was finally realized.\textsuperscript{14}

The significance of Eliot’s successful struggle against both the old Harvard medical faculty and the surviving apprentice system cannot be sufficiently emphasized. In spite of their apparent recognition of the disastrous state of medical apprenticeship after the Civil War,\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{12} See Chase \textit{supra} note 2, at 336-40. See also the text of sections II and V \textit{infra}.
\item \textsuperscript{13} F. Shattuck, \textit{Reports of Societies: Boston Society for Medical Improvement}, 142 B. MED. & SURGICAL J. 567, 568 (1900).
\item \textsuperscript{14} See Shattuck, \textit{supra} note 3, at 569-80.
\item \textsuperscript{15} See Beecher & Altschule, \textit{supra} note 5 and accompanying text.
\end{itemize}
Beecher and Altschule nevertheless make the following inexplicable argument:

Eliot had two definite avenues in mind for the rehabilitation of the Harvard Medical School. Both had to do with quality: of students and of the teaching. . . . In the second category he intended to eliminate the apprenticeship. Although these goals seemed laudable then, with the passage of time the second has been found to be not entirely sound. It is a curious thing that the apprentice system was (and sometimes still is) spoken of in terms of disdain, yet it still cares for at least 50 percent of medical education through the four to six years of intern and resident programs. The difference is that in the eighteenth and nineteenth centuries, the student was guided usually by a single preceptor, whereas in the late nineteenth and twentieth centuries there were and are multiple preceptors for each student. The principle is the same, and the difference is not important. 16

On the contrary, the principles underlying apprenticeship and modern clinical medicine are not the same. As Eliot understood perfectly, the difference was of extraordinary importance. Guided by a single preceptor, as even Beecher and Altschule seem to agree, in the nineteenth century meant often enough that the medical student was not guided at all. Yet professional supervision and individual instruction were for Eliot essential to clinical teaching. Under a single practitioner, what range of cases could a student hope to see? Only clinical experience in university hospitals and laboratories could secure systematic and comprehensive instruction. Indeed, doctors trained under the apprentice system frequently lacked even the manual and ocular skills necessary to carry out a diagnostic examination, given the advance of medical science and clinical instruction by the turn of the century. 17

Having indicated that Eliot terminated apprenticeships for Harvard Medical students in 1871, Beecher and Altschule then assert that the apprentice system “still cares for at least 50 percent of medical education through the four to six years of intern and resident programs.” 18 Thus, the authors seem uncertain of what they mean by “ap-

16. Id. at 93-94.
17. See Eliot, supra note 6 and accompanying text.
18. See note 16 supra and accompanying text.
prenticeship.” The relation between clinical rotations and clinical residencies, between medical schools, teaching hospitals and the medical profession appears to have rather little in common with the old apprenticeship training. Modern clinical medicine may be described as just one more version of apprenticeship only if one is willing to remove the designation “clinical” from its historical context and allow it to represent any educational system whatsoever, so long as there is at least some direct patient exposure involved. As in Foucault’s illustration drawn from French medicine, what was significant about clinical medical instruction was not what it had in common with apprenticeship (i.e., practical experience) but the way in which it was different: the clinic brought first hand training “for the senses and the reason” within the systematically organized and controlled space of professional institutions.

II. LEGAL EDUCATION

Initially, the clinical form of medical instruction at Harvard was presented as a model for the case method’s development.20 When defending the case method of instruction in the law school by comparing it to clinical instruction in the medical school, President Eliot urged that the analog within legal education to the hospital in medical education was not the court or law office, but rather the law library; law books were to the law student what the bodies of the sick and wounded were to the medical student. Only systematic study of case reports and their mode of reasoning could provide the law student with a professional education. This was implicitly, of course, an expression of contempt for the legal apprenticeship system whereby students prepared for the bar by studying in the office of a practicing attorney. Students, observed Eliot, who should habitually spend their time in courts or law offices would waste it. Like clinical instruction in medicine, the case method of teaching law constituted a compromise between the prevailing lecture and treatise method in the schools and the apprenticeship system outside the schools. Indeed, by bringing together cultivation of “mentat powers of close attention through pro-

19. See Foucault, supra note 11 and accompanying text.
longed investigations at close quarters with the facts" with a systematically organized institutional framework, the case method could be conceived as clinical instruction in law.

That the case method was perceived (following Eliot's analogy) to constitute clinical education in law is suggested by one critique of the method, advanced by an opponent. Professor Christopher G. Tiedeman of the Law Department of the University of the City of New York developed his analysis in the first volume of *The Yale Law Journal*. A special issue, published in 1892, was devoted to the increasingly controversial debate over "methods of legal education."

"Like the student of the different sciences," remarked Tiedeman, the law student must learn how to make original investigations for himself, and diagnose, so to speak, the principles of law from the cases in actual litigation. But no reason can be given why he must learn the whole science of the law by his own investigations in the undigested mass of raw material in the shape of adjudicated cases.

Tiedeman further argued that because students of clinical medicine had not been altogether denied the treatises within which previous research was recorded, law students under the case method should not be denied the use of "theoretic" or treatise material within their studies. This illustrates how far the case books had come to be the exclusive classroom textbooks under case method instruction.

Tiedeman felt the issue was one of "finding the middle and true ground of a controversy":

Impressed by the defects of the older systems of instruction, in which the law student was presented with more or less abstract propositions of law, with the aid of textbooks, which often were either nothing more than digests of the cases, and put together in an illogical and disorderly manner, or whose statements of the law were so loose and inaccurate as to prove misleading; and more impressed with the necessity of 'legal clinics' in the course of instruction in the law school instead of being left for acquisition in the law office, the advocates of instruction by

21. See note 6 supra and accompanying text.
23. See notes 30 & 31 infra and accompanying text.
cases have gone to the opposite extreme or placing too high a value upon the study of cases, and of unduly depreciating the value of the study of theoretic law, apart from learning it through the medium of practical law.24

Thus, Tiedeman acknowledges the improvements made by the case method law school and perceives the inadequacy of the previous abstract presentation in the old law schools, on the one hand, and of leaving the study cases to the law offices, on the other. He fully appreciates the kind of compromise which the case method law school represents.

Yet Tiedeman asserts that, in effect, a good thing has been carried too far. Without questioning the consolidation of professional legal education within the schools or the wisdom of placing case reports at the center of legal study, Tiedeman urges that secondary or discursive work should no more be eliminated from clinical legal education than it had been in clinical medical education. He concludes:

The advocates of instruction by the use of cases have effected an important reform in legal education by arousing the law schools of the country to the importance of infusing more life into their instruction, and of introducing into their curricula what I would call ‘legal clinics’, and for this great good the legal profession should be grateful to them.25

Like a scientist or doctor, the law student needed to learn to ‘diagnose’ principles of law from case reports. Many observers of American legal education, doubting that law constitutes a science in any rigorous way,26 have failed to recognize the relationship between clinical or laboratory instruction and case method teaching. The relationship was less between law and science than between systematic instruction in law and systematic instruction in medicine or the scientific disciplines. What these departments of the university had in common was their uniformly practical and systematic professional organization under President Eliot. Scientific study referred to practical and concrete instruction within a rationalized professional institution which shunned

25. Id. at 157.
26. See text at sections IV and V infra.
everything arbitrary and local (i.e., apprenticeship).27

Part of the confusion on this issue no doubt stems from the indirect form in which the case method was analogized by its sponsors to clinical instruction. Eliot, for example, analogized the law library (not the case method itself) to the hospital in clinical medicine.28 Dean Christopher Langdell deployed a similar metaphor thirteen years later:

[It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. . . . If it be not a science, it is a species of handicraft, and may be learned by serving an apprenticeship to one who practices it. . . . But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him, - then a university, and a university alone, can furnish every possible facility for teaching and learning law. . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.29

Langdell’s remarks may be read as an effort to bestow upon the law a conceptual character identical to that of the physical and biological sciences; in that event, the relation between the law school and the scientific and medical departments of the university might appropriately be viewed as one whose nature Langdell misunderstood. But Langdell was as committed as Eliot to the construction of university-based, professional legal education. If the practice of law was not a handicraft, and systematic professional education could not be secured through apprenticeship, then it would become necessary to regard law as a university science.

Eliot and Langdell both know well enough that the law library was

27. See note 108 infra and accompanying text.
28. See note 20 supra and accompanying text.
29. C. Langdell, Record of the Commemoration, November fifth to eighth, 1886, on the two hundred and fiftieth anniversary of the founding of Harvard College 97-98 (1887) (quoted in A. SUTHERLAND, THE LAW AT HARVARD 175 (1967)).
not the proper workshop of professional legal education nor were the printed books which were, in effect, the laboratory manuals of case method teaching to be found in the library. Eliot made this point clearly in his description of the case method's development at Harvard:

Professor Langdell's fundamental idea was that the law should be taught, not from treatises or from lectures which would probably be either imperfect treatises or commentaries on treatises, but at first hand from the records of actual cases in which important principles or practices had been laid down and established by judicial tribunals. . . . It soon appeared that it was highly inconvenient for the many students to get timely access to the few copies of the reports to which Professor Langdell referred them, and he therefore undertook the preparation of a collection of select cases on contracts. This selection was followed in a few years by a series of volumes of select cases on the subjects of instruction in the Harvard Law School, almost all of which were prepared by Professor Langdell's colleagues; and his method was gradually adopted by most of the teachers in the School. The possession of these volumes of cases makes it unnecessary for the student to resort incessantly to the volumes of reports on the library shelves, unless the professors revise their selections of cases, or wish to add cases of a date later than that of the volumes in use.

Thus it was primarily with their casebooks (rather than in the library) that law students prepared for classes and it was in the case method classroom itself (Tiedeman's 'legal clinics') where students not only demonstrated but in fact developed "the mental powers of close attention through prolonged investigations at close quarters with the facts, and of just reasoning on the evidence." Langdell's fundamental idea (as Eliot indicates) was that law should be taught systematically from concrete cases, by "teachers who have travelled the same road," and only in rationally organized, national professional schools.

Langdell sought to steer the same course as Eliot between the ab-

30. See Chase, supra note 2, at 332-336.
31. ELIOT, EDUCATIONAL REFORM 199-201 (1898).
32. See note 6 supra and accompanying text.
33. See note 29 supra and accompanying text. See also notes 61 & 81 infra and accompanying text.
34. See note 108 infra and accompanying text.
Abstract, expository lecture and treatise tradition and the artisan apprentice system, neither of which could guarantee a professional education. His and Eliot's definition of scientific discipline itself may have been exhausted by the kind of systematic and concrete instruction which everywhere came to supersede the conservative academies and discredited apprenticeship tradition as the fundamental organizing structure of modern professionalization. As one of Langdell's early students later made plain in *The American Law Register*:

In order to judge of Professor Langdell's success it is necessary to keep clearly in mind what was his aim. He asserted and believed that law is a science, but his vital proposition (for the purpose of weighing his work as a teacher) is not that law is a science, but that there is a scientific method of teaching and studying the law.35

III. THE REAL CLINIC IN LAW

Skepticism regarding the status of law as a science frequently amplifies a casual inattention to the relation between case method instruction and clinical education. For those less hostile to the association of law and science, misconceiving the law library as the laboratory of legal education has also contributed to the obscurity of the case method's role as clinical instruction in law.

Law librarian Edward F. Hess, Jr., for example, introduces the 1977 University of Illinois College of Law *Law Library Guide* with the following statement: "Beyond any other group on the campus law students make use of the library as the heart and soul of their education. It is trite but nevertheless true to say that the Law Library is the counterpart of the laboratory in medical or scientific education."36 So long as the law library is superficially apprehended as the law school's laboratory, the real link between case instruction and clinical teaching will be rendered less visible. Indeed, for the past fifty years the reference to clinical teaching in the law schools has oddly been reserved to survivals

35. W. Schofield, Christopher Columbus Langdell 55 O.S. 46 N.S. *The American Law Register* 281 (1907).
and rediscoveries of various kinds of apprenticeship.

Thus, during the 1930s, Jerome Frank was able to attack the case method law school (in behalf of what might be described as a regression to a form of apprentice system) and call his alternative a "clinical lawyer school." It is not unreasonable to argue that because Frank continued to feel that legal education should be confined to professional schools, his option was not so much a reversion to apprenticeship as it was a refinement of the modern professional school, with a greater tilt toward the "concrete and practical" (or perhaps a different conception of what was, after all, "practical").

Yet Frank seems not to have sensed at all the relationship between Langdell's (and Eliot's) transformation of the Harvard Law School and the development of systematic instruction throughout professional education. In perceiving the case method as fundamentally arcane rather than systematic and practical (in relation, alternatively, to the apprenticeship and the lecture method), Frank seems hardly to have understood the successful professional institution which he was criticizing and within whose ideological terrain he would have to justify his reforms so long as he believed law school should remain selective points of entry to the profession.

Certainly Frank was right to argue that the law schools did not provide their graduates with many practical skills essential to the practice of law. But the new professional schools did not pretend to provide that sort of training. However concrete and practical clinical instruction might be, it did not duplicate the character of merely artisan training. As Foucault points out clinical instruction was a species apart, a form of simultaneously direct and mediated experience, less a kind of artisan training than initiation into professional life.

The following observation by Boalt Hall Professor Preble Stolz from a 1969 paper on the failure of "clinical experience" in American legal education typifies the conceptual reduction of clinical instruction to merely artisan or practical experience, and its total divorce (as a term of reference) from the case method:

38. See note 11 supra and accompanying text.
39. In reference to the notion of "initiation", see Chase, supra note 2, at 344.
Modern legal education in this country begins at Harvard in 1870, but it was not until about the turn of the century that the model Langdell created at Cambridge began to be copied generally. Legal clinics have been associated with law schools since that time. As the name suggests, they were conceived on analogy to the medical school clinic where medical students were given exposure to sick people in the context of practice rather than the classroom. Clinical experience rapidly became a central part of medical education but a comparable kind of exposure to the real world of law practice, although repeatedly tried, has never been anything more than a fringe activity in legal education. Why?

Stolz answers his question with two assertions: first, “until quite recently clinical or practical experience ranked very low in the value structure of legal educators”; and second, uncertainty about the appropriate “form of the non-classroom experience,” given the poor reputation of “legal aid” bureaus, etc., has discouraged the development of clinical legal education.

At least Stolz’s first sentence is correct: the case method originated as the fundamental organizing principle of an entire law school at Harvard, as we have pointed out. Yet Stolz places the birth of “legal clinics” thirty years later, and seems unaware of the earlier characterization of the case method as a “legal clinic” and as the appropriate equivalent to the medical school clinic or hospital. He seems to equate clinical education in medicine with apprenticeship, not realizing that the clinic stands precisely between the classroom (the old lecture method) and practice (the daily rounds of a practicing physician).

Coming at the turn of the century, then, what actually did constitute Stolz’s “legal clinics”? He explains in a footnote: “There were student-organized ‘Dispensaries’ at the University of Pennsylvania and at Harvard before the turn of the century.” Now if the case method has been introduced at Harvard as a clinical or laboratory way of teaching law, a kind of legal clinic, and a very different kind of instruction is

41. Id.
42. Id. at 55.
43. See Chase, supra note 2, at 336-40.
44. Stolz, supra note 40, at 54 n.1.
introduced under the same name while Eliot and Langdell are both still on the scene, we might reasonably doubt the character of our analysis to this point. Stolz indicates that his information comes from A.Z. Reed's *Present-Day Law Schools in the United States.*

References to Reed, however, reveals the lameness of Stolz’s theorization. What Stoltz calls “legal clinics,” Reed describes as a response to the legal profession’s concern for social service. He indicates that the earliest manifestation of this interest “was the establishment of a ‘Dispensary’ by a law club of the University of Pennsylvania law school in 1893. Later, independent legal aid societies were started among the students at Harvard and at several other schools.” Harvard’s legal aid society, Reed indicates, was begun in 1913 - not “about the turn of the century” as Stolz indicates. Were these legal aid societies “conceived on analogy to the medical school clinic,” as Stolz proposes? According to *The Centennial History of the Harvard Law School:*

> In 1913 the Legal Aid Bureau was formed, as part of the activity of the Law School Society of Phillips Brooks House; it is now an entirely independent organization. It offers some of the older students an opportunity of engaging in welfare work while at the same time they acquire professional experience often more enlightening than can be gained in the specialized practice of the modern city office.

The legal aid societies would seem to have been modelled on private welfare and charitable organizations rather than clinical education in medicine. The systematic and comprehensive organization of concrete and practical experience in the case method law school presents a much sharper reflection of the clinical approach to medical instruction than the work of legal aid societies, Stolz’s “legal clinics.” Indeed, the attraction of legal aid work suggested by the law school’s *Centennial History* is not its compensation for the absence of clinical legal instruction in the law school, but rather its advantages over other forms and

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45. See A. Reed, *Present-Day Law Schools in the United States and Canada* (Carnegie Foundation Bulletin No. 21 (1928)).
46. Id. at 217.
47. See note 40 *supra* and accompanying text.
ways of acquiring “professional experience.” 49 The law school sought to provide its students with professional education, not professional experience, and the legal aid bureau’s “older students” did not appear to confuse the two.

Stolz's second reply to his query regarding the “failure” of clinical experience in legal education refers to the low repute of student legal aid bureaus conceived as “teaching institutions” resulting from their limitation “basically to the crisis needs of the very poor.” 50 Could the problem be less that such clinical experience is not valued by many legal educators than that such experience is not clinical in the context of Eliot’s transformation of modern professional education? Is such experience brought within the carefully administered process of professional transformation which is the essence of those programs sponsored by Eliot and which liquidated the apprentice system? What Stolz actually describes is not the failure of clinical experience in legal education but rather the ineffectual resurgence of apprenticeship within a modern professional school system.

The modulated degree of “exposure to the real world of law practice,” 51 which the case method has always represented, may simply constitute the closest relationship to actual practice within which the novicite law student may be safely placed with a certain guarantee of administrative control over the structure of professional education. Moot courts and law clubs, actively promoted by Dean Langdell, have long been a part of Harvard legal education and constitute, like the case method classroom, a concrete and practical experience which can be effectively controlled. 52

Stolz’s assertion that “practical experience” has ranked low among the pedagogical values of American legal educators certainly does not apply to the originators of the case method at Harvard, who gradually foreclosed the lecture and exposition tradition within American legal education. Professors Ames, Keener, Gray and Thayer 53 frequently

49. Id.
50. Stolz, supra note 40, at 55.
51. Id. note 40 and accompanying text.
52. See C. Warren, 2 History of the Harvard Law School 327-31, 413-16 (1908). During the Langdell period, law clubs gradually replaced the moot courts as the center of Harvard’s oral advocacy program.
53. See id. at 419-27; Sutherland, supra note 29, at 162-299.
found themselves defending the case method from an opposite claim: the charge that the case method was too practical and specific to actual adjudicated cases and the legal arguments advanced within them to be useful. "This method of studying law," asserted New York attorney James C. Carter in Langdell’s defense, by going to its original sources, is no royal road, no primrose path. It is full of difficulties. It requires struggle. If there is anything which is calculated to try the human faculties in the highest degree it is to take up the complicated facts of different cases; to separate the material from the immaterial, the relevant from the irrelevant; to assign to each element its due weight and limitation and to give to different competing principles and rules of law their due place in the conclusion that is to be formed, and I know on the other hand of no greater intellectual gratification than those which follow from the solution in this way of the great problems of the law as they successively present themselves.\(^{54}\)

Carter was convinced: the case method worked.

### IV. SYSTEMATIC INSTRUCTION AND MODERN PROFESSIONALISM

The most recent, and perhaps most elaborate ever, statement of the proposition that Langdell’s main idea was that law must be considered a science is found in Professor Grant Gilmore’s *The Death of Contract* and *The Ages of American Law*. Without considering the possibility that Langdell’s major contribution was an institutionalization of the idea that modern professional education in law requires systematic instruction comparable to that in the sciences and clinical medicine, Gilmore asserts:

Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell’s idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell’s idea shaped our legal thinking for fifty years.

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Langdell's idea was that law is a science. . . . From that basic proposition several subsidiary propositions followed.

Ideologically, it followed that legal truth is a species of scientific truth. The quality of scientific truth, as most nineteenth-century minds understood it, is that once such a truth has been demonstrated, it endures. It is not subject to change without notice. It does not capriciously turn into its own opposite. It is, like the mountain, there.

Gilmore seems to base his analysis upon an extremely limited sampling of Langdell's ideas. He suggests that "[a]part from the casebook on Contracts (plus the Summary) and a second casebook on Sales (1872), [Langdell] seems to have written little or nothing." Although it is true that Langdell rarely defended the case method of law teaching itself, his annual reports on the development of the Harvard Law School between 1870 and 1895 encompass a greater number of total pages than his Contracts casebook which, of course, was a collection of case reports rather than original writing. Gilmore makes no mention of these interesting reports.

In the major biographical essay on Langdell (to which Gilmore does not refer), James Barr Ames spends two pages discussing (without exaggerating their impact) Langdell's books and essays, including at least twelve articles in The Harvard Law Review. The last of these constitutes an intriguing study of the relationship between law and society in nineteenth century Britain. Langdell even published a short history of the Harvard Law School between 1869 and 1894, the period

57. See Forty-Sixth Annual Report of the President of Harvard College: 1870-1871 (1872) through Annual Reports of the President and Treasurer of Harvard College 1894-95 (1896) Langdell's portion of these quite extensive reports on university life and politics as well as growth and development, always begins: "Sir, — I beg to submit the following report upon the Law School for the academic year . . . ." Id.
59. Id. at 474-75. See C. Langdell, Dominant Opinions In England During The Nineteenth Century In Relation To Legislation As Illustrated By English Legislation, Or The Absence Of It, During That Period, 19 Harv. L. Rev. 151 (1906). See also note 112 infra.
of his deanship.  

In his sketch of the law school, Langdell discussed the following changes in legal education which he conceived to be most significant: (1) the development of a new course of study; (2) conferring degrees only upon examination; (3) improvement of the library and appointment of a permanent librarian; (4) development of a new method of study and instruction, utilizing casebooks rather than treatises; (5) holding regular faculty meetings; (6) the gradual increase of tuition fees; (7) establishment of examinations regulating advancement from one year to the next; (8) hiring J.B. Ames as an assistant professor in the law school while he was only a student; (9) establishment of the distinction between ordinary and honor degrees; (10) final extension of the degree program to three required years of study; (11) establishment of entrance examinations for those without college degrees; (12) completion of Austin Hall; (13) founding of the Harvard Law School Association; (14) establishment of *The Harvard Law Review*; (15) issuing a complete catalogue of all the graduates of the law school; (16) listing 108 colleges from which prospective law degree candidates should have graduated; (17) increase in the number of faculty and students in the law school.  

The single most important change, Langdell seemed to believe, was the establishment of law school teaching as a career in its own right, as well as the hiring of Harvard graduates as law teachers not only at Harvard but in schools across the country. Indeed, the professionalization of law teaching was a prerequisite to the realization of Langdell’s “main idea” (which he shared with Eliot); the development of systematic and comprehensive, university-based professional education. Langdell argued that the law should be studied not from treatises but directly and in a rigorous way from the reported case decisions themselves. “The method,” asserted Eliot,

was much derided at the start by lawyers who had been brought up on treatises and commentaries on treatises; but it soon justified itself in a conclusive way. After a few years it was demonstrated that young men who had been thus trained to the practice of the law could make them-

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61. *Id.* at 494-98.
selves more useful to their seniors in the offices they entered than fresh law graduates had ever been before, and than young men contemporaneously trained in other methods. There followed a rapid growth of the Harvard Law School which has continued to this day, in spite of numerous restrictive measures which demanded better preparation for admission, more years of residence and finally a preliminary degree in arts or science as a condition of entrance to the School.62

Did these momentous changes occur in the wake of a new gospel, a spreading faith in the scientific quality of law or was the transformation of the American legal profession at the heart of things?

The changes which were taking place in the practice of American law toward the end of the nineteenth century were closely related to the growth of industrialism and urbanism under the direction of corporate capitalism. The birth of new professions and the transformation of older ones within the matrix of industrial society constitute, according to sociologist Magali S. Larson, one aspect of the process of social modernization. Most research analyses, Larson asserts,

implicitly or explicitly present professionalization as an instance of the complex process of 'modernization.' For professions, the most significant 'modern' dimensions are the advance of science and cognitive rationality, and the related rationalization and growing differentiation in the division of labor. From this point of view, professions are typical products of modern industrial society. The continuity of older professions with their 'pre-industrial' past is therefore more apparent than real.63

The effort to maintain continuity of appearance against the real background of discontinuity and transformation provoked, by the beginning of the twentieth century, a crisis of self-image within the legal profession. "In the opening decades of the century," historian Richard Hofstadter points out, "the American legal profession was troubled by an internal crisis, a crisis in self-respect precipitated by the conflict between the image of legal practice inherited from an earlier age of more independent professionalism and the realities of modern commercial

62. Eliot, supra note 7, at 202-03. See also C. Eliot, The Tendency to the Concrete and Practical in Modern Education (1913).
63. Larson, supra note 1, at xvi.
It is important to add that the movement away from what Hofstadter calls a "more independent professionalism" constituted a movement toward deployment of a model of "cognitive rationality" (e.g., the spread of case method legal education as standardized professional training), and sharper internal stratification or what Larson describes as "growing differentiation in the division of labor." 65

In Hofstadter's view, the older and more independent professionalism among attorneys had been characterized by lawyers whose status and reputation derived from the quality of their courtroom advocacy and broad learning; men of considerable public influence and power within a widely remarked tradition of American statesmanship, whose sense of public responsibility was bound up with a self-conception of being officers of the court as well as agents of particular clients, and who were members of a democratic profession, access to which was open to virtually all as a kind of "natural right." 66 By the end of the century, however, the status and fortune of leading members of the bar came increasingly to depend upon effective counsel and advice rather than courtroom forensics. The public influence of attorneys also resulted more from their close relationship to concentrations of private capital rather than from having provided the rank and file of practicing politicians. Lawyers saw themselves less and less as officers of the court and increasingly (in the words of one troubled attorney) as "clerks on a salary" to those paying the most generous retainers. And the development towards higher standards in the law schools and promulgation of codes of ethical conduct in the new professional organizations signalled both sharper distinctions between the various echelons within the profession. 67

"At the turn of the century," Hofstadter argues,

lawyers as a group were far less homogeneous than they had been fifty years before. The large, successful firms, which were beginning even then to be called 'legal factories,' were headed by the wealthy, influential, and normally very conservative minority of the profession that tended to be

64. R. Hofstadter, The Age of Reform From Bryan to F.D.R. 156 (1955).
65. See note 63 supra and accompanying text.
66. Hofstadter, supra note 64, at 157.
67. See id. at 156-64. See also Larson, supra note 1, at 166-77.
most conspicuous in the Bar Associations.68

“There was a second echelon of lawyers,” Hofstadter continues,
in small but well-established offices of the kind that flourished in smaller
cities; lawyers of this sort, who were commonly attached to and often
shared the outlook of new enterprisers or small businessmen, frequently
staffed and conducted local politics. A third echelon, consisting for the
most part of small partnerships or individual practitioners, usually car-
rried on a catch-as-catch-can practice and eked out modest livings. As
the situation of the independent practitioners deteriorated, they often
drifted into ambulance-chasing and taking contingent fees. Much of the
talk in Bar Associations about improving legal ethics represented the un-
sympathetic efforts of the richer lawyers with corporate connections to
improve the reputation of the profession as a whole at the expense of
their weaker colleagues.69

Hofstadter’s concluding sentence is quite important: it remained
necessary for elite lawyers to improve the reputation of the profession
“as a whole” in order to improve their own standing within public opin-
ion. At the level of formal professional status, elite attorneys were indistinguishable from the very bottom rung of the professional hierarc-
chy. This fact resulted from an important difference between the
formal organization of the American and English bars.

Legal historian J. Willard Hurst points out that the colonial
American bar had before it the example of England’s distinction be-
 tween a higher order of barristers or courtroom advocates and lower
echelon of solicitors or client-caretakers.70 The barrister-solicitor dis-
tinction in England, according to Hurst,
brought the ablest practitioners together, to form the Inns of Court. Le-
gal education was controlled by the members of the Inns, and these law-
ners early began to specialize in advocacy, which was then the most de-
sirable part of law practice. Despite its chance beginnings, the barrister-
solicitor distinction grew into a maze of social, legal, and economic

68. HOFSTADTER, supra note 64, at 157.
69. Id.
70. See J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 252-
elements.\textsuperscript{71}

In Colonial Virginia, Massachusetts, and New Jersey, Hurst observes the initial American replication of the English bifurcation of formal status within the legal profession. But the combination of a highly mobile class structure in the United States with the specific circumstances surrounding the Revolution (e.g., popular revulsion against the English, the end of formal training for American lawyers at the Inns of Court, hostility to leading members of the bar who had maintained Royalist sympathies) broke up the early influence of local bar associations and professional groups. "In 1790," Hurst concludes, "the country was poor, scattered and sparsely settled, and engrossed in exploiting its natural wealth; conditions would not allow law practice to develop according to the costly etiquette of the peculiar English type of lawyers' specialization."\textsuperscript{72}

Indeed, we may even argue that (as Larson suggests) modern professionalism is so closely wedded to industrialization that the first efforts at professional organization in American law filed as consequence of their prematurity in relation to social and economic conditions. Thus, if the nineteenth century (in its industrial phase) is marked by waves of professionalization, it is also (in its pre-industrial phase) marked by waves of deprofessionalization which constitute the equivalent in the United States of decolonization in the professions. This is the sort of historical contour outlined by Robert H. Wiebe, who suggests that "[e]arly in the nineteenth century educational and apprenticeship requirements had still restricted the practice of law in many parts of the East."\textsuperscript{73}

"As in medicine," continues Wiebe,

deprofessionalization moved apace in the second quarter of the century, when democratized, decentralized admission to the bar demolished practically all standards. Training passed from the colleges to a convenient law office, and along with thousands of others, John Peter Altgeld, an indifferent student, passed the bar examination after reading for a few months in his spare time. A great many practiced law as a sideline. . . .

\textsuperscript{71} Id. at 309-10.
\textsuperscript{72} Id. at 310.
\textsuperscript{73} R. Wiebe, The Search for Order 1877-1920 at 116 (1967).
It was [an elite of legal experts], partly to honor themselves, partly to work for higher standards, who in the seventies began organizing city and state bar associations, capped in 1878 by the American Bar Association. What started gradually became a flood after 1890. The expanding need for carefully trained lawyers shifted education back to the classroom, where in the better schools the quality of instruction rose rapidly. . .74

If the shift in legal education brought law students into the classrooms of the rising university professional schools (increasingly adopting the case method of instruction), and if the shift in professional organization brought attorneys in increasing numbers within city and state bar associations, the shift in legal practice itself brought greater numbers of lawyers into the employment of large corporations and financial institutions. It was true, of course, that as early as the 1850's attorneys such as Richard Blatchford had brought business to their firms from corporations involved with railroad consolidation or other commercial transactions.75 But it was not until the Civil War that corporations, in conjunction with expanding transport and communications infrastructures and the growth of great cities, began to provide the major retainers for America's elite lawyers.

The concentration of industrial and financial power which accompanied the growth of corporate capitalism transformed the conventional practice of estate planning into a major business speciality and both patent and personal injury law became of sufficient importance to warrant their own practicing bars.76 The gradual expansion of government regulation of private corporate activity during the Progressive period77 created challenging work for attorneys who could safely guide their clients through the statutory obstacle course. "Within this purely professional frame of reference," writes Hurst, "the most basic change in the nature of lawyers' professional work was the shift in emphasis from advocacy to counseling. . .

74. Id. at 116-17.
75. See Hurst, supra note 70, at 298.
76. Id. at 298-99.
The years after 1870 showed a more matter-of-fact attitude, a prevailing distaste for litigation as a costly luxury, and increasing effort to use law and lawyers preventively."

The implication of these changes for legal education was not that law students should be graduated as patent or railroad lawyers, or as experts in various kinds of "legal prevention." What rising standards for the profession "as a whole" and legitimation of stratification within the profession on the basis of competence and credentialism meant was that the older lecture system of instruction in the schools as well as the apprentice system (or any system, for that matter) outside the schools could not be effective. The broad sweep of these changes is explained by Magali Larson:

[T]he passage from restricted monopolies of practice to the organization and control of expanded and competitive markets was a necessary one for the professional sectors of the middle class, seeking to improve their position in the emergent stratification systems of capitalist society. Their task presupposed the abandonment - deliberate or involuntary - of the restrictive corporate warrants of professional credibility. It tended toward the reconstruction of monopoly on the universalistic principles dictated by the new dominant ideology. The crowning of this monopolistic project appears to be a set of legally enforced monopolies of practice. However, the actual effectiveness of such sanctions depends on the parallel construction of a 'monopoly of credibility' with the larger public. The conquest of official privilege and public favor was, for the professions, a double external task of ideological persuasion, which had an internal precondition: the unification of the corresponding areas of the social division of labor under the direction of a leading group of professional reformers.

And with special relevance to the emergence after 1870 of the case method law school, Larson concludes: "The crucial means for this unification, and therefore the concrete core of the professions' organizational task, was systematic training - or, in my terms, the standardized and centralized production of professional producers." The case method (which made possible for the first time the standardized in-

78. Hurst, supra note 70, at 302.
80. Id. at 17.
struction of large numbers of students) in the hands of full-time professional law teachers secured a spectacular centralization of the professional training of attorneys. It is thus hardly surprising that Langdell, as we have seen, regarded the initiation of the law teaching profession at Harvard to be of singular importance. Indeed, even beyond the project of general standardization for the profession as a whole, a relative handful of prominent law professors spread through a number of prestigious university law schools could train the leading members of bench and bar for generations.81

At a time when enrollments were still limited to handfuls of students and university professional schools were struggling to stay alive, Charles Eliot already perceived the case method’s potential as an instrument of standardization and controlled expansion. “It should be the aim of a University’s Law School,” he wrote in 1874-75, “to train young men of good preliminary education and average ability, taken by the hundred...”82 The rigorous training of large numbers of law students, who would carry with them the network of professional relations developed in Cambridge, remained a trademark of the Harvard Law School long after Eliot and Langdell had turned the responsibility of educational leadership to their successors.

V. HARVARD ON THE OFFENSIVE

If, in retrospect, the case method law school appears to be the almost inevitable solution to the problem of “standardized and centralized production of professional producers”83 confronted by the American legal profession during its period of historic “modernization,”84 nothing was quite so simple or transparent to American lawyers and educators in 1870. On the contrary, Eliot and Langdell initially met considerable opposition to their reform program. Any notion of a kind of fatalistic determination by which the social and structural transfor-

82. Warren, supra note 52, at 396-97 (quoting C. Eliot).
83. See note 80 supra and accompanying text.
84. See note 63 supra and accompanying text.
formation of the professions automatically precipitated a rationalization of the professional training programs would entirely exclude the actual factor of human agency, the intervention by relatively autonomous individuals within the movement of things. History may present a certain configuration of circumstances, but that totality must still be accurately comprehended by willful individuals capable of initiating change. When considering the role of human agency in social transformation, theorist Antonia Gramsci remarked:

Real will is disguised as an act of faith, a sure rationality of history, a primitive and empirical form of impassioned finalism which appear as a substitute for the predestination, providence etc., of the confessional religions. We must insist on the fact that even in such cases there exists in reality a strong active will. . . . We must stress the fact that fatalism has only been a cover by the weak for an active and real will. This is why it is always necessary to show the futility of mechanical determinism, which, explicable as a naive philosophy of the masses, becomes a cause of passivity, of imbecile self-sufficiency, when it is made into a reflective and coherent philosophy on the part of the intellectuals. . . .

Neither Eliot nor Langdell were willing to leave the orchestration of modern American legal education to providence, and their pedagogy was a reaction against the “imbecile self-sufficiency” of apologists for the educational status-quo.

Their self-consciousness regarding the relationship between a restructuring of American legal education and the transformation of the legal profession itself is clearly revealed in their annual reports, particularly Langdell’s reports on the condition of the law school for the years 1876-77 and 1880-81.

Beyond recapitulating the enrollment and financial figures for the year in relation to previous years, Langdell’s main focus in his annual report for 1876-77 was the peculiar situation of law in relation to the other professional disciplines and how it had led Harvard into a serious conflict with the state (i.e., public authority, particularly state courts

86. See note 57 supra.
and legislatures) regarding the future of legal education. Langdell referred to the fact that while admission to the clerical, medical, and scientific professions was controlled by the professions themselves, admission to the legal profession was controlled by the state which gave neither "recognition [n]or countenance" to the Harvard Law School. The only "privilege" the school received, even in Massachusetts, was that of having time spent by a student in the school accepted as an equivalent to the same amount spent as an apprentice in a lawyer's office.

Although Langdell pointed to recent movements in New York and Massachusetts to raise standards of admission to the legal profession, he was worried by the fact that such movements were not under the control of the law schools nor designed to make university legal education essential to preparation for the bar. "[N]either this Law School nor any other," stated Langdell, "has participated at all in this movement, nor directly exercised any influence over it; nor was it in any degree the aim or object of the movement either to support and strengthen law schools, or to make use of them in furtherance of the objects in view." 89

The special situation of the legal profession was precipitated not only by its subordination to state control of admissions but the kind of control enforced which represented a special way of interpreting the relation of the American to the English legal profession. "The true cause" of the problem, asserted Langdell,

will be found primarily in the fact that the American lawyer represents two professions, which, in their nature, are distinct, which call into exercise different qualities of mind and character, and which require different kinds and degrees of education and training for their successful pursuit; namely, the professions of attorney and counsellor respectively. One reason why these two professions have always been pursued in this country by the same persons, undoubtedly is that they have generally been supposed to be one and the same profession. Sometimes, indeed, it is assumed that a lawyer is only an attorney, and at other times that he is

88. Id.
89. Id. at 87-88.
only a counsellor; but the fact is seldom intelligently recognized that he is both. Moreover, the State has commonly treated the legal profession, especially as regards every thing relating to the preparation for it and the admission into it, as if its members were attorneys merely; and this view has not been regarded with disfavor by the profession itself, for the idea is deeply rooted that every young man should begin as an attorney merely, and that age and experience alone are a sufficient warrant for assuming the position of a counsellor. Accordingly, our States, in dealing with the legal profession, have copied the English practice relating to attorneys.90

The distinction which Langdell draws between attorneys and counsellors is, of course, identical to the English distinction between solicitors and barristers (Langdell uses the words “counsellor” and “barrister” interchangeably).91 What is extraordinary is Langdell’s assertion that the two are separate “in their natures,” and not merely in England. He does not deny that the two “professions” of attorney and counsellor have been pursued in the United States “by the same persons,” but he implies that this practice confuses two quite different legal roles.

The reason that Langdell offers for the two professions having been pursued in the United States by the same persons “is that they have generally been supposed to be one and the same profession.”92 But why, then, the general supposition in favor of a formally unified legal profession in America? Langdell does not pursue the historical contour beyond this initial tautology. He is more interested in exploring the implications of confusing the two professional identities.

The most serious consequence would appear to be adoption on the part of the State of the English practice relating to attorneys. In its initial form, this practice provides the basic justification for State control over admission to the profession. The State had no claim over the loyalty of barristers who were subordinate only to their colleges from which they were “called” to the law. Beyond this necessary first step, treating all American lawyers like members of the lower order in the English profession resulted in dramatically limited restrictions upon

90. Id. at 88.
91. Id. at 88-90.
92. Id. at 88.
ways of preparing for the American bar.

Langdell obviously admired the independence of the English barrister, 

[who] is not an officer of the courts, and the latter have neither more nor less authority over him than they have over litigants who conduct their own causes without the assistance of counsel. Such being the status of English barristers, it is needless to say that there is nothing analogous to it in the condition of the legal profession in this country. On the other hand, if we inquire into the status of attorneys in England, we shall find ourselves on familiar ground. While barristers are supposed to constitute a learned and liberal profession of the highest grade, attorneys have always been regarded and treated more as artisans than as professional men; and their chief marks of distinction from the public at large, so far as regards their legal status, consist in their receiving their appointment from the State, in their being liable to have this appointment revoked at any moment, and in their being constantly subject to the surveillance of the courts. . . .

If there was a gradual development within the upper echelons of the American legal profession of a shift from predominantly advocacy practice to that of counsel and legal prevention, there never developed in the American legal profession (even at the corporate firm level) a functional split equivalent to that between solicitors and barristers in England. Indeed, in regard to practical lawyering functions, J. Willard Hurst argues:

In the nineteenth century the advocate emerged as the model of the leader of the bar in the United States, and successful firms typically included a ‘court’ lawyer and an ‘office’ lawyer. Such a partnership was itself a development that differed basically from the English pattern. Neither in fact nor in form was the advocate in this country confined, as was the English barrister, to appearing in court and giving ‘opinions.’

After 1870 leadership at the bar in the United States went to men who more resembled the solicitor. But, as in the early case of the advocate, these ‘solicitors’ were not confined to the role that English etiquette would have assigned them. In such men as Elihu Root or Louis D. Brandeis the bar of the United States developed a type of leader peculiarly its

93.  Id. at 89.
own. Such men mingled the roles of barrister, solicitor, business adviser, and statesman.  

In short, the English categories so poorly fit the American reality that the shift from advocacy to counsel functions might just as well be designated as a shift from “counsellor” (or barrister) to “solicitor,” so long as one spoke in terms of specific functions performed rather than in terms of relative access to official privilege. But it is precisely the latter which was of paramount concern to Dean Langdell. Indeed, his whole conception of the distinction “in their nature” between attorneys and counsellors revolved not upon differences in function but rather upon distinctions in social background, formal status, and recognized privilege.

It was “different qualities of mind and character” which required “different kinds and degrees of education and training” which attracted Langdell to the English professional categories. Echoing Foucault’s comparison of doctors educated through clinical experience to health officers trained through apprenticeship, it was the English distinction between a “learned and liberal profession of the highest grade” and a lower order “treated more as artisans than as professional men” to which Langdell was drawn, like a moth to the luminous gaslamps of Victorian English stability. And it was England which revealed most strikingly the ultimate rewards of distinguishing between art and science, between apprenticeship and professional education:

Indeed, it is doubtful if ever, in any country, any profession has occupied a position so exalted as the higher branch of the legal profession in England. In consequence of a very highly centralized judicial system, and in consequence of the profession being divided by law into two branches (counsel and attorneys), all the members of the higher branch, at least with few exceptions, reside in the metropolis and form a large, compact, distinguished, and influential body of men, inheriting great traditions, endowed with great privileges, and clothed with great powers, - with the power, among others, of determining, without appeal, what new members shall be admitted into the body, and whether existing members

94. Hurst, supra note 70, at 310-11 (emphasis added).
95. See note 90 supra and accompanying text.
96. See note 11 supra and accompanying text.
97. See note 93 supra and accompanying text.
shall remain in it, and upon what terms. I say without appeal; for, though the judges have a visitatorial power over the body, yet the judges are all taken from the body and continue to be members of it. Every member of this body, on the one hand, feels the influence, shares the advantages, and enjoys the support and protection of the entire body, and, on the other hand, has all the members of the body to compete with; and upon those who succeed in struggling to the front the State showers its honors and rewards to an extent absolutely unprecedented. Under such a system, legal education will take care of itself in a great measure, at least so far as the interests of the public are concerned. In this country, on the other hand, the State has, upon the whole, done its best to reduce the legal profession to the level of an ordinary pursuit; it has neither done anything for it, nor permitted it as a body to do anything for itself.  

If the State would not formally distinguish and endow an upper echelon of American lawyers, then that professional project would be carried forward by "the body" itself or, at least, a leadership cadre from within it. At the level of professional training, this meant that law schools would have to take the initiative themselves (with whatever risk of declining enrollments) in raising standards and providing national and systematic (rather than local or arbitrary) professional education. At the level of professional organization, this meant that lawyers would have to be persuaded of the potential influence which arose from common association. "The profession does not constitute one organized body at all;" asserted Langdell, "and if it can be said to have any organized bodies within it, they are of the slightest and feeblest description, and do not embrace respectively more than a single city or county."  

Langdell, of course, did not have long to wait for the nascent bar associations to begin to discover their strength and assert their demands for professional self-regulation. What he and Eliot had realized (somewhat ahead of everyone else) was the necessary relationship between modern professionalism and the educational process through which new members of the professions would be recruited and trained,

99. Id. at 81.  
100. See, e.g., Hurst, supra note 70 and Auerbach, supra note 81.
then funnelled into various organized strata within the profession. "The only sure way of raising the professional standard," argued Langdell, "is by raising the standard of legal attainments, education, and character in the men by whom the profession is recruited, or at least in the better class of them."\(^{101}\) And it was the case method law school elaborated at Harvard during this period which proved the most effective device for "raising the standard of legal attainments" among those who would assume new roles in determining "what new members shall be admitted into the body."\(^{102}\)

The anachronistic and inefficient apprentice system could never provide the "standardized and centralized production of professional producers" required by modern professionalism. "In short," Langdell claimed, retaining his distinction between artisans and professionals:

> while a lawyer's office is the only place in which an expert attorney can be made, it cannot be too clearly understood that it is not a fit place in which to learn anything relating to the profession of a counsellor or advocate. . . . The art of the attorney, being in its nature local, should be acquired in the place where it is to be practised; while the science of the advocate, being confined within no narrower limits than the system of English and American law, may be best acquired, other things being equal, in the place where that system of law is studied and taught most exclusively as a science, i.e., exclusively of every thing local, temporary, or arbitrary. This consideration alone is sufficient to settle conclusively the destiny of this school; and accordingly, from the time of its first establishment on its present basis, the policy has been uniformly declared and acted upon of making it national, not local. To depart from this policy voluntarily would be madness; to be forced to depart from it would be ruin.\(^{103}\)

Just as Eliot's contribution to modern professional education consisted of a struggle on two fronts (against the expository lecture tradition in the schools and against the independent apprenticeship outside the schools),\(^{104}\) the survival of the Harvard Law School (by the 1870s required a struggle against both madness and ruin, against (respec-

\(^{101}\) Langdell, \textit{supra} note 98, at 82.
\(^{102}\) \textit{Id.} at 80-81.
\(^{103}\) Langdell, \textit{supra} note 87, at 91-92.
\(^{104}\) \textit{See} text at sections I and II \textit{supra}.
tively) the local bar and the state. This involved a defense of the “study of law as a science” as much in terms of what it excluded (“everything local, temporary, and arbitrary”) as what it included (the systematic study of individual case reports).

Defending the case method from voluntary abandonment under pressure included convincing the local bar of its superiority to the apprentice system. Additionally, it meant preservation and enhancement (against parochial interests) of Harvard as a national law school preparing lawyers for practice in New York, the Middle West, and throughout the country, rather than only in Boston or other New England communities.

Defending the case method from forced abandonment at Harvard meant convincing the state (particularly New York) to admit Harvard Law School graduates to licensed practice on the same basis as graduates of state schools. If individual states gave preference in admission to the bar (through a variety of means including reduction of standards) to graduates of state schools, then students would attend law school where they planned to practice. This would not only defeat Harvard’s national aspirations and tend to reduce the capacity of the profession to develop national organizations, but it would specifically reduce the numbers of students planning to practice in New York City who would study for a law degree at Harvard. Eliot and Langdell go to great lengths in their annual reports to underscore their sense of propriety in requesting equal treatment from the states: it was not a question of anyone favoring Harvard but rather of the state merely permitting the legal profession (with Harvard playing a leadership role) to improve its own standards and practices. “The Law School,” Langdell indicated,

therefore, has all the reasons for continuing its present policy that it has for continuing to exist; and what is required, therefore, is that the State should realize its need of the service which the Law School is seeking to render it, and that it should recognize in the Law School (and in institutions of similar character and aims) an instrument (and the only one within its reach) by which this service can be secured without expense or charge to the public. All that the School asks of the State, in the way of action, is that it give to candidates for the legal profession the option of preparing themselves for its higher branch, and that it recognize an institution which furnishes the means and facilities for such preparation as
doing a national and not a local work. 105

Did Harvard Law School under Eliot and Langdell prepare students for the "higher branch" of the profession because, at Harvard, law was taught and studied as a science? Or did Langdell consider the case method "scientific" because it was the best means of training professionals, as opposed to mere "attorneys"? Did case method study in a national law school exclude "everything local, temporary, and arbitrary" because it was taught as a science, or was the reverse true?

Langell's principal commitment was to the construction of a first-class professional law school which would contribute to the standardized and centralized production of upper echelon lawyers. He seemed willing to recruit the language of science, or of England's professional traditions, and impose them upon the ensemble of immediate circumstances and options which Harvard confronted, always with his goals clearly in view. Indeed, without elaboration, Langdell asserted that the development of national law schools and the consolidation of power within national professional organizations constituted a service to the state (without mentioning the profession itself) for which the state should be grateful because the public was not being charged. Obviously, Langdell was single-minded in his faith in the professional project.

In his annual report for 1876-77, Langdell stated:

The difficulty of examining in a given subject is in proportion to the difficulty of teaching it; and there can be no doubt that English and American law is one of the most difficult subjects to teach. The opinion has, indeed, been prevalent that it is incapable of being taught as a science; and, though the correctness of this opinion will not be admitted by those who represent this School, it may be supported by plausible arguments. *Law has not the demonstrative certainty of mathematics*; nor does one's knowledge of it admit of many simple and easy tests, as in case of a dead or foreign language; *nor does it acknowledge truth as its ultimate test and standard, like natural science*; nor is our law embodied in a written text, which is to be studied and expounded, as is the case with the Roman law and with some foreign systems. Finally, our law has not any long-established and generally recognized traditions which will

indicate to the examiner what his examination ought to be, and to the student what it will be; . . . \textsuperscript{108}

Situated within Grant Gilmore's theoretical outline of the development of American law, Christopher Langdell would appear to be (on the basis of the statement above) an anti-Langdellian, crypto-Legal Realist. The one idea to which Gilmore leads us to believe Langdell will cling tenaciously, the Harvard Dean hurls to the winds. How can such things be?

In fact, Langdell was once again confronted with a challenge to the professional project being developed at the Harvard Law School. The progressive development of state requirements regarding legal education ("making a reasonably long period of pupilage a \textit{sine qua non} of admission to the profession")\textsuperscript{107} appeared threatened by the idea that a sufficiently objective and scientific bar admissions examination could be administered that would provide entry to the profession for those who were qualified and would reject those who were not, rendering unnecessary any reference to whether or not the candidate had studied in a law school.

Here, for the first time, the "law as science" philosophy (which Langdell had deployed so effectively in distinguishing apprenticeship from professional education) suddenly (borrowing Gilmore's phrase) "turned into its opposite"\textsuperscript{108} and cut directly against the elaboration of university-based, three-year professional schools as the heart of the professional project's initiation program. And, in a stroke, Langdell effectively abandons the philosophy. To be sure, the weight of his "other" position rests heavily enough upon his words that he goes to the trouble of finessing the discontinuity ("though the correctness of this opinion will not be admitted by those who represent this School," etc.).\textsuperscript{109} Nevertheless, there can be no mistaking Langdell's intention: he seeks to downplay the presumed identity between law and science sufficiently that no argument can be advanced in behalf of passing "scientific" examinations as the exclusive prerequisite to admission to the legal profession.

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 96-97 (emphasis added).
\item \textsuperscript{107} \textit{Id.} at 95.
\item \textsuperscript{108} See GILMORE, note 55 \textit{supra} and accompanying text.
\item \textsuperscript{109} See note 106 \textit{supra} and accompanying text.
\end{itemize}
In conclusion, at times Langdell makes scientific knowledge analogous to systematic (as in the German sense of Wissenschaft, knowledge which can be studied systematically)\textsuperscript{110} and legitimately describes the case method as scientific study because the case method law school (in relation to the old lecture academies and the apprentice system) constituted systematic and standardized professional training. At other times, he leaves room for a different relation between law and science to be read into his words, one where the analogy to the rigour of the physical sciences seems implied. But as soon as it appears such a reading may jeopardize the developing professional project at the Harvard Law School, the “law as science” position is dramatically undercut.

This conclusion is reflected in relation to the broader structure of nineteenth century American legal development by Professor Morton Horwitz:

Perry Miller has shown the dominance of the equation of law with science in all antebellum legal theorizing. Except for the identification of ‘science’ with systematization and classification, however, there is no coherent content or methodology to be found in these persistent claims to the scientific character of law. What does seem extremely clear, nevertheless, is that the attempt to place law under the banner of ‘science’ was designed to separate politics from law, subjectivity from objectivity, and laymen’s reasoning from professional reasoning.\textsuperscript{111}

Thus, Eliot and Langdell’s “subjective” vision of how the American legal profession should be organized (and what methods should be employed to secure professionalization in the schools) could be made to appear “objective” and (at least in theory) appeal to the modern mind, by characterizing the case method law school as a scientific enterprise. But a somewhat different (and equally subjective) vision of the legal profession, promoted by state courts or legislatures, could just as readily be made to appear “objective” and above politics through utilization of “scientific” bar examinations to determine admission to the profession. In that instance, Langdell was as adroit as Professor Gilmore in debunking an easy identification of law with the physical sciences. “A

\textsuperscript{110} See R.W. FRIEDRICHS, A SOCIOLOGY OF SOCIOLOGY 204-05 (1970).
better symbol could hardly be found;” suggests Gilmore, “if Langdell had not existed, we would have had to invent him.”112 Langdell did exist, of course. But that did not prevent Professor Gilmore from inventing him anyway.

VI. LEGAL EDUCATION Regarded As A SOCIAL RELATION

It is reasonable to argue that Charles Eliot and Christopher Langdell were at times willing to associate law with science as a kind of rhetorical device, clever salesmanship on the part of premier educational entrepreneurs.113 Obviously, they were also capable of regarding

112. Gilmore, supra note 55, at 42.
113. Besides its genuine contributions to intellectual argument, Darwinism was also used as a popular rhetorical device. Though it might explain nothing, intellectuals found that an illusion to the theory of evolution was an interesting way to say something quite ordinary, or to provide a scientific explanation for change. In his fascinating essay Individualism and Collectivism, for example, Charles W. Eliot of Harvard used the concept of a biological sport - a departure from predictable heredity - to explain how an intelligent student might have poorly educated, lower-class parents.


The chapter of Dicey’s Law and Public Opinion described by Langdell as most clearly belonging in a “law book” includes a warning against overstating the law’s relation to science similar to Langdell’s own disclaimer quoted in the text accompanying note 106 supra.

If one may be allowed to apply the terms of logic to law, one is tempted to assert that judicial legislation proceeds by a process of induction, whilst parliamentary legislation proceeds, or may proceed, by a process of deduction. This contrast contains an element of truth . . . but the suggested contrast, unless its limits be very carefully kept in mind, is apt to be delusive. The Courts no doubt do not begin by laying down a general principle, but then a great deal of their best work consists in drawing out the conclusions deducible from well-established principles, and has therefore a deductive character . . . ordinary judicial legislation is logical, the best judicial legislation is scientific.


If much of legal realism contends that courts do, indeed, often argue from predetermined principles or bias, Dicey has broken sufficiently in his analysis with any “delusive” belief in the inductive science of law that Gilmore’s Langdell should reasonably be expected to respond with angry disagreement. Instead, Langdell praises Dicey’s social-historical orientation and concludes: “Any American who wishes to know the England of the nineteenth century as if he were a native will find in Professor Dicey,
legal education at Harvard as a science precisely because it was system-
atic professional preparation of counsellors who would join a "com-
 pact, distinguished, and influential body of men" 114 - just the opposite
of merely artisan training turning out legal handicrafters like wooden
tops.

But that is not what is important. In the end, it does not make
much difference exactly how or why Eliot and Langdell regarded law
as science. Indeed, for our purposes, it is not even necessary to decide
whether the equation law equals science is true. 115 Our analysis must
be carried out on a different level. Recall Professor Gilmore's focus
upon an ideological demystification of Langdellian scientism. Yet why
was Langdell so successful? Gilmore hardly seems interested. He as-
serts that "Langdell's idea evidently corresponded to the felt necessities
of the time,"116 and adds that

[s]ooner or later a Blackstone or a Langdell appears. . . . If a Black-
stone or a Langdell comes at the right time, he will be heard and his
words will, for a generation, be devoutly believed: his message is a com-
forting one and ought to be true even if it is not. Since Langdell was
heard and was believed, he evidently came at the right time.117

From the point of view of serious social thought, nothing is "evi-
dently" or obviously correct and virtually nothing can be relied upon to
happen "sooner or later." No explanation of social reality makes any
sense absent reference to the concrete structure of social relations. "In
other words," asserts Pashukanis,

we must determine whether or not legal categories are such objective
forms of thought (objective for an historically specific society) which cor-
respond to objective social relationships. Consequently, our question is: is
it possible to understand law as a social relationship in the same sense

who is a worthy successor of Blackstone, an incomparable instructor." Langdell, supra
note 59, at 167. See also E.J. HOBSBAWM, THE AGE OF CAPITAL 1848-1875, at 251-76
(1976).
114. See Langdell, note 98 supra and accompanying text.
115. For brief but convincing arguments that it isn't, see W. SEAGLE, THE
QUEST FOR LAW 13-15 (1941) and R. POUND, 2 JURISPRUDENCE § 64 (1959).
116. GILMORE, supra note 55, at 42.
117. Id. at 64.
in which Marx termed capital a social relationship? Such a statement of the question pre-empts reference to the ideological nature of law, and all our consideration is transferred to an entirely different level.\footnote{PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 55 (P. Beirne & R. Sharlet, eds. 1980). See E.J. Hobsbawm, From Social History to the History of Society, Daedalus 20-45 (Winter, 1971); L. Goldmann, Cultural Creation in Modern Society 76-88 (1976); M. Aglietta, A Theory of Capitalist Regulation: The U.S. Experience (1979).}

Therefore, it is necessary to conceive the theorization of “law as science” as an objective form of thought with reference to objective social relations. And it is the correspondence between the social relations of the American legal profession and categories of discourse about professionalism and legal education which must be explained.