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THE ACHIEVEMENT OF THE AMERICAN LAW SCHOOL

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There are three functions of the lawyer: The agent's function, one of guiding those who seek the aid of the courts in their quest of justice; the advocate's function, one of effective presentation of controversies to the tribunals; and the jurist's function, one of finding and formulating the principles and precepts by which just results may be reached in particular cases. These functions were well developed in Rome. As a jurisconsult, the jurist, from adviser to judges and litigants became a writer of treatises. In the third century, when legislation superseded juristic writing as the growing point of the law, the law teacher took the place of the practitioner or writer. From that time in the Civil Law system the jurisconsult became a law teacher. In the organization of justice handed down by Justinian there were law schools and the advocate's function and the jurisconsult's function were merged. The term jurisconsult was applied only to teachers and writers.

The Roman Empire in the West fell in 476. Roman law in Western Europe was decaying from the fourth century to the twelfth century, when the study of law was revived in Italian universities. The Germanic law, brought in by the invaders who overthrew the Empire, had no means of growth because it was not a taught law and had no *corpus juris* and no organs of legislation. In the earlier Middle Ages only the law of the Church was growing.

In Continental Europe law teaching became academic from the time when the teaching of Roman law was revived in the Italian universities. The teachers were professors in the universities, teaching from books. They were jurists writing commentaries on authoritative texts, seeking to organize and systematize the law which was developed in the universities from those texts. On the other hand, in England the teaching of law in the Inns of Court, as it grew up from the thirteenth century, was professional, not academic. The teachers were practising lawyers, in touch with the law in action, seeking to develop the law of England as a working system for meeting concrete problems of adjusting relations and ordering conduct. Teaching in the Inns of Court was tied to the work of the courts. Thus, the common law became characteristically a law of the courts and has been such ever since, whereas the civil law is a law of the universities. The close contact of common law legal education with the work of the courts was decisive in enabling the judges to develop Anglo-American law through judicial decision.

Thus, English lawyers at the end of the Middle Ages had developed a well-organized profession, maintaining a professional tradition, providing adequate teaching of those who were to enter the profession, and actively furthering the development of the law.

It is usual to speak of the fourth year of James I (1607) as the date of colonization of what is now the United States. At that time the common law was still in the stage of the strict law. It was the

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law of the age of Coke, not that of the age of Mansfield. To the plain Puritan who emigrated to America it seemd "a dark and knavish business." Its records were in Latin and the reports in Law French. It was heavily burdened with the formalism of the strict law and its ideals were those of the relationally organized society of the Middle Ages and so not in accord with those of pioneers opening up the wilderness. Moreover, English law of that time was hard on dissenters who were in larger part colonizing America because it spoke from an era of organization while the colonists largely spoke from an age of individualism. Law books were few then, even in England. The first American law book, a reprint of the text of Magna Carta and the great statutes of Edward I, was published in 1687. Besides, the clergy were supreme in the colonies in the seventeenth century and were looked to as guides, whereas the public looked to lawyers in the nineteenth century. In New England the clergy strove to govern their communities from the Bible and their individual sense of justice. Also, the royal governors frequently interfered with the administration of justice so as to dispense a personal justice rather than a justice according to law. This continued, more or less, until the Revolution. Reception of the common law was earlier and more complete in Virginia than elsewhere. In the colonies, generally, it began at the end of the seventeenth century and was not complete in all respects at the Revolution.

In the development of a bar in the colonies in the century and three quarters from the first settlement to the Declaration of Inde-

pendence there was first an attempt to administer justice without lawyers, later a period of irresponsible filling out of writs by court officials and pettifoggers, then one of admitted practitioners in permanent organizations, and finally one of trained lawyers—the bar at the eve of the Revolution. Each of those stages lasted somewhat longer than a generation, longer in some colonies than in others, but a traceable sequence in all. Planned administration of justice without lawyers has been a feature of all Utopias, and a phenomenon of revolutions from the time of Jack Cade's rebellion. But the moment the task of law goes beyond one of policing a pioneer, rural, agricultural community, assistance to those who seek justice is more and more urgently called for and well-manned and well-organized assistance to those who come to or are taken before the public tribunals, becomes a significant feature of legal polity.

In Massachusetts, New Hampshire, Pennsylvania, and Maryland the traditional English system as to attorneys was followed. Each court admitted attorneys to practice before it. In Rhode Island, Connecticut, and Delaware each court of general jurisdiction admitted attorneys to practice before it, but admission by one court sufficed to authorize practice in all others. In the other colonies there was centralized control over admission to practice. In Delaware there was a distinction between those who practiced in the courts of common law and those who practiced in equity, corresponding to the English distinction between attorney and solicitor, down to 1858. In Massachusetts there was a distinction between barrister and attorney, but not the English distinction. A barrister was only a senior attorney. There was no distinction as to the required education. In New Jersey in 1798 the supreme court provided for an order of serjeants who conducted examinations for admission to the bar; but this was abolished in 1835. It came to be the general practice for an admitted attorney to state in open court that an applicant had "read law attentively" in his office for two years (the time was later extended to three), whereupon the court directed the clerk to administer the oath.

A barrister admitted by one of the Inns of Court in England was qualified to practice as a barrister in the colonies. Hence in the American colonies it was the custom for parents who could afford it to send their sons to study in the Inns of Court. Between 1760 and the Revolution more than one hundred Americans were studying there. They had the great advantages of access to complete libraries and opportunity of taking notes in the courts at Westminster. The majority in the bar, at the time of the Revolution, were graduates of the nine American colleges. The American bar on the eve of the Revolution was on the whole an educated profession.

Conservatism, which has generally been a characteristic of lawyers, led many of the strongest of those who were in practice at the Revolution to take the Royalist side, so that the profession was for a time decimated. In consequence of political conditions after the Revolution, the public was very hostile to things English and it was impossible for the common law to escape the odium of its English origin. Pennsylvania, New Jersey, and Kentucky legislated against citation of English decisions in the courts, and there

was a court rule against such citation in New Hampshire. Almost nothing of the decided cases of that time in most of the states seemed worthwhile to report. Kent, Marshall, Story, and the great judges who came later upon the bench, found neither help nor hindrance from reported decisions of their American predecessors. Moreover, the idea of a profession was repugnant to the Jeffersonian era. It was felt that all callings should be on the same footing—the footing of a money-making calling. To add dignity to any calling by labeling it a profession was considered undemocratic and un-American. All the states made admission to the bar an easy matter with only a minimum of qualification.

Yet, great lawyers practiced in this period. Six of the ten outstanding names in the judicial history of the United States, five of whom were college graduates and two of whom studied under great lawyers of the period before the Revolution, handed down a noble tradition. But American legal education, as we know it today, is a product of law schools, departments of universities. Professional organization, developing and maintaining the spirit of a profession, which became decadent and substantially disappeared, was revived by the bar associations, and became a force after 1870, following establishment of the Bar Association of the City of New York. Legal education, emphasizing study rather than apprenticeship, developed gradually from apprenticeship in the period of decadent professional organization; this was taken over by universities and became established in the form in which it has gradually gone round the world since 1870.

In 1750 the Vinerian Professorship of English Law at Oxford was established for Blackstone, who had not made a place for himself in practice and had fallen back on his fellowship of a college. This led to *Blackstone's Commentaries on the Laws of England* (1765-1769), the classical text-book introduction to the common law from which students were taught in America for at least a century. In 1777, the legislature of Connecticut proposed to endow a professorship of law at Yale, if given some part in the appointment and government of the college. The Yale Corporation would not agree to this and the plan fell through. But professorships of law, established on the Oxford example, were held by Thomas Jefferson (1779) succeeded by George Wythe (1779- 1780) at William and Mary, by James Wilson (1790) at the College of Philadelphia (now the University of Pennsylvania), by David Howard (1790) at Brown, and by James Kent (1794) at Columbia. Out of the latter grew later *Kent's Commentaries on American Law* (1826-1830) which has stood for the common law in America where Blackstone had stood for the common law of the English-speaking world. But these academic lectures did not essay a complete preparation for the practice of law which still went on in the offices of practicing lawyers.

Later a type of law school grew up on the model of a magnified law office in which the students read books but were quizzed and guided as a group by practitioners as had been done singly by practitioners. These private law schools, conducted by a corps of

teachers, could grow into faculties of law as faculties of universities.

The first and greatest of these schools was the Litchfield Law School founded by Tapping Reeve at Litchfield, Connecticut, in 1784. He became a judge of the superior court in 1789, and later chief justice. In 1798, James Gould, whose *Principles of Pleading in Civil Actions* (1832) was long the standard American text, was associated as instructor and became head of the Litchfield Law School on Judge Reeve's death in 1823. He was assisted by an instructor. The school was discontinued in 1833. It was the forerunner of the American law school of today. It combined lectures, prescribed reading, and practical exercises in a system of instruction carried on in an expanded law office. Students came to it from every part of the country. Not less than seventeen states and the District of Columbia were represented in its roll of students during the forty-nine years of its existence. It trained two justices of the Supreme Court of the United States, eight chief justices of state courts, forty judges of higher state courts, and a long list of governors, senators, and members of the cabinet. It lacked the atmosphere of culture and higher education and ample library facilities, which are given to legal education in the American university of today.

In September, 1815, the Harvard Corporation voted to establish the Royall Professorship of Law, a chair on the model of the Vinerian Professorship at Oxford, which had already been provided for in four American universities. Chief Justice Isaac Parker, the first Royall Professor, in his inaugural lecture, foreshadowed what was to come. He said: "At some future time, perhaps, a school for the instruction of resident graduates in jurisprudence may be usefully ingrafted on this professorship; and there is no doubt that when that shall happen one or two years devoted to study under a capable instructor before they shall enter into the office of a counsellor to obtain a knowledge of practice will tend greatly to improve the character of the bar of our state." He significantly added, referring to the Litchfield School: "A respectable institution of this sort in a neighboring state, unconnected with any public Seminary, has been found highly advantageous in the education of young gentlemen to the bar." In this building upon the conception of the Litchfield School is the genesis of the American university law school of today.

Accordingly, as Royall Professor, Chief Justice Parker proposed to the Corporation another additional professorship and the establishment of a school as a department of the university with a course of study in addition to the lectures of the Royall Professor. The plan was adopted and in June, 1817, Asahel Stearns, a lawyer practicing in Cambridge, was elected University Professor of Law. The degree of Bachelor of Laws was provided for, and the students in the law school were put on the same footing generally "in respect to privileges, duties, and observances of college regulations as by the laws pertain to resident graduates."

After ten years the new arrangement was not working out well. The number of students began to decline. Chief Justice Parker resigned the Royall Professorship; Professor Stearns was

elected County Attorney of Middlesex County, and resigned his professorship. It looked for a time as if the plan of a law school as a part of a great university would fail. Happily, Nathan Dane, the draftsman of the celebrated *Northwest Territory Ordinance,* and author of *Dane's Abridgement,* the pioneer digest of American legislation and judicial decision, conceived the idea of putting Joseph Story at the head of the school, providing an adequate endowment, and setting it definitely upon its feet. In this he succeeded. Story, a man of prodigious industry, who was able to sit as one of the justices of the Supreme Court of the United States at Washington, to sit as the justice assigned to the First Federal Circuit, to serve as Dane Professor of Law and head of the Harvard Law School, and to write the classical treatise on constitutional law and no less classical exposition of the main topics of Anglo-American commercial law, was put at the head of the school. John Hooker Ashman, who at the age of twenty-nine had already made his mark as a lawyer, was, on Story's recommendation, appointed Royall Professor. From this time the progress of the law school, as a true part of the university and as the controlling agency of legal education, was assured.

In 1882 Harvard Law School had a building of its own in the Harvard Yard—Dane Hall, destroyed by fire in 1918. Although Ashman (a victim of tuberculosis) died young after a scant four years of teaching, there was a succession of great teachers, authors (as the product of their teaching) of great treatises, long standard texts for practitioners, expounded by law teachers and studied by students who carried on the work begun by Story. Greenleaf, Parsons, and Washburn kept up the succession in what became standard texts for a generation. In contemporary schools, William Henry Rawle, John Barbie Minor, Thomas McIntyre Cooley, and Melville Madison Bigelow, maintained the flow of classical texts from American law schools till the end of the nineteenth century.

Credit for the decisive step in establishing the law school as a faculty of a university with the organization, prestige, requirements as to admission, study and graduation, corps of teachers, and appointments fully on a high academic level, must be given to President Eliot. On the resignation of Theophilus Parsons as Dane

Professor in 1870, Eliot, newly elected President of Harvard, sought to provide a dean and faculty as something more than what had grown up from the merging of office preceptorship and private proprietary school. With this in view, he brought Langdell, whom he had known when an undergraduate at Harvard while Langdell was writing notes for *Parsons on Contracts,* to the Law School as Dean and Dane Professor. What is more, he provided for the award of the ordinary degree only after examination and provided for government of the school by a faculty presided over by the dean in the absence of the president of the university. Theretofore the professorships had been held by judges or lawyers of high reputation at the bar. Langdell, while recognized by those who knew him as an able, well ready and successful practitioner, was not of outstanding reputation as successor of Story, Greenleaf and Parsons. Choice of the head of the school not on the basis of reputation as practitioner or judge, whose very name would give weight to the school, but on the basis of capacity to understand, expound and develop the law, the experience of the jurisconsult, not of the advocate, was a radical step forward. This putting of law teaching in its place as part of the work of professional education in a university maintained itself in the generation after Langdell's appointment and has come to prevail generally in the common-law world except in England, where it has only slowly been gaining acceptance at Cambridge and Oxford and to some extent at London.

As late as 1912 the dean of the law school of a state university could say that it was the business and duty of the state university law school to teach the law of the jurisdiction as part of the common law. In the United States we used to hear, on disputed questions of legal doctrine, about the Pennsylvania rule or the New York rule, or the Ohio rule or the California rule, as if there were some geographical relation of a legal doctrine to give it character. As the teaching of law has passed from the proprietary school and university schools on its model to faculties of law, as distinguished from teachers of local laws, we no longer hear of this cult of local law. The American law school of today stresses local teaching of general law not general teaching of local law. Today, two of the judges of the highest courts in England had a large part of their legal education in an American law school and one of the justices of the Supreme Court of the United States studied at length in England. One of the judges of the Supreme Court of Canada was recently a graduate of an American law school. The English-speaking world has come to think of law, not merely of laws. Law, as a system of principles for administering justice, is taught in the universities. Laws, rules for local policing, can be learned without being taught.

As we move toward a world legal order, a world regime of justice according to law, the idea that the training of the jurisconsult, developed in Roman law, preserved and handed down in the medieval universities in their teaching of the civil law, developed for the common-law world by the American university law schools, takes on primary significance. Legal education, as training in the application of reason to experience, leads toward a law of the world.