

1-1-1990

Historicizing Law Schools: An Alternative to The Socratic Tunnel Vision?

Steven Alan Childress
Tulane Law School

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal Education Commons](#)

Recommended Citation

Steven A. Childress, *Historicizing Law Schools: An Alternative to The Socratic Tunnel Vision?*, 38 Buff. L. Rev. 315 (1990).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol38/iss1/8>

This Review Essay is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

REVIEW ESSAY

Historicizing Law Schools: An Alternative to The Socratic Tunnel Vision?

STEVEN ALAN CHILDRESS*

I. INTRODUCTION

Historians can do good history and they can do bad history.¹ Worse history inadequately tells us what happened and why. In historicizing United States legal education, no less, the better history will tell us how we got here and what other ways we could have gone. Legal history is doing a good job in that endeavor as to the law and the legal system. Modern criticisms of legal education are helpful in that they ask what is best for the present and future. We should not, however, limit ourselves to criticizing just current legal education or historicizing just law. We should, in addition to improving our performance in those areas, also focus on historicizing legal education. In this essay, I discuss this problem in the context of two works of the last decade—one the leading history of law schools, the other presenting a glimpse of an alternative past, possibly offering a different world of legal education than that which we face today.

II. STEVENS' ELITE SURVEY

Robert Stevens begins his book *Law School*² by praising the Langdell legacy and the Harvard Dean's "Socratic"³ method: "The case

* Associate Professor of Law, Tulane Law School. J.D., Harvard University Law School. The author wishes to thank, and exonerate, Harry Scheiber, John Stick, and Jonathan Turley for their comments and suggestions.

1. See generally Nelson, *Standards of Criticism*, 60 TEX. L. REV. 447, 476-90 (1982).

2. R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983).

3. That label is a misnomer, since Socrates and his teaching bore little resemblance to the law teachers and their method today. Stevens more carefully calls it the "case method," but that may be

method was, and remains, an apparently brilliant educational tool."⁴ Then, after 288 pages exploring the history of the American law school, Stevens winds up his last sentence at the same spot, here in the role of apologist: "Finally, we may be sure that Langdell will continue to be blamed for things he never believed or at least never understood."⁵

A lot of the information for a thorough and reflective history of United States legal education is in those 288 pages. But Stevens' approach and apparently constricted goals guarantee us that he will tell us all about the scarecrow Langdell, the wizard Ames, the rusted tin man of formalism, the cowardly pride of realist lions, and that good witch of the Northeast—Harvard—without ever leaving the narrow point of the yellow brick road. En route, we learn little about explanations, alternatives, or the broader society beyond the elite eastern schools. And strikingly absent is any real assessment of the juxtaposition and vision of that witch of the West—Hastings—with her mysterious and schematic Pomeroy system, which developed late in the nineteenth century just as the Langdellian vision was spreading elsewhere.⁶ Stevens' book is, in toto, a history of Harvard and the case method, and the plethora of legal educators further down the list come across as excess baggage on our trip.

At least Stevens can be read like an open book, since his perspective is spelled out from the first pages: "The history of the United States has, in many ways, been the history of the tension between equality and excellence."⁷ The law schools, he says, track this "clash." With that dichotomy and "tension" (false? cynical?) as its frame, there is little wonder that this history will not tarry on the "lesser" schools except to catalog how much of the Harvard paradigm each adopted.

Perhaps an equally interesting, more telling tale would be found in these other schools, and in what aspects of Harvard they did *not* incorporate.⁸ This untold story would at least be the tale affecting more practic-

limiting in its own way, if it is possible to conduct the traditional law school question-and-question game without using only cases. See, e.g., D. VERNON, *CONTRACTS: THEORY AND PRACTICE* (1980).

4. STEVENS, *supra* note 2, at xv.

5. *Id.* at 279.

6. "Is she a good witch or a bad witch?", with apologies to L. Frank Baum. Cf. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFFALO L. REV.* 195 (1980) (quoting Baum: "Toto, somehow I don't think we're in Kansas anymore").

7. STEVENS, *supra* note 2, at xiii.

8. Many a school around the country must face "the hard fact that it cannot be a replica of the Harvard Law School of fifty or so years ago. The fond illusion that legal education is nothing more than cloning a single faculty's sense of self-worth has outlived not only its usefulness but also its moral appeal." Young, *Mission Statements*, 16 *SYLLABUS* 1 (1985). In this way, my criticism is similar to the broader complaint that some general legal histories tend to rely on the East for nation-

ing lawyers and representing more people, including some of our most legendary and influential legal figures, such as Roscoe Pound, Clarence Darrow, Hugo Black, and Warren Burger.

To be sure, much of the full picture of American law schools is indeed found in the book, especially in its full-text footnotes found shadowing each chapter, or can be readily perused in the sources Stevens cites. In a later part of this essay, I raise one missing comparison, the "Pomeroy method" of California's Hastings College of the Law, and show how it would have made a striking parallel to the Langdell-Ames saga, thereby fleshing out Stevens' own complaints about the atomistic perspective on law held by most schools.

My conclusion is not that Stevens has written a bad book. Indeed, if it were retitled and had not appeared in a pithier and important article thirteen years before,⁹ I have no doubt that this book would deliver, in an elegant way, on the promise of its title and intended Top-Ten scope. In reality, however, the book is inadequate and misleading as a general history of "law schools." The irony is that Stevens certainly had the materials before him to truly complete his history *and* to tell the full story of those parts which may have affected Americans the most, or potentially could have redefined the way students look at law. Perhaps these sources did not fit into his troublesome but unexplained polarization of excellence and equality. Regardless, alternative hope or critical vision simply did not make print, and the result leaves Stevens wondering why Langdell is blamed for things I would like to hear Stevens talk more about.

III. THE HARVARDIZATION OF AMERICA

There is no doubt that Harvard's history has greatly influenced the history of what one might call more "generic" law schools.¹⁰ Stevens details how, after Langdell introduced his case method in 1870 and Ames

wide "facts" behind theoretical arguments. See Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1718-20 (1981).

9. Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY, 5 PERSPECTIVES IN AMERICAN HISTORY 405 (D. Fleming & B. Bailyn eds. 1971). See *infra* note 40 and accompanying text.

10. By this label I mean no disrespect, though one question left hanging in the book is how much over time the less known schools were really inferior in intent and delivery to Harvard. Stevens does not really discuss how the educational process or practical result in the relevant legal community was less, beyond some notes on admissions requirements. But see Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 476 n.88 (1979) (Yale afraid to raise admission standards for fear of losing the "right" kind of students from good families). Presumably English law training, though undergraduate, is quality. See Smith, *The Case Method of Teaching Law*, 1 J.A.L.TCHRS. 17 (1967) (comparing British styles).

refined it in the next generation,¹¹ other law schools fell one-by-one like bodies in an Agatha Christie novel, especially among the elite of private eastern schools and established state universities.¹² Yet Stevens is not clear as to what was left intact within these schools or what other schools had been doing (and continued to do, in large measure). For example, the reader must have a sharp eye to notice the comment that poorer students "could probably not afford to go to a school that taught by the case method."¹³ What else was going on?

The case method is seen, in *Law School*, to predominate even today,¹⁴ while Stevens ignores studies which show that its domination remains partial, at most.¹⁵ More fundamentally, Stevens usually writes of the "case method" as a single entity, without saying whether that uniformly means something, explaining how it varies in application, or analyzing how much of the method and its infamous "trappings" (including teacher abuse, inefficiency, emotional damage, and subtle indoctrination) are endemic and inseparable.¹⁶ If this "method" is to be presented as the heart of law school history, it must be given substance and examined on its own terms.

Because, in some ways, the Socratic method *is* the history of many law schools,¹⁷ Stevens cannot be faulted for pointing that out and exploring that narrow history. A complete history will necessarily press a lot of pulp on the case method. Unquestionably, too, the Harvard chronology is interesting and important (though less needy of rediscovery¹⁸ than the more obscure issues of legal history). Nevertheless, these aspects are not the sole chronology of law schools.

In addition to an unclear overemphasis on one educational tool that many schools adopted in some form, Stevens is skimpy in providing historical theory and explanation for the dated events. Why did the case

Cf. Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968).

11. STEVENS, *supra* note 2, at 56.

12. *Id.* at 59-64.

13. *Id.* at 102.

14. *Id.* at xiv.

15. See Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME L. REV. 190, 199-200 (1976).

16. See, e.g., Kennedy, *How The Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970). See also Childress, *Baby and Bathwater: Developing A Positive Socratic Method*, 18 LAW TCHR. 95 (1984) (method should be distinguished from its abusive trappings).

17. See STEVENS, *supra* note 2, at xiv-xv. See also Childress, *supra* note 16, at 95-96.

18. See, e.g., J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* (1978); A. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967* (1967). See also note 40 *infra* and accompanying text.

method spread so quickly to predominate in the way that it did (if it really did so)? Stevens does list certain pedagogic advantages of the method¹⁹ and poses its logistic adaptability to other schools.²⁰ But the more interesting explanation is less pristine. The method was profitable in excusing huge gaps in teacher-student ratio,²¹ it may have allowed lazy teachers to “hide the ball” on their own inadequacies,²² and it was seen to divide top-flight schools and students from the herds in the profession.²³ More historically, the method was *associated* with Harvard, elitism, and presumed “excellence” in a way that ignores the costs to Stevens’ polar “equality.”

Stevens notes the method’s association with Harvard, but he does so in a way that obscures the dilemma of cause-and-effect and implies, perhaps too neatly, that Harvard has predominated *because* of its method:

A teaching style that has survived, at least in appearance, without great change, has had inevitable implications. It should come as no surprise that one school—Harvard, the founder of the case method—has dominated the development of legal education for a century. Indeed, even today, Harvardization is frequently the touchstone either of academic quality or the focus for academic crises.²⁴

Stevens does provide the reader with good data on Harvard’s superior marketing job of its “new”²⁵ method. For the period after Langdell’s introduction (and especially after Ames’ “refitting” of the method from formalist doctrine to legal processing) Stevens describes Harvard teachers moving to other schools,²⁶ deans writing Harvard for innovations,²⁷ and the old guard of the American Bar Association outmanned and outvoted after an influx of Harvard committee members in 1893.²⁸ Other parts of the Harvard package, including law review, moot court, and

19. See, e.g., STEVENS, *supra* note 2, at 54-56, 63, 269.

20. *Id.* at 61, 64.

21. *Id.* at 63-64.

22. See Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226, 235 (1973).

23. STEVENS, *supra* note 2, at 63.

24. *Id.* at xv.

25. In reality similar methods were used before Langdell. *Id.* at 52; see also Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 749-50 (1976). One interesting question: if the method appeared before, why did it take Harvard and Langdell to make it catch on? Perhaps the answer lies more in Harvard than in the method.

26. STEVENS, *supra* note 2, at 60-62. The parallel to the State University of Moscow or the first apostles is interesting, and teachers still tend to “go out” from top schools. See *infra* note 31.

27. STEVENS, *supra* note 2, at 58-61. And Harvard President Eliot apparently had a missionary zeal and real marketing skills. *Id.* at 35 (“set out to conquer”).

28. *Id.* at 59.

pow-wow clubs, were also adopted widely and quickly.²⁹

All of this may more easily lead to a conclusion not that the Harvard method was adopted because it was uniformly superior for perceptive deans, or naturally won out in enlightened faculty votes; rather, the better inference from Stevens' own facts is that the Harvard method won not so much for its method as for its "Harvardness."³⁰ In this way, Stevens' cause-and-effect is not only limited but also limiting, preventing him from digging deeper into the method's debits-and-credits, as well as from discovering a truer history of the extortion, elitism, infiltration, and incest³¹ that apparently flourished in the 1880-1910 period. The case method can be cast as the imposed Vichy Republic of a lost war, not a dialectic development in the innately better product.³² At least exploring this reverse causation more would fill out Stevens' historical account.

Stevens' overreliance on this apparently inevitable goodness skews his focus in other ways. The result is a history that describes the domination (if only partial) of the *present* by "the" case method. This perspective corners him into having no place for a "past potential" tense in his synthesis. There is to Stevens "but one significant breakthrough in pedagogy."³³ Not only does he fail adequately to say why it broke through, but other possibilities at that turning point are ignored. In the end he offers no real future possibilities other than the past as it actually developed—the case method.

IV. CRITICAL GAPS IN HISTORICIZING THROUGH THE HARVARD PRISM

Once Stevens makes the framework as narrow as he has (and reduces "the" law school to a fight over quality and equality), little is left for him to dream of how the past might have been,³⁴ or, also importantly, what we can and should do *now* for the future of legal education. Of

29. *Id.* at 117-18.

30. *See id.* at 63.

31. Even today studies show that 60 percent of full-time law teachers received degrees from only twenty schools (of 160)—most of these from the "top" five. *See Fossun, Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 507.

32. I do not mean to say that the case method product *is* inferior. In fact I have argued that the method has many real and potential advantages. *See Childress, supra* note 16, at 101-04. But in a *history* both viewpoints should be used to flesh out a fuller account of how we have wound up where we are.

33. STEVENS, *supra* note 2, at xiv. There is "no serious competitor." *Id.* It is "the innovation in legal education." *Id.* at 63 (emphasis in original). *See also id.* at 269.

34. *Cf. Cox*, Book Review, 92 HARV. L. REV. 1170, 1178 (1979) (reviewing J. SELIGMAN, *THE HIGH CITADEL* (1978)) (the "true lawyer will be a dreamer too").

course, a critical stance as to the present leaves Stevens untouched, if in fact he provides a good historical account in the meantime. In this case, however, the limited vision makes for inadequate history leaving him to raise a lot of good questions and scratch some subtle issues of the profession without the proper vantage point from which to begin to seriously address them.

Stevens notes forlornly that legal education is atomistic, that is, taught in parts without a general, coherent framework or theory.³⁵ One might say that this is a more natural product of the case method and its dominance than is "excellence" in legal education. In either event, Stevens does not explore past opportunities to provide a real core of legal understanding through educational methodology. He does not even propose an introductory course on the structure of law.

Stevens notes the inadequate attention given to social sciences, as with the somewhat unsuccessful attempt to empiricize at Yale in the 1930's.³⁶ Even then he does not blame Langdell for the *intended* isolation³⁷ of law from other disciplines. He mentions Berkeley's first flirtations with law and society,³⁸ but ignores the innovation of a Ph.D. program in Jurisprudence and Social Policy or other research programs in law and society which developed in the 1960's at other schools.³⁹ Apparently, such efforts do not fit into a history of law school that emphasizes the parroting of Harvard. In this way, Stevens' book adds little to his "Two Cheers" article of 1971—admittedly a fine article for its purpose⁴⁰—with only cosmetic updating and little incorporation even of the elitism criticism of the profession by Jerold Auerbach in an article next to Stevens' own.⁴¹

The isolation of law study allows Stevens to give short shrift to other education issues and possibilities. The advent of computer education in the 1970's, especially in Minnesota's widely-used software on legal ethics, is bound to have real impact on (and pose new problems for) the educa-

35. STEVENS, *supra* note 2, at 133, 279.

36. See Schlegel, *supra* note 10.

37. See J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 262-68 (1950) (Langdell supported separation of disciplines). Cf., Stevens, *supra* note 9, at 418-19.

38. See STEVENS, *supra* note 2, at 277. *Id.* at n.94 (the notation is largely limited to the founding of the LAW & SOC'Y REV).

39. See Skolnick, *The Sociology of Law in America: Overview and Trends*, 4 LAW AND SOC'Y REV. 4, 34-37 (1965). Cf. STEVENS, *supra* note 2, at 286.

40. See Stevens, *supra* note 9. Auerbach calls it "[b]y far the best historical survey." J. AUERBACH, *UNEQUAL JUSTICE* 373 (1976).

41. See Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in *LAW IN AMERICAN HISTORY* 551 (1971).

tion process at law schools,⁴² as well as on the thinking behind legal research.⁴³ Stevens also gives inadequate attention to the possibility of tutorials (perhaps by upper-class students), the relationship between student and teacher,⁴⁴ and the future and real effect of present clinical and externship programs.⁴⁵

In the process, Stevens bemoans a perceived lack of quality scholarship,⁴⁶ prejudice against women,⁴⁷ and the apparent uniformity of law schools.⁴⁸ None of these points is developed or related to the larger problems of the legal profession in general, and legal education in particular. Instead, each appears to be another casualty of some war between quality and equality. And the centerpiece is a boosterism of the case method which in places is justified and in others is hollow—and damaging to his title's mission of describing and explaining legal training in general.

V. THE POMEROY PERSPECTIVE

One historically interesting possibility was the taxonomic and comprehensive system of legal education that John Norton Pomeroy was developing at California's Hastings at about the time Langdell's innovation took hold at Harvard. Stevens ignores the entire phenomenon, except to add a minor point to his case method argument: "When Pomeroy went to Hastings in 1878, the trustees forced him to use the lecture method, but he soon returned to a modified form of the case method."⁴⁹

This is unfortunate, for reference to the events at Hastings at this time would not only make Stevens' book a truer *history* of legal education, but would also give him a firmer springboard to what he might call the more important events happening at, and spreading from, Harvard.

42. See Comment, *The Impact of Computers on the Legal Profession*, 30 BAYLOR L. REV. 829 (1978).

43. See Berring, *Full-text Databases and Legal Research: Backing into the Future*, 1 HIGH TECH. L. J. 27 (1986); Childress, *The Hazards of Computer-Assisted Research to the Legal Profession*, 55 OKLA. B. J. 1531 (1984); Gelfand, *Public Control of Computer-Assisted Research: A Commentary*, 55 U. DET. J. URB. L. 783 (1978).

44. See, e.g., Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 398-401, 413 (1971); Maslow, *Self-Actualizing People: A Study of Psychological Health*, in *THE SELF: EXPLORATIONS IN PERSONAL GROWTH* 190-91 (C. Moustakas ed. 1956). Instead, Stevens consistently paints student reaction to their education process as mere "complaints." STEVENS, *supra* note 2, at 318.

45. Cf. STEVENS, *supra* note 2, at 229-30, 240.

46. *Id.* at 278.

47. *Id.* at 82.

48. Cf. *id.* at 277-79.

49. *Id.* at 66 n.14. See *id.* at 61.

Even from a Harvard's-eye-view of law schools, the Hastings parallel is telling. Hastings, founded in 1878, was practically *the* school in the West and may have had the potential to affect western legal education in the way that Harvard was starting to do nationwide. Pomeroy, a former professor at New York University and author of leading treatises on constitutional and municipal law,⁵⁰ developed the school's first curriculum. It was phenomenally different from the course-nuggets approach at Harvard and at most schools today. The Pomeroy system taught *all* the law, framed by a taxonomic case syllabus.⁵¹ Still, for Hastings a picture similar to the Harvard chronology developed: Pomeroy refined his approach and passed it on to the next generation of Hastings students through the next full-time professor, Charles Slack, who like Ames, was a recent graduate of the hiring school.⁵² But Slack never secured his position like Ames did⁵³—nor apparently did he attempt to win others to the overall method—and Pomeroy's pedagogic legacy soon was co-opted by newer professors (some from Harvard), and gutted after Slack left full-time teaching.

There are many good reasons why, historically, the Pomeroy method died out: Slack was not Ames, Hastings was not Harvard, and the West was not the East (especially as regards the felt necessity of schooled law). The Pomeroy method was huge, complex, and difficult to implement by atomized professors,⁵⁴ especially those not Pomeroy's students. More fundamentally, the method may have simply been inferior as a method, though we do not know enough about it, or a present application of it, to draw that conclusion. Still, at least it provides, even if in glimpses, an alternative vision of what legal education might be—all-encompassing, theoretically unified or organized, and presented as a coherent whole.

Stevens explores none of these developments, possibilities, or explanations, and the effect is a disservice even to his emphasis on Harvard and the case method. Within the parallel and historical reality lies some

50. T. BARNES, *HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY* 67, 91, 94-95 (1978). "Municipal" meant comprehensive, or an encyclopedic categorization, not "city."

51. *Id.* at 102-108.

52. *Id.* at 89, 117-20.

53. *See id.* at 129. Barnes provides more factual background on his protagonists than does Stevens for Langdell and Ames, who despite their central importance to the history are briefed in a few paragraphs. *See* STEVENS, *supra* note 2, at 38, 52, 56. Ironically, Barnes provides as much or more of the interesting past and *history* of the Harvard duo.

54. *See* T. BARNES, *supra* note 50, at 116, 125, 127-29.

pointers for the dominance of Harvard that Stevens is in effect describing without digging into.

VI. CONCLUSION

In many ways, Thomas Barnes' less encyclopedic study of Hastings,⁵⁵ while having a title less ambitious in scope, serves as a better history of the American law school even as it explores its microcosm. The author consistently fleshes out the more usual account of office study, Langdell-Ames, Harvard, realism, elitism, and post-war boom as a vehicle to draw a firm base for an interesting parallel and possibility from Hastings. In the process, he avoids the cheerleading blandness of most efforts in the "This School's Anniversary" genre.⁵⁶ His analysis extends far beyond one school and one taxonomic professor from the East. Stevens, too, draws a firm base for what is meant to be a broader study. Stevens, however, often does not venture far enough from his broad base of facts and dates. When he does, his unabashed reliance on the case method, and the elite schools that propagated it, limits his freedom to ask more questions about what else was going on—and more critical questions about what he describes.

The lesson for the future of historicizing about U.S. legal education seems clear: now that the Harvardization of U.S. law schools has been cataloged, we need more data and critical analysis of the past alternatives, the "quality" dilemma, and the future beyond socratic nostalgia. To the extent Stevens' book sparks such an inquiry, in both its information and its gaps, it succeeds as legal historicism. But if it stifles inquiry into the past of legal education, and the alternative visions possible, merely because it succeeds in being accepted as the encyclopedia on the subject, it, unhappily, cuts off the creative possibilities of a world, and a past, beyond the socratic straightjacket.

55. *Id.*

56. See, e.g., SUTHERLAND, *supra* note 18 (which does not even seem embarrassed by its title, a history of "men").