Training the American Aristocracy: An Historical Examination of American Legal Education Models

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If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not amongst the rich, who are united by no common tie, but that is occupies the judicial bench and bar.

Alexis De Toqueville

I. INTRODUCTION

Two myths dominate contemporary thinking about the role and the effectiveness of legal education in the United States. The first myth is the fable that all lawyers in the United States practice the same kind of law, engage in the same activities for the same kind of clients and therefore may be given the same kind of training in law school. This myth should be called the “Myth of the All Purpose Lawyer”. The second unsupported belief about legal education is the myth of the “Business Lawyer”. It is commonly held that most lawyers work in large firms, advise business clients on business matters and that legal education should be structured to conform to the needs of business oriented lawyers.

If these two myths restated essentially valid conclusions about the role of lawyers in this society and the kind of work which lawyers perform in support of their role, the myths would do little damage to legal education. However, the available data shows that these myths convey an essentially untrue picture of life after law school. Further, the available evidence shows that the legal profession is stratified into a three layered sandwich consisting of a professional elite which represents about 25% of all lawyers, a lawyer middle class of about...
and an under class of about 60% of all lawyers, each subgroup having very different types of law practice and clientele.

The fraternal debate carried on by many legal educators since 1965 on the nature, purpose and design for an optimum form of legal education for America's lawyers has ignored the impact of the myths of the Single Purpose Lawyer and the Business Lawyer. The great debate began in the 1960's with a spate of articles describing student discontent with the legal education "system". These articles also represented attacks on law teachers and the professional goals of the legal education community, although the first of such articles were written by law professors. Within five years, a flood of impressionistic student-written literature condemning legal education appeared. The impressionistic phase was followed by several serious scientific studies of legal education and its impact on students and lawyers by psychiatrists and psychologists. In the early 1970's, some law professors supported radical revision of law school curricula and structure. These changes were put out in a report which

1. The self critical literature of the past few years added little to the theoretical foundations for legal education. The literature usually began with an assertion that law students were bored with law school after the first year of studies. The author then proposed a scheme by which boredom, discontent and feelings of irrelevance might be relieved by altering the curriculum or by abandoning the "Socratic" method of teaching. Others blamed some institutional failure to identify student needs and aspirations as the cause of the trouble with law schools. See, e.g., Bergin, The Law Teacher: A Man Divided Against Himself, 54 U. Va. L. Rev. 637 (1968); Campbell, Attitudes of First Year Law Students at the University of New Mexico, 20 J. Leg. Ed. 71 (1967); Johnstone, Student Discontent and Educational Reform in the Law Schools, 23 J. Leg. Ed. 255 (1970); Little, Pawns and Processes: A Quantitative Study of Unknowns in Legal Education, 21 J. Leg. Ed. 145 (1968); Miller, New Dispensation in Legal Education, 2 John Marshall J. 288 (1969); Patton, The Student, The Situation and Permanence During the First Year of Law School, 21 J. Leg. Ed. 10 (1968); Reich, Toward the Humanistic Study of Law, 74 Yale L. J. 1402 (1965); Peisman, Some Observations on Legal Education, 1968 Wis. L. Rev. 63 (1968); Savo, Toward a New Politics of Legal Education, 79 Yale L. J. 444 (1970); Symposium, 17 Cleveland Marshall Law Rev. 189 (1968); Curriculum Reform Roundtable, 20 J. Leg. Ed. 387 (1968).

was rejected by the American Bar Association in 1972. Since the rejection of the Carrington Report, the self-critical debate has apparently subsided. The grand designs for curricular and institutional reforms have been put in cold storage. Legal educators appear to be more concerned about "raising standards" than in reform. The current literature which attempts to reflect student attitudes about legal education and the law portray the students of the late 1970's as self-centered, job oriented and content with the status quo in legal education.

The point of this article is to present a basis for reinterpreting the four major models for a law school. Since 1870, only four institutional structures have been seriously proposed for adoption as the proper role for a law school. The principal model for legal education, the Langdellian model, is based upon the Harvard Law School of the late nineteenth and early twentieth centuries. It is a business oriented legal educational model. The second, which like the Langdellian model, is academic in character and intellectualising in its approach to law, was derived by Prof. Myers McDougall and Prof. Harold Lasswell at the Yale Law School in the late 1930's and early 1940's. The third and fourth models proposed for legal education are both clinical in orientation. The eldest, the Jerome Frank model, appeared full term in a 1930 law review article written by Judge Jerome Frank. It called for a clinical legal training program for future trial lawyers. The last great model for legal education, originally proposed during the great debate over law school curricula by Prof. Thomas Shaffer and Dr. Robert Redmount, assumes that legal knowledge comes from active engagement in "lawyering."


5. T. Shaffer & R. Redmount, Lawyers, Law Students and People, 6-13 (1977). (hereafter "Lawyers, Law Students and People"). The authors say that:

Human regimens of study begin and end in experience. They emphasize a well-being that goes beyond rights, powers and duties. Fact finding and fact evaluation are matters for complex inquiries more than hypotheses. Learning facts in interviews and learning to bargain and negotiate are other transactions which involve moral and emotional, as well as intellectual, aspects of experience—and all of these things in all of their implications, can be studied. (id. 12)

... To begin with, it is our premise (our hypothesis and our empirical conclusion) that the learning of law, more than the practice of law, is task-oriented rather than person-oriented. (Id. 25)
which includes training in counselor and negotiating skills as well as trial advocacy skills.

The relative worth of each of these models for a law school can be assessed only by examining the role each curricular and institutional model offers for law teachers and for law students in preparing for a relevant strata of law practice in America. The theme of this article is that legal education cannot be an experience divorced from the strata of practice to which law students will gravitate on graduation. This article compares the four models for legal education and assesses each in terms of the type of ideological and technical preparation each offers for law students.

II. THE SOCIOLOGY OF THE LEGAL PROFESSION

A. A Literary View of Lawyers in America. Lawyers have been ripe targets for novelists for centuries. In contemporary twentieth century American fiction, several authors have constructed novels centering on the lives and activities of lawyers. These literary descriptions seem to point to more than one kind of social and economic level for lawyering in the United States. The resulting differential treatment by authors of their literary lawyers leads one to believe that law is not an unitary practice. The sweep of American fictionalised law includes such people as Anthony Travers’ Paul Biegler in Anatomy of a Murder, an unlovable criminal lawyer, Carl Sandburg’s roguish Abraham Lincoln from Abraham Lincoln, The Prairie Years, and James Gould Cozzins’ Arthur Winner, the hero of By Love Possessed. Together with other fictionalised lawyer portraits, these fictionalized attorneys present a contradictory and ambilavent picture of lawyers in America:

(1) all the fictionalised lawyers have some form of special power over common men, which is re-

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Learning the Law is, now, we believe, too primitive an experience. It lacks mental, moral, emotional, and social development and, therefore, does not serve the best interests of society or, for that matter, the best interests of the legal profession. It lacks humanistic concern, probably because it lacks the appropriate means and conditions which would ameliorate and improve the learning experience. (Id. 33)

7. C. Sandberg, Abraham Lincoln the Prairie Years (1928).
flected in an aristocratic assumption that they have special benefits because they carry special burdens for society as a whole;

(2) fictionalised lawyers are crafty, manipulative individuals who take advantage of ordinary people for their personal benefit;¹⁰

9. One of the most striking literary expressions of the "ruling class" approach may be found in Rittenhouse Square, Arthur Solmsen's novel about a young Main Line Philadelphia lawyer who is assigned by his "white shoe" law firm to a month's duty as a public defender. The young associate, Ben Butler, who has worked in securities registration at the firm of Conyers & Dean, falls in love with the original law process and wants to leave the firm to become a full time public defender. He seeks the advice of Ordway Smith, one of the younger partners in the firm:

"What do I think? A wretch who's spent his life helping plutocrats hang on to their money?" He continued to look at the ceiling. "What difference does it make what I think? This is the age of public service, of service to the common man, and I'm a relic from the days of the robber barons. You've received the call, and you're going to heed it, aren't you? Isn't your mind made up?"

"No, it's not, Ordway. That's why I'm asking your opinion."

He stretched out his long legs and turned his face toward me. "You really want my opinion. All right, I'll give it to you ... All this talk about what's more 'important' than business and money—Ben, that's just oratory, that sounds good when you say it fast, but does it mean anything? ... Those prisoners you defended over there are really the dregs, the bottoms of the barrel, the wreckage of society ... They're the ones who couldn't make it because they're discriminated against, or because they're uneducated or poor or stupid or maybe just plain lazy ... Now what do we do at C&D? What do they do in any big law office? To some extent we help rich people hang on to their money, but mostly we give advice to corporations, to businessmen ... the point is we work for businessmen, successful businessmen, instead of people who've been arrested by the police."

"I know that, Ordway—"

"All right, what's more 'important' social work or business? ... Business is life for most people. Business is their jobs and their children's future and security to their old age ... most people just try to do their work and get along and play by the rules—if they can find out what the rules are. And it's our job to tell 'em." (Id. 295-97).

10. This is expressed best in Anatomy of a Murder. Paul Biegler agrees to defend Frederick Manion charged with shooting a man who attempted to rape his wife, Laura. Biegler goes to the County Jail to interview his client. In the course of the interview, Biegler gives Manion what he calls the "lecture":

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the Lecture is an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land "Who, me? I didn't tell him what to say" the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?" (Id. at 35.)

Biegler then lectures Manion on the insanity defense. Biegler tells Manion that the evidence is all against him and the jury would surely convict him if he has no defense, even though he shot the man who was fooling around with his wife. Biegler then tells Manion that the jury might be willing to let him off because he is a "good guy" but the judge would probably instruct the jury to convict him. Biegler, at an apt moment,
lawyers operate on a set of moral principles which are not the same as those of ordinary mortals;\textsuperscript{11}
\begin{enumerate}
\item despite the aristocratic posturing, the manipulative behavior and the strange moral choices made by lawyers, lawyers are absolutely necessary mediators of power relationships in our culture;\textsuperscript{12}
\item The kinds of things lawyers do varies with the situation of the lawyer; some lawyers help the poor and oppressed beat the system;\textsuperscript{18} other lawyers organize and plan difficult and dangerous social and economic schemes for the government or for private industries;\textsuperscript{14} other lawyers are patient counselors and trusted family advisors.
\end{enumerate}

The literary descriptions of lawyers shows a person whom most ordinary people will love and hate at the same time.

\textsuperscript{11} This concept of the "higher immorality" of lawyers has many literary episodes devoted to describing it. First, there are the devious tricks of such people as Paul Biegler and his concocted insanity defense for Manion in \textit{Anatomy of a Murder}. There are several descriptions of lawyers "covering up" for other lawyers' criminal behavior, such as Arthur Winner's concealment of embezzlement in \textit{By Love Possessed}. There are also many distinctive references to the lawyer's working environment which show that lawyers move in a closed universe. One of the more frightening portraits of the lawyer not in touch with ordinary humanity appears in Evan Connel, Jr.'s character, Mr. Bridges. Mr. Bridges, a lawyer in a medium sized city, moves entirely within his own ritual of legal mumbo jumbo. This insularity is experienced by his family in an anguished Christmas day in the Bridge family when Mr. Bridge gives \textit{all} his family shares of stock which he then zippers into his brief case for safekeeping, not trusting them with their own presents. Bridge's values have no relation to the values of his own son, Douglas, nor to the rest of his family. Bridge is happy only in his law office and in his ritualised behavior patterns.

The theme of the law office as a temple appears in James Gould Cozzins' description of Jake Riordan's law office in \textit{The Just and the Unjust} \textit{351-61} (1942). Jake's office, occupied by his predecessors for more than 100 years contains ancient daguerrotypes, handbills for Lincoln's funeral train, and other votive objects. It is a place for doing homage to the law, not to transact ordinary business.

\textsuperscript{12} This message can be taken from \textit{Anatomy of a Murder}, \textit{By Love Possessed}, and many other modern novels. The rage with which Charles Dickens insults and demeans lawyers in \textit{Bleak House} and \textit{David Copperfield} also shows Dickens' dependence on lawyers and his fury with the ambiguities of dependence and independence.

The best modern example of the heroic lawyer appears in Harper Lee's \textit{To Kill a Mockingbird} (1959). Atticus Finch struggled to provide a meaningful defense for a Black man charged with raping a white woman. Finch's client is nearly lynched. The trial results in a predictable death sentence. Finch refuses to do nothing less than his best efforts for the condemned man, despite community hatred and fury at both the man and the crime.

\textsuperscript{13} Louis Auchincloss' novels of Wall Street lawyering show a great many examples of the cunning strategies of lawyers planning great economic and social enterprises for and on behalf of their clients.
The literary lawyer is someone to depend on, but not someone to trust. He or she is dishonest, but ultimately fair. People cannot do without lawyers in all types of social endeavors, but no one wants a lawyer for a son-in-law. In short, novelists give lawyers most of the known characteristics of a socio-economic elite class. At the same time, novelists indicate that lawyers operate within an order of privilege in which some lawyers are much more important than others. Three strong examples of this insight can be gained from *Anatomy of a Murder*, *By Love Possessed*, and *The Law and Timothy Colt*.

Anthony Travers chose to build a novel on a criminal lawyer and his client in *Anatomy of a Murder*. Paul Biegler is a seedy solo practitioner in an Upper Penninsula town in Michigan. He used to be the district attorney, but lost his campaign for re-election. Most of his clients are “one shot” cases seeking a divorce, bankruptcy or deliverance from the clutches of the law. Finally, Biegler gets the chance to seek revenge against his successor. An Army Lieutenant is charged with murdering a local bartender who forced himself on the Lieutenant’s wife. The murder on its face was a cold blooded assassination. However, Biegler concocts an “insanity plea” with his client’s cooperation, and the help of a paid expert witness, which results in his client’s acquittal. The ironic ending of the novel shows up the cunning of Biegler’s client and Biegler’s own duplicity. However, Travers impliedly assures the reader that Biegler is a vital cog in the link of criminal justice, and something of a picaresque champion of the poor and downtrodden, rather than an egotistical criminal seeking revenge on his successor in office. Biegler is devious, tricky and manipulative because he is forced by the logic of the legal system to adopt such tactics in order to save his client from a life prison sentence for a “justifiable” homicide. Paul Biegler does not lack courage in his approach to law. The very defense itself admits his client committed what would otherwise be a murder.

Arthur Winner, James Gould Cozzins’ hero in *By Love Possessed*, is a much different sort of lawyer. First, Winner belongs to a firm in his small New England milltown. The firm has been in existence for at least 75 years. Winner’s father was a member in his time. The firm represents the local mill owner, the local financial institutions, and Winner himself spends a great deal
of time in court, but other firm members work on estates or act as trustees for charities. The major conflict around which Cozzins structures the novel is Winner's discovery that his senior partner has been embezzling funds from one trust account after another in order to make up shortfalls in the local charitable trust occasioned by the partner's bad investments. Winner decides to cover up his senior partner's crime for the good of the whole community and of the firm. He obtains the cooperation of the third partner in his scheme. Cozzins adds several subplots to this theme of "higher immorality", including an adulterous episode and the conflicts produced by the local bad boy from a good family. Winner's legal activities are easily distinguished from those of Paul Biegler. Winner has the respect of his community. His practice is roughly balanced between court work and advising people in the office. None of Winner's clients will affect the outcome of state or national policies, but in the small town in which he operates, his clients represent the ruling elite. Biegler's clients were the underclass. Winner's decision to conceal the crime of his partner, like Biegler's decision to trump up a defense for his client, however, are acts of the same character. In both cases, the authors lead the reader to accept the lawyer's choice of an immoral means to a morally defensible end as appropriate and correct under the circumstances.

Finally, Louis Auchincloss's Timothy Colt represents quite a different type of lawyer altogether. Colt is an associate who is employed in a very large Wall Street law firm. Colt graduated from a prestigious law school and an Ivy League college. His wife is a Social Register type. Colt's worklife has very little to do with clients and the affairs of clients. In his large organization only a few lawyers really meet the outside world. Colt is employed in writing securities regulations memos, in making up estate plans for millionaires and in otherwise serving those firm partners who in turn serve the heads of giant corporations or family dynasties. Colt's ambition is to become one of those partners, which he perceives will be achieved by total attention to the engineering technology of his legal work, good manners and keeping the patronage of a senior partner. Colt's mentor in the organization is Mr. Knox, a very unlikely Wall Street lawyer. Knox has a passionate concern for justice, rather than
for the client's interest. He inserts flights of literary fancy into briefs directed to the Securities Exchange Commission. In the end, Colt loses Knox's patronage and is sent over to an estate planning partner. The resulting crisis brought on by details of the estate plan force Colt to reexamine his more selfish way of life and ambitions and to accept the moralistic approach to reality which Knox had.

Timothy Colt's legal business bears no resemblance at all to that of Arthur Winner or Paul Biegler. Colt's firm has no poor and downtrodden clientele at all. It represents only the most powerful economic interests in the world. Colt does very little direct work for clients; he is a legal engineer working on engineering great architectural triumphs to be proposed by the public contact parties in the firm to the heads of great corporations and wealthy families. Colt has no contact with street crime. In fact, Colt has very little contact with the outside world. His life is lived out in the legal monastery populated by compulsive workers. Auchincloss gives the reader a picture of the Wall Street law firm as a sort of holy sanctuary in which the higher truths of law are revealed to the initiates slowly after much effort. Colt is transformed by this ritual from a young man on the make to a true believer in the majesty of the law. Auchincloss hints that the necessary purification ritual is the competition for partnership between young, aggressive associates vying for favor with the senior partners.

These three literary lawyers are very different men. Each plays the role of lawyer in distinct ways. However, each is clearly a power broker or a mediator of social control. In each case, the object of social control is specifically different in kind, not simply in quantity. Colt's practice is simply not a more lucrative version of Winner's or Biegler's practice. At the top of the legal pyramid sits the members of Colt's firm and their associates. These people advise the people who in turn make national social, economic and political decisions. The Wall Street lawyer, by skillful use of the technical side of law, manipulates the course of such decision-making. It is the skill which Colt recognizes and yearns to possess for himself. The conflict in Colt's case lies between two means to exercise this power. On the other hand, Winner's clients, although well-off for the most part, do not change the face of the earth with the
stroke of a pen. At most, they alter the relationships between worker and mill owner, between bank and borrower, in a small town. Winner controls their behavior in part by use of technical legal skills in the courtroom and in an advisory practice, and in part by the tangled web of relationships between people in small town life. Winner's legal work takes him out of the office and into the main stream of life in his town. Colt's work is totally confined to the law office.

Finally, Paul Biegler's clients are neither rich nor powerful. His clients are deprived of ordinary access to social control over others. Biegler manipulates the legal system to prevent his clients' imprisonment. Only Biegler can get them off. Biegler operates on a different level of practice in which technical skill in the holy rituals of the law is of less importance than a crafty knowledge of the courtroom behavior of judges, juries and opposing counsel. The work Biegler does has no resemblance at all to the refined briefs and memos prepared by Timothy Colt for his senior partner on the intricacies of securities registration. Colt would find it impossible to manipulate opposing lawyers and judges in the casual way that Paul Biegler does. Biegler might envy the practice of Arthur Winner and the financial security of his clientele, but Biegler would not be at home drafting wills for the genteel small town plutocrats which occupy so much of the time of Winner's firm. It is also hard to imagine Biegler cooperating with a man such as Julius Penrose, Winner's other partner.

Literary descriptions of American lawyers clearly conform to a three-fold vision. In the first rank are those lawyers whose professional lives are played out in the service of the American elite. These men and women have a great deal of influence over state and national decision-making by use of the legal system of rationalizations on behalf of their corporate clients. The second class of men and women in law practice work in less prestigious but socially acceptable roles as guardians of middle class values and ideals in small town America and in the larger communities in the nation as well. These individuals manipulate legal rationalizations in order to protect the status quo values of their communities. Finally, the third class of literary lawyer lives out his or her professional life among the poor, the unlovely and unglamourous, defending these unfortunates from the harshness of the system.
B. The Professional Structure of the Lawyer Class. Literary descriptions of lawyers at work anticipates the findings of social science on the roles played by lawyers. The myth of the all purpose lawyer states that all lawyers do about the same sort of things professionally. Reality, as presented by fictional lawyers, shows lawyers working in at least three different strata of society. Social scientists have in the past several decades been able to identify and explain some of the indicia of stratification among American lawyers.

In the past half century, social scientists have undertaken studies of American community life. Beginning with Middletown, these studies have identified the indicia of social strata in American culture. According to the Lyndes and Warner, American social life is pretty well defined by the relationship between the upper, middle and lower strata of any given community. In terms of interaction to common situations, the three strata of American life tend to react differently and to adopt lifestyles which indicate a vast difference in the perception of events in their community. Similar stratification studies of practicing attorneys have been attempted within the past two decades. At the same time, improved systems for economics of practice reporting have allowed state bar associations to keep general statistics on relative earning power among lawyers in several states. All these factors make it possible to assess the sociological basis for identifying the strata of lawyers in America.


16. The various systems of social class structures used by the Lynds and by Warner are effectively described in simple language in M. Gordon, Social Class in American Sociology 13-20 (1963). The most frequently used commonplace division of any American community is three level: low, middle and upper class structures. There are competing and much more complex structural description methods such as that employed by Tocott Parsons, or by the pluralist social scientists of recent vintage. The analysis of lawyers as a class involves a selection of distinguishable characteristics for identifying the various levels of lawyerlike activities. This topic will be developed later in the article in more detail.

17. The original fieldwork by the Lynds in Muncie, Indiana was reported in such fashion as to emphasize the different expectations and attitudes of working class and middle class individuals in Muncie to such technological and social changes as cars, indoor plumbing and high school graduation. The inference is that the class position of an individual affects his or her perception of an event or act in subtle, unconscious ways.
Lawyers are a professional occupational group whose average net earnings fall within the top 20% of all American occupational classes. Income has traditionally been accepted as one indicia of social strata and is thus a useful measuring rod for determining whether there are strata among American lawyers. The available survey data shows that the top income producers among American lawyers are those men and women who are partners in law firms of 15 or more persons in major metropolitan areas. The clientele of these larger firms tends to be large corporations and their executives and rentier-owners of large shares of corporate securities. It follows that the income derived by law practice in larger firms in big cities comes from legal services rendered to men and women of great wealth, power and social influence. The men and women who practice law in these large firms represent somewhere between 15 and 25% of all lawyers in any large metropolitan area. Such individuals do not practice in small town America.

Other indicia of stratification may be applied to the men and women who practice law in large firms in big cities. According to the available data, these individuals have generally graduated from law schools considered elite by the legal profession. The men and women who work in large firms in big cities also have graduated from elite preparatory schools and Ivy League

18. U.S. Bureau of the Census, 1970 Census—Subject Report, Occupational Characteristics, Table 1 at 1, Table 19 at 368 (1972).
22. Lawyer's Ethics 18; see also J. Carlin, Lawyers on Their Own, A Study of Individual Practitioners in Chicago 17-23 (1963) (hereafter "Lawyers on Their Own").
23. Lawyer's Ethics 19, Table 8. See also Lawyers on Their Own, chapter I fn. 13 and 14 at 32-33 for further data on the subject. The author's 1978 survey of the Springfield, Massachusetts bar indicates a similar division of educational background in a smaller city.
24. See Reed, Springfield Massachusetts Bar Survey 1978 (as in author's possession) for details on the secondary education background for lawyers in firms of from six to twenty in a medium sized city. The kind of education which elite lawyers receive begins to diverge at the secondary level. See E. Baltzell, The Protestant Establishment, Aristocracy and Caste in America 122-29, 342-44 (1963) (hereafter "The Protestant Establishment"). Prof. C. William Domhoff presented an expanded list of exclusive preparatory
colleges far more often than the law of chance would account for.25 Lawyers in large firms belong to the exclusive gentlemen's clubs or women's clubs conceded to be the clubs which the upper strata of American society belongs to.26 Many lawyers in large firms appear in the Social Register.27 If an index of stratification can be manufactured from the present data, it follows that the men and women who are partners in large firms in big cities would rate very highly on such an index in terms of income, education, and social connections.

A second group of lawyers fits essentially similar indicia of high social status. The men and women employed by the legal staffs of Fortune 500 type corporations tend to have relatively high incomes, to be graduates of elite law schools and to have Ivy League and prep school educations. These individuals have in the past tended to come from the ranks of associates in large firms in big cities. The corporate house counsel, of course, has only one client, his or her corporation. The legal activities of such counsel naturally focus on the advancement of their corporation's interests at law. The history of the corporate house

25. G. Domhoff, Who Rules America? 17-19, 58-60 (1967) (hereafter "Who Rules America?"). The Wall Street firms surveyed by Smigel showed a similar pattern for undergraduate education. 16% of the partners in large Wall Street firms were Yale graduates in 1957, 15.4% in 1962. Harvard provided 14.3% of all firm partners with an undergraduate education in 1957, and 14.5% in 1962. 50.4% of all large firm New York lawyers in partnership positions were Ivy League graduates in 1957. In 1962, 50.1% of all large firm partners were Ivy League graduates. The Wall Street Lawyer 180 Table VII-1, 109 Table IV-3. Smigel also analysed the Martindale Hubbel Law Directory for 1962 for large firms in major cities in the Northeast obtaining the same relative results for most other large cities. Id.

26. The role of clubs in business and government has been well documented by C. Wright Wills (see C. Wills, The Power Elite 61-62 (1956) (hereafter "The Power Elite"). See also The Protestant Establishment 353-79; The Higher Circles 23-24, 84. Baltrell's description of the levels of authority and power represented by what floor one lunches on at Pittsburgh's Duquesne Club each day is as fine a description of clubmanship as is found in American sociological literature. It reads like a Cleveland Amory description of society. Domhoff's list of exclusive male clubs, while certainly not exhaustive, surely represents all the clubs on which an elite consensus of opinion has laid its hands. He lists 40 clubs starting with Portland's Arlington Club and concluding with Woodhill Country Club in Minneapolis. The Higher Circles 23-24. Unfortunately, the only way that club membership can be tied into the ranks of lawyers is to check the Social Register for lawyers listed in that city's edition, or to obtain club membership lists for individual clubs. The former is not inclusive; the latter is practically impossible.

counsel staff tends to resemble the history of large firm partners. This justifies inclusion of house counsel within the upper strata of American lawyers.

Finally, the upper strata of American lawyers should include those public servants, in state or national government, who are large firm members on leave from their firms, or graduates of the associate training camps in larger firms. Their educational, cultural and social background parallels that of corporate house counsel and large firm staff. These three groups of lawyers belong to the social strata which owns most of the corporate securities in America, the .5% of all Americans who own 22.0% of all wealth of the nation. The lawyers in large firms, large house counsel staffs and in big government have the day to day ability to alter the course of our collective destiny. This power clearly places such lawyers within the inner circle of C. Wright Mills' "power elite". The elite lawyer has played

28. Prof. John Donnell describes the background and educational characteristics of house counsel in The Corporate Counsel, A Role Study 40, 43, 48 (1970) showing how the corporate house counsel staff is built up by "spin-offs" from large law firms, principally those on Wall Street and in Washington.

Baltzell describes in The Protestant Establishment how the internal structure of large manufacturing and financial corporations was built up through old school ties at Ivy League schools during the latter part of the nineteenth century. Much the same sort of recruiting practices appear to apply to the recruiting of lawyers for house counsel staffs. House counsel come from predominantly elitist educational institutions, if current data is correct. See e.g., J. Donnell, supra at 34-51 for educational background statements on counsel at companies 1, 2 and 3.

29. F. Lundberg, The Rich and the Super Rich 6-18 (1968). According to Lundberg, in 1962 some 200,000 consumer units or households held assets having a net worth of $500,000 or more, which in turn represented about 22% of all wealth in the United States. Lundberg also cited a 1960 University of Michigan survey of ownership of corporate assets, which showed that the top 11% of spending units in the United States held 56% of the total assets and 60% of the net worth of all private holdings of corporate stock in the nation. Lundberg then summarized:

Throughout this study, therefore, it is going to be taken as fully established that 1.6% of the adult population own at least 32 per cent of all the assets and nearly all the investment assets, and that 11 percent of households (following the University of Michigan Study) own at least 56 percent of the assets and 60 percent of the net worth. It is even possible, as we have seen, that 3/5 of 1 percent own more than one-third of all productive assets as of 1965-1967. It is evident that this leaves very little to be apportioned among 90 percent of the population.

The elite lawyer, then, moves and functions within the larger social class described by C. Wright Mills, Domhoff, Baltzell and Lundberg as a national elite.

30. The Power Elite 16-18, 19-21. Mills' theory of an elite directorate of American life and government is often misunderstood by those sociologists and political scientists who subscribe to the pluralist point of view which more or less holds that national, state and local policy decisions are made by the influence of impersonal forces representing counterbalanced specialised interest groups in any level of decision-making. The pluralist school of social science based its conclusions on such well-conceived empirical investigations
an effective role in deflecting national social policy goals in directions dictated by the interests of large corporations and wealthy families. One of the best documented cases of such deflection of social reform was presented by G. William Domhoff. He detailed the manner in which lawyers from large firms, together with their corporate clients, manipulated the American labor movement from a socialist position on labor policy to acquiescence in such partial reforms as workmen's

of decision making as Dahl's classical study of New Haven policy making processes published as *Who Governs* (1966). Despite the statements of the pluralist school about Mills' position, Mills never held that history was the product of a conspiracy among the wealthy, nor that all political, social or economic decisions were made by an inner-elite core of business manager, politicians and generals. What Mills attempted to do, in contradiction to the determinist behavioralism which prevailed among social theorists, was to show that some persons, because of wealth, social position and access to the means of exerting power over others, can have a disproportionate impact on national, state and local policy making. Dahl's studies neither proved nor disproved Mills' contentions. But let C. Wright Mills explain himself:

It is not my thesis that for all epochs of human history and in all nations a creative minority, a ruling class, an omnipotent elite, shape all historical events. Such statements, upon careful examination usually turn out to be mere tautologies, and even when they are not they are so entirely general as to be useless in the attempt to understand the history of the present. The minimum definition of the power elite as those who decide whatever is decided of major consequences does not imply that the members of this elite are always and necessarily the history-makers; neither does it imply that they never are. *(The Power Elite)*

The indicia of elite status is something like corporate voting power; some people own “more shares” in national, state and local decision-making than do other people. The people who are “big shareholders” tend to control the focus debate and they have a disproportionate impact on its outcome, compared to numbers of debaters.

The course of events in our times depends more on a series of human decisions than on any inevitable fate. The sociological meaning of fate is simply this: that when the decisions are innumerable and each one is of small consequence, all of them add up in a way no man intended—to history as fate. But not all epochs are equally fateful. As the circle of those who decide is narrowed, as the means of decisions are centralized and the consequences of decisions become enormous, then the course of great events often rests on the decisions of determinable circles . . . The power of the elite does not necessarily mean that history is not also shaped by a series of small decisions, none of which are thought out . . . The idea of a power elite implies nothing about the process of decision making as such; it is an attempt to delimit the social areas within which that process, whatever its character, goes on. It is a conception of who is involved in the process. *(Id. at 21)*

Mills clearly includes lawyers in his “power elite”:

The inner core of the power elite also includes men of the higher level and financial type from the great law factories and investment firms, who are almost professional go-betweens of economic, political and military affairs, and who thus act to unify the power elite. The corporation lawyer and the investment banker perform the functions of ‘go-between’ effectively and powerfully. By the nature of their work they transcend the narrower milieu of any one industry, and accordingly are in a position to speak and act for the corporate world or at least sizeable sectors of it. The corporation lawyer is a key link between the economic and military and political areas. *(Id. at 289, emphasis added.)*
compensation laws and minimum wage laws.\textsuperscript{31} Such lawyers correspond to the literary descriptions furnished by the characters in Louis Auchincloss' novels. Consequently, the evidence for the existence of an elite strata of American lawyers within the general population of lawyers is clear and convincing.

The elite strata of American lawyers accounts for only 15 to 25\% of all lawyers in the nation at most.\textsuperscript{32} It naturally follows that the most significant issue to be resolved is the relative division of the remaining 75 to 85\% of all lawyers in the country. How many lawyers have career patterns like that of Arthur Winner? How many have a career at the bitter end of the legal profession like that of Paul Biegler? Stratification studies on the American population and on individual cities tend to show that the middling strata of Americans is the most numerous in size of all social strata. However, stratification studies of lawyers in metropolitan areas tend to show the reverse.

Prof. Jerome Carlin did two studies on urban lawyers. His first study involved an impressionistic study of 100 solo practitioners in Chicago, Illinois, completed in 1958 and published in 1962 as \textit{Lawyers on Their Own}.\textsuperscript{33} In 1966, Carlin completed a study of the bar of New York City directed toward formulation of policy on legal ethics and the practice of law.\textsuperscript{34} These

\begin{itemize}
  \item \textsuperscript{31} The Higher Circles 201-05. According to Domhoff, an organization called the National Civic Federation, organized, funded and staffed by elite lawyers, proposed legislation which would have transferred the regulation of competition out of the courts and into an administrative agency in 1908. The measure did not pass. In 1912, the NCF, represented by lawyers who also represented J. P. Morgan & Co. and Seth Law, sent the same measures back to Congress. Lowe got Representative Clayton and Senator Newlands to sponsor the bill, which was the 1908 legislation with minor changes. It became the Federal Trade Commission Act and the Clayton Anti-Trust Act. The elite also organized the American Association for Labor Legislation, which drew up and eventually pushed the Social Security Act through Congress. (Id. at 207-18). The AALS was active from 1900 through 1930, in transforming organized labor's demands for political participation into a drive for state workmen's compensation laws and for a national labor act. Both objectives were achieved by the same group of lawyers, industrialists and financiers. \textit{Id.} at 209-11, 220.
  \item \textsuperscript{32} This figure has been given by Carlin in \textit{Lawyers' Ethics} as 21\% of the New York City Bar. \textit{Lawyers Ethics} 22-23. He gives similar figures for Chicago in \textit{Lawyers on Their Own}. The author's own research indicates that an elite strata of practice exists in medium sized cities of approximately the same size.
  \item \textsuperscript{33} This publication was the first extended case study of actual lawyering behavior in the United States. It is still a very valuable source book for information on law practice in a large American city 20 years later.
  \item \textsuperscript{34} \textit{Lawyers' Ethics} represented a further extrapolation of Carlin's theme that law practice was stratified, elitist and immobile on the whole. Carlin's theme had first been presented by Albert Z. Reed in his two studies on admission to the bar for the Carnegie
two studies tend to show that the bar in both cities is divided into an elite of between 15 and 25%, a small middle class of around 15% of all lawyers, and a large underclass of lawyers in solo practice and in two man firms accounting for between 50 and 60% of all lawyers in metropolitan areas. Carlin's two studies focused on the behavior of the underclass of lawyers, rather than on the behavior of the middle strata of lawyers. Consequently, sufficient data has been generated to describe impressionistically what the conditions of law practice may be among metropolitan solo practitioners and small firm lawyers.

Carlin's study of 100 Chicago solo practitioners showed that their professional worklife consisted in "one shot" legal services given to clients in three main areas: divorce, bankruptcies and small collections for neighborhood businesses. Carlin's study showed that a significant number of Chicago solo practitioners also engaged in "accident chasing" in order to build a personal injury practice, but that few solo practitioners were trial attorneys, preferring to refer out cases which could not be settled to specialists in litigation for a percentage of the eventual fee. Carlin then began a stratification analysis of his solo practitioners. He found that Chicago solo practitioners were first...
generation Americans of East and South European ethnic stock who practiced in their own ethnic neighborhoods, or drew their clientele from their own ethnic neighborhoods. These solo practitioners did not attend Ivy League colleges or prestigious law schools. Chicago solo practitioners were graduates of local night law schools or mixed part time and full time schools. Many had no college education at all. From this data, he drew the conclusion that the legal ethics observed by these solo practitioners, which were at a considerable variance from the published standards of the American Bar Association, were the product of the environment in which these men were forced to scramble for a living.

In 1966, Carlin completed his study of the New York City bar which included a detailed stratification study of New York's lawyers. In summary, Carlin found that the lowest status group among New York City lawyers were East European ethnics of Jewish religious background who had attended mixed and part

38. Id. 124-126.
39. Id. at 26-27. See particularly Table 28 at 27.
40. Carlin says that:

Largely because of the residual character of his practice, the individual lawyer generally finds it difficult if not, in some instances, impossible to conform to the ethical standards of practice. In his efforts to obtain business, and in his dealings with clients and various public officials, he is frequently exposed to pressures to engage in practices contrary to these official norms. (Id. at 209).

* * *

Let me make it quite clear that I am not contending that all individual practitioners are primarily bookkeepers, brokers, or fixers. There are, of course, many able, highly skilled and honorable lawyers in this part of the bar. Nor do I wish to convey the impression that only these lawyers are engaged in such activities. The point I wish to make is this: that because the individual practitioner tends, by and large, to be at the bottom of the status hierarchy of the metropolitan bar, he, more than other practitioners, is likely to be a bookkeeper, broker, and/or fixer. (Id.)

* * *

In considering the work of the individual lawyer in Chicago, one is drawn to the conclusion that he is rarely called upon to exercise a high level of professional skill. This arises in part from the generally low quality of his professional training, but even more from the character of the demands placed upon him by the kinds of work and clients he is likely to encounter. Most matters that reach the individual practitioner—the small residential closing, the simple uncontested divorce, drawing up a will or probating a small estate, routine filings for a small business, negotiating a personal injury claim, or collecting on a debt—do not require very much technical knowledge, and what technical problems there are are generally simplified by the use of standardized forms and procedures. . . . As a result, the legal work of the individual lawyer is, in most instances, reduced to a fairly routine, clerical-bookkeeping job—the very kind of job which many non-lawyers and lay organizations are as well, if not better, equipped to handle than the lawyer. (Id. at 206-07).
time law schools of low prestige within the confines of New York City. These East European Jewish practitioners amounted to 47.0% of all Manhattan lawyers. Their practice clientele was mainly East European and Jewish in character. The kind of legal work which these men and women performed involved advisory practice for small businesses, some probate and real state practice, and considerable personal injury and matrimonial work. 42 Solo practitioners and small firm lawyers in New York City had a much greater number of Puerto Rican and Black clients than did large firm lawyers. Very few solo practitioners and small firm lawyers derived their income principally from business advisory practice, as did the large firm lawyers. The New York City solo practitioner and small firm lawyer spent more time in court each week than did his large firm and medium sized firm counterparts. However, the solo practitioner and small firm lawyer spent his court time waiting around to handle small-time criminal matters and in the lower levels of state and municipal courts, whereas the larger firm lawyer spent most of his court time, if any, in federal courts in actual trial work. Carlin presents a picture of a neatly stratified bar in New York City in the early 1960's. There are no material reasons to suppose the situation has changed greatly in the past fifteen years. The lawyers forming the under-class of attorneys in metropolitan areas do the kind of work that large firm lawyers refuse to take on, including some types of representation considered unethical.

Thus, between 50 and 60% of lawyers in large cities are a professional underclass having very little upward mobility to greater economic opportunities and social prestige. These

41. Lawyers' Ethics Table 15 at 28, Table 20 at 31.
42. Id. Table 12 at 25.
43. Id. Table 10 at 24.
44. Id.
45. Id. Table 13 at 26. Note the large percent of time spent "waiting around" for customers in low level courts for small firm lawyers and for solo practitioners.
46. Id. See also table 14 at 27 for level of contact figures.
47. Id. Table 30 at 50. Carlin administered a questionnaire posing a series of ethical problems to all levels of the New York City bar. There were 16 problems posed to all participants. The difference in the level of agreement with the ABA approved action in each case varied substantially in most instances according to practice strata level. Table 35 at 55 identified, according to Carlin's index for ethical ratings, a substantially greater non-conformity with bar association ethical standards (on kickbacks, referral fees and other activities scorned by upper level lawyers) among solo practitioners and small firm lawyers than in large firm ranks.
48. The data already set out clearly supports this interpretation. It also brutally
individuals are educationally disadvantaged, and ethnically and racially stereotyped. Between 15 and 25% of the lawyering profession in metropolitan areas form an elite of lawyers which serve the super rich. The remainder, between 15 and 25% of all lawyers, constitutes the middle class lawyer. Only Carlin’s New York City bar survey reveals anything about the middle class lawyer.

Carlin identified the lawyer in Manhattan associated with a firm of from 3 to 14 individuals as a middle class or middle strata lawyer. About half of the income in middle class law practice in New York City comes from business advisory practice, contrasted with about three fourths of the income in large firms and only one third of income in small firm and solo practice. Roughly forty per cent of the business clients of middle class firms have a net worth over $500,000 as against 10% for small firm and solo practitioners and 72% for large firm lawyers. The business clients of medium sized firms tended to be less heavily concentrated in heavy industry and major finance than large firm clients, but greatly larger than small firm and solo practitioners. Medium sized firms had more Puerto Rican and Black clients than large firms, but less substantially than small firms and solo practitioners.

About half of all medium sized firms clients had high status ratings, as established by Carlin, as against 62% for large firms, and a niggardly 12% for solo practitioners. Large firms and medium sized firms had about the same percent of practice time

49. Carlin’s data in Lawyers’ Ethics shows such a clear division of the New York City bar along religious and ethnic lines as to constitute some evidence of systematic discrimination in hiring by large firms in those days. Whether such practices occur today is a matter of conjecture. Id. 38-39, fn. 22-23.

50. Lawyers’ Ethics 22-23.
51. Id. Table 10 at 24.
52. Id.
53. Id.
54. Id.
55. Id. Table 11 at 25.
in business legal work, roughly two-thirds of all legal services being rendered in that area.  

In general the kind of legal services provided by medium sized New York City law firms more than it did small firms and solo practitioners. The only major difference was that medium sized firm lawyers tended to spend more time in court, and before federal agencies than did the large firm lawyers.

Recent data taken from Springfield, Massachusetts suggests that a similar pattern of stratification on educational, economic, ethnic, religious and other factors exists in medium sized American cities.

Bar association economics of practice surveys in Massachusetts and in Michigan partially confirm this fairly rigid social structure among American lawyers. Consequently, it should be apparent that a legal education system which purports to turn out one kind of lawyer to serve one type of practice interest is inappropriate as an instructional vehicle for instruction and training for other legal roles. Nonetheless, the endurance of the myth of the all purpose lawyer defies the mass of data which shows its fallacy.

C. Analysis of Lawyer Functions and Lawyering Skills.

Lawyers serve four primary functions in society. First, lawyers formulate and supply structural rules to society so that society may carry on its tasks. Second, lawyers provide access to the means of dispute settlement in society. Third, lawyers assist in marshalling natural and human resources to accomplish social goals. Finally, lawyers mediate core social values to the rest of society through rule making and dispute resolution and the

56. Id. Table 12 at 25.
57. Id.
58. Id. Table 13 at 26.
59. The author's empirical study of the Springfield, Massachusetts Bar discloses that 56.8% of Springfield lawyers are solo practitioners, 16.4% are partners in firms from 2 to 4 persons in size, 16.6% are in firms of more than 6 persons and associates, primarily in the larger firms are remainder of practicing lawyers in the City of Springfield. The largest Springfield firm has 11 partners and 7 associates, and 2 members of counsel to the firm. Of the non-associates, 6 attended Harvard Law School, 4 Boston University, and 1 each attended Georgetown, Boston College and Western New England Law School. The firm partners include one prep school graduate, 6 Ivy League college graduates, and 2 Amherst graduates. The associates show similar background. 2 attended the University of Pennsylvania Law School and 1 each attended Harvard, Columbia, Case-Western Reserve, Catholic U. and Suffolk. 2 graduated from Ivy League colleges, 1 from Wellesley and 1 from Williams College. Springfield solo practitioners by and large attended the local night unaccredited law school, and received their college education at local commuter colleges, if at all.
60. See footnote 35 supra.
marshaling of resources. Over the centuries, lawyers have developed a technology of lawyering skills to perform these four social functions. At this stage of evolution, the relevant lawyering skills may be classified as advocacy, counseling, negotiating, research, planning, drafting and adjudication. These skills are employed by all lawyers to some extent, but the level of practice strata a lawyer occupies dictates the emphasis which he or she gives to each lawyering skill.

1. Lawyerizing Functions by Practice Strata. Lawyers produce the structural rules by which the actions of governmental bodies and private citizens are determined in large part. 51 different jurisdictions manufacture structural rules in state general assemblies. Municipal governments also manufacture structural rules as do counties and townships. Finally, the Congress of the United States and the administrative agencies established by Congress make further structural

61. These classifications are derived from the “law jobs” of Karl Llewellyn, originally put forth in The Normative, The Legal and the Law Jobs: the problem of Juristic Method, 49 Yale L. J. 1353, 1373 (1940). Llewellyn broke down the sociological roles of lawyers (which he called the Law Job) into four aspects or classes:

I. The disposition of trouble cases—which corresponds to “providing access to the means of dispute settlement in society”.

II. The preventive channeling and the reorientation of conduct and expectation so as to avoid trouble—corresponding to “formulating and supplying structural rules to society so that society may carry on its tasks”.

III. The allocation of authority and the arrangement of procedures which legitimize action as being authoritative—corresponding to both “mediating core social values to the rest of society,” and to portions of “formulating and supplying structural rules to society so that society may carry on its tasks”.

IV. The net organization of the group of society as a whole so as to provide direction and incentive—corresponding to “marshalling natural and human resources to accomplish social goals” and to portions of “formulating and supplying structural rules to society so that society may carry on its tasks”.

Llewellyn stated later that: “the jobs, therefore, get themselves done after some fashion always—or the group is simply no more.” Id. 1381-82. In short, the four social roles performed by the lawyer class must be performed in all societies at all times in order to ensure the society's continued existence.

62. Classifications of legal technology have been formulated by a number of scholars. See, e.g., Q. Johnstone & D. Hopson, Jr., Lawyers and Their Work 77-130 (1967), for an elaborate, but not logically distinct taxonomy of legal technology. See also Watson, Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education, 8 U. Mich. J. Law Ref. 248, 253-60 (1975) for a psychiatrist's analysis of the technology of the law. The usual classifications of legal technology correspond to the classifications of the Taylor system of management and time study. Essentially, complex legal tasks are broken up into their component parts into the simplest units of work and time possible, in order to analyse the amount of time devoted to each technological function. This system survives in the weekly time sheets and billing slips used by most law firms to prepare statements for clients on work done. The author's classifications of legal technology follows Johnstone & Hopson and other classifiers.
rules guiding behavior. The rules are prepared by legal technicians following the technical requirements of lawyers for precision and accuracy. The statutes of the United States, of the 50 states and the District of Columbia, and the ordinances and bylaws of inferior governmental units provide a framework within which private behavior is regulated. All this is lawyer work, involving the skills of negotiating, drafting, advocacy and counseling. Elite lawyers have by far the greatest share of the business of structural rule making in this nation. Elite lawyers supply ready made statutes and proposed regulations to Federal agencies and to Congress. Elite lawyers appear before Congressional Committees on behalf of their multinational corporate clients, and prepare, submit and argue for relief before administrative agencies for their clients. Some middle class lawyers have impact on the state and local level by functioning on behalf of clients before local administrative boards and public utility commissions. The underclass of lawyers has practically nothing to do with fashioning general rules for society.

2. Access to Dispute Resolution Machinery by Strata. In our society, individual dispute resolution leads to the generation of general rules of behavior under the principle of stare decisis. The elite lawyer is concerned about both aspects of the dispute resolution process on behalf of his or her clientele. Access to the highest levels of dispute resolution, the state and federal courts of last resort, is theoretically open to all litigants. In practice, only the litigants whose lawyers can be compensated for such work can have access to the U. S. Supreme Court and other equivalent courts. Therefore, much of the most exciting, lucrative and mentally challenging forms of dispute resolution belong almost exclusively to elite lawyers in private practice, and middling lawyers in the service of government agencies. This division of access extends to trial work. Elite lawyers seldom try low level criminal cases in inferior state courts. Under class lawyers seldom appear in the U.S. District Court in civil or criminal litigation. The federal trial machinery is in most instances the province of the litigation departments of large law firms. Access to administrative agencies is limited to
the upper strata of the bar for the most part. What agency work lower level lawyers do is confined to local boards and commissions, or to workmen's compensation boards.

3. *Marshalling Resources by Strata.* Elite lawyers work for large corporations. Their practice involves the issuance and registration of securities, the drafting of documentation in support of bond issues and to secure major bank loans. Elite lawyers represent multi-national corporations at the collective bargaining table. Corporate house counsel with large corporations negotiate labor disputes for their clients. The organization of labor and capital for modern industry has been a task assumed by lawyers as the architects of modern business associations. This work is, on the national level, a function of the elite lawyer alone. Middle strata lawyers occasionally register securities before state Blue Sky agencies and approve documentation for local financial institutions, or conduct labor negotiations for small sized businesses. They also have a substantial close corporation practice for small business people. The underclass lawyer does collections for small time merchants, closes real estate transactions for residential units for local banks, and forms a very few close corporations. The lawyering skills of counseling, negotiating, drafting and planning are variously employed in this trade.

4. *Transmitting Cultural Values by Lawyering Process.* Every lawyer mediates values to his or her client by the type of services he or she performs for the client, and the way in which those services are performed. The elite lawyer serves as a moral theologian for big business. His decisions about what may or may not be done within the legal system on behalf of his clients represents a distillation of American values. The elite lawyer is nearly totally client centered in his approach to lawyering. Successful action to obtain whatever the client desires is the norm for legal action. This ethical position justifies almost any action which can be taken without reprisal by the government or by a competitor. Despite this client centered approach to judgment, elite lawyers are hyperethical in relationship to such matters as fee splitting, advertising, and conflicts
of legal interest on behalf of clients. This they view as a positive ethical duty which lesser lawyers do not observe fully. The middle class lawyer tends to share some of the attitudes of his elite contemporary. The middling lawyer is also client centered, and unwilling to engage in kickbacks, ambulance chasing, or other devices to get business. In both cases, the economic necessity for such practices do not exist. The underclass lawyer, however, may be less client centered than the elite or middle class lawyer. He may owe allegiance to other norms than total dedication to the client’s narrow interest. On the other hand, he or she is likely to be much less scrupulous about such matters as kickbacks, fee splits, ambulance chasing and conflicts of interest, since the economic impact of these professional rules fall most heavily on the underclass lawyer.

More fundamentally, lawyers mediate social values by their implicit attitudes about practicing law and about the processes of the law itself. Clients sense that lawyers have distinct moral positions on the nature of the legal process itself. First, lawyers particularly those in the elite of the profession see law as a system devoid of moral content. The prevailing view of law is that its principal value is utilitarian; it obliges not by moral force, or by persuasion that the values it protects are good, but on the strength of coercion. If law is purely instrumental, then only its ends justify it as means. This view comes out in the dealing between large firm lawyers and the various administrative agencies of the United States.

It is not so easy to establish the moral position of the middle class lawyer. Available data seems to indicate that value neutrality and perception of law as an instrumental good alone dominates the thinking of middlebrow lawyers as well.63 The moral position of the underclass lawyer is

63. Medieval Arabian and European commentators on law, following Moses Maimonides, held that all law derived its authority from God, whether the law was innately known, as in the case of natural law, issued by the predominant religious authority, as in the case of ecclesiastical law, or issued by secular rulers, as in the case of ordinary positive law. In obeying the law, citizens obeyed God. As obedience to God’s command was a matter of saving one’s soul the nature of legal obligation during the medieval era was essentially religious. This jurisprudential position eroded gradually during the renaissance particularly at the hands of French and English philosophers. Jean Bodin
defined in more concrete and different terms. Such lawyers tend to view the legal system as a system of oppression which must be resisted, thus taking on an anti-authoritarian position. The degree to which clients perceive the moral position of their lawyer is also unclear.

5. The Influence of Legal Education on Lawyer Functions and Lawyering Skills. The available data suggests that legal education may have some effect on the way in which lawyers act out their respective roles in the community and the degree to which they employ and emphasize certain lawyering skills. It is apparent that solo practitioners and small firm lawyers who do a great deal of "one shot" business have to develop special counselor skills for intake counseling. It is equally evident that negotiating skills are much more important to labor lawyers and to insurance defense counsel than to lawyers who earn their living by doing real estate title work for residential closings. However, the relative degree of contempt which lawyers have for formal training in counseling and negotiating skills seems to be related to their perception of such skills as inappropriate objects for legal education, no matter how much they perceive such skills as important to their law practices.

The remainder of this article is devoted to exploring the impact of legal education on a deeply stratified American bar and assessing the relative virtues of law school models for various strata of law practice.

and Hobbes both held that the force of law derived from the agreement of all men to assign their freedom to a dictatorial principle; the Divine Right Kingship, in Bodin's case, or a monster state in Hobbes' view. The modern point of view derives from Hobbes: legal obligation is coercion, not consent, nor moral authority. The jurisprudential principle, working itself out on a practical level among lawyers on the firing line, is to identify law as a purely technological instrument of social policy, i.e. as a means of coercion. This view subconsciously colors lawyers' approach to law practice, on all levels of law practice. It is more apparent among the lawyers of the elite and middle classes than it appears to be among lawyers of the underclass.

64. This position is articulated in Anatomy of a Murder's portrayal of Paul Biegler. Underclass lawyers normally appear as picaregue figures in American literature, when they appear at all. The social attitudes expressed by the Chicago solo practitioners to Jerome Carlin in the late 1950's also show this same position.

65. For a striking example of this dichotomy, see Baird, A Survey of the Relevance of Legal Training to Law School Graduates, 29 J. Leg. Ed. 264, Tables 6 and 7 281-83 (1978).
III. THE PROTOTYPES FOR AMERICAN LEGAL EDUCATION.

A. Langdell's Model for Legal Education. American legal education has been patterned after the organization, curriculum and teaching techniques designed Christopher C. Langdell of Harvard Law School in the early 1870's.66 The Langdellian model for a law school continues to be the most popular model for legal education in the United States 110 years after its creation. In has been legislatively approved by the American Bar Association for nearly 60 years as the sole pattern for legal education. The extraordinary success of this legal education system is not explained by the prestige of its author or of his law school.

1. Langdell's Debt to Spencerian Sociology. Langdell attended Harvard Law School during the deanship of Joseph Story. He left the law school without taking a degree in 1854.67 Langdell then went to work in New York City. He was an office lawyer who rarely went to court. He spent most of his time in the law library, doing research on legal matters. Langdell's reputation among the New York City bar for thoroughness in research and for scholarship did not make him a public figure. When President Charles N. Elliott picked Langdell for the Dane Law Professorship in 1870 and elevated him to the Deanship of the Law School in 1871, Langdell was unknown to the legal profession as either a jurist or a trial lawyer. His predecessor had been a Justice of the U.S. Supreme Court.

In 1870, the Harvard Law School was in crisis. Its enrollment had declined for a number of years. Its students were indifferent about law studies, and the professional staff was disorganized, unsure of its mission and ill-equipped to compete with a good law office apprenticeship as a means of entry to law practice.68 In this atmosphere, Langdell received a free hand to reform the law school. Langdell's undergraduate background was in science, like that of President Norton. Langdell superimposed on the Law School an educational model taken

67. Id. at 359.
68. Id. at 360-63.
from two sources: contemporary life science, particularly zoology, and the sociology of Herbert Spencer. Langdell made legal education into a study of taxonomy. Since Langdell was a shy, retiring man who wrote very infrequently, the evidence for this choice comes from secondary sources and from Langdell's speech at the 250th anniversary ceremonies on the founding of Harvard College, held in 1886, after his revolution had been reported to other schools and had become respectable:

It was indispensible 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 law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft and may best 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 learning and teaching law. We have also constantly inculcated the idea that the library is the proper workshops of professors and students alike; that it is to us all that the laboratories of natural history is (sic) to the zoologists, all that the botanical gardens are to the botanist.

According to Langdell, the legal specimen was an appellate decision. The law professor performed an introduction by gathering legal specimens, typing them into genus and species and

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69. This methodology appears principally in Langdell's scholarly work on equity jurisprudence. See, e.g., Langdell, *A Brief Survey of Equity Jurisdiction*, 1 Harv. L. Rev. 55 (1887), an article which ran for four years, ending finally in 4 Harv. Law Rev. 99 (1891) in which Prof. Langdell classified, distinguished and analogized a system of equity jurisprudence from English and early American case law. This methodology is in the best Spencerian tradition, reminding the reader of the subconscious impact of Herbert Spencer on most mid 19th century American thinkers in all fields. It was also clearly a taxonomic study of law.

70. This address appears in A. Sutherland, *The Law at Harvard* 175 (1967) (hereafter "*The Law at Harvard*"). It was originally published in the Boston Weekly advertiser, then it appeared in two slightly different versions in 21 Am. Law Rev. 123 (1887) and again in 3 L. Q. Rev. 118 (1887) together with Holmes' speech at the same occasion. This particular quote follows Sutherland.
generating general descriptive laws about their characteristics. This system of science was designed to resemble as much as possible the taxonomic work of a zoologist. Once a law professor generates a set of legal rules from the gathering of specimen, he may then manipulate the exterior world of phenomenon by classifying new appellate specimens under the previously generated system.

What this new science of the law offered was the chance to achieve mastery of the real world through the lawyer's application of a system of symbolic rules about legal specimens. Legal education consisted in mastering the techniques of classification, in order to control reality in law practice by manipulating the system for one's clients. Before Langdell's time, most young lawyers had learned law by apprenticeship as an art form. An aspiring law clerk learned how to use legal principles derived from "nature" by one or more legal philosophers in court and in the office by watching his master operate in the legal world. This mechanic's approach to law was often supplemented by lectures on Blackstone, Kent and other commentators given after work by scholarly practitioners. In a few instances, these schools for law clerks had affiliated loosely with a local college. The law learned in this manner was an art derived from principles more or less innately known to all men, the moral art of resolving social and economic issues through the legal process. Langdell's science of the law, if Langdell was correct, replaced the natural law jurisprudence of Blackstone and Kent with a social science of law relying on empirical investigations conducted only by specialized law professors.

Nineteenth Century practitioners and judges looked at precedent as an opportunity to create new law according to the prevailing moral principles of their society. The doctrine of stare decisis did not create general principles of law which could not be varied; older case law served as a springboard to new case law. According to Langdell, however, law did not state moral propositions which obligated men to change their be-

behavior accordingly. Instead, law simply described behavior by classifying it. This proposition was derived from the then popular Social Dynamics and Social Statics of Herbert Spencer. It was a reductionist approach to legal theory. It appeared at precisely the right point in American history to be acceptable to scholars and to lawyers. It was a system which was relatively easy to master. The Langdellian system of thought also answered the needs of social change in the latter part of the Nineteenth Century because it relieved law from its moral force.

Langdell also deliberately created the law professor. Langdell introduced a professional sub-culture for legal scientists who spent their work poring over appellate decisions in the library and extracting legal classification systems from the raw material of case law. The law professor incorporated his findings into reports called case books and then indoctrinated law students by means of these reports in his symbol system. Such procedure followed the social and political theories of Herbert Spencer admirably. The law professor then generated treatises setting out their findings for practitioners. This activity brought a

73. C. Langdell, Selection of Cases on the Law of Contract v-vii (1871). See also Langdell, A Brief Survey of Equity Jurisprudence, 1 Harv. Law Rev. 55, 116-18 (1887) where Langdell finds the obligation of the Chancellor's court derived from spiritual and canon law, but applied to English subjects by pure coercion, i.e., by the power to imprison in support of its decrees. The entire "Brief Survey" is an exercise in the taxonomy of equity by its various systems for giving coercive relief to litigants.

74. Langdell's debt to Herbert Spencer seems not to have been acknowledged by Charles Warren or Arthur Sutherland. The well-read gentleman of the 1860's or 1870's was familiar with Spencer. Langdell's use of Spencerian sociology in classifying equity may have been subconscious and unintentional. His classification of equity was also in line with his training in biology. However, the parallelism between some of Langdell's disciples and Spencer is striking enough to suggest that Langdell himself was aware of the essentially Spencerian system of thought he employed. The most notable example of this phenomenon appears in Eugene Wambaugh's 1892 text on the principles of legal study, published while Wambaugh was teaching at the University of Iowa. The Study of Cases was organized in quite the same way as Spencer's First Principles (1867). Wambaugh's book contained a "survival of the fittest" principle for testing case law precedent which follows Spencer's description of simple and compound evolution in First Principles 249-65, and § 115 of The Law of Evolution at 283-84 which states Spencer's principle of "aggregation" also describes the Langdellian case method of study of law. Langdell's study of law depends on an evolutionary movement from the least complex to the most complex by the accretion or "aggregation" of specific instances from which a general rule is taken. This is Spencerian aggregation at work.

75. James B. Ames was the first true law professor. He never practiced law. On graduation from Harvard, he was hired as a law teacher, and turned loose in the law library and in the lecture room without any real life lawyering experience at all. Other men in a similar mold appeared by the 1890's.

76. The early treatises of the 1880's and 1890's are still valuable source materials on American law. Thayer's Preliminary Treatise on Evidence (1892) and Gray's Rule Against Perpetuities (1886) are commonly used today. Keener, Ames and other late
real sense of order to the crazyquilt of legal rules and procedural requirements which characterised law in the last quarter of the Nineteenth century. Langdell's law was manageable. Its schematics could be learned and effectively applied by lawyers for their clients. Langdellian science made law a better instrument for social and economic change, by substituting a dialektical system of law for an a priori deductive system of law. The revolution in legal thought was such a profound change that Langdellian science still dominates legal thought in the 1970's.

2. Langdell and the Reformers. The values generated by Langdell's science of law were internal and structural. Legal science could be technically efficient, logically correlated and socially effective as a tool for change or for preservation of the status quo. It could not state propositions of right or wrong. Langdell thus substituted technical consistency for moral content at a time in American history when the ownership of productive property was concentrating into the hands of a small minority of citizens. This concentration of wealth in the hands of the few occurred at precisely the same time as hordes of immigrants were admitted to the United States to serve as the raw material for an industrial work force. Coincidentally, the sons of Irish and German immigrants from the mid-nineteenth century were now rising to political power in large cities, entering the learned professions, and making their impact on the national political scene. This ferment led lawyers of impeccable social and ethnic credentials to form organizations to protect the established bar from the infiltration of persons not qualified to act as attorneys. The first such group, the Association of the Bar of the City of New York, founded in 1870, included Christopher C. Langdell as a charter member. By 1880, bar associations on a statewide level existed in Connecticut, Wisconsin, Iowa and several other states, modeled after the Association of the Bar

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19th century treatises prepared by Harvard professors are historical curiosities. The great treatise writers were men like Wigmore (Harvard 1887) Williston (1887 also) and others who grew up after a generation of Langdellian legal thought had laid the groundwork for their inquiry.

77. The great national reporter digest system invented by Charles West at the same time also contributed to the regularisation of American legal thought and work at the same time, as did Frank Shepard's system for finding whether a case had been overruled or not. These independent movements coincided with a more rigorous academic training to make law into a real weapon for social change during that era.

of the City of New York.\textsuperscript{79} The bar association members were a small fraction of all practicing lawyers. They represented the lawyers with the highest income, greatest prestige and most socially acceptable background. The bar associations pressured the judiciary to raise the standards for admission to the practice of law in order to exclude the recent immigrant and his poorly educated children from admission to the practice of law. At the time, most states required an applicant for admission to the bar to be “over 21 and of good moral character”.\textsuperscript{80} Admission was by motion by an admitted lawyer before the local judges of the county court system. This admission procedure was adopted during the Pre-Civil War era by Jacksonian Democrats in order to democratise the profession of law, which was considered to be too aristocratic for the good of the nation. Within the confines of a relatively homogeneous community of self-supporting farmers and tradepeople of a common ethnic and religious heritage, the system of admitting anyone who wanted to practice on motion by an older lawyer worked reasonable well. It was not acceptable for admission to practice in large metropolitan communities.

The main avenue for raising admissions standards was the institution of stiff written examinations on law for all applicants to the bar.\textsuperscript{81} These examinations tended to favor applicants with a formal education. The men who went to the Harvard Law School were exceptionally favored by such a system, since it correlated to the examinations which they took each year to advance to the next level of legal education.\textsuperscript{82} The written bar examinations tended to screen out the applicant for admission who could not write and did not know any Langdellian legal science. It also tended to promote formal education in law as a precondition to practicing law. Harvard Law School was conscientiously designed by Langdell and his assistants to provide an education for an elite, rather than a democratic form of general education in law for men of limited formal

\textsuperscript{79} For details on the founding of the American Bar Association, see 3 ABA Journal 658 (1917). The American Bar Association was intended to be a replication of the Bar Association of the City of New York; a society of elite practitioners on a national scale.

\textsuperscript{80} Training for the Public Profession of the Law 363-68.

\textsuperscript{81} Id. at 95-103.

\textsuperscript{82} If Warren's History 365, 367-68 describes the early debate by which the merits of the written examination at the end of the first year of studies was determined by the Board of Overseers.
education. In the mid 1870's Langdell secured a requirement for admission to his school which stated that applicants must either possess an undergraduate Bachelor’s degree or pass a stiff examination on foreign language skills and Blackstone. At the time, very few American men were eligible for admission to such a school. Those men who were eligible were the sons of the very well-to-do minority who could afford a collegiate education for their offspring.

3. Langdell’s Pedagogic Methods. Langdell’s educational system for lawyers was designed to turn out men who would serve the interest of the wealthy and the powerful in large metropolitan areas. His instructional course emphasized his scientific theories to the detriment of any practical skills training in court room work or on legal drafting. This represented a great departure from the kind of legal education provided by all university affiliated and independent law schools before Langdell’s time. The scientific curriculum of law at Harvard was organized around three fundamental assumptions: first, law was learned by students on their own by working in the library; second, classroom exercises were held only for the purpose of developing the discursive reasoning powers of students, rather than to convey any content knowledge of the law of any particular state; and third, periodic written examinations on subject matters of legal studies were necessary to ensure quality control.

The curriculum itself was organized on the principles of German University work. After a required sequence of fundamental courses in the traditional subjects of Property, Torts, Contracts and Procedure, the entire curriculum was elective.

83. Id. at 394-99.
84. The ranks of college graduates in 19th century America were drawn from the elite. Langdell's policy restricted legal education to the sons of gentlemen, withholding admission to ambitious but uneducated young men from the new ethnic communities in the United States.
85. This assumption never seems to have been articulated beyond the discussion held with the Board of Overseers in 1871. In its way, it was one of the most radical alterations in law school. Prior to 1870, written examinations on course subject-matter were unheard of outside of St. Louis University Law School.
86. See II Warren's History 405-06 for the 1876 curricular offerings. The 1925-1926 Harvard Law School catalogue is reproduced in A. Reed, Present Day Law Schools (Arno Press Ed. 1976) (1928) (hereafter “Present Day Law Schools”). Training for the Public Profession of the Law 459 shows the number of years-hours of instruction in the Harvard Law School in 1870, which may be compared with a similar chart for 1921 in Present Day Law Schools 457-59.
The catalogue for Harvard Law School displayed far more courses than any student could take during his three years at Harvard. No student was expected to enroll in more than a fraction of the courses offered at Harvard during his course of studies. The effect of the elective program was to specialize legal education still further by intensiveness of subject matter concentration. Exercises in skills for law practice were confined to Moot Court presentations of appellate argument by 1880. This organization was consistent with Langdell’s belief that law was learned by self study in a library. The case book was a concession to the demand of students for organization of their time, and for reduction of wear and tear on library books. For Langdell, the primary learning experience was case-reading in the library.

Since classroom exercises were to play an important role in developing law students’s analytical abilities, a new pattern had to be developed for class time. The traditional law school used class time for the purpose of purveying information to students by lectures. Information gathering under the Harvard system was to be done by students on their own in the law library. Langdell then converted classroom time into a dialectical process, resembling the dialectic of his own science. His teaching technique consisted of posing a series of questions to students, who were supposed to respond to the questions by giving answers. Langdell would then confound the student by asking another question without indicating whether the previous question had been correctly answered. This discursive technique was further refined by James Barr Ames, the first true law professor, into what has been incorrectly called the “Socratic Dialogue” system of classroom exercise. This pedagogic technique was effective without regard to the content of any course of studies. It was an exercise in a peculiar educational and intellectual process. It forced students to classify, distinguish, and reason analogously. It perceived the sole source of law to be the decisions of appellate judge under a contrived version

87. This was clearly intentional: it was designed to encourage legal specialization by students in the German university manner. See the speech of Oliver W. Holmes, Jr. at 4 L. Q. Rev. 118 (1887).
88. Charles Warren published a series of reminiscences by former students illustrating the case method of teaching. The most interesting is that of William Schofield (Harvard Law ’83) which also described Langdell’s appearance, character, and personal idiosyncrasies. II Warren’s History 454-60.
of the rule of stare decisis. Whatever credibility the exercises lacked as true scientific investigation, the exercises in disputa-
tion over case law certainly reinforced the reading of cases in the library, and increased the mental agility of the partici-
pants.

The utility of the Harvard system of training for law practice depended on the objects for which that training was structured. It was clearly an effective way of reproducing more law pro-
fessors. It emphasized research in the library, recitation in class under a cross fire of non-directive questioning, and the handling of large quantities of information. Since law professors were expected to export the revolution in education, the school made special efforts to be a teacher training program. The Harvard regime was also a valuable training ground for lawyers who would go into one of the emerging large law firms in Boston or New York. In those firms, the young lawyer would be hired as a clerk to do research. After providing more senior men with reams of information on topics assigned for a suitable period of time, the young clerk on a salary from the firm would then meet real clients. Thus, research skills and the ability to argue, classify, distinguish and analogize were valuable to law clerks in large firms. The independence created by the Harvard system also seemed to develop a sense of judgment and dis-
cretion much more effectively than the older law office training system. However, the Harvard system neglected the skills training which would prepare a young man to try cases in court, to counsel clients, and to negotiate effectively with an adversary for a settlement, the kind of skills which small town practitioners then required.

89. This is the period of the Anglo-Saxon ascendancy described by H. Digby Baltzell in The Protestant Establishment. Harvard College during that era was divided into “the Gold Coast” of exclusive clubs and off-campus residences of the sons of the rich, and “the other Harvard” for the intellectually gifted young men of lower socio-economic standing who inhabited the Yard. One of the Yard dwellers at this time was Louis D. Brandeis, who was snubbed by the young plutocrats of the Gold Coast on account of his Jewish ancestry. The Protestant Establishment 129-35.

90. The main reason for the emphasis on business legal subjects and impractical academic training was, of course, the development of the Wall Street law factory. Cravath, Swain & Moore, the prototypical Wall Street law factory, has been thoroughly if somewhat one-sidedly documented by R. T. Swaine, The Cravath Firm and Its Predecessors (1948). A general historical description of the large New York City law firm of the 1960’s was written by Paul Hoffman in 1973. Lions in the Street is a highly readable account of the doings of large New York law offices. Additional private histories describing other Manhattan firms include R. Carson, Davis, Polk, Wardwell, Sunderland & Kiendl, a Background with Figures (1965); A. Dean, William Nelson
4. The Revolution Exported. Harvard-style legal education was exported first to Columbia Law School in the 1890’s. By 1915, the Harvard model had been adopted by most full-time university affiliated law schools. The standard American university-affiliated law school just prior to World War I had a curriculum modeled after Harvard’s. The first year a required subjects was followed by electives for the remaining two years of legal studies. Students were expected to inform themselves on law, and to participate in classroom dialectical exercises to train their minds. In order to enter a university affiliated law school, a student had to show some college educational background. The university law school graduates were likely to go to work for the larger firms in their states. Some few university trained students would become law professors; a few would serve as judicial clerks for the appellate judges whose opinions they studied in case books. Very few of these university trained men would go into solo practice in large cities, or return to the small towns from which so many came. However, these men represented a small percentage of all men admitted to the bar in that era. The majority of men admitted to the bar attended a different type of law school; the night school. Night law schools sprang into being in the 1880’s and 1890’s as a result of the upward mobility of ethnic immigrants. The sons of immigrants could not afford to take three years’ time to engage in full time law studies at a university school. Family responsibilities and low educational level kept them out of university schools, as did the prevailing nativism at such schools. The night part time school was a logical product of the time. The night school, operated either by local practitioners for profit, or by the local Young Men’s Christian Association as an adjunct to the business schools, admitted young men who had

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Cromwell, An American Pioneer in Corporation, Competitive and International Law (1957); W. Earle, Mr. Shearman and Mr. Stirling and How They Grew (1964); O. Koegel, Walter S. Carter, Collector of Young Masters, or the Progenitor of Many Law Firms (1963); T. Pfieffer, Law Practice in a Turbulent World (1965). For some reason Erwin Smigel did not develop a historical background on the Wall Street firms he studied in The Wall Street Lawyer.

91. R. Stevens, supra note 72 at 437-39.
92. Id. at 435-41.
93. Present Day Law Schools 554-602. The minimum requirement was two years of college preparation; few schools required more and only four schools required a college degree for admission. Id. at 137.
no college background. Many of these young men worked in local factories or stores, not in the legal system. The lecturers in night schools purveyed information on the law of the state in which the school was situated. The primary objective of the night school was to train its clientele to pass the state bar examination. The graduates of such schools normally went into practice on their own in the large urban communities in which they resided.

In the early 20th century, a number of night schools were absorbed by universities in large cities. This pattern of development was in large part connected with the rise of Catholic universities in large metropolitan areas. These law schools eventually conducted a full time day program for some students, and a large night program for the sons of immigrants. The American Bar Association and the Carnegie Foundation commissioned a study of legal education in America in 1915-16 modeled on the Abraham Flexner report on medical education completed in 1910. The ulterior motive behind this study was to drive the night schools and mixed schools out of existence, the very object which the Flexner Report undertook on behalf of medical education. If that were done, the full time university law school on the Langdellian Model would have the legal education market cornered.

5. The Reed Studies. Carnegie Foundation selected Albert Zantzigger Reed to undertake the study in 1916. In 1921, Reed delivered his first report, an historical and sociological analysis of American legal education from the Revolution to World War I. Reed first established the position that law, unlike other professions, was peculiarly affected with a public interest: access to the means of justice.

94. The typical standards for admission to the night proprietary law schools appear in Present Day Law Schools 287-306. Reed had few good things to say about such schools in Preparation for Public Profession of the Law. In general he felt they purveyed a greatly inferior version of the curriculum of the day school simply to enable their students to take the bar. Id.
95. Present Day Law Schools 307-16. Reed concluded that the part time divisions of these mixed schools was about as unsatisfactory a legal education as that provided by the night proprietary school.
96. The Flexner report resulted in the closing down of many medical schools of inferior quality. It was at least the hope of some of the people on the Special Committee of the American Bar Association that a similar report on legal education would close down the night law schools.
Whatever incidental purposes are charised by particular law schools, the main end of legal education is to qualify students to engage in the professional practice of the law. This is a public function, in a sense that the practice of other professions, such as medicine is not. Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political.\textsuperscript{97} 

Reed then proceeded to examine the lawyer's role in the class structure of the United States. Reed concluded that lawyers did not perform the same functions in society.\textsuperscript{98} He distinguished two sub-classes of American lawyers: a) lawyers who advised the rich, the powerful and the government, and b) attorneys whose function it was to give access to legal services to the immigrants and the poor.\textsuperscript{99} Reed held that law schools affiliated with universities had ignored this class distinction, as had many night and mixed law schools.\textsuperscript{100} Reed also considered the scope of American legal education excessively narrow and technical in character:

The broad fields of economics and of government which are there (in Europe) regarded as essential elements of a lawyer's training are with us cultivated, if at all, only by the minority of students who attend college before entering the law school. The exclusion of these topics from the law school curriculum proper is explained first by the law office parentage of the modern American law school and secondly by the greater and constantly increasing complexity of our technical law. This has made it impossible for academic influences to add these topics yet continue to do justice to the narrower field of study during the limited number of hours available for instruction.\textsuperscript{101} 

This narrowness, Reed said, was the result of the agreement of admitting authorities in the states and law schools to place

\textsuperscript{97} \textit{Training for the Public Profession of the Law} 3.
\textsuperscript{98} \textit{Id.} at 41-45.
\textsuperscript{99} \textit{Id.} at 57-60.
\textsuperscript{100} \textit{Id.} at 48.
\textsuperscript{101} \textit{Id.} at 49.
primary emphasis on the intricacies of judge-made law. This arose from the decision to prepare all persons alike for all branches of the practice of law by the same system of instruction. This was supposed to prevent the admission of incompetent persons to law practice. However, the legal instruction system did not provide any exposure to real clients and was entirely theoretical in scope.

Reed's survey established that the Harvard-style law school had become the primary model for all American law schools. Reed also found that the law school had become the primary agency for social control of admission to the bar. The sub-cult of law professors dominated legal education and preparation for the bar with the tacit consent of the elite practicing bar.

Reed found that by 1900 the apprenticeship system had been displaced as the primary means for admission to the bar by law school preparation. He believed that the American Bar Association and other associations of elite lawyers had been instrumental in assigning the task of preparing for the bar to the law schools. By the time Reed completed the second volume of his survey of law schools, the American Bar Association had already voted to place its imprimatur of the Harvard style school as the sole standard for accrediting law schools.

B. The Value Structure of Langdellian Legal Education. Langdell's legal education model transmitted no values in terms of an explicit legal credo. It did convey strong value content via the implicit statements about the role of law and of lawyers contained in the process itself. As a scientific discipline, Langdellian legal science was intended to be positive and value-neutral. In reality, Langdellian legal science supported the social ascendancy of the plutocracy and the aggregation of productive wealth into the hands of a very privileged few. It accomplished historically by its implicit mean-

102. Id. at 60.
103. Id. at 281-87.
104. Id. at 254-70.
105. The Special Committee on Legal Education chaired by Elihu Root was simply part of a long-drawn process by which the American Bar Association extended its control over legal education in America. Reed details this process in Present Day Law Schools 22-24, 30-35, as does Preble Stolz in Training for the Public Profession of the Law: (1921) A Contemporary Review, Am. Ass'n of Law Schools 1971 Proceedings, Part I Section III (hereafter "Stolz on Reed").
106. Stolz on Reed 154-60.
ing what it could never have done by explicit statements of purpose and value. The Langdellian ideology had four polar notions:

1. *For lawyers, Technical competence is Success.* Langdell saw lawyers as scientific technicians. He conceived of legal research as pure science in a library. A successful lawyer was a successful manipulator of symbols. Successful manipulation of the symbols of legal reality on behalf of clients led to increased income and prestige in the profession. This position ensured that law professors would be the most prestigious members of the profession because they were the most technically competent research specialists.\(^\text{107}\) Therefore, the law professor was an appropriate role model for young lawyers on the make.

2. *Law is Process, not Content.* The absence of content in legal education under the Langdellian model for a law school was intentional. Law schools created a fictitious national law as an object of study. National law was derived from both English and American cases. The system of instruction stressed process over content. Thus, the matter to be learned was not knowledge of law, but the art of lawyer-like thought. Since the subject matter of any course was about the same, the thing taught was the technique of briefing, comparing, classifying and applying appellate decisions to intellectual puzzles chosen by the teacher. *Any* case could be analyzed equally effectively by a technically competent lawyer.

3. *People do not Count.* The Langdellian approach to legal science drained the concrete crises off human beings of all existential reality by reducing cases to a bunch of abstract propositions. In many law school courses, symbols and propositions replaced human behavior as the object of study entirely.\(^\text{108}\) The human drama of the living law was meaningless in an abstract universe of symbols derived from appellate cases. People did not count as much as the logical relations

\(\text{107. Lawyers, Law Students and People 5.}\)

\(\text{108. E.g., if A makes a contract with B to transfer 1,000 widgets to B on July 15th, for a price of $2.00 per widget, FOB cars place of origin and B defaults, what remedy has A under the Code?}\)
between abstract symbols. This point has not been lost on four generations of law students.

4. **Law is the Technology of Dialectical Conflict Resolution.** The most important contribution of Langdellian legal science to jurisprudence was the description of the legal process as the technology of conflict resolution. Oliver Wendell Holmes, Jr. deserves credit for first stating this theory in the *Common Law* published just before he took his seat as a Harvard law professor.\(^1\) If law is the technology of conflict resolution, then lawyers could rationalize their prostitution to individual clients as a "natural" component of the scientific dialectics of conflict resolution. Lawyers could feel morally justified by representing the thesis or the antithesis principle in a morally neutral dialectical process. Law did not represent a commandment of God, nor as law a deductive exercise of judgment from innate first principles of practical wisdom. Law was an evolutionary experience in which abstract, dialectical principles embodied themselves in litigants who thrashed out law on the appellate courtroom floor. Therefore, the traditional adversary system of justice was scientifically correct.

These values secularised law. Law became a pure instrument of social policy. Langdellian legal science, purveyed by law schools, helped materially to destroy the moral force of man-made law, while at the same time this science justified a "higher immorality" within the ranks of the symbol manipulating lawyer class. When the Landellian system appeared, American culture was ripe for secularisation. Once American culture had become secular, rather than Protestant in character, law derived its *obligatio* from compulsion rather than conscience.

Langdellian legal science was criticized in the 1890's as immoral. In the early 20th century, it was criticized as too narrow and too technically oriented.\(^2\) A secularised legal

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\(^1\) See preface to the *Common Law* for Holmes’ discussion of his purpose in writing a legal history on the origins of the common law and its vitality for 19th century American legal scholars.

\(^2\) This criticism was summarized by Albert Z. Reed as follows:

There was no provision for practical training in advising clients or in conducting litigation, but only for the acquisition of theoretical knowledge; no insistence with this domain upon a cultural college foundation, but only upon work done in the professional school itself; no attention paid here to govern-
system needed, according to the critics of the pre-World War I era, to base its findings on applied social science, principally empirical sociology and economics. In the decade and a half following the end of World War I, the critics of Langdellian legal science became loosely identified as the "Realists". The Realists published a great many articles critical of standard legal inductions from appellate cases, which called for legal scholars to study empirical social science. The law faculties of Yale University, then Columbia University became infected with this spirit. These men conceived of law as a value neutral technical structure, just as Langdell did. They wished to add to inductions from appellate cases, inductions from extended case studies, empirical investigations of social conditions and economic trends as the proper objects of legal scholarship. The Realist Movement produced no new pedagogical system. However, two educational models were derived from the Realist school of jurisprudence representing two radically different approaches to law teaching.

C. The McDougall-Lasswell Model. In 1943, two Yale University Professors wrote a gigantic law review article stating a legal education model which conformed to most of the criticism of Langdellian legal science offered by the Realists.

Now, finally, the scope of formal legal education was narrowed still further. The fiction that even generalized judge made law was to be mastered, was abandoned. Portions of it were to be mastered, but large portions were avowedly not. American law became for the student, not a field to be surveyed broadly, but a thicket within which a partial clearing, pointing in the right direction, is made. The young practitioner is then equipped with a "trained mind" as with a trusty axe, and commissioned to spend the rest of his life chopping his way through the tangle. Training for the Public Profession of the Law 379-80.

111. This, of course, arose from the critical approach to law and the infusion of social science emanating from Columbia and Yale law schools during the 1920's. The realist movement, amorphous as it was, and as ineffectual as an educational reform vehicle as it later proved to be, did propose to question the universal predominence of the Langdellian type of law school. Such questioning was a by-product of the realists; concern for integrating social science and the law. For background reading on the infusion of social science into the law curriculum, see B. Currie, The Materials of Law Study, 3 J. Leg. Ed. 331 (1951) 8 J. Leg. Ed. 1 (1955) reprinted in Ass'n of American Law Schools Proceedings Part One Section II (1971).
a decade or so earlier. Myers McDougall's and Harold Lasswell's *Legal Education and Public Policy: Professional Training in the Public Interest* produced a well developed design for a new type of law school. According to McDougall and Lasswell, law school should be a systematic training ground for future policy making. Policy is to be oriented in an American law school around "clearly defined democratic values," which then led the authors to develop a taxonomic classification of 17 functions which lawyers perform as policy makers in a democratic society. This then defined adequate training for law practice:

What, then, are the essentials of adequate training for policy? Effective policy-making (planning and implementation) dependent on clear conceptions of goal, accurate calculation of probabilities, and adept application of knowledge of ways and means. We submit that adequate training must therefore include experiences that aid the trend-thinking and scientific thinking.

The authors then defined "goal thinking" as the promotion of major democratic values in order to reduce the number of "moral mavericks." The supreme value to a democracy, according to McDougall and Lasswell, was the dignity and worth of the individual. The duty of legal education was to clarify the value structure which flowed from this primary value. Clarification, in this context, did not mean amassing deductions about moral choice emanating from a single posited value. The object of clarification was to free lawyers from dependence on *a priori* deductive morality. In short, the authors accepted and refined Langdell's notion of value neutrality to that of a general purgation of socially unacceptable values.
“Trend thinking” was the notion that policy-making lawyers must be concerned with what will happen as a matter of scientific probability rather than with what ought to happen according to some a priori value structure.\textsuperscript{122} “Trend thinking” was not abstract prediction. It was a way of using deterministic conditions to achieve personal ends via “scientific thinking”. McDougal and Lasswell held that trends were a “register of the relative strength of the variables” which produced the trend itself.\textsuperscript{123} Therefore, “scientific thinking” meant analysis of trends and goals. The analysis of skills and goals generated the “skills table” which stated four “thought skills” two “observation skills” and two “management skills” which became the formal object of legal studies under the McDougall-Lasswell formula.\textsuperscript{124} The policy-making law school was to build its curriculum and its objectives around the skill table.\textsuperscript{125} McDougall and Lasswell criticized the traditional Langdellian law school because its curriculum was built on an obsessive reliance on appellate decisions as the sole object of study.\textsuperscript{126}

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\textsuperscript{122} Id. at 213-14.
\textsuperscript{123} Id. at 214.
\textsuperscript{124} The skills system developed by McDougall & Lasswell was as follows:
1. Skills of Thought.
   a. Goal thinking.
      The basic values of democracy: how derived, how related operationally to concrete events.
   b. Trend Thinking.
      Past trends and future probabilities appraised according to the degrees of the realization and the distribution of the basic values.
   c. Scientific thinking.
      The variables that condition the democratic value-variables.
   d. Legal technicality (the distinctive skill of the lawyer). The command of the vocabulary, citations and procedures that courts and other authoritative agencies expect from counsel.
2. Skills of Observation.
   a. Intensive procedures.
      Observer devotes himself for a long time to a particular person or situation, and uses complex methods (detailed personality studies, detailed studies of historical or current situations).
   b. Extensive procedures.
      Observer devotes himself briefly to a particular person or situation and uses a simple method (brief opinion poll, interview; cursory report on a situation).
   a. Primary relations.
      Persons with whom one deals individually.
   b. Public relations.
      Persons with whom one deals as a member of a large group.

\textsuperscript{125} Id. at 243-389.
\textsuperscript{126} Id. at 233.
2. Curriculum and Pedagogy for a Policy Making Law School. McDougall and Lasswell offered additions to the Langdellian model for legal education. They did not insist that it be replaced. Instead, the authors wished to reorganize the traditional law school around their “skill principle”. All law students would first be exposed to six multidisciplinary courses which oriented them to the impact of law outside of the effect case law had on judges. Following this introduction to law and social policy, the skills principle would be employed in organizing the upper division law curriculum into clustered courses based on skills of thought which included the traditional Langdellian objects of law study. McDougall and Lasswell proposed adding extended case study methods and sampling procedures to the standard Langdellian curriculum in the form of seminar programs for in depth exploration of social and economic phenomena. These upper division seminars would focus on ideology, diplomacy, economy and strategy relating to national policy matters. The authors proposed that management skills should be taught to law students in an analytical, conceptualized curriculum which would help them deal with people in the policy-making framework in which lawyers operated.

McDougall and Lasswell believed that law was not a closed system of consistent rationalised principles deduced from appellate decisions. In order for lawyers to function as social policy makers in a democratic society, lawyers would require

127. Id. at 256. The value courses were Law and Control, Law and Intelligence, Law and Distribution, Law and Production, Law and Character, and Law and Community Development. In 1972 Prof. Paul Carrington included in his report of proposed curricular reforms to the Association of American Law Schools a list of preliminary first year courses which were related to the courses proposed by McDougall and Lasswell as appropriate introductory courses in law. See Carrington Report 15-18. Carrington's proposed sequence consisted of Law and Social Control, Legal Advocacy, Legal Doctrine and Method I and II. Legal Doctrine and Method I was a course designed around the study of norms in the transfer of real property, resembling the taxonomic study of property proposed by McDougall and Lasswell. Carrington's recommendations paralleled those of McDougall and Lasswell, and changed the emphasis of the first year of law school from traditional Langdellian legal science to a study of the law as a social phenomenon.


129. Id. at 272-80.

130. Id. The authors also proposed that the course should be supported by a handbook called the Skills Book. The contents of the Skills Book were not described in detail by the authors.

131. Id. at 280-89.
an extended intellectual horizon. McDougall and Lasswell did not say that Langdell was wrong in identifying law as a value-neutral science. They indicated how the original Landellian matrix could be adapted to fit with the current human relations school of management theory and with the state of social science in the 1920's and 1930's. Legal science remained a process oriented, value neutral exercise in manipulating human behavior. It had simply been consciously re-oriented toward the kind of society which existed under the New Deal. An effective lawyer in the New Deal had to be able to work closely with elective and appointive government officials for his client's interests. An effective lawyer had to be able to converse with non-lawyer brain trusters in Washington who had studied economics or sociology. An effective lawyer had to be able to assume a role as a Washington bureaucrat and therefore had to be able to manage other people using Elton Mayo's manipulative technology for increasing work output. Lasswell, the social scientist and McDougall the law professor, developed a law school which combined insights from both disciplines in a single course of studies. Such a law school would have been a very exciting place in which to train a policy making elite for governing society.

3. The Stillbirth of the Policy Making Law School. McDougall and Lasswell's legal education model was never totally followed in any American law school. Yale Law School adopted substantial portions of the proposed policy-making curriculum after World War II. In the late 1950's Yale itself retreated to a more conservative educational style, abandoning the divisional program which followed McDougall and Laswell's basic syllabus for policy making legal education. Many schools did take up one or more multi-dimensional policy making courses for a while. Some schools still carry a few such courses in their catalogues today. Since the McDougall-Lasswell model for legal education was the only educational prototype generated by the Legal Realist school, it would have provided a laboratory within which to train an elite for managing a centralized federal bureaucracy. Perhaps the McDougall-Lasswell model was too openly an elite training experience to satisfy the needs of legal
education in the New Deal era. Periodically, legal scholars produce commentary on the McDougall-Lasswell model for legal education, but no law school has investigated adoption of such a curricular model for several decades.138

D. Frank's Clinical Law School. In the early 1900’s, the University of Denver Law School opened a legal clinic as part of its educational program. The original aim was to provide free legal services to the indigent.104 However, the faculty at Denver discovered that student participation in the free legal clinic program encouraged student achievement in regular classes and also gave Denver students a very practical introduction into the working world of lawyers. In essence, the University of Denver Law School had adopted the rejected "extended law firm" concept for legal education.136 However, Denver's pioneer efforts in clinical legal education were not emulated by the majority of American law schools.

In 1931, the University of Pennsylvania Law Review published an article by a New York bankruptcy lawyer named Jerome Frank.136 Frank had graduated from the University of Chicago Law School in 1912 and had joined the law firm of Levinson, Decker, Cleveland and Schwartz in Chicago. He became a specialist in corporate reorganizations.137 In 1929, he moved to New York and joined Chadbourne, Stanchfield and Levy. That year Frank underwent psycholanalysis because


135. The "extended law firm" law school originated by Albany Law School in the 1850's was adopted by other institutions. See W. Johnson, Schooled Lawyers 45-47, 74 (1978) for a description of the Albany influence on the University of Wisconsin law school during the 1860's and 70's.


he was disturbed by feelings that the law might not be the right profession for him. After analysis, Frank wrote *Law and the Modern Mind*, in which he developed a jurisprudence explaining the obligatory force of law by reference to Freudian psychology. Frank also introduced American readers to the psychological investigations of the learning process undertaken by the Swiss research psychologist Jean Piaget. Piaget had developed a theory of structured intellectual development in which he identified various levels of developing consciousness in children. According to Piaget, the development of a personal sense of moral obligation also developed gradually over the period of childhood and adolescence. Freud suggested that a personal sense of obligation to obey laws had to do with substituting the commands of the civil government for the orders of one’s father. Frank developed from these partial insights a jurisprudential structure which rooted the moral obligation to obey the law in a transference of obedience from one’s parents to the state. At the time, Frank’s insights and conceptual framework were unique.

During the same period of time, Frank produced his model for a clinical law school. This effort was as innovative and as bold as his jurisprudence. *Why not a Clinical Lawyer School?* began with a sharply worded critique of the structure and teacher selection method of the Harvard style conventional law school.

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138. *Id.*
139. J. Frank, *Law and the Modern Mind* 248-51 (1931). *Law and the Modern Mind* is at times a difficult book to grasp. It is discordantly written, and appears to have been drafted in a vignette style rather than as a systematic exposition of a jurisprudential position. The conclusions of Frank given in Part III do tie together his theses about the nature of legal obligation.
141. Piaget recognized at least three stages of intellectual development with corresponding development stages in the facility of discrimination or judgment. The lowest level of functioning, characteristic of infants, was called sensori-motor; the intermediate level was labeled the intuitive stage, when abstract combinations can be made by children. The final stage, conceptualising seems to involve a refinement of the second stage into a discrete of series of comparative operations performed by the human intelligence. Frank related the development of legal obligation in human personality to these three stages of intellectual development.
anyone who wanted to be a law teacher, because appellate decisions were the sole object of study in law school, and the purpose of going to law school was to pick up legal rule making from appellate cases. Law students became fixated on rules. Frank considered this pedagogy psychologically and pragmatically bad lawyer training:

But the tasks of the lawyer do not pivot around those rules and principles. The work of the lawyer revolves around specific decisions in definite pieces of litigation ... the lawyer is truly concerned with how the courts will act in some concrete case ... A lawyer tries to answer these questions: "What will happen if these specific documents or transactions should hereafter become a part of the drama of a lawsuit? What will a court decide is their meaning and effect?" For the legal rights and duties of the client ... mean simply what some court, somewhere, some day in the future, will decide.⁴⁴

According to Frank, lawyers had two primary groups of skills which they employed. The first skill was that of predicting and anticipating a future enforceable court decision. The second skill was trying to get a decision from a court satisfactory to the client's interest.⁴⁵ These groups of lawyering skills could not be learned by any law student in class. The student would learn these skill only by observing and participating in court room and law office practice with experienced lawyers.

Students trained under the Langdell system are like future horticulturalists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be expected that there is some correlation between the kind of stuffed-dog study and the overproduction of stuffed shirts in the legal profession.⁴⁶

Langdellian legal science claimed that judges always followed the rule of stare decisis. Frank considered this assumption to

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¹⁴⁴.  *Id.*
¹⁴⁵.  *Id.* at 910.
¹⁴⁶.  *Id.* at 911.
¹⁴⁷.  *Id.* at 912.
be a gross oversimplification of the trial process.\textsuperscript{148} His remedy was to put students in contact with real courts and real lawyers in a clinical law resembling the clinical program of a good medical school.\textsuperscript{149}

Frank held that a clinical law school would be based on four fundamental propositions. First, law teachers should be men with at least five years' experience in the actual practice of law, so that law schools would not teach students "law teachers' book law" alone.\textsuperscript{150} Second, the traditional case system model for studies based on the appellate decision should be revised to deal with case studies in the sense of a psychological case history. Students should read and study motions, pleadings, discovery and actual transcripts of trials rather than the simple attenuated version presented in an appellate decision.\textsuperscript{151} Third, every law school should be based on a clinical sequence of instruction, in which students, under supervision of experienced practitioners, learn law by doing law jobs.

In this way, the students would learn to observe the true relation between the contents of upper court opinions and the work of practicing lawyers and the courts. The student would be made to see, among other things, the human side of the administration of justice.\textsuperscript{152}

Frank's clinical lawyer school was a serious challenge to traditional Langdellian legal education. First, Frank's educational model was adapted to the training of working lawyers who would practice in courts and in law offices. It was the kind of education which would prepare a young man to go into law practice on his own and make a living trying lawsuits. It had much greater application to the practical side of law practice than did Langdellian legal science. It was also a non-elite form of training for the public profession of law. Second, Frank's clinical school was not a reductionist exercise in appellate decision classification. Frank placed great emphasis on the human drama of trial work and of encounter with real people in crisis. Consequently, Frank's clinical school was

\begin{itemize}
\item 148. Id. at 912-13.
\item 149. Id. at 914-23.
\item 150. Id. at 914.
\item 151. Id. at 916.
\item 152. Id. at 918. Emphasis in original.
\end{itemize}
considerably more humanistic than the traditional Langdellian model for legal education.

Frank's model was originally prepared by a man who had never taught law in a law school. Frank nevertheless embodied the humanistic side of the Realist movement in a legal education model. Frank's clinical lawyer school was dialectically opposed to the traditional system of legal education, and to the later model generated by McDougall and Lasswell. The Langdellian and McDougall—Lasswell models were academic, reductionist and elitist. Frank's clinical law school was non-academic, non-reductionist and democratic.

The 1960's saw a revival of Frank's idea of a clinical law school first in fulfillment of what educators conceived as the social obligation of law schools to provide meaningful legal services to poor persons. The first impulse toward clinical legal education was not pedagogic. It was therefore within the tradition of the University of Denver experience. Following the outburst of funding by the Ford Foundation and the United States Department of Health, Education and Welfare for altruistic clinical programs sponsored by law schools, a wave of student demand for "relevancy" in legal education increased pressure on traditional academics to add more clinical programs to the curriculum in the late 1960's and early 1970's. Finally, in the mid-1970's the social forces which generated a clinical program in legal education gave way to the realisation that Frank was right after all. Clinical experiences were remarkably effective ways to train future lawyers for performing the traditional roles of advocate, counselor, negotiator and drafter. Unfortunately, as altruism gave way to a growing consciousness of the pedagogic value of clinical education, the sources of funding for clinical programs dried up.


155. This assumption has replaced altruism toward the unfortunate as the principal rationale for law school clinical programs in recent years.

156. See Annual Report, Counsel on Legal Education for Professional Responsibilities
Frank’s model for a clinical law school required the entire program of law studies to be designed around a one or two year clinical sequence. Modern clinical programs have been added to the traditional Langdellian curriculum piecemeal, without a consistent program for integrating the study of law and the practice of law into a unified structural educational experience. In most law schools, students are lucky to get as much as three credits in a clinical program out of the 80 to 90 credits they must take in order to graduate. It is doubtful that a legal education program designed after Frank’s model could be accredited under the present rules for accrediting law schools established by the American Bar Association. Consequently, no law school has given the Frank model a fair chance to compete with the traditional Langdellian model for legal education.

E. The Shaffer-Redmount Model.

1. The Agonizing Reappraisal of the Lawyer Class. The 1970’s were not kind to lawyers. The decade saw a growing drumfire of muck-raking criticism of the legal profession by such people as Ralph Nader and his staff. The American Bar Association was threatened with disestablishment as the sole accrediting agency for law schools for purposes of federal funding. The cost of legal services continued to climb, and at the same time, lawyers were publicly humiliated and disgraced by the conduct of their peers, including the U.S. Attorney General, during the Watergate interlude of 1972-1974. The U.S. Supreme Court invalidated three-standing restrictive trade practices which all bar associations supported for decades during the 1970’s: the minimum fee schedule for legal work, the prohibition against lawyers advertising for legal business, and the prohibition against soliciting business from prospective client classes. The cumulative impact of the social change among lawyers

(1979) for the latest funding by the Ford Foundation for clinical programs in the United States.
157. Frank’s clinical lawyer school would call for programs which probably would not meet the present residency rule requirements stated in Standard 306(d) of the American Bar Association for accrediting law schools.
161. Id.
of these events, together with the entry of vast numbers of women and minority persons into law schools and into the ranks of young attorneys, cannot be assessed at this writing.

Predictably, the movement to lawyer specialisation has been promoted as a means for limiting the economic impact of women and minority lawyers on traditional law business. Specialization favors lawyers who were admitted some years ago, who have established a practice. These lawyers, protected by the usual grandfather clauses proposed with specialization programs, would be automatically certified as specialised attorneys. New lawyers would be required to apprentice themselves to older attorneys to gain experience, and to subscribe to a lengthy course of continuing legal education studies in order to pass examinations in their specialty, closely modeled on the bar examination procedure. Therefore, specialization would hold back the impact of women and minorities on the income of established attorneys.

Recently, the practicing bar, through its associations, have interfered with the curriculum and course of studies in law schools. Indiana and the Second Judicial Circuit of the United States have prescribed a course of studies in law school and formal experience requirements as conditions precedent to admission to the bar in both cases. The Judicial Conference of the United States recently adopted new limitations on admission to practice before the District Courts of the United States on an experimental basis, requiring supervised trial experiences and law school instruction in trial advocacy as condition precedent to admission to the District Courts in the trial districts.

162. Mark Green and Ralph Nader present a convincing argument for the position that specialization in the bar is prompted by economic self-interest among lawyers in order to extract greater fees for legal services by parcelling out legal tasks among a team of certified specialists, rather than by performing the tasks in one office by a generalist. See J. Hochberg, “The Drive to Specialization” reprinted in R. Nader and M. Green, Verdicts on Lawyers 118-28 (1976).

163. Some legal educators have inevitably opposed the movement among the practicing bar to regulate the contents of legal instruction. Indiana Rule 13, which was the first attempt by a state bar association to control course contents in law school, was opposed by the dean of the Notre Dame Law School and by professors in all four law schools in the state. The deans of the two state operated law schools judicially abstained from commentary on Rule 13. Rule 13 prescribes 56 credit hours of study in 14 course areas as condition precedent to admission to the Indiana Bar. See Ind. Code Ann. Court Rules (1979 Supp.) for text of Rule 13.

All this ferment has produced another model for legal education which is antithetical to the traditional law school and to the model proposed by McDougall and Lasswell for legal education.

2. The Contemporary Humanist Movement in Legal Education. The pressure generated by the practicing bar on law schools has been essentially conservative, if not reactionary. Lawyers have demanded that legal education retreat from some of the experimental courses offered in the 1960's and early 1970's to a "Spartan legal education" emphasizing traditional Langdellian science. At the same time, practitioners' groups call for more instruction in skills training, particularly in the skills of trial advocacy, drafting and writing. Taking the demands of the practicing bar as a meaningful statement of dissatisfaction with the status quo, the bar appears to call for contradictory remedies for its dissatisfaction. On one hand, practitioners demand more Langdellian legal science at the expense of new directions in legal education. On the other hand, practitioners demand the law schools provide more practical skills training for law students. These contradictions have led to a counter-counter revolutionary movement among legal educators.

The humanist movement, in the tradition of Frank, have a love affair with Sigmund Freud and Jean Piaget. The principal propagandists of the humanist movement, Shaffer and Redmount, have prepared an institutional model for legal education. They exposed the vulnerable flanks of American legal education through a series of studies on the impact of legal education on the behavior of law students. Shaffer and Redmount hypothesized that legal education transformed the behavior of law students into behavior patterns appropriate for their station as members of an elite. They discovered that, upon examining the available data, including their own em-

165. The most outspoken commentary on a return to Spartan Legal Education is that of Judge Carl McGowan, which appeared in 65 A.B.A. Journal 374 (1979). Judge McGowan made a persuasive argument that the primary purpose of legal education is not preparation for the technical tasks of legal work, but general mind training.

166. The pressure from practitioners for more skills training appears in the findings of the author's survey of Springfield, Massachusetts lawyers. Like their colleagues, these lawyers would require law schools to furnish more skills training in trial advocacy, drafting and writing than is currently done.

167. Lawyers, Law Students and People 2.
 empirical analysis of student attitudes, their original hypothesis was untrue. Law school seemed to have very little impact on student behavior at all.\textsuperscript{108} They concluded that the curriculum, the clinical programs, the type of teaching techniques and all the extra curricular activities of typical law schools did not make young men and women magically into lawyers. They found that law students learn an impersonal, overly rationalized set of doctrinal principles from their professors.\textsuperscript{109} In turn, they found that law professors see themselves as dominant individuals who control student behavior through classroom exhibitions of technical, verbal competence which is isolated from the real working life of lawyers, and from the thought processes of the rest of the modern university community.\textsuperscript{170} Shaffer and Redmount call this the "institutionalization of hypocrisy."\textsuperscript{171} The authors then characterize American legal education in the 1970's as a meaningless ritual:

Human regimens of study begin and end in experience. They emphasize a well-being that goes beyond rights, powers and duties. Fact finding and fact evaluation are matters for complex inquiry more than hypothesis . . . . The jurisprudence of a fact, the system by which it is identified and governed in the real life and lives of human beings, is a matter that was discovered in our courts before 1920, but it has yet to be discovered in the laboratories of legal education.

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American legal education is a portentous, extensive, recondite enterprise. There is nothing which is so important to the country and so little understood, even by those who stand in its midst. We find that, despite the myths and the movies, law teaching does little more than the most obvious things for its students. It is a sometimes clever, often boring, initiation rite for the legal profession; and it serves up reams of information about the law. It is a ritual in a library.\textsuperscript{172}

The solution, according to Shaffer and Redmount, is to re-

\begin{itemize}
  \item \textsuperscript{108} \textit{Id.} at 2-4.
  \item \textsuperscript{109} \textit{Id.} at 25-28.
  \item \textsuperscript{170} \textit{Id.} at 8-9.
  \item \textsuperscript{171} \textit{Id.} at 12-13.
\end{itemize}
build the law school on an humanistic model. This model rests in part on the therapeutic derived from Carl Rogers and noetic theories derived from Jean Piaget and Jerome Bruner. Shaffer and Redmount propose a shift in teacher orientation as the principal means for restoring American legal education to its rightful place. This reorientation of teaching attitudes by law teachers would mean a fundamental break with the past and present conceptions of the role of the law teacher in law school. Shaffer and Redmount call for the dismantling of the Langdellian law professor cult. In turn, they require that law teachers become facilitators of learning. To make this change possible, Shaffer and Redmount describe techniques by which primary classroom experiences could be cooperative rather than competitive, and humanistic in content rather than reductionist. The principles of unconditional positive regard for the student, empathy and congruence would predominate in the classroom setting, as well as in all other student-teacher contacts.

Shaffer and Redmount conducted an attitudinal survey and took personality profiles on a fairly select group of first and third year law students at the University of Notre Dame Law School and two other Indiana law schools. To this data base, they added tape recordings of actual classroom sessions in the same schools, and additional classroom tapes taken at the University of Southern California in 1970 to 1974. Shaffer and Redmount did not claim that their data supported a statistical inference about all American schools. Instead, Shaffer and Redmount introduced a combination of analytical and empirical methodology which they called "advocacy research." Shaffer and Redmount have adopted the thesis that law schools are not humanistic. They amass data in support of their hypothesis, which does not establish a null hypothesis about legal

173. Id. at 209-29.
174. C. Rogers, Freedom to Learn 303-26 (1969). Shaffer and Redmount show familiarity with and empathy with the three principles of Carl Rogers' client-centered teaching and therapeutic method:
   1. The law teacher must have unconditional positive regard for his client;
   2. The teacher must have empathy with students respecting his and their feelings.
   3. He must be congruent, and acceptant of his students as people who do not need to exploit or manipulate others.
175. Lawyers, Law Students and People 219-20.
176. Id. at 59.
They represent that they are doing what a good lawyer does; furnish all evidence for their cause without considering other hypotheses to explain the data. The object of this method is to persuade the reader not to demonstrate to the reader the statistical verification of the null hypothesis. Shaffer and Redmount use this approach to empirical research to support their call for a personalist revolution in legal education.

Shaffer and Redmount considered their education program "transferable" to any other kind of law school. Theoretically, a traditional Langdellian law school, a school modeled after McDougall and Lasswell, or even a Frank Model clinical law school could adopt the personalist techniques proposed in Lawyers, Law Students and People. This assertion is contradictory, considering that the intellectual foundation for the Langdellian and McDougall-Lasswell models requires an abstract, reductionist approach to the classroom teaching situation as part of the process itself. Shaffer and Redmount mean to make lawyers more humanistic, and to be humanists, lawyers have to learn to be human themselves and to use and employ modern counselor skills with clients. This demand alone prevents "transference" of the Shaffer-Redmount model to a traditional law school.

Dr. Redmount, however, has supplied a curricular model which is intended to be employed with the humanistic revolution in law school. Redmount prefaced his curricular model:

The intellectual and political traditions of legal education derive from eighteenth and nineteenth century rationalism. The educational methods follow principally in the classical tradition of Socrates and the medieval scholastics. The basic structure of the law to be learned deals with the abstractions of experience in theoristic, behavioral, ethical and political categories. Hence, traditionally, the student learns that law is divided into contracts and property, torts and crimes, constitutional law, civil and criminal procedure, and so forth. The traditional function of law

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177. Id. at 59-67.
178. As that term is used by educational psychologists—the learning process in one field of endeavor is useful to the learner in another field of endeavor as well.
teaching and learning is the simplification of experience in intellectual terms so as to engender skill and manageability in dealing with the mass of law. The exaggeration is in the nearly exclusive emphasis on rationalism that tends to deny important meaning and intention to experience.\footnote{Id. at 255-56.}

Redmount then explains clinical legal education as a result of the application of Bentham's principle of utility to legal education. It is, as Redmount recognized, also learning by doing as described by John Dewey. Redmount considered clinical education to be a popular antidote to the intellectualist model for legal education.\footnote{Id. at 256.} Against this background, Redmount proposes his own curricular model:

\begin{quote}
The substance of the transactional emphasis in law is in the theory and practice of intentions and operations. It is also in the uses, meanings and consequences of conceptual law. The system of conceptual law may be understood in terms of various partisan and non-partisan uses and non-uses, and personal and social consequences. Analysis of intention, action and meaning in these terms captures the true ethical, political, psychological and economic character of effective law. A system of inquiry is likely to develop that includes psychological search, empirical observation, and logical derivation and abstraction. Given perspective through time, it also affords an historical dimension through which to understand and to learn to respect the character of continuity and change in human experience and in the institution and discipline of law.\footnote{Id. at 261-62.}
\end{quote}

Redmount used the term "transactional" to describe the curriculum derived from this insight into the intellectual structure of law. The organizational structure of his curricular model bears some resemblance to the McDougall-Lasswell policy-making curriculum and to the first year studies program contained in the Carrington Report. The first six weeks of the first year curriculum would be a study of human relations, fact finding and legal counseling.\footnote{Id. at 262-64.} Instruction would be in
small section classes. Following the six week introductory workshop on counseling and human relations skills, Redmount would divide law into three functional categories: governmental relations, business arrangements and family relations. He would then break down each field of legal studies into four components: Planning, facilitative, preventive and corrective. The first year of law school, freed from adherence to the subject-matter restrictions of the usual law school first year, is a sequence of phased problem solving courses conducted in six week blocks, each week dealing with a different, progressively more difficult legal problem. Redmount's second year of legal studies would be a clerkship in a law office or in court, which is designed to integrate the first year's studies into a half year learning experience in the field. The second half of the second year would be a study of jurisprudence. Redmount's third year of legal studies would be an internship in a law office patterned after those commonly found in medical education.

The Shaffer-Redmount model shows its debt to Frank's model in several ways. Like Frank's clinical law school, it places the emphasis on learning by doing by students, rather than passive reception of knowledge about doctrinal law. It is person-oriented and non-reductionist in character. It is also designed to turn out working lawyers who will counsel, negotiate and draft for clients. It is more personalist than the traditional law school. It is also a non-elite model for legal education.

IV. CONCLUSION.

A. Legal Education for a Three Tiered Bar. The legal education community has resolved its conflicts about an appropriate law school model by rejecting the McDougall-Lasswell, Frank and Shaffer-Redmount models for legal education in favor of the Langdellian model. The official standard for accrediting law schools is based on the Langdellian model for legal education. However, the preceding discussion has shown that the Langdellian model for legal education is a consciously elitist
model for the production of law professors, clerks to Supreme Court Justices and for Wall Street lawyers. The upper 15% to 25% of the American bar has dictated the standard for a good law school to the remaining 75 to 85% of all American lawyers. Unfortunately, the effect of this universal approach to legal education has been to ensure that the vast majority of American lawyers receive an inferior version of a Harvard-style legal education circa 1925. Consequently, the vast majority of American lawyers are ill-prepared to serve as lawyers by their legal education program, which does not prepare them to try lawsuits, counsel, negotiate, draft or manage business.

Since the available data shows that the American bar is quite clearly stratified into three distinct classes, it follows that legal education for the elite need not be legal education for the small firm or solo practitioner. The mission of Harvard, Yale, Columbia, Chicago, Michigan and Stanford and other schools dedicated to the advancement of the science of law need not be changed. These schools quite rightly prepare men and women for admission to the elite law firms, legal education and judicial clerkships in high appellate courts. Consequently, the mission of the remaining 75 to 80% of American law schools should not lie in repetition of the patterns of the elite schools.

Two very viable curricular models for a practitioners' law school have been generated by extremely able thinkers. The Frank model for a clinical training course for trial advocates has never been adopted and organized into a three year structured sequence. Since about one of three lawyers is a trial advocate, schools following the Frank model could provide the nation with a much more proficient trial bar. The second practitioners' law school model, generated by Shaffer and Redmount is applicable to the remaining two thirds of American non-elite lawyers. The typical solo practitioner or small firm lawyer spends most of his time or her time behind a desk and telephone, counseling, negotiating, drafting and researching problems for his or her middle class clientele. The lawyer who is on his or her own, or in a firm of less than five or six individuals must master counselor skills. He or she must also understand the elements of simple trial advocacy, negotiating
and drafting. He or she need not be educated in the intricacies of high public finance, economics or in the various schools of jurisprudence, unless such an individual desires some “legal culture” in the nature of general background education.

The primary purpose of legal education remains the preparation of men and women for the public profession of law. The course of such professional training is a matter affected with a broad public interest beyond that of the narrow economic and social interests of the bar itself. Admission to law practice in the future may require different standards and different educational programs than those now in existence or in modular form. In any case, the present promulgation of one standard for legal education ill serves the public interest.

B. Standards for a Three Tiered Bar. It follows from this discussion that admission to the bar should be stratified in the same way that actual practice is stratified. Certification to the elite group of practitioners of law should be distinctively different from certification to lower levels of practice. For example, admission to the lower levels of law practice should rationally reflect the kind of lawyering skills and substantive legal knowledge required of solo practitioners and small firm practitioners and low level governmental lawyers. If a competency examination is required, the examination should include counseling, negotiating and trial advocacy, in addition to substantive knowledge of basic business and family law. Additionally, persons certified to this level of practice should be clinically trained and should show supervised clinical counseling, negotiating and trial experience prior to admission. The examination process for such individuals should not be a heavily content-laden exclusionary device stressing doctrinal legal knowledge.

Certification to the middling level of law practice would include certification in counseling, negotiating and trial advocacy as described above, together with some showing of appropriate doctrinal knowledge of U.S. and state tax laws and the rudiments of corporate formation law. It is possible to create a certification process by which an applicant for bar admission receives a “C” certificate to solo practice or small firm non-specialized practice on graduation from law school,
followed by a legal residency with a six to fourteen person law firm for a period of two years, after which a "B" certificate is issued after an examination on the substantive rules of U.S. Income and Estate and Gift Tax, the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Finally, the elite lawyers will be chosen on account of aptitude, family background and economic circumstances, for legal education at Harvard, Yale or like schools in a traditional doctrinal manner. This notion also presupposes a "farm system" by which promising very bright men and women who are educated at a more practically oriented school certifying students for B and C practice certificates will be sent up to the major leagues on recommendation by professional staff at such schools. Special scholarship funds should, of course, be created to promote such transfers. The elite law schools should consider dividing the elite legal education market in such manner that a sufficient number of very talented men and women are educated to become large firm lawyers, government officials and law professors. This would produce two desirable results. First, it would allow the present elite schools to concentrate on narrow but vital educational missions without the excess baggage of the present lower half of every law school class. Second, it would really define the role of elite legal education in terms of the rational need for an American aristocracy of professionally trained national leaders. The precise doctrinal content of an elite legal education would be set by a national "A certification" program for law graduates. An "A certificate" would require a showing of detailed doctrinal knowledge of securities law, accounting, economics, politics, U.S. taxation law, and applicable Federal agency regulations in addition to doctrinal knowledge of the kind provided for in "B" or "C" certification programs. Top law firms and high governmental positions would be available only to "A" certificate holders. Graduates of non elite schools who may wish to receive "A" certification could then attend special certification programs at an elite school, if otherwise qualified for admission as a special student.

Unconscious or devious elitism has been practiced in legal education since law schools first affiliated with colleges. As enrollments decline during the next decade in law schools, most American law schools will be forced to justify their continued
existence. It will not do to remain open only to provide a watered down version of the Harvard legal education program of 1925. There will no longer be an excessive number of men and women wanting to enter the practice of law from which the run of the mill school can draw applicants at will. In the next decade, law schools will have to make serious efforts for conscious adoption of an educational program tailored to meet market needs for legal services. It follows that the great majority of American law schools, if they are to survive the next decade, must provide an attractive legal education program which really trains law practitioners for the delivery of effective legal services. With the exception of the top quarter of American law schools, this means adopting a curricular model and institutional program which follows either the Shaffer-Redmount model or the Frank model for a practitioner's legal education program.