
**THE ORIGIN OF LL.M. PROGRAMS:
A CASE STUDY OF THE UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL**

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ABSTRACT

Graduate legal education programs, the most common of which is the *Legum Magister* or LL.M., have come under increasing criticism in recent years in the United States. Many observers have accused law schools of offering these degrees as a means of raising revenue, and maintain that they provide no real value to graduates obtaining the degree as they are not respected in the market for legal services. Despite these negative appraisals, the number, size and types of these programs have continued to grow rapidly at American law schools across institutions of widely varying sizes and reputation.

While much has been written on the recent development and current state of graduate law programs, almost nothing has been written on how and why these programs came into existence, despite the fact that a number of U.S. law schools claim that their programs were founded well over a century ago. As LL.M. programs continue to blossom and law schools attempt to address the rising tide of criticism aimed at them, law faculty and administrators would be well advised to examine the origin and history of these degrees. Is it possible that law schools have been hoodwinking innocent lawyers into getting a useless degree for decades? Who were these degrees originally intended for and who ultimately chose to

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matriculate into these programs? What were the curricula for these programs like?

Through historical analysis and archival research, this case study of the development of graduate law programs at the University of Pennsylvania Law School reveals that they were founded in response to a perceived need to make the study of law a more scholarly inquiry, and to ensure that law school training was not wholly confined to the necessities of legal practice. These programs were not created to enhance the job prospects of its graduates in the traditional legal market. They were part of a drive toward professionalization and standardization at the turn of the Twentieth century that was reflected across a wide sector of American society, and reflected the long simmering tension between those who viewed law as an art and those who viewed it as a science.

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1. INTRODUCTION

The current standard educational path for lawyers in the United States is a three-year graduate program culminating in the award of a *Juris Doctorate* ("J.D.") degree. Upon completion of an accredited program law students receive the J.D. which generally enables them to sit for a comprehensive "bar" examination in any state in the country. However, in the past two decades there has been an explosion in the number and size of Master of Laws ("*Legum Magister*," or "LL.M.") programs offered by U.S. law schools.¹ In the past fifteen years alone the number of these programs has more than doubled, rising to more than three hundred in 2013 compared to just one hundred and ten in 2000, with more than 10,000 students in the United States seeking the degree in 2013.² This growth has been driven by a number of factors but most agree that, at least in part, this increase is due to the downturn in the number of applicants to J.D. programs in recent years across law schools, and the corresponding need it has created to meet revenue shortfalls created by the loss of J.D. tuition dollars.³

LL.M. programs are generally two semesters in duration, are equivalent in cost to one year in the J.D. program,⁴ and are designed for attorneys already holding a foundational law degree, either from the United States or elsewhere. Since they are only open to those already holding a law degree, they are often referred to as "gradu-

¹ See *A Consumer's Guide to LL.M. Programs*, 21 NAT'L JURIST 26, 26 (2011) (noting that "[a]most 10,000 students were enrolled in graduate law programs in the 2010-2011 school year, In 1990, there were only 5,000 graduate law students and 7,300 in 2000.").

² Owen Praskievicz, *Standing Out: Why LL.M.'s are More Popular than Ever*, NAT'L JURIST, GRADUATE L. ANN. 4, 4 (2013-14).

³ Nora V. Demleitner, *Stratification, Expansion, and Retrenchment: International Legal Education in U.S. Law Schools*, 43 INT'L L. NEWS 1,6 (2014) (noting that "[a]s U.S. law schools experience increasing fiscal pressure due to the downturn in the number of applicants to their JD programs, ever more of them have opened or increased the size of LLM program targeting foreign attorneys.").

⁴ Karen Sloan, *An Elite Education's Going to Cost You - Tuition at Top Law Schools Surpasses \$55k per Year*, NAT'L L. J. (Mar. 2, 2015), <http://www.nationallawjournal.com/home/id=1202719224840/An-Elite-Education-Going-to-Cost-You?mcode=1202617074964&curindex=2&slreturn=20150308134603> (noting that the average tuition among all American Bar Association accredited law schools was \$35,312 in 2014 with the schools ranked in the top 10 on the rankings published by U.S. News & World Report averaging over \$55,000).

ate” law programs. While many schools offer a general LL.M. degree designed for international attorneys,⁵ many other LL.M. degrees involve some sort of specialization (e.g., LL.M. in Intellectual Property Law or LL.M. in Tax Law) and are aimed at a domestic audience. Unlike the J.D. degree, these graduate degrees are regulated very loosely by the profession’s governing body, the American Bar Association (“ABA”). As one author notes, “[t]here is no consensus among law schools, accrediting agencies or legal educators as to [the] purposes, goals or standards of graduate legal education.”⁶

In recent years, the growth of LL.M. programs has come under increasing criticism from a variety of observers who cast doubt on the utility of LL.M. programs for graduates and accuse law schools that offer them of seeking to enrich themselves at the expense of unwary students. Many feel that obtaining an LL.M. will not enable degree holders to get better jobs or generally enhance their career prospects, and that they are, therefore, useless and should not be offered by law schools. Of course, for many not in the legal profession the current sentiment is perhaps better represented by the joke: “Question: What do you have when a lawyer is buried up to his neck in sand? Answer: Not enough sand.” In other words, outside of strategies for curbing their numbers, why should anyone be concerned about how lawyers are educated? If the students matriculating into these programs, who by definition are adults already in possession of a law degree, are unable to make use of them, why is this the fault of the institutions that offer the degree? The answer lies, partially, in the fact that arguably more than any other profession, lawyers perform critical functions across the American political system and social landscape, occupying a unique position of trust and responsibility in our society.

In this country lawyers have been, and continue to be, what one author described as “uniquely important and influential” throughout its history.⁷ Legislators, politicians, and their staff are disproportionately lawyers as are, of course, nearly all federal, state and local judges. Private attorneys, corporate counsel, public defenders,

⁵ The current program at the University of Pennsylvania Law School is an example of this type of LL.M. degree.

⁶ Henry D. Gabriel, *Graduate Legal Education: An Appraisal*, 30 S. TEX. L. REV. 129, 130 (1988).

⁷ Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 7 (2008).

prosecutors, civil rights attorneys, mediators, and community legal services lawyers provide crucial assistance for large portions of the U.S. population. The history of legal education is, as one author put it:

Effectively, the history of lawyers and, often, of the law. To attempt to fully understand the law, one must understand who creates, maintains, and changes it, and these people have only one common feature among them: a legal education.⁸

If law schools are somehow failing in their mission to educate attorneys, the results could have a significant impact on American society. Moreover, the considerable expense of these programs to the students would render any active deception on the part of law schools in taking in students reprehensible and seem to make any effort to understand their purpose advisable.

As law schools attempt to address the rising tide of criticism aimed at LL.M. programs, law faculty and administrators would be well advised to examine the origin and history of these degrees. This is particularly true in the current environment in which the legal job market is contracting, law school applications continue to drop, and law schools scramble to come up with alternative revenue streams.⁹ As another online author speculated:

Firing faculty and downsizing staff – perhaps even closing whole law schools – will soon be common; so will the appearance of the LL.M., a degree whose strange history may be emblematic of the most serious problems in legal education. The LL.M., awarded after the first degree in law, was once almost exclusively pursued by foreign students and lawyers seeking expertise in technical fields like tax law Now . . . the degree is being awarded to more and more Americans, often by schools with low employment rates . . .

⁸ Steve Sheppard, *Introduction: Why Study the History of Law Schools?*, in *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 1* (Steve Sheppard ed., 1999).

⁹ Catherine Ho, *Law School Applications Continue to Slide*, WASH. POST (June 2, 2013), http://articles.washingtonpost.com/2013-06-02/business/39697850_1_american-bar-association-accredited-law-school-legal-job-market [https://perma.cc/U4R3-B2WT].

and there may soon be a dramatic expansion of LL.M.'s offered online.¹⁰

This author's apocalyptic vision is certainly alarming, but is it accurate? Does it make sense to lump the presence of LL.M. program in with the firing of faculty and the closing of law schools? What is this "strange history" that he eludes to? Some LL.M. programs purport to date back over one hundred years. Is it possible that law schools have been bamboozling innocent lawyers into getting a useless degree for over a century? Who were these degrees originally intended for? What were the curricula for these programs like?

Using historical methods, the aim of this Article is to cast some light on these issues using the University of Pennsylvania Law School ("Penn Law"), an institute that claims to have offered its first LL.M. degree in 1898,¹¹ as a case study. Specifically, the research questions investigated by this project were:

1. What is the origin/purpose of graduate law degrees in the United States?
2. How did the LL.M. Program come into being at Penn Law?

To date, there have been a number of works looking at some aspect of the history of Penn Law. In fact, a brief history of Penn Law written by Professor Sarah Gordon can be found on its website, entitled: "Chiseling Legal Tradition."¹² This synopsis, while informative, is written from the perspective of the faculty and concentrates primarily on the history of legal scholarship at Penn Law and its relationship to the physical space in which the school has resided. It makes no mention of Penn Law's graduate programs. Similarly, while there have been other works focusing either in whole or in part on the history of Penn Law School,¹³ at most they make only

¹⁰ Bryce Wilson Stucki, *Online LL.M.'s: A New Way to Rob Peter to Pay Paul?*, AM. PROSPECT (July 11, 2013), <http://prospect.org/article/online-llms-new-way-rob-peter-pay-paul> [<https://perma.cc/N25X-6QVS>].

¹¹ See PENN LAW: ABOUT: HISTORY, <https://www.law.upenn.edu/inbrief/timeline.php> [<https://perma.cc/T33Y-98LL>] (last visited Nov. 2, 2017).

¹² Sarah Barringer Gordon, *Chiseling Legal Tradition*, PENN LAW, <https://www.law.upenn.edu/inbrief/chiseling-legal-tradition.php> [<https://perma.cc/J7FZ-PMYM>] (last visited Nov. 2, 2017) (describing Penn Law School's origins, tradition, history and architecture).

¹³ See, e.g., DEREK DAVIS, "A LIVING SCIENCE AND A PRESENT ART": A HISTORY OF

passing note of the law school's graduate programs. This Article will explore the origins of graduate legal education through the analysis of archival data and secondary source material.

To place the inquiry in its proper context, this Article begins with a brief review of the history of United States Legal Education from its inception to the first decade of the twentieth century. Thereafter, an examination of the appearance of graduate law programs in the United States is undertaken, followed by an exploration of their appearance at one particular school: The University of Pennsylvania. In an attempt to answer the questions, set forth above, the Author reviewed relevant secondary sources and published primary sources as well as conducted archival research at the archives of the University of Pennsylvania.

2. THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES

Arguably, the history of American legal education extends back to ancient times and the establishment of the first rules and regulations along with the corresponding need for individuals to study and interpret these early laws. However, a more reasonable date might be 1756 with the establishment of the first chair of law at University of Oxford. The first holder of this professorship was William Blackstone. Some historians point to this date as the genesis of American legal education because it was the writings of Blackstone that were used by those in colonial America interested in studying

THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL (2000) (describing historical background of Penn Law School's origins); Bridget J. Crawford, "Daughter of Liberty Wedded to Law": Gender and Legal Education at the University of Pennsylvania Department of Law 1870-1900, 6 J. GENDER, RACE & JUST. 131 (2006) (examining a thirty year period of major changes in legal education, reasons for the decline in clerkships, and transition to the modern era of the Law Department); George Wharton Pepper, *Transitional Years in the University of Pennsylvania Law School*, 101 U. PA. L. REV. 169 (1952) (describing the author's recollection of the law school); HAMPTON L. CARSON, AN HISTORICAL SKETCH OF THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA (Press of the Times Printing House, 1882); Adam Jonathan Heft, *William Draper Lewis and the Development of a Modern Law School at the University of Pennsylvania* (Apr. 2, 1993) (senior honors thesis, University of Pennsylvania) (on file with the University of Pennsylvania); C. Stuart Patterson, *The Law School of the University of Pennsylvania*, 1 GREEN BAG 99 (1889) (describing Penn Law School's structure, objectives, management, and teaching methods); EDWARD POTTS CHEYNEY, HISTORY OF THE UNIVERSITY OF PENNSYLVANIA 1740-1940 (University of Pennsylvania Press, 1940).

the law.¹⁴ To be clear, these were scholars interested in the law as a focus of academic scholarship, as opposed to students training to practice as attorneys. Even those attending Professor Blackstone's lectures at Oxford were not preparing for a career in law, but rather for life as learned gentleman, which might involve some civic engagement but did not generally involve the actual practice of law.¹⁵ This distinction between the study of law and its practice is important to understanding the history of American legal education and can be traced all the way back to its origins, with Blackstone opining in an era of legal training dominated by legal apprenticeships that a lawyer:

educated to the bar, in subservience to attorneys and solicitors, will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know. [A well-educated attorney must be interested] in the elements and first principles upon which the rule of practice is founded [or otherwise he could] seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.¹⁶

During much of the colonial period in the United States, admission to the practice of law was largely unregulated, with nearly any white male being able to solicit clients for legal services.¹⁷ In early Colonial America, there was nothing resembling a unified legal system even within individual colonies, and lawyers were often viewed by the colonists with distrust.¹⁸ This attitude arose from a combination of factors, including a pioneering spirit that disdained formalized rules and regulations; less than fond memories of lawyers in

¹⁴ Steve Sheppard, *An Introductory History of Law in the Lecture Hall, 1997*, in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 7, 9-10 (Steve Sheppard ed., 1999).

¹⁵ Edward J. Dempsey, *The Origin of Legal Education Institutions and Their Founders*, 21 NOTRE DAME LAW. 162, 166 (1946) (arguing the origins of legal educational institutions come from England, being strongly influenced by St. Thomas More and University of Oxford scholars).

¹⁶ Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. LEGAL EDUC. 311, 314 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *32).

¹⁷ See ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (University of North Carolina Press, 1983) (discussing the formalization of the American legal profession).

¹⁸ ALBERT J. HARNON, LEGAL EDUCATION IN THE UNITED STATES 19 (Bancroft-Whitney Company, 1953).

Europe, who for some represented an establishment the colonists were seeking to escape; and the often unprofessional and corrupt practices of those claiming to be attorneys in the colonies, many of whom would stir up litigation simply for the sake of collecting court fees.¹⁹ Until the middle of the Eighteenth Century, members of the legal profession were almost universally held in low esteem, and in many colonies, people purporting to be lawyers were forbidden from receiving any fee for their services.²⁰ This animosity also stemmed in part from the hostility of religious communities, as many colonial Americans looked to their clergymen to guide their new governments and resolve disputes rather than those trained in secular law.²¹

None of the colleges established during the colonial period offered courses in law;²² although, in well settled areas, it was common for attorneys to have spent some period of time at a college studying something other than law followed by a period of law-office apprenticeship.²³ By the time of the Declaration of Independence, most jurisdictions had established a system of some mandatory period of apprenticeship followed by a formal examination of some type. For example, when John Jay, the first Chief Justice of the United States Supreme Court, became a lawyer in 1768 the process for admission to the bar was virtually identical to that found in England for centuries prior.²⁴ After receiving a classical education at King's College in 1764, he became an apprentice for five years in the offices of a local attorney, to whom he paid two hundred pounds.²⁵ Bar examinations varied in rigor and format but were usually administrated by local courts or members of the bar.²⁶

Legal apprentices, known as clerks or pupils, did any number of

¹⁹ *Id.*

²⁰ CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 4 (Little, Brown & Company, 1911).

²¹ *Id.* at 7.

²² Dempsey, *supra* note 15, at 166.

²³ Bailey, *supra* note 16, at 312.

²⁴ Dempsey, *supra* note 15, at 165.

²⁵ *Id.* This fee was typical for the period with apprentice clerks typically paying a fee of \$100 to \$200, or if the lawyer had a strong enough reputation it could sometimes be as much as \$500. See James M. Peden, *A History of Law School Administration*, 1997, in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 1105, 1107 (Steve L. Sheppard ed., 1999).

²⁶ Stevens, *supra* note 17, at 25.

menial tasks for their masters,²⁷ a large part of which involved the copying of legal forms. Through this process and by observing each stage of a legal case at close range, in theory at least, law clerks gained an intimate knowledge of the various writs and pleadings that lay at the core of daily practice for attorneys of the period.²⁸ However, the problem with this system was that a particular preceptor might be too busy, a poor teacher, have a meager or narrow practice area, or simply be unconcerned with teaching his law clerks. This naturally led to wide disparities in the educational experiences of attorneys of the day, a variation that survived the Declaration of Independence, as the newly autonomous colonies did not undertake to write an entirely new system of laws but, instead, reaffirmed that the Common Law of England remained in force and the apprenticeship system continued.²⁹ Law clerks then came away from this educational experience with a robust knowledge of the technical and practical aspects of legal practice but often had no familiarity with legal theory or the philosophy underlying the system of rules they had become intimately familiar with.³⁰

Legal education within institutions in the United States had its roots, as in so many things, back in England. Prior to the American Revolution, more than two hundred colonial Americans had studied at the Inns of Court in London, returning with both a refined sense of legal history and philosophy as well as, perhaps more importantly, professional ties to various London law offices.³¹ The Inns of Court, four of which remain in existence to this day, are able to trace their history as far back as the fourteenth century. They are professional associations for barristers in England and Wales that supervise and discipline members as well as provide libraries and other professional facilities. For much of their existence they also served an important training function where lectures were read and law degrees conferred with the primary form of legal education being the argument of moot cases, which when done by the student members of the Inns served as oral examinations.³²

²⁷ W. Hamilton Bryson, *The History of Legal Education in Virginia*, 14 U. RICH. L. REV. 155, 157 (1979). These instructors/attorneys were known as "preceptors."

²⁸ *Id.*

²⁹ *Id.*

³⁰ Bailey, *supra* note 16, at 314.

³¹ SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 1* (West Publishing Company, 1993).

³² Sheppard, *supra* note 14, at 16.

However, if one defines a "law school" as an institution organized to prepare students to be lawyers, among the first in the United States was the Litchfield Law School.³³ Like similar schools that would follow, this law school was not attached to any institution of higher learning but began as an outgrowth of the office of a practitioner responsible for some number of law clerks who had proven popular enough that he had opened a formalized training program.³⁴

The school housed what was initially an overflow of students in Judge Tapping Reeve's law office in the small village of Litchfield Connecticut.³⁵ Judge Reeves was the brother-in-law of Aaron Burr, who became Litchfield's first student in 1774.³⁶ Judge Reeve's lectures were centered on the application of the common law to conventional disputes.³⁷ Rather than cover public law topics like constitutional government or politics, it included lectures on things like master and servant relations, actions for debt, evidence, trials, insurance and partnership, and the program of study was taken in conjunction with, or in addition to, a traditional law clerkship.³⁸

The Litchfield School, and similar institutions, attracted students for multiple reasons. First, once hostilities commenced with the British, it was no longer possible to travel to England for formal instruction, thereby increasing the popularity of these institutions for those who wished to receive some sort of academic training in law.³⁹ Further, the onset of the Revolutionary War and its aftermath naturally caused people to have a greater need to make use of the legal system to resolve disputes and settle issues of property and commerce.⁴⁰ For example, the Revolution led to an increase in trade with other nations in order to fill the gap in both imports and exports that, at least temporarily, could no longer be fulfilled by the former colonies' connections to England.⁴¹ This led to a widespread increase in demand for legal services and schools like the Litchfield School, in

³³ *Id.* at 13.

³⁴ STEVENS, *supra* note 17, at 3.

³⁵ Sheppard, *supra* note 14, at 13.

³⁶ *Id.*

³⁷ *See Id.* ("The course was rooted in the practicalities of the common law governing private disputes[.]")

³⁸ *Id.*

³⁹ STEVENS, *supra* note 17, at 4.

⁴⁰ Peden, *supra* note 25, at 1106.

⁴¹ *Id.*

conjunction with a shortened period of apprenticeship, helped meet this demand.

By accommodating students in active law clerkships, students at Litchfield were able to progress rapidly into the profession. Formal admission to practice in each jurisdiction (usually state or county-wide) was in the hands of local courts, which usually required would-be lawyers to pass an oral examination administered by judges or a committee appointed by the court made up of prominent local practitioners.⁴² If the examiners determined an applicant's answers were adequate, they were admitted to practice law within that jurisdiction. Often family influences and other connections were equally or more important than a mastery of the subjects tested. Therefore, there was an obvious value in studying under the tutelage of a local judge or prominent attorney.⁴³ By 1782, Judge Reeve had a more or less standardized set of lectures, and by 1813 he was training fifty-five students⁴⁴ at a time.⁴⁵ Among its alumni were sixteen United States Senators, fifty members of Congress, forty judges of higher state courts, eight chief justices of state courts, two justices of the United States Supreme Court, ten state governors, and five Cabinet members.⁴⁶ Its success spawned imitators, and by 1835 there were, or had been, eighteen other law schools independent of a university, each offering programs similar to Litchfield's.⁴⁷ Many of the instructors in these proprietary law schools were judges. Judges of the period were notoriously poorly paid and teaching law was a method of generating additional income without risking potential conflicts of interest.⁴⁸ Ultimately, the Litchfield School closed in 1833, ten years after the death of its founder, in part the victim of the frontier disdain for scholarship embedded within the new Jacksonian democracy.⁴⁹

Running concurrently with Litchfield and its imitators at the turn of the nineteenth century and sharing their fate to some degree, were the first programs run out of, or attached to, established American colleges. While these institutions offered instruction in the law,

⁴² *Id.* at 1108.

⁴³ *Id.*

⁴⁴ In a presumably larger and more attractive building.

⁴⁵ Sheppard, *supra* note 14, at 13.

⁴⁶ WARREN, *supra* note 20, at 359.

⁴⁷ Sheppard, *supra* note 14, at 14.

⁴⁸ Bryson, *supra* note 27, at 184.

⁴⁹ Davis, *supra* note 13, at 12.

they were largely scholarly inquiries and played no role in conferring the right to practice law, a power restricted entirely to local courts, which almost always required some period of law clerkship.⁵⁰ Some institutions established professorships in fields such as "police" or "jurisprudence," which one author speculates probably involved the study of some aspects of law combined with what we would call today political science.⁵¹ The first move in the direction of a law faculty in the United States appears to have been made by Yale University and its President Ezra Stiles.⁵² At the time of his election in 1777, the Connecticut Assembly proposed to endow three professorships for the College – law, medicine, and oratory – provided the Assembly might have some voice in the governance of the College.⁵³ However, while Stiles was accepted as president of the College, Yale's faculty refused to yield any of its powers and the plan was never implemented, although Stiles himself taught several lectures for students on topics such as "Law and Jurisprudence."⁵⁴

It seems clear that most attempts at legal instruction within institutions of higher learning in the eighteenth century were failures. The only two success stories were in the South at the College of William and Mary, which appointed the first member of its law faculty in 1779,⁵⁵ and Transylvania University, which followed in 1799.⁵⁶ The program at William and Mary was established by Thomas Jefferson, the Governor of Virginia at the time, and was not intended to train students in the practice of law but rather was designed for elite young gentlemen responsible for political leadership in a fledgling republic.⁵⁷ Elsewhere, as one author noted, little more than

⁵⁰ Jonathan Stuart Bennett, *Nineteenth-Century Legal Education in Philadelphia: Essays Exploring the Founding and Development of the Law School of the University of Pennsylvania* 1 (1990).

⁵¹ JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 55 (John Hopkins University Press, 2d ed. 2011).

⁵² WARREN, *supra* note 20, at 341.

⁵³ *Id.* at 342–45.

⁵⁴ *Id.* at 342.

⁵⁵ Sheppard, *supra* note 14, at 14. This appointment was George Wythe, the preceptor who oversaw the law clerkship of Thomas Jefferson. Appointed by William and Mary in 1779, he is widely regarded as the first true professor of law in the United States.

⁵⁶ *Id.*

⁵⁷ Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 527 (1990) (analyzing beginnings of the concept of university legal education and arguing that, as a means of developing public virtue, it initially failed to take root in the Northeast).

“false starts occurred at Columbia, Philadelphia, Harvard and Maryland” during this period.⁵⁸ These early efforts at legal education tied to institutions of higher learning were integrated into the classical college curriculum, reflecting the commonly held view at the time that the study of law at a college was a branch of moral philosophy, and not in any way a replacement for training in a law office.⁵⁹ These programs were viewed as a means to cultivate future leadership for the new republic and encourage students to lead lives of public virtue, not as a method for the training of practicing attorneys.⁶⁰

While early university law programs were not popular, many lawyers of the day, particularly those that achieved prominence, did have a college education but not in law. In fact, some pre-Revolutionary bar organizations looked at requiring some type of formal education to both ensuring a higher level of competence among practitioners and as a method to help increase the profession’s exclusivity.⁶¹ For example, in New York in 1756 admission to the bar required a seven-year apprenticeship, but those holding a college degree were only required to apprentice for three years. By 1771 Massachusetts had gone a step further when it declared: “consent of the bar . . . shall not be given to any young gentleman who has not had an education at college, or a liberal education equivalent in the judgment of the bar.”⁶²

Following the War of 1812, a number of forces emerged that injected new life into moribund or abandoned university law programs. Among them were a significant growth in industry, population, and geographic expansion, creating a surge in the national economy and a renewed need both for more lawyers and a more unified and codified means for settling disputes.⁶³ A newly assertive Supreme Court also began to insert itself into national affairs, thereby raising societal awareness of lawyers as important figures.⁶⁴ In this atmosphere a number of developments occurred. The earlier programs at Columbia and Pennsylvania were revived, Yale acquired a nearby independent school, Harvard expanded its faculty,

⁵⁸ Sheppard, *supra* note 14, at 14.

⁵⁹ Bailey, *supra* note 16, at 318.

⁶⁰ Carrington, *supra* note 57, at 541.

⁶¹ Peden, *supra* note 25, at 1107.

⁶² *Id.*

⁶³ Bennett, *supra* note 50, at 6; Sheppard, *supra* note 14, at 16.

⁶⁴ STEVENS, *supra* note 17, at 6.

and a significant number of new university law programs emerged.⁶⁵ Still, it was a far from a robust period in legal education at universities. At Harvard, for example, which opened the doors of its law school in 1817, the curriculum included a mixture of student recitations from Blackstone and other law books, as well as faculty recitation of written lectures with students also participating in moot courts and debating clubs. It was not an academically rigorous program, as students were not required to read prior to lectures, or even attend them regularly.⁶⁶ Nor was it a popular program, averaging only nine students per year through the 1820s.⁶⁷ One author characterized the first twelve years after Harvard Law School's founding as a "complete failure[,]” reaching an early low point in 1829 when it had only one student.⁶⁸ Perhaps in response to this underwhelming turnout,⁶⁹ the newly appointed Harvard Law professor and Supreme Court Justice Joseph Story undertook a systematic restructuring of the study of law at Harvard. It became decidedly more rigorous as well as more geared to the profession, and the process represents to some scholars the true birth of what would become the modern American law school.⁷⁰

In the years prior to 1850, there was nothing on the American education landscape resembling “law schools” as we know them today. If a man wanted to become a lawyer,⁷¹ he entered a law clerkship similar in concept to that followed by prospective blacksmiths or carpenters, in rare instances supplemented by instruction at a university or independent law program like those noted above.⁷² In

⁶⁵ Sheppard, *supra* note 14, at 17-20.

⁶⁶ *Id.* at 17.

⁶⁷ *Id.*

⁶⁸ Dempsey, *supra* note 15, at 168.

⁶⁹ Irrespective of its shaky beginnings, Harvard has the distinction of operating the oldest law school affiliated with a university in the United States that has remained continuously in existence since its founding. See WARREN, *supra* note 20, at 361.

⁷⁰ STEVENS, *supra* note 17, at 15 n.46 (opining that Story's appointment as law professor set Harvard's on its course toward becoming the preeminent law school in the United States); LON FULLER, REPORTS ON THE LAW SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA 6 (May 1958) (characterizing Story's reorganization of the study of law at Harvard in 1829 as marking the birth of the modern university law school in the United States).

⁷¹ The first female lawyer in the United States was Arabella Mansfield who was admitted to the bar in Iowa in 1869. STEVENS, *supra* note 17, at 82.

⁷² Bennett, *supra* note 50, at 1.

many instances, particularly on the frontier, there was far less preparation than required. In his work recommending a complete overhaul to the American legal education system, John Sonsteng cites a fictional account of a frontier lawyer prior to the Civil War as providing an accurate picture of the state of legal education at the time:

About all it took to be a lawyer back then was to have read the books and understood a little bit of them. And also to own a black suit of clothes and a white shirt of moderate cleanliness. For anyone even remotely sharp-witted, frontier lawyer was said to be a fine profession.⁷³

However, as the middle of the Nineteenth century approached, legal education in the United States began to undergo a transformation. Robert Stevens' *Law School: Legal Education in America from the 1850s to the 1980s* attempts to explain how entry into the legal profession went from one accessible by moderately clean, remotely sharp-witted frontiersman, to one thoroughly dominated by higher education institutions. While Stevens notes that socio-economic context and a small number of influential actors played major roles in this evolution, his narrative is consumed by a central divide that he asserts is crucial to understanding the story of American law schools: the often profound tension between a vocal segment of practicing attorneys and many legal academics over the form and substance of legal education.⁷⁴

One method used by law schools of the period to increase enrollment, and one particularly antagonistic to local practitioners, were attempts such as those noted previously to get local courts to count time spent in university law programs as equivalent to time spent as a clerk in an attorney's office. For example, a professor of law at Hamilton College in Clinton, New York, persuaded the New York state legislature to pass an act in 1855 that allowed graduates of the law department at Hamilton to be admitted to the bar upon examination by lawyers who were members of the faculty at that institution.⁷⁵ This practice was known as the "diploma privilege" and was of great concern to practitioners who correctly surmised

⁷³ John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century* 14 (Wm. Mitchell C. L., Legal Research Paper Series, Paper No. 89, 2008) (citing CHARLES FRAZIER, *THIRTEEN MOONS* 110 (2006)).

⁷⁴ See, e.g., STEVENS, *supra* note 17, at xv.

⁷⁵ Peden, *supra* note 25, at 1108.

that if the practice spread it would remove control over entry into the profession from themselves into the hands of the academic community.⁷⁶ The phenomenon did indeed spread, and four years later the University of Albany secured the right for its law school graduates to be admitted to practice simply upon the presentation of a diploma in law from that institution, and a year later, in 1860, the right was also granted to the graduates of Columbia law school.⁷⁷ Still, by the mid-nineteenth century, legal education in the United States seemed well on its way to the model currently found in many other countries. As noted above, law clerkships remained the common method of acquiring the legal skills and professional connections necessary for entrance to the bar, and university study, while undertaken by some, was perceived as a supplement to such practical experience.⁷⁸ It is generally recognized that this path was to a large degree single-handedly derailed by the efforts of Christopher Columbus Langdell, the first Dean of Harvard Law School, and Charles Eliot, the Harvard president at the time.⁷⁹ As Stevens states: "In the fifty years from 1870 to 1920, [Harvard] was intellectually, structurally, professionally, financially, socially, and numerically to overwhelm all the other [law schools]."⁸⁰

Among the influences motivating legal educators in general, and Eliot in particular, was the continental model of higher education.⁸¹ By the latter half of the nineteenth century the typical European university was made up of four "faculties": theology, medicine, law, and philosophy. The law faculty was considered, along with the other three subjects, to be a location of scholarship and academic pursuit, rather than a place to learn how to be a lawyer in a practical sense.⁸² In contrast to the United States, in countries like Germany and Austria entry to the profession of law required multiple years of study at the university level, and could not be accessed by law clerkship alone.⁸³ Eliot, who had spent time in Germany specifically

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See Gail J. Hupper, *The Rise of an Academic Doctorate in Law: Origins through World War II*, 49 AM. J. LEGAL HIST. 1, 6 (2007) (discussing the historical development of legal education in the United States).

⁷⁹ STEVENS, *supra* note 17, at 36-38.

⁸⁰ *Id.* at 41.

⁸¹ Hupper, *supra* note 78, at 8-9.

⁸³ JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 7 (CARNEGIE FOUNDATION: BULLETIN NO. 8, 1914).

to study the modes of education found there, passed on this sense of the study of law as a “science” rather than as a profession to Langdell, who incorporated the idea into a radically new curriculum for the teaching of law at Harvard.⁸⁴

This perceived Germanic ideal of “pure” learning, indifferent to practical applications, was not just restricted to law but was the inspiration for American educators across a wide array of disciplines during this period as they reorganized departments and established new colleges and universities.⁸⁵ For many scholars, the rigor and gravity given to advanced scholarship at German institutions of higher education was seen as vital to American development and needed to be imported into its own colleges and universities.⁸⁶ This sentiment is reflected to some degree in the seminal piece of education legislation of the era: the Morrill Land Grant Act of 1862. This federal statute provided incentives to states to dedicate land sale proceeds to the establishment of college programs in various “useful” disciplines such as agriculture, mechanics, mining and military instruction.⁸⁷ In other words, this piece of legislation reflected an understanding that advancement and training in these areas could not be left to experience alone, but rather must be rigorously studied in an academic setting as well.

When Langdell was appointed Dean of Harvard’s law school, the duration of the law program was eighteen months, sometimes less, and the course of study consisted of ungraded courses on basic law subjects. Students did not take exams and the faculty was comprised of part-time instructors who maintained full-time jobs as lawyers or judges.⁸⁸ There were two principle concepts introduced by Langdell to Harvard’s law curriculum beginning in the early 1870s: the use of the “case method” to teach law, and the idea that law should be taught as a graduate program requiring multiple years of study following an undergraduate degree.⁸⁹ One of the primary motivations for instituting these changes was a desire to make the study of law more of a scholarly enterprise.⁹⁰

⁸⁴ Hupper, *supra* note 78, at 11.

⁸⁵ LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 126–27 (U. of Chi. Press, 1970).

⁸⁶ THELIN, *supra* note 51, at 87.

⁸⁷ *Id.* at 76.

⁸⁸ Sonsteng, *supra* note 73, at 16.

⁸⁹ *Id.* at 35–37, 55–58.

⁹⁰ *Id.* at 36.

As part of the need to bolster the perceived academic rigor of these programs, experiential training was replaced by Langdell's "case-method" which was to be administered through Socratic dialogue.⁹¹ This meant that instead of learning what lawyers do on a day-to-day basis through apprenticeship, law students studied judicial opinions through which they were expected to glean the "black-letter-law" of a particular subject area through vigorous argument between and among students and faculty.⁹²

This environment was intended to stimulate critical thinking by pitting opposing views of judicial opinions against one another, rather than absorbing lectures based on the commentaries of historical luminaries.⁹³ In the oft-repeated words of many American legal educators today, law school taught you to "think like a lawyer."⁹⁴ By the late nineteenth century this notion had already gained a firm foothold with a prominent lawyer of the day opining: "Schools cannot make a lawyer. They can only help him to make himself a lawyer."⁹⁵ Asking students questions was by no means an innovation. The difference lay in the portion of time in class spent in Socratic dialogue and the preparation required by students to effectively participate in the system.⁹⁶ These changes and the general concept that some amount of higher education should be necessary to practice law grew out of a sense by many observers that entry to the legal profession was too easy and instruction in the law too unsystematic. As a result, Harvard's Law School became synonymous with serious legal education.⁹⁷

These developments did not go unnoticed by other law schools, and by 1916 the University of Pennsylvania – and five years later the law schools of Stanford, Columbia, and Yale – added the undergraduate college degree prerequisite as well as the case method, at

⁹¹ *Id.* at 55.

⁹² REDLICH, *supra* note 83, at 11–12.

⁹³ Bryson, *supra* note 27, at 194–95.

⁹⁴ Drew Coursin, Comment, *Acting Like Lawyers*, 2010 WIS. L. REV. 1461, 1462–63.

⁹⁵ John Randolph Tucker, *What is the Best Training for the American Bar of the Future*, 19 ANN. REP. TO A. B. A. 595, 602 (1896).

⁹⁶ Sheppard, *supra* note 14, at 29.

⁹⁷ See BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906 2 (2009) (noting that by 1900, Harvard Law School had grown to six hundred full time students, making it the largest and wealthiest professional school of any type in the United States).

least in part, to not be perceived as inferior to Harvard's program.⁹⁸ These innovations reflected one aspect of a long simmering controversy over standards in the legal profession. On one side were those who subscribed to the view that the privilege of practicing law was a matter of high public concern as lawyers were spokesmen for others, representing individuals, their property, and their liberty. As such, they felt that the practice of law should be allowed only to those of proved learning and established fitness and competence.⁹⁹ For example, the Virginia State Bar Association was formed in 1888 with the stated goal of raising standards in the legal profession, subtly noting that the current "tests prescribed for determining fitness for administration to the bar in Virginia are a mocking farce."¹⁰⁰ Those seeking to place legal education firmly within institutions of higher education were aided by a reversal of the Jacksonian era disdain for scholars and formal education that emerged in the post-Civil war years.¹⁰¹

On the other side were those who felt that all men had the inherent right to practice law. This conviction which had existed for a number of decades perhaps reached its apex in 1851 with a provision in the state of Indiana's constitution guaranteeing every male citizen of the state the right to practice law, provided he was of good moral character and at least twenty-one years of age.¹⁰² This democratic concept held that admittance to the profession must not be denied to members of the lowest economic stratum, with the obvious corollary that the practice of law must not become the privilege of the well-to-do. Proponents of this view perceived university prerequisites and the increased scholarly character of law school education as creating economic barriers to the profession for worthy but indigent prospective lawyers, and that the imposition of these barriers only allowed access to those of the most privileged class.¹⁰³ Even among those who felt that the American legal profession was in need of an increase in professional standards not all agreed that a

⁹⁸ Vijay Sekhon, *The Over-Education of American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States*, 14 GEO. MASON L. REV. 769, 771 (2007).

⁹⁹ HARNO, *supra* note 18, at 85-86.

¹⁰⁰ Bryson, *supra* note 27, at 204 (quoting VA. ST. B. ASS'N REP. 6, 7, 12, 15 (1888)).

¹⁰¹ VEYSEY, *supra* note 85, at 1-4.

¹⁰² Dempsey, *supra* note 15, at 170.

¹⁰³ *Id.*

move towards a more scholarly mode of instruction was the best way to achieve this goal.

By 1891, the American Bar Association ("ABA") which had been formed in 1878 to "raise the standards of the profession," opposed the concept of making law a graduate course of study and attacked the case method arguing it did nothing to serve "the ideal work of lawyer" which was "knowing the rules and keeping clients out of court."¹⁰⁴ Initially, this group had little impact on legal education. By 1899, however, the ABA had called for the formation of an organization of faculty from top law schools, and in 1900 the Association of American Law Schools ("AALS") was formed with twenty-five charter members.¹⁰⁵ In the first decade of the 20th Century, the ABA, run by elite-educated lawyers, and the AALS, run by elite-educated scholars, had the same motivation: removal of "unqualified" practitioners from the legal profession, many of whom came from among the country's minority and immigrant populations.¹⁰⁶ While law schools at the turn of the twentieth century were becoming more standardized, there still existed a great degree of variation between programs with one author, writing at the time, noting that the

methods pursued and requirements [at university law schools] differ both in kind and degree so widely that classification is a matter of difficulty, while some even depart so far from well-recognized standards that they warrant serious speculation as to any practical utility. Deficient, both as to quality and quantity, in instructive force; established without proper equipment in libraries or buildings; having a patronage too small to warrant any number of electives or a protracted course, and requiring nothing in the way of preliminary education, they lack even the merit of meeting a want.¹⁰⁷

To clean up these perceived deficiencies they looked to the American Medical Association (AMA), which in 1910 issued the Flexner Report, effectively closing down dozens of medical colleges in the United States by condemning non-scientific teaching methods in medicine.

The ABA and the AALS saw law, like medicine, as a "public profession" and a vital part of the governing mechanism of the state.¹⁰⁸ As such, while as recently as 1891 the ABA had opposed Langdell's

¹⁰⁴ STEVENS, *supra* note 17, at 27, 58.

¹⁰⁵ *Id.* at 96-97.

¹⁰⁶ *Id.* at 114.

¹⁰⁷ V.O. Johnston, *Law Schools and the Profession*, 5 W. RES. L. J. 61, 62 (1899).

¹⁰⁸ STEVENS, *supra* note 17, at 113.

innovations, by the First World War, both the ABA and their academic counterparts in the AALS were actively looking to drive out law schools perceived as insufficiently scholarly.¹⁰⁹ In the wake of the Flexner Report, the AMA had rid itself of night, part-time, and numerous programs it deemed to have inadequate facilities, thereby significantly decreasing the number of medical students and ultimately doctors.¹¹⁰ The ABA thought that it had found a similar solution in the Carnegie Foundation, which published the first major report on American legal education in 1914.¹¹¹ This report was authored by an Austrian professor, Josef Redlich, who noted that even at the most elite law schools in the United States, the “democratic idea, which pervades everything in America” existed, and students of many different types of backgrounds could be found there.¹¹² However, he also noted the existence of “proprietary law schools” designed to provide the quickest and cheapest possible training for the bar examination and which satisfied the needs of “those social strata whose sons are not thinking of university education in either the American or continental sense. They consider the legal profession as a trade, like any other, and regard legal education in the same light as commercial education in a commercial school.”¹¹³

The Carnegie Foundation followed this report in 1921 with Alfred Z. Reed’s “Training for the Public Profession of the Law,” which contained a description of the organization of the American legal profession and how it was affected by bar admission rules, law schools, and trade associations. It provides valuable insight into the state of American legal education up to that date. At the time of the Reed Report, there existed 142 law schools in the United States with a diverse mixture of part and full-time programs offering a number of paths into the profession.¹¹⁴ However, in contrast to Flexner’s opinion on the state of medical education, Reed was in favor of maintaining the distinct kinds of instruction being taught in various categories of law schools, and supported keeping at least three types of law schools in existence to produce lawyers who could deliver

¹⁰⁹ *Id.* at 114.

¹¹⁰ THELIN, *supra* note 51, at 148-49.

¹¹¹ REDLICH, *supra* note 83.

¹¹² *Id.* at 70.

¹¹³ *Id.*

¹¹⁴ See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 430, 441 (1921) (breaking down the law schools active at the time by type).

different skills and services to different levels of clientele: (1) university-based law schools that would produce judges and lawmakers to help shape the law into what it should become; (2) intermediate schools fit for grooming another level of professional who was to serve the needs of businesses and middle class clients; and (3) proprietary night schools producing lawyers to provide legal services to those at the bottom of the socio-economic hierarchy.¹¹⁵ Supporting a unified bar, the ABA and AALS combined to crush Reed's initiative, insisting on the raising of standards for a degree to be used across all practice areas and institutions.¹¹⁶ While Reed's ideas were not ultimately adopted, both his report and that of Redlich vividly illustrate the ongoing and evolving battle between those who considered law and the training of lawyers as a scholarly pursuit and those who viewed it as a trade that should be based, at least in part, on practical experience. As late as 1870, only slightly over half the states in the union required any sort of preparation prior to the bar exam and no state required students to attend law school.¹¹⁷ By the first decade of the twentieth century, three years had become the standard duration for the first degree in law (then known as the "LL.B.") among top schools, and a few were requiring incoming students to possess a bachelor's degree in some other discipline prior to admission.¹¹⁸ By 1935, due to lobbying efforts by the ABA, nine states required graduation from an ABA-approved law school in order to sit for a state's bar examination.¹¹⁹ By 1938 twenty-three states had imposed this requirement, and the ABA began to require increasingly stringent requirements for accreditation.¹²⁰ This included the establishment of a core curriculum that did not mandate experiential training, as well as a durational requirement of three years to obtain the degree. Many part-time and night law schools, which

¹¹⁵ *Id.* at 416-19.

¹¹⁶ See William Draper Lewis, *American Bar Association's Position on Legal Education: Agreements and Differences Between the Report of the Committee on Which the Action of the Association was Taken and the Carnegie Foundation Report*, 8 A.B.A. J. 39, 41 (1922) (expressing doubt on whether Reed fully realized "the disastrous effects on the public—especially the poor—of admitting to the bar each year an increasing number of superficially trained men without professional ideals.").

¹¹⁷ See Bailey, *supra* note 16, at 312 (discussing the results of Reed's study of legal education).

¹¹⁸ See Hupper, *supra* note 78, at 17 ("By the early 1900s three years had become the standard for the duration of the LL.B.").

¹¹⁹ See Sekhon, *supra* note 98, at 778 (discussing changes in bar examination requirements).

¹²⁰ See *id.*

were often the only institutions available to minority and immigrant populations, disappeared as state legislatures required graduation from an ABA-accredited school.¹²¹ Why three years of additional study? It was probably not related to any pedagogical necessity. One author suggested that three years was perceived as almost as many as four, implying that lawyers are three-fourths as learned as doctors and entitled to at least three-fourths as much status and income.¹²² Three years was also probably viewed as another means of limiting immigrant and lower income entry into the profession.¹²³ In this fashion, the study of law in the United States was restricted to a perceived elite, studying arcane and confounding legal principles. From the latter part of the nineteenth century, the story of legal education in the United States has been one of competition between private institutions and their academic leaders, significantly influenced by a trade organization comprised of practicing professionals. While these two groups disagreed on a number of issues, not the least of which was how lawyers should be trained, they came to agree that, in the words of one historian:

The idea that law was a trade to be learned like any other, although it spoke to much in American history, was antithetical to the ideology of legal professionalism. The goal of leading academic institutions and of leading members of the profession was to use the law schools to raise the quality and “tone” of the legal profession in America.¹²⁴

Many observers have noted that despite significant tensions, American law schools’ curricula over the following decades remained largely static.¹²⁵ While much of the structure introduced by Langdell has persisted to the present day, there have in fact been

¹²¹ See STEVENS, *supra* note 17, at 191–99 (discussing the development of the modern law school curriculum and state raids on non-accredited schools).

¹²² See *id.* at 179 (discussing the ABA’s attempts to emulate the medical profession by requiring three years or four years of part-time study).

¹²³ See *id.* at 99–100 (discussing Jerold Auerbach’s view that “the efforts to raise standards . . . were primarily concerned with keeping out Jews, blacks, and immigrants.”).

¹²⁴ *Id.* at xv.

¹²⁵ See Katherine Mangan, *Legal Educators Rethink How Lawyers are Trained*, CHRON. HIGHER EDUC., Jan. 11, 2008, at A12 (2008) (discussing some legal educators’ attempts to revamp their programs due to growing frustration over a legal education system that has changed little in over a century).

periodic attempts by practitioners and others to introduce some degree of skills training into law school curricula. Indeed, almost right from the outset, Langdell's innovations raised grave concerns among many practitioners who saw danger in training that was too heavily academic. As noted previously, as early as 1891, the ABA attacked the case method, as in their eyes it did nothing to serve "the ideal work of [lawyers]."¹²⁶ While the ABA clearly supported restricting the profession and introducing higher standards, it did not agree with the legal academy on how these standards should be acquired. This tension is captured in a pair of articles published in the *American Law Register* in 1888.

In the first, Henry Budd, a Philadelphia attorney, argues that the rise of the diploma privilege—by allowing lawyers to become licensed more quickly—lowered the quality of legal services provided by many attorneys.¹²⁷ Noting that until recently, American legal education was centered on the office of the preceptor who directed the course of reading for his pupils, Budd pointed to the value of this personalized attention which allowed students to work on real world cases under the supervision of an expert who "also took pains to impress upon his pupils the dignity of their profession, its great public weight, and in many cases set before them an example of learning and honor which are the distinguishing marks of the true lawyer."¹²⁸ This was in contrast to university law programs, where a collection of four or five professors delivered lectures on a few narrow areas of law to a much larger group of students who—in less than two years, in many places—were able to obtain a license to practice a profession that bore little resemblance to their law school experience.¹²⁹ Budd had little doubt that even "plodding" students could study the lectures of their professors and successfully pass an examination without understanding the underlying principles in a particular area of law.¹³⁰ Henry Rogers, a young law professor and future Dean of Yale Law School and Judge of the United States Court of Appeals for the Second Circuit, disagreed.

¹²⁶ STEVENS, *supra* note 17, at 58.

¹²⁷ See Henry Budd, *A Few Thoughts on the Relation of the Courts and the Law Schools to Legal Education*, 36 AM. L. REG. 71, 72-73 (1888) (comparing the old system of American legal education to the law school system).

¹²⁸ *Id.*

¹²⁹ See *id.* at 73 (discussing the shortcomings of law school education and the diploma privilege).

¹³⁰ See *id.* at 73-74.

In direct response to the article authored by Budd, Rogers made the case that law school was the proper place to study law, and “that a student who desires the best insight into legal principles, and the most thorough and systematic knowledge of law as a science, should seek it in the schools rather than in the offices.”¹³¹ In defending this position, Rogers first noted that studying law as other sciences are studied—in institutions of higher education—is not a new idea and dates back to at least ancient Rome.¹³² He noted further that in countries such as Germany—which had a population of law students that dwarfed that found at U.S. law schools at the time—all lawyers were compelled by law to attend a program of legal study at a university.¹³³

According to Rogers, “[t]hat the standard of legal education, as fixed by the law schools, is higher than that fixed by the courts, ought to be well known to every intelligent member of the profession, who has any knowledge of the work which the law schools of this country are doing.”¹³⁴ If a student “desires to know the law, to master its principles, and understand its reasons,” according to Rogers, he “will not have a rational doubt” that law school is the place where law should be studied.¹³⁵ Responding in a third article, Budd acknowledged that law schools could be most valuable “in their proper place,” but noted

knowledge of law acquired in a law school as generally conducted . . . in the United States, where the system of instruction is purely in classes, where as a rule there is no entrance examination and where the course is too short to permit of full, systematic, scientific instruction, is inferior to that which was obtained under the old system, where the preceptor was a learned and conscientious man (and no other should ever dare to take students) who would not make a mere clerk of his students and who would give to him careful, individual instruction.¹³⁶

¹³¹ Henry Wade Rogers, *Law Schools and Legal Education*, 36 AM. L. REG. 341, 344 (1888).

¹³² *See id.* at 341–42 (“The idea that law can be best studied, as other sciences are studied, in colleges and universities, is not an idea of recent growth.”).

¹³³ *See id.* at 345 (comparing the German legal education system to that of the United States).

¹³⁴ *Id.* at 348.

¹³⁵ *Id.* at 355.

¹³⁶ Henry Budd, *A Reply on the Subject of Legal Education*, 36 AM. L. REG. 407,

The debate between Budd and Rogers demonstrates the atmosphere of the period, with those skeptical of the rising influence of institutional law programs opposed by those convinced that more of this type of instruction should be required. Both sides were alarmed at a perceived deterioration in the quality of legal practitioners. However, each named the other as the source of the problem.

Over the ensuing decades this conflict persisted, with some practitioners clamoring for a more practical course of study, and academics responding either that the case method and Socratic dialogue provided training enough or simply that society was better served by training students to “think like lawyers” rather than teaching them how to actually practice law.¹³⁷ One practitioner writing in favor of university law school programs at the turn of the twentieth century opined that they trained lawyers in

the art and habit of analysis so essential to the successful practitioner. [The university law student is] familiarized with leading cases, is taught to distinguish and apply them to similar or allied cases, and incidentally becomes acquainted with the language and modes of reasoning adopted by those eminent at the bar or on the bench.¹³⁸

In 1910 the ABA recommended that after completing three years of law school, prospective lawyers undertake a mandatory one-year clerkship to be done in a law office or judge’s chambers.¹³⁹ This recommendation was never made into a requirement and never implemented. By the 1920s and 30s the demand for more practical training was answered in the form of the first legal clinics, which, while available to all upper level students, were not a required part of the curriculum and were most often capped to accommodate only a tiny fraction of the student body.¹⁴⁰ Even as these clinical programs were being introduced, some were calling for a transformation from a

408-09 (1888).

¹³⁷ See, e.g., STEVENS, *supra* note 17, at 119-20 (discussing criticism of the case method).

¹³⁸ Johnston, *supra* note 107, at 62.

¹³⁹ See STEVENS, *supra* note 17, at 120 (discussing the ABA’s recommendation).

¹⁴⁰ See *id.* at 162 (discussing how some schools redressed a lack of practical training through limited clinical programs).

“law school” suited to academics, to a “clinical lawyer school” designed for the practice of law.¹⁴¹ Other suggested innovations included the ABA’s unheeded call in 1930 for one half of the faculty at law schools to be practitioners, and Chief Justice Burger’s rejected proposal to the ABA in 1970 for two years of conventional law school to be followed by one year of law clerkship.¹⁴² These requests for more practical training in law school seem a manifestation of a recurring tension between academics and practitioners over how lawyers should be educated; or stated another way, over the purpose of legal education. However, despite these efforts, the form established by Langdell one hundred and forty years ago has proven remarkably resistant to change.

This resilience is explained, at least in part, by another aspect of American legal education: the strong influence of these institutions on one another.¹⁴³ Once established at Harvard, the structure and nature of the curriculum spread relatively quickly to other well established schools, often times propelled by Harvard law graduates hired by university presidents for the express purpose of transforming their curricula in imitation of the Harvard model.¹⁴⁴ These “elite” institutions were then able to impose their will on the rest of the legal education landscape by co-opting the ABA into accepting the model as an important piece of its mission to maintain high standards for the profession.¹⁴⁵

The endurance of the form of legal education established at the end of the nineteenth century can also be explained, at least in part, by the historic circumstances out of which it arose. During that period there was a national movement toward standardization, perhaps most clearly embodied by the establishment of the U.S. Bureau of Standards in 1901. One of the chief proponents of the creation of

¹⁴¹ See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 923 (1933) (suggesting law schools should replace the case method with a more pragmatic style of legal education).

¹⁴² See STEVENS, *supra* note 17, at 176 (discussing the ABA’s 1930 resolution); *id.* at 243 (discussing Justice Burger’s proposal).

¹⁴³ See Hupper, *supra* note 78, at 14 (discussing how a competition for prestige amongst law schools led to the development of doctoral law programs).

¹⁴⁴ See generally Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 340 (2007) (discussing the development and stability of the Harvard model).

¹⁴⁵ See STEVENS, *supra* note 17, at 95 (discussing the ABA’s early attempts to emphasize the importance of attending law school).

this office was Henry S. Pritchett, who would later go on to be President of the Carnegie Foundation, where he commissioned both the Flexner and Reed reports.¹⁴⁶ For many in the decades prior to the turn of the twentieth century, there existed a compelling need to elevate the dignity of the legal profession, instill confidence in the legal system, and thereby affirm the belief that justice could be obtained through law.¹⁴⁷ As law firm partner V.O. Johnston wrote in 1899:

The cause of legal justice has long been hampered by those whose knowledge of its subject matter was merely superficial, whose aim was never set above the financial gain properly incident to a successful practice and whose training was only of the so-called practical order which enabled them by means wise and otherwise to tip the scales in favor of their client and their own advantage.¹⁴⁸

Law schools developed changes to their curriculum, including the introduction or revitalization of graduate law programs,¹⁴⁹ to respond to these needs by linking law with science and attaching legal education to the university, an institution rapidly growing in influence and esteem in the modern world.¹⁵⁰

¹⁴⁶ See *id.* at 103 n.2 (“Pritchett . . . commissioned the Flexner and Reed reports.”).

¹⁴⁷ See Calvin Woodward, *Justice Through Law – Historical Dimensions of the American Law School*, 34 J. LEGAL EDUC. 345, 354 (1984) (“[T]here was a deep need to elevate the dignity of the legal profession . . . thereby reaffirming the traditional belief that justice could be attained through law.”).

¹⁴⁸ Johnston, *supra* note 107, at 61.

¹⁴⁹ See, e.g., *School and Alumni Notes*, 17 YALE L.J. 219, 219 (1908) (noting enhanced requirements for its graduate law degree programs “in accordance with the general raising of the standard of the Yale professional schools”).

¹⁵⁰ See Johnston, *supra* note 107, at 61 (“The higher average education in other departments of the word’s industry requires the same progress of the lawyer if he would keep abreast of the times and occupy his proper sphere of influence.”).

3. THE APPEARANCE OF GRADUATE LAW DEGREES

Graduate coursework in law has existed for centuries in Europe.¹⁵¹ These courses were entirely scholarly inquiries into the theoretical and abstract analysis of the law.¹⁵² As noted above, however, the study of law developed along quite different lines in the United States with legal training centered on learning the skills of the profession, and as a result this type of scholarly graduate program in law did not flow naturally.

With respect to graduate law degrees in the United States, a report to the ABA in 1906 noted that a “master’s degree in law” was offered in nineteen schools, all of them in the form of an LL.M.¹⁵³ Each of these programs involved an additional year of legal study beyond that required for the base degree in law, the LL.B.¹⁵⁴ Eleven of the schools offering these degrees had admissions requirements for the LL.B., an innovation added shortly after the turn of the twentieth century by an increasing number of law schools wishing to signal their elite status, and a reform pushed for by those wishing to raise standards for the profession.¹⁵⁵ Graduate law programs may then have come out of the strong sentiment by the legal community at the time of the need to increase standards for the legal profession and a concurrent push to make the study of law more scholarly;¹⁵⁶ which in turn was part of a larger trend of American life toward institutionalization and standardization during this period.¹⁵⁷ These programs were also likely a product of the previously noted cyclical

¹⁵¹ See Gabriel, *supra* note 6 (discussing the early history of graduate legal education).

¹⁵² See *id.* (“Theoretical and abstract analysis of law has been the primary purpose of legal education in Europe.”).

¹⁵³ See REPORT OF THE COMMITTEE ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1906), reprinted in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES, 1177–82 (Steve Sheppard ed., 1999).

¹⁵⁴ See *id.* at 1177.

¹⁵⁵ *Id.* at 1177–82.

¹⁵⁶ See Hupper, *supra* note 78, at 14 (noting that a graduate degree “could function at once as an educational initiative that has intrinsic merit, a source of funds and prestige for the school, a means for the professional class to experiment, and a substitute for extending the basic law degree”).

¹⁵⁷ See STEVENS, *supra* note 17, at 20 (discussing a thirst for more “rationalism” during this period with an accompanying urge for professionalization and stratification brought about by the desires of a growing middle class for a structured environment. Feelings of dislocation brought about by the industrial revolution and the opening of the frontier also played a role).

battles and recurring tensions within American legal education over how law students should be trained, which persist to this day.¹⁵⁸

The first offerings that might legitimately be called graduate law degrees, appeared for a short time in the 1860s and 70s at Columbia and Harvard, and were followed by longer lasting programs at Yale beginning in 1876.¹⁵⁹ These degrees were to be completed following the LL.B., and while they required some amount of coursework, they also required a written thesis, were more scholarly in focus, and had significantly more stringent entrance requirements.¹⁶⁰ To a large degree, these early programs were a reflection of the desire by university law school faculties to add an additional year of study to their law programs.¹⁶¹ Among early post-graduate law degree (LL.M.) programs were those established at Columbian University (now known as George Washington University) in 1877, initially simply a supplement to its existing two-year LL.B. program; Columbia in 1893 (after it lengthened its LL.B. from two to three years in 1891); and the University of Michigan in 1889, initially as a third year supplement to its two-year program, and eventually as a fourth year supplement to a three-year LL.B. in 1895.¹⁶²

Why were these programs created? The few authors who have addressed this question argue that they were not created to meet the demands of legal scholars interested in abstract analysis, but had more “utilitarian” origins reflecting the desire of law schools to extend institutional legal education for an additional year.¹⁶³ This

¹⁵⁸ See *id.* at 6–7; see also William D. Henderson, Commentary, *Why Hands-on Training is Not Enough*, NAT'L JURIST 4 (Sept. 2011) (“The daunting economics facing law schools is intertwined with heightened business pressures on practicing lawyers. To help ease these pressures, many employers are telling law schools that [they] need to do a better job producing practice-ready graduates who can ‘hit the ground running.’ Many legal educators have responded by pushing for a greater commitment to experiential education—more clinics, pro bono initiatives, simulation and skills courses and externships, all of which emphasize learning by doing.”).

¹⁵⁹ See Hupper, *supra* note 78, at 14 (discussing the founding of the first graduate legal programs).

¹⁶⁰ See *id.* at 14–15 (describing the first graduate legal programs).

¹⁶¹ See Gabriel, *supra* note 6, at 131 (discussing how the establishment of graduate legal education reflected “a desire by law school faculties to increase the time of undergraduate legal education from two to three years.”).

¹⁶² See Hupper, *supra* note 78, at 15 (discussing the beginnings of early university LL.M. programs).

¹⁶³ See Gabriel, *supra* note 6, at 131 (“Graduate legal education . . . began as professional training, reflecting a desire by law school faculties to increase the time of undergraduate legal education from two to three years”); see also Linda R. Crane,

view finds some support in the Report submitted to the Carnegie Foundation by Alfred Reed in 1921 on the state of legal education, in which he opined that graduate law degrees were created as an inducement to get students to remain in university law programs for a longer period.¹⁶⁴ However, it appears that at least part of the motivation behind this desire to extend the period of legal study for law students was, in fact, to provide a more scholarly or “abstract” enquiry into the law.

According to Reed, top law schools in the late nineteenth century desired to make the study of law more scholarly and rigorous by requiring three years of study, but feared that lengthening the basic law degree beyond two years would drive students into law offices as apprentices or into “inferior” law schools.¹⁶⁵ This view is supported by an instructor at Yale Law School who in 1889 observed: “The Faculty believe that more than two years’ study should be required before the bachelor’s degree [in law] is conferred, but have felt that it is impracticable to insist upon such a requirement at the present time. There is [currently] no school in which such a degree cannot be obtained after two years’ attendance”¹⁶⁶

This observation provides an important insight into the environment in which law schools in the late 1800s were operating. They were not simply institutions of higher learning motivated by the pursuit of knowledge, but were driven by powerful economic forces as well. Most notably for law departments at universities during this period, there existed two other avenues through which students could progress into the legal profession: apprenticeships and/or proprietary schools unaffiliated with institutions of higher learning. While training in a college or university could often offer a higher quality of education, it was also time consuming and, perhaps most significantly, more expensive.¹⁶⁷

The desire to both deepen and broaden the study of law while simultaneously not driving away current and prospective students

Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends, 33 J. MARSHALL L. REV. 47, 54 (1999) (discussing how the initial law degree was named Juris Doctor after law school became a de facto graduate level education, motivated by the idea that three years of post-collegiate work was as demanding as that required for a Ph.D. or M.D.).

¹⁶⁴ See REED, *supra* note 114, at 176.

¹⁶⁵ *Id.*

¹⁶⁶ Leonard M. Daggett, *The Yale Law School*, 1 GREEN BAG 239, 247 (1889).

¹⁶⁷ See *id.*

with increased requirements for the basic degree in law, Reed contended, led to schools offering an advanced degree beyond the LL.B. In his report, Reed stated that the first Law School to offer the "novel degree of LL.M." was Columbia, which actually conferred the degree beginning in 1863 to students remaining for a third year of law study, but, unable to attract students after the first two years, the degree was allowed to dissolve thereafter, although it continued to be announced in the Columbia university catalogue.¹⁶⁸ Reed noted that Harvard and Boston University adopted a "similar device" for a few years after 1873 but called their graduate law degree an "A.M." and "M.A." respectively.¹⁶⁹ Reed also noted similar graduate law programs at Yale (offering an M.L. (one-year) and a D.C.L. (two-year) beginning in 1876) and Columbian (offering a Master-of-Laws course in 1877), with Georgetown, National University, Washington University (St. Louis), Northwestern, Michigan and Minnesota all offering a one-year M.L. or LL.M. by 1890.¹⁷⁰ Further, Reed noted that additional attempts by other law schools of the era to launch similar programs were never able to get off the ground.¹⁷¹

According to Reed, attendance in these programs was "very small," and he somewhat cryptically went on to state that the "chief interest of this early movement for post-graduate work in law lies in the fact that it failed, and that the lesson of its failure seems to have been lost upon the present generation."¹⁷² Writing in 1921 amidst the prior noted strong push to increase the standards in the legal profession and rigor in legal education, Reed would ultimately recommend against a three-year academic course of study requirement for all law students, holding the door open for law programs of various types aimed at attorneys performing different functions. From his perspective, the lack of interest shown in the early graduate law programs should have been taken as something of a cautionary tale by those in his era looking to impose a mandatory three-year duration for the basic law degree and take the education of lawyers completely out of the hands of practitioners. Graduate law programs have been looked at with some skepticism, at least in some quarters,

¹⁶⁸ REED, *supra* note 114, at 176.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 4 (noting that in 1874 the University of Iowa law school attempted to add an additional postgraduate year that was unsuccessful and formally abolished in 1882).

¹⁷² *Id.* at 176.

at least as far back as 1921.

While Reed's contention that the primary motivation for the creation of graduate legal programs was to induce students to remain at law schools for additional training seems plausible, it is important to note that these programs came to life in the broader context of a systemic and radical transformation that took place in United States higher education between 1865 and 1900. According to one author, the forces driving this change were post-war reconstruction, which brought new private and public funding sources, a yearning for equality with perceived higher quality institutions in Europe, and a sense of alarm over the declining influence of the academy in the preceding decades.¹⁷³ Academics who had studied overseas surveyed post-Civil War America and were convinced that the seriousness of purpose associated with higher education in Europe, particularly in Germany, was essential for American development as a whole.¹⁷⁴

In her work examining the academic doctorate in law, Gail Hupper noted that in the late Nineteenth century, ideas imported from continental Europe began to be considered by top law schools in the United States as well. Specifically: (1) the idea of law as a "science" that belonged in a university; (2) the idea of a full-time law professor—the norm in Europe but in sharp contrast to the U.S., where even university law faculty were practitioners first and instructors second; and (3) the idea of advanced study for students who wished to become legal academics.¹⁷⁵ Hupper noted further that these ideas "meshed well with a fourth phenomenon of the era: a call for lawyers equipped to handle the increasingly complex legal needs of a rapidly industrializing nation."¹⁷⁶

These forces had already begun to be noted by legal academics of the period. For example, in setting forth a framework for legal education in 1873, Harvard law professor and former governor of Massachusetts Emory Washburn noted that the legal profession had

¹⁷³ See VEYSEY, *supra* note 85, at 2.

¹⁷⁴ See THELIN, *supra* note 51, at 87 ("Numerous scholars who had pursued advanced studies [in Europe] argued that the seriousness of purpose associated with advanced scholarship at German universities was essential for national development . . .").

¹⁷⁵ See Hupper, *supra* note 78, at 3–4 (discussing the European ideas that influenced the development of doctoral law programs in the United States).

¹⁷⁶ *Id.* at 4.

eroded since the time of the American Revolution and the subsequent decades.¹⁷⁷ During this period, many members of the bar were less concerned with income, and in his view were content instead with “influencing the public judgment” by consciously “wielding a moral power,” which was granted as a reward for their demonstrated wisdom and independent judgment.¹⁷⁸ While this view of early American lawyers is undoubtedly influenced by Washburn’s own experience during that period, he maintained that during that time, formal legal education was not terribly important.¹⁷⁹ By contrast, he viewed the current environment for lawyers as far less noble, where “party politics succeeded to statesmanship, and noisy partisanship took the place of tried patriotism and sound judgment,” and “money became more and more the chief end for which men labored,” as it had become “the test and measure of a man’s social position . . . giving consequence to men, who without it were of no account in the community.”¹⁸⁰ According to Washburn, it was imperative that something be done to sustain the character of the legal profession “against the downward tendency which it was taking, from a liberal science to a mechanical trade.”¹⁸¹

For Washburn, one of the chief dangers to the law profession of his day was that many of the collegiate law programs that had appeared since the middle of the Nineteenth century were being used simply as a mechanism to get into practice more quickly and make more money sooner.¹⁸² In a second article, while he conceded that there would always be many lawyers “whose occupation is a mechanical dealing with . . . details,” for whom “[a]ccuracy and readiness of despatch [sic] . . . are what is wanted, rather than breadth of learning or a familiarity with principles;” Washburn identified another category of attorneys who hoped “to lead at the bar, and make their influence felt in directing and sustaining sound public

¹⁷⁷ See Emory Washburn, *Legal Education. I. Why?*, 21 AM. L. REG. 65, 65–66 (1873) (discussing the legal profession in the Revolutionary War Era, when fortunes were rare and lawyers entered the profession due to the respect it conferred).

¹⁷⁸ *Id.* at 65.

¹⁷⁹ See *id.* at 66 (“In such a state of things, legal education was a secondary matter.”).

¹⁸⁰ *Id.* at 66–67.

¹⁸¹ *Id.* at 67.

¹⁸² See *id.* (“Our law schools . . . are in danger of losing the fine spirit with which they started in the eager haste of their students ‘to get into practice,’ and reducing the requirements of their course of study . . .”).

thought.”¹⁸³ For this second group, Washburn noted changes in technology were making the world a much smaller place with a correspondent need for lawyers to be able to understand the laws of other local and international jurisdictions in order to help the law evolve and for society to move forward.¹⁸⁴ Therefore, according to Washburn, legal education needed to evolve in order to grapple with the new realities of the later Nineteenth century. Part of that evolution, he thought, could take place within the college law programs, where students could learn the academic and philosophic underpinnings that had shaped the law up to that point. He noted that American law students need not exclusively “pursue the study of the Roman law into its specialties and details . . .”

[b]ut if one of these [students] wishes to go beyond the scope of the mechanical details of his profession, and to ascend into the purer and clearer atmosphere of jurisprudence as a liberal science, he cannot do it more readily or effectually than by drawing inspiration from that immortal system of which it has been eloquently said: ‘As if the mighty destinies of Rome were not fulfilled, she reigns throughout the whole earth by her reason, after having ceased to reign by her authority.’”¹⁸⁵

This grandiose vision of legal history was an eloquent entreaty not to allow the profession to remain mired as a mere mechanical activity.

In his third and final article on legal education, Washburn made an impassioned plea that entry to the profession be barred to those who had trained exclusively as apprentices. He had “no faith in learning law as an apprentice does his trade, by *doing* the same thing over and over again, till he masters it by manipulation, independent of the science that lies at the bottom.”¹⁸⁶ For Washburn, and a growing number of legal academics of the day, a legal education should have “a broader scope than merely learning how to do a thing,” as lawyers “must be ready to engage in the making and administering

¹⁸³ Emory Washburn, *Legal Education. II. What?*, 21 AM. L. REG. 265, 266 (1873).

¹⁸⁴ *See id.* (discussing how trade rendered “it necessary for every lawyer who deals with questions involving principles which lie outside of mere local law, to study jurisprudence in its broader relations to men and human affairs”).

¹⁸⁵ *Id.* at 271.

¹⁸⁶ Emory Washburn, *Legal Education. – III. How Much?*, 21 AM. L. REG. 409, 412 (1873).

of laws, as well as construing and interpreting them, and therefore must know beforehand something of the science of government."¹⁸⁷ One aspect of the legal profession that Washburn and others considered in sore need of upgrading was the civility of the bar, which had been infiltrated in their view by large number of coarse and ill-mannered men. For those hopeful for a more refined atmosphere, there was

no school that [they knew] of so well calculated to educate a young man in all respects . . . as a good law school. In that is embraced a good library, good instructors and a body of ingenious young men who come together for a common end, with high purposes and generous motives, old enough to know what is due from one gentleman to another, and free and independent enough to rebuke rudeness or coarseness in any of their number, and to imprint lessons of propriety upon the minds and memories of the most reckless among them.¹⁸⁸

This opinion was in sharp contrast to that held by many practitioners of the day, as set forth above by Philadelphia attorney, Henry Budd, who viewed university law programs as responsible for placing dangerously underqualified lawyers into the steam of commerce.¹⁸⁹ In fact, in addressing the very same problem – “sharp, active practitioner[s], hurrying to ‘get business,’ [and] to get rich” at the expense of society – Budd explicitly blamed law schools, stating that they had “taken a place which under the American system of legal education they were never intended to take – or, rather, which have assumed to do that which they do not accomplish.”¹⁹⁰ He blamed the schools for “the admission to the bar of men scantily prepared for the work of their profession and in many cases not even so sufficiently equipped as to be able to acquire that learning which in many cases is necessarily postponed until after the technically called studentship has come to an end, not understanding thoroughly the foundations of the law.”¹⁹¹

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 414.

¹⁸⁹ See Budd, *supra* note 127, at 71–72 (arguing that new lawyers were less prepared under the university law programs).

¹⁹⁰ *Id.* at 72.

¹⁹¹ *Id.* at 71.

It is unlikely then that those who blamed university law programs for the low quality of many legal practitioners of the day would support the creation of additional years of law study in the form of graduate law programs. However, the influences identified by Hupper and given voice by Washburn are expressly linked to the formation of graduate law programs in an article written about Cornell Law School by one its professors, Harry Hutchins, in 1889. Describing the state of Cornell Law School at the time, Hutchins states: "In obedience to what seemed to be a demand for such action, it was recently determined to provide hereafter opportunities for graduate work in the law" ¹⁹² This program was one year in duration, open to the graduate students of Cornell or any law school "of recognized standing" and led to the granting of the Master of Law degree to graduates. ¹⁹³ As stated by Hutchins, the degree was intended to

meet the needs, *first*, of those who desire to devote an additional year, under the direction of teachers, to the general study of the law; *secondly*, of those who propose to make a specialty in practice of some particular branch of the law, and who wish to take advanced preparatory work in the line of the specialty chosen; and *thirdly*, of those who have in view the study of the law as a science, and who desire to become familiar with the sources and philosophy of our jurisprudence. ¹⁹⁴

Hutchins' reference to "a demand for action" could very well signal a desire on the part of the institution to offer a degree already offered at other schools. This inter-school competition is also signaled in Hutchins' statement that the new degree is open to students from other schools of "recognized standing." Moreover, the desire to offer a more scholarly form of legal education is clearly set forth in the description of who the degree was intended for. Such a course of study appears to directly respond to the calls of Washburn and others that at least some lawyers must be ready to engage in the creation, guidance and administration of laws, as well as the construing and interpreting of them, and therefore must know beforehand something of the philosophy and history behind the creation of

¹⁹² Harry B. Hutchins, *The Cornell University School of Law*, 1 GREEN BAG 473, 488 (1889).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

these regulations. This sentiment is echoed in a report on legal education prepared by a committee of the American Bar Association and the U.S. Bureau of Education, published in 1893.

That report first noted that the "importance of well-trained lawyers is greater now than at any time in history. The law has become so complex and extensive with the multitude of decisions and statutes that a higher training is indispensable."¹⁹⁵ By way of illustration, the report noted an observation by a law professor from that period who stated: "It is easy to find single opinions in which more authorities are cited than were mentioned by Marshall in the whole thirty years of his unexampled judicial life, and briefs that contain more cases than Webster referred to in all the arguments he ever delivered."¹⁹⁶ Noting that lawyers filled "a large proportion of our offices, State and national, and their influence is most potent in political affairs[,]" the report stated that "[a] system of law which accepts all the cases on a given subject as authority is possible only with a thorough knowledge of the elementary principles of the law on the part of the lawyers and judges. These, with a proper classification and scientific method, have become indispensable."¹⁹⁷ Acknowledging that a course of more than two years of legal study in a university was "impracticable" for many, the committee recommended, among other things, that "for those to whom a longer course of study is possible, provision be made in the schools for post-graduate courses, where the subjects of general jurisprudence and public law shall be taught."¹⁹⁸

Stated another way, the committee members from the ABA and the Bureau of Education directly identified post-graduate legal education as a solution to the perceived evolution of the law in the United States and its attendant challenges to legal practitioners, a position echoed in the wake of the report by the then Dean of Yale Law School Austin Abbott. Noting that a great danger of the day was "the lack of respect for law which is shown in so many ways, from social laxity, and commercial and political fraud," Abbot cited "the ultimate necessity of post graduate courses [in the law] of the

¹⁹⁵ AM. BAR ASS'N & U.S. BUREAU OF EDUC., REPORT ON LEGAL EDUCATION 14 (1893), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024297049;view=1up;seq=9> [https://perma.cc/73UF-ZD6Y].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 15.

highest grade” as a “clear” solution in aid of “a trained bar that can supply fit candidates for the bench, the legislature and the chief executive and administrative offices.”¹⁹⁹

By 1889 Yale had created a two-tiered system of graduate law degrees designed to properly train practicing members of the profession as well as those seeking a higher level of legal scholarship. The first, the Master of Laws, required an additional year of study and offered topics of general interest and was meant to serve as an introduction to the “higher grades of practice.”²⁰⁰ The second graduate law degree offered at Yale was the Doctor of Civil Law. It was available only to those who had completed the Master of Laws and had completed a course in Roman Law, with “a good knowledge of either French or German” also being a requirement.²⁰¹ The objective of the Yale faculty in creating this second degree was characterized as follows: “a test of real attainments in legal scholarship, insisting upon an unusual standard of ability and industry, and never giving the degree unless the candidate had proved himself especially worthy of the distinction.”²⁰²

As the turn of the twentieth century approached, graduate programs in law began to explicitly signal that they were designed for those who sought more than what might be strictly necessary for the average law practitioner. This concept is reflected in the description of the Master of Laws program at the University of the City of New York (present-day NYU) in its catalogue for 1892-1893, the year after the degree was introduced. The catalogue sets forth that the program was

framed upon a broad basis, with the design of aiding the equipment of Attorney and Counsel for the Trial of Causes; for the Argument of Questions of Law; for Conveyancing²⁰³; for Preparation for the Bench; or for Legal Authorship, as well as of promoting advanced studies in the History and the higher Philosophy of Jurisprudence, and in Constitutional and Political Science. . . . The design is both to supply the most common deficiencies in undergraduate attainments, and to promote the development of powers needed for the

¹⁹⁹ Austin Abbott, *Existing Questions on Legal Education*, 3 YALE L.J. 1, 15 (1893).

²⁰⁰ Daggett, *supra* note 166, at 248.

²⁰¹ *Id.* at 249.

²⁰² *Id.*

²⁰³ Meaning, the transfer of property.

higher walks of the profession.²⁰⁴

Clearly, the program was established to produce graduates capable of doing more than simply assisting clients with run-of-the-mill legal problems. It was instead designed to address a perceived gap in legal education that was inadequately preparing students to assist in shaping the law amidst the dizzying array of changes taking place at the turn of the twentieth century. This goal was set forth in explicit terms as another of the guiding principles in the foundation of the Master of Laws at this law school:

The multiplicity of new relations and controversies at the present day constantly raises new questions on which there are no adequate precedents. And old questions abound in conflicting precedents. When a case is embarrassed by want of precedent, or by conflict, then is the opportunity for counsel capable of free and strong forensic reasoning. American law has silently become a *Progressive Jurisprudence*; and the great need of the post-graduate student is to carry forward his elementary studies so as to develop the ability to keep abreast of its movements, and to deal with current business in accordance with these requirements of the times.²⁰⁵

While not spelled out as clearly in the records of other schools of the period, an examination of the requirements for graduate degrees in law at other schools reveals a similar desire that recipients of the degree have a strong grounding in history and philosophy as well as the laws of other nations, reflecting a perceived need to produce legal scholars in addition to legal practitioners.²⁰⁶

This need was not a perception held only within the confines of

²⁰⁴ THE UNIVERSITY OF THE CITY OF NEW YORK, CATALOGUE AND ANNOUNCEMENTS 128 (1892-1893), reprinted in NEW YORK UNIVERSITY, CATALOGUE (Hathi Trust Digital Library) (ebook), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015066697429;view=1up;seq=6> [<https://perma.cc/D5RE-RD7Z>] (last visited Mar. 8, 2018).

²⁰⁵ *Id.* at 129.

²⁰⁶ See, e.g., *Calendar of the University of Michigan for 1892-1893*, at 140-41 (1893) (setting forth required courses for its Master of Laws degree including Public International Law, History of Treaties, History of Real Property Law and the Science of Jurisprudence); *Catalogue of Yale University 1890-1891*, at 176 (setting forth the requirement of a preliminary examination in Roman law and Roman history as a prerequisite to its Master of Laws degree); *Northwestern University Catalogue 1891-1892*, at 121 (setting forth required courses for its Master of Laws degree including Comparative Constitutional Law, Public International Law, and History of English Law).

university law programs. Addressing the myriad legal issues facing American society at the turn of the twentieth century, lawyer John Randolph Tucker suggested

diverse grades of degrees might be adopted to measure the amount of scholastic training the law school has furnished the student: Proficient in Law; Bachelor of Laws; Master of Laws. Each student would thus adapt his time to his necessity, and win the degree, which fairly measures his scholastic work. Besides, the shortest time, might be devoted to the grounding in the principles of the law, and the longer time to the precise and scientific study and analysis of cases.²⁰⁷

The problem for law schools and the legal profession, of course, went beyond simply creating this type of coursework. Schools also had to figure out how to get students to enroll in it. It is worth noting that simply because graduate law programs began to spring into existence in the late nineteenth century, they were very poorly attended with only a trickle of students completing them.²⁰⁸ One author surveying the American law school landscape from the year 1906 reported that “thirty-three schools give post-graduate work, but only 23 had any students – 270 in all,” out of a total law school population of 15,411.²⁰⁹ Describing the postgraduate law degree, the author noted that it was “not generally provided for, [was] not in demand, [had] no standing with practitioners, [was] not usually attractive to the best students” and raked “an undue amount of the instructors’ time for the benefits conferred”²¹⁰

It seems likely, then, that the creation and continued existence of graduate law programs were manifestations of the tension between law as a scholarly pursuit and law as a profession at American law schools, or more broadly a reflection of a renewed emphasis on scholarship in American colleges and universities. This renewed focus was driven at least in part by the rapid wave of industrialization, scientific discovery and professionalization that followed the end of

²⁰⁷ Tucker, *supra* note 95, at 603.

²⁰⁸ Clarence D. Ashley, *The Training of the Lawyer and Its Relation to General Education*, 37 J. SOC. SCI. 229, 237 (1899) (noting that in spite of the development of graduate law programs specializing in general jurisprudence, Roman Law, and the historical development of U.S. law, these programs “have not met with any great interest among . . . law students”).

²⁰⁹ H. L. Wilgus, *Legal Education in the United States*, 6 MICH. L. REV. 647, 659, 665 (1908).

²¹⁰ *Id.* at 659.

the Civil War.²¹¹

Higher education historian John Thelin characterized the American university of this era as “an adolescent – gangly, energetic, and enigmatic;”²¹² the variation and somewhat precarious nature of the early graduate law programs may well be a reflection of this personality trait. At the same time, there can be little doubt that competition, not only with the apprentice model and proprietary law schools, but in and among university law schools themselves, also played a role. As admissions pools began to become more national and prospective students became more aware of the differences between university programs, schools interested in attracting top students and increasingly mobile professional law faculty could ill afford to fall behind in the intellectual arms race that was sweeping legal education during the late nineteenth century.²¹³ This may be one reason why graduate law programs spread rapidly and persisted, at least as set forth in university catalogues, even though they appear to have attracted very few students.

Graduate law programs may never have been intended to increase the job opportunities of graduates in the traditional legal marketplace, or even make them better practitioners, but instead appear to have been created in response to calls to make the study of law more “scholarly,” to add or maintain prestige at academic institutions, and to substitute for extending the duration of the basic law degree. To this day, perhaps the ABA merely “acquiesces” to their existence because graduate programs are fundamentally different from the basic degree in law and they should not be evaluated using the same lens that is used for J.D. programs. American legal education up through the early part of the twentieth century struggled, as it does today, with two related but distinct missions: (1) to provide education in the law; and (2) to prepare students to engage in the practice of law. As one author has noted: “at different times and in different types of institutions, one emphasis has been more in vogue than the other, and these emphases may well have shifted in accord with shifts in the culture beyond the walls of the law school.”²¹⁴

²¹¹ Hupper, *supra* note 78, at 8.

²¹² THELIN, *supra* note 51, at 153.

²¹³ Hupper, *supra* note 78, at 14.

²¹⁴ Sheppard, *supra* note 8, at 45.

4. GRADUATE PROGRAMS IN LAW AT THE UNIVERSITY OF PENNSYLVANIA

Any inquiry into the history of Penn Law and its graduate programs must begin the founding of the University of Pennsylvania itself. A glance at Penn Law's website lists 1740 as the year Benjamin Franklin "found[ed] the University of Pennsylvania."²¹⁵ This is perhaps a bit misleading,²¹⁶ particularly as Mr. Franklin wrote in his autobiography that he had first conceived of the college in 1745, but other events distracted him and he took no action until 1749.²¹⁷ However, in 1740, a charity school was in fact established in Philadelphia with Ben Franklin as one of the school's trustees.²¹⁸ This was a school for indigent children, maintained by the voluntary contributions of members of the local church parish. It was in no sense an institution of higher learning. Nine years later, in 1749, Benjamin Franklin distributed a petition for the founding of a "Publick [sic] Academy" of higher learning. With the charity school foundering, in 1753, he obtained a charter from the provincial legislature to start the "Academy and Charitable Schools in the Province of Pennsylvania."²¹⁹ This institution opened two years later in 1755 as the College, Academy and Charitable Schools in the Province of Pennsylvania. In 1779, in the midst of the Revolutionary War, the legislature removed several trustees of that institution on suspicion of being Tory sympathizers and had the school re-chartered under the name, the University of the State of Pennsylvania. This school was run simultaneously with the former institution until the two were finally merged into the University of Pennsylvania in 1792.²²⁰

As for the law school of the University of Pennsylvania, Penn Law's website makes prominent note of 1790, the year in which

²¹⁵ PENN LAW, *supra* note 11.

²¹⁶ See THELIN, *supra* note 51, at 2-8 (noting how links to the past are frequently distorted by modern institutions of higher education in order to enhance their prestige).

²¹⁷ THE CAMPUS GUIDE: UNIVERSITY OF PENNSYLVANIA 1 (2002) (noting that Franklin first conceived of the idea for the college in 1745 as set forth in his autobiography); BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 176-79 (W.B. Conkey Company 1900) (1771).

²¹⁸ Davis, *supra* note 13, at 5.

²¹⁹ *Id.*

²²⁰ *Id.*

James Wilson, a U.S. Supreme Court Justice and signor of the Declaration of Independence, offered a series of lectures intended to be the beginning of a three-year course meant to cover the entirety of public and private law.²²¹ The aim of the course was “to furnish a rational and useful entertainment to gentlemen of all professions, and in particular to assist in forming the legislator, the Magistrate and the ‘Lawyer.’”²²² While Wilson would go on to give a total of twenty-four of these lectures and generally enjoyed a good reputation as a member of the bar, it should be noted that his lectures were not universally well regarded. One contemporary wrote, “Mr. Wilson on the bench was not the equal of Mr. Wilson at the bar, nor did his law lectures entirely meet the expectations that had been formed,” while another stated, “These lectures . . . have not met with general approbation, nor is their excellence altogether undisputed.”²²³

Like the other university law programs of the era, this course was not intended in any way to provide training for the practice of law, but rather to instill Wilson’s students with the virtues of republican leadership.²²⁴ The lectures were simply meant to inform attendees on relevant topics and there appears no indication in the records of the University of Pennsylvania or Wilson’s personal papers that he had any intention of founding an institution in any formal sense.²²⁵

While these lectures were initially attended by such luminaries as President Washington, his Cabinet, members of both Houses of Congress and numerous state officials, they lasted less than two years and ended for reasons that remain unclear to this day.²²⁶ These

²²¹ Sheppard, *supra* note 8, at 15.

²²² REED, *supra* note 114, at 122.

²²³ WARREN, *supra* note 20, at 347–48 (quoting William Rawle, who had practiced law under James Wilson, and an unnamed author published in 1804).

²²⁴ Carrington, *supra* note 57, at 549.

²²⁵ Mark F. Lloyd, Interim Report to Vice-Dean Beck and Professor Arnold on The History of The Law School of the University of Pennsylvania 2 (Aug. 31, 1978) (unpublished manuscript) (on file with the University of Pennsylvania Law School Archives).

²²⁶ See Davis, *supra* note 13, at 10 (noting simply that the course did not continue); Carrington, *supra* note 55, at 549–50 (noting speculation that the course may have ended due to Wilson’s courting of a seventeen-year-old girl in Boston, who later became his second wife, or because of significant financial difficulties arising out of his purchase of an iron works); C. Stuart Patterson, *The Law School of the University of Pennsylvania*, 1 GREEN BAG 99, 99 (1889) (noting also that the course did not continue); Lloyd, *supra* note 225, at 2 (noting evidence that both the size and social

lectures centered on theoretical considerations of the role of democracy in the United States and the moral foundation of the republican form of constitutional government.²²⁷ Though Wilson remained on the University's roster as its first, and only, "Professor of Law" until his death in 1798,²²⁸ no further instruction in the law appears to have been contemplated at the University of Pennsylvania until 1817.²²⁹

That year, Charles Hare was elected as the second Professor of Law in the school's history, and while it appears that Professor Hare did in fact initiate a course of study, also intended to be three years, his lectures only lasted a year.²³⁰ Hare's reason for discontinuing the course of study was apparently due to the onset of health problems characterized by one author writing in 1882 as "a loss of reason."²³¹ By the time the University of Pennsylvania re-established its chair in law, William and Mary, Transylvania University, and Harvard (where initial lectures had been instituted the previous year) appear to have been the only colleges or universities actively running a law program in the United States.²³² In other words, the apprenticeship model for legal education still dominated the landscape.

Following the collapse of Professor Hare's program, the study of law at the University of Pennsylvania appears to have remained dormant until the appointment of George Sharswood, a judge of the Philadelphia District Court, as Professor of Law in 1850.²³³ It is not clear why there existed such a lengthy gap between Hare and Sharswood. One reason may have been simple economics. There were numerous members of the local bar on the board of trustees of the University who supplemented their income and enhanced their law practices by serving as preceptors to law clerks in the Philadelphia area.²³⁴ The establishment of a robust law program in the region

prominence of the audience began to diminish after the initial few lectures along with Wilson's interest in giving them as the novelty of presenting them waned).

²²⁷ See Bailey, *supra* note 16, at 318.

²²⁸ Wilson's appointment as a professor of law was preceded in the United States only by that of George Wythe at William and Mary, who was appointed in 1779 as noted previously.

²²⁹ DAVIS, *supra* note 13, at 12.

²³⁰ Patterson, *supra* note 13, at 99-100.

²³¹ CARSON, *supra* note 13, at 19; see also CHEYNEY, *supra* note 13, at 234 (noting that Charles Hare became ill in the winter of 1817-18, "ultimately losing his mind").

²³² DAVIS, *supra* note 13, at 13.

²³³ CARSON, *supra* note 13, at 21.

²³⁴ See DAVIS, *supra* note 13, at 14 (describing how students would pay their preceptors for the privilege of training in law offices).

based in the University would mean a dilution, if not outright interruption, of this income stream and source of cheap labor. As noted previously, in this system, clerks were at the mercy of their preceptors, whose reputation and success were usually of significantly more importance than the law clerk's legal education.²³⁵ Moreover, in most cases, the clerk or his family paid a fee in exchange for the preceptor's time and resources in training the younger man.²³⁶

The life of a law clerk was generally a dull and tedious existence. As printed legal forms were often necessary, but not readily available, the job of a law clerk often entailed endless hours of copying legal documents, thereby creating a powerful incentive for lawyers to take in law clerks.²³⁷ A reason for the resurgence of university programs may lie in the fact that as commerce grew, population centers became more dense, communications and technology improved, and the country moved off the wartime footing of the Revolutionary War and the War of 1812; the old law clerkship system as the sole preparation for a career in law, with its heavy emphasis on local practice, became increasingly ill-suited to the training of attorneys for the new and complex problems of the day.²³⁸

In any event, in 1849 the University of Pennsylvania established five new departments — Modern languages and Literature, American History, Chemistry, Natural History, and Law — and named Sharswood as the chair of the Law department.²³⁹ Sharswood delivered his initial lecture in the fall of 1850.²⁴⁰ Among Sharswood's first tasks was to decide whether the focus of the law department should be on training attorneys for local practice or attempting to establish a "national" law school to compete with Harvard that was more focused on theory.²⁴¹ From the outset, then, at Penn there was tension centered around how law students should best be instructed. This ambivalence was reflected in the 1854-1855 catalogue, which stated:

The Professors do not presume to embrace in their course,

²³⁵ Heft, *supra* note 13, at 2.

²³⁶ Bryson, *supra* note 27, at 157-58.

²³⁷ Bailey, *supra* note 16, at 313.

²³⁸ See Hupper, *supra* note 78, at 6-7 (discussing how the growth of university legal education was stimulated by various factors, including the demand for lawyers capable of handling the increasingly complex needs of an industrializing society).

²³⁹ DAVIS, *supra* note 13, at 16.

²⁴⁰ *Id.* at 17.

²⁴¹ *Id.* at 17-18.

the peculiar laws and rules of procedure in all parts of the Union. Their design is so to discipline and prepare the mind, by instruction in the principles of jurisprudence and their application in Pennsylvania, that other local codes can be acquired with facility and advantage.²⁴²

While this statement reflects at least some thought that Penn Law graduates might take their education and practice in other jurisdictions, it also reflects Sharswood's preference that students be trained in the idiosyncrasies of the laws of the Commonwealth. This opinion is also reflected in his view that his lectures would be a supplement to law office clerkships, rather than provide the entirety of what students needed know to practice law.²⁴³

It was also not Sharswood's thought that instruction in law should be restricted to candidates with demonstrated prior academic ability, and his course had no admissions prerequisites for aptitude or previous education.²⁴⁴ He appears then to have been among those noted previously who felt that the practice of law should be open to all, or at least to all white men. By contrast, as of 1849, the general college course at the University of Pennsylvania required entrance examinations in Latin and Greek authors, arithmetic, and grammar.²⁴⁵ Admission standards were therefore far lower for the study of law than they were for a basic liberal arts baccalaureate degree. Sharswood remained in his post until 1868 when he ascended to the bench of the Supreme Court of Pennsylvania.²⁴⁶ He was replaced by his faculty colleague Spencer Miller.²⁴⁷ During this initial period, the Law Faculty was established consisting of three professors, but it was not a particularly popular program with the average graduating law class numbering only fifteen from the years 1852 to 1881.²⁴⁸ One author writing in 1940 speculated that this was due at least in part to the fact that local courts and practitioners did not have much respect for the program and refused to allow the degrees and certificates issued by the law school to have

²⁴² *Catalogue of the Trustees, Officers, and Students of the University of Pennsylvania Session 1854-55*, at 32-33 (1855).

²⁴³ DAVIS, *supra* note 13, at 18.

²⁴⁴ See CARSON, *supra* note 13, at 25 (explaining that there was no examination, college degree, nor any previous line of study required for matriculation).

²⁴⁵ DAVIS, *supra* note 13, at 20.

²⁴⁶ *Id.* at 22.

²⁴⁷ *Id.*

²⁴⁸ CHEYNEY, *supra* note 13, at 236.

any significance in their regulations for admission to practice.²⁴⁹ Thereafter followed a number of leaders who over the next thirty years oversaw the establishment of a much more academic system for the instruction of lawyers at Penn Law.

One of the high points of this period was the granting by the courts of Pennsylvania in 1875 of the aforementioned "diploma privilege," an exemption to the requirement of an apprenticeship period to be qualified to practice law for holders of a Bachelor of Laws from the University of Pennsylvania.²⁵⁰ Nevertheless, it would still take nearly another thirty years for the law program at the University of Pennsylvania to free itself entirely from the law clerkship system. As in the re-establishment of the law school itself, the principle obstacle appears to have been that the men in control of the apprenticeship system had a strong economic motivation to see that it remained in place.²⁵¹ Working against these entrenched practitioners was the nineteenth-century trend toward legal specialization that appeared as lawyers began to concentrate their practices in particular fields of law.²⁵² In this new environment, a well-rounded university education became more attractive, particularly after 1875 when it was recognized by the courts as sufficient to practice. Simply put, if you wished to practice locally, the courts' decision meant one could swiftly gain entry to the profession without a formal apprenticeship of any kind. All one needed was a degree from Penn Law. Unsurprisingly, shortly after this decision was announced enrollment at the law school rose swiftly, growing from fifty-nine students in 1874-1875 to one hundred and forty-one students in 1879-1880.²⁵³

As the program grew in popularity, it did not necessarily become academically more rigorous; at least not right away. While the course catalogue from 1876-1877 seemed to offer a wide-ranging and thorough course of instruction across two years of instruction,²⁵⁴

²⁴⁹ See *id.* (discussing how the District Court, the Courts of Common Pleas, and the State Supreme Court gave only slight recognition to the value of the law degrees).

²⁵⁰ CARSON, *supra* note 13, at 34.

²⁵¹ Heft, *supra* note 13, at 3.

²⁵² *Id.* at 7.

²⁵³ *Id.* at 8.

²⁵⁴ See *Catalogue of the University of Pennsylvania 1876-1877*, at 86-91 (describing the various subjects and opportunities for learning available through the law program, as well as the arrangement of the course).

this was in fact not the case. Examinations were rare and inconsistent, and classes often did not meet regularly or frequently, forcing students to seek outside tutoring to obtain knowledge on a subject purportedly covered by the curriculum.²⁵⁵ This was due in large part to the fact that very few professors were full-time instructors and instead held legal practices that commanded much of their attention.²⁵⁶

In addition, professors were compensated directly by the students. Once expenses were paid, the remaining tuition funds were simply divided among the instructors.²⁵⁷ This provided a powerful incentive to attract as many students as possible, regardless of their qualifications.²⁵⁸ The situation changed dramatically in the spring of 1889 when the trustees adopted a new system for regulating the finances between the law school and the university. The new system effectively capped the amount that individual instructors could receive from student enrollment and placed control of remaining funds in the hands of the trustees.²⁵⁹

This change decreased the incentive to attract as many students as possible and dovetailed with the increasing desire on the part of many practitioners in the latter part of the nineteenth century for greater standards in the profession.²⁶⁰ It was also concurrent with a move among the faculty to make the curriculum of the law school more rigorous so as not to be perceived as inferior to other schools of the day offering law degrees. As part of this effort, in 1887 Algernon Sydney Biddle introduced Harvard's case method of instruction at Penn Law.²⁶¹ Similarly, in 1888 Penn Law followed the trend established at other top institutions and extended its program from two to three years.²⁶² The lack of admissions standards to the law school also began to be perceived as a problem, particularly in the absence of any financial reward for large class sizes.²⁶³ No single event propelled Penn Law's transformation into a modern law

²⁵⁵ Heft, *supra* note 13, at 9.

²⁵⁶ *Id.* at 10.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 11–12; see also *Report of the Provost of the University of Pennsylvania for the Two Years Ending October 1, 1889*, at 105–106.

²⁶⁰ Heft, *supra* note 13, at 11.

²⁶¹ Lloyd, *supra* note 225, at 13–14.

²⁶² *Id.* at 13.

²⁶³ Bennett, *supra* note 50, at 35.

school more, however, than the appointment of William Draper Lewis as dean of the faculty of law at the University of Pennsylvania.

Lewis became Dean at the age of twenty-nine in 1896 with a single-minded determination to raise the standards of legal education in general, and the overall reputation of Penn Law in particular. Like many of his era, he was very concerned about raising the quality of legal practice and was convinced that this should be done through the establishment of legal education as a modern academic pursuit.²⁶⁴ While dean of the Law School from 1896-1914, Lewis began the conversation with local bar associations and legal examiners to implement a state-wide bar examination;²⁶⁵ established an entrance examination that could be waived upon the presentation of a certification of college attendance, in effect introducing the idea of a college degree as a pre-requisite to admission to the law school;²⁶⁶ established a minimum age for entrance to the law school;²⁶⁷ oversaw the construction of a new facility dedicated solely to the law school;²⁶⁸ established a full-time faculty;²⁶⁹ expanded the curriculum, both increasing the amount of course work required by students as well as increasing the variety of courses students could take;²⁷⁰ implemented the first ever attendance requirement in the department's history;²⁷¹ and oversaw the significant growth and development of the law library.²⁷² During his nineteen years of leadership, Lewis shepherded the law school at the University of Pennsylvania completely out of the era of legal apprenticeship and into the modern era of legal education.

One of Lewis' main goals was to have legal education entirely transferred out of the hands of practitioners and into the hands of

²⁶⁴ Heft, *supra* note 13, at 24.

²⁶⁵ See *id.* at 83-86 (detailing Lewis' efforts to improve the quality of the bar examination and implement a statewide standard for the exams).

²⁶⁶ *Id.* at 35, 38. Penn Law did not explicitly require a college degree for law school admission until 1916. STEVENS, *supra* note 17, at 46 n.22.

²⁶⁷ Heft, *supra* note 13, at 47.

²⁶⁸ *Id.* at 26-27.

²⁶⁹ *Id.* at 50, 99.

²⁷⁰ *Id.* at 63, 100. Among the courses he championed was the introduction of a course on legal practice, designed to blunt the rising tide of criticism that law graduates were receiving no instruction on the actual practice of law. *Id.* at 67-68. This course was the pre-cursor to clinical course work which would become ubiquitous in law schools decades later. *Id.* at 101.

²⁷¹ *Id.* at 90.

²⁷² *Id.* at 69.

law professors.²⁷³ In a report to the Provost dated January 28, 1897, he wrote that the “office of the practicing attorney, where the student was formerly initiated into the art of his future profession, and regularly examined as to his progress has become a thing of the past.”²⁷⁴ He continued:

Not one third of the reputable attorneys in the city will receive law students even on the payment of a fee. The increased office rent is partly responsible for this, but the main causes are that the title insurance and trust companies on the one hand, and typewriters on the other, which perform all the work that used to be left to the students. Where the student is received, as far as examination is concerned, he is neglected. As far as knowledge of practice, where he is permitted to assist his preceptor, which is seldom, his knowledge is always confined to the line of business in which his preceptor is engaged. . . . The law school has become a center of legal instruction for a much wider area than the city. We not only train lawyers for the city, but for the state and country at large.²⁷⁵

Clearly set forth in this statement is Lewis’ opinion that the apprenticeship model of legal education had been overtaken by the modern age; both conceptually, as Philadelphia law firms seemed unable to him to provide the necessary breadth of instruction for lawyers at the turn of the twentieth century, and practically, as other professions and advances in technology were rendering the work of apprentices superfluous.

This is not to say that Lewis believed that law should be taught on a theoretical basis alone. He maintained instead that the practical application of the law was important, but could also be delivered within the confines of a law school. It would seem that it was in this atmosphere that Penn’s graduate programs in law were founded, as

²⁷³ See generally William Draper Lewis, *American Bar Association’s Position on Legal Education – Agreements and Differences Between the Report of Committee on Which the Action of the Association was Taken and the Carnegie Foundation Report*, 8 A.B.A. J. 39–40 (1922). It is worth noting that Lewis was the author of the American Bar Association’s response to the Reed Report in 1922 which clearly sets forth his views on the importance of university legal education and its responsibility for maintaining the highest standards for the legal profession.

²⁷⁴ See *Minutes of Meeting of the Faculty of the Department of Law*, UNIV. OF PA. 45 (Jan. 28, 1897, 3:30 PM).

²⁷⁵ *Id.* at 45–46.

the timeline posted on its current website notes the year 1898 as the year “the first LL.M. degree was offered.”²⁷⁶ A closer examination of the historical record, however, indicates that this is not entirely correct.

The year 1898 appears at least nine years too late in light of an article published by former Dean of Penn Law, C. Stuart Patterson, in 1889. Dean Patterson notes the existence of a “post-graduate course of study, covering two years and involving a philosophical inquiry into the history and sources of the law.”²⁷⁷ According to Patterson, graduates of this decidedly scholarly sounding course “received the degree of Master of Laws.”²⁷⁸ Another researcher noted the following:

In 1896 William Draper Lewis was named Dean of the Faculty at the age of twenty-nine. He immediately took control of the school. The post-graduate course which had been Professor Parsons’ responsibility alone from its inception in 1883 was suspended and not re-established until 1907.²⁷⁹

This suspension of the graduate law program is most likely due to the fact that that the LL.B. program had recently been expanded from two years to three, thereby rendering the extra year superfluous to some degree.²⁸⁰ In any event, this pushes the inception of Penn Law’s LL.M. Program back even further, to 1883, where it appears to have been under the charge of Professor of Law James Parsons.

James Parsons had been appointed in 1874, joining the faculty as the new chair in the Law of Personal Relations and Personal Property.²⁸¹ Regardless of his specific area of expertise, Parsons was a firm believer in the idea that law was a science that needed to be mastered like any other traditional academic discipline of the day. In his introductory lecture in 1875, Parsons characterized law as a “science made up of all other sciences, the science of sciences!”²⁸² A

²⁷⁶ PENN LAW, *supra* note 11.

²⁷⁷ Patterson, *supra* note 13, at 107.

²⁷⁸ *Id.*

²⁷⁹ Lloyd, *supra* note 225, at 15.

²⁸⁰ See Hupper, *supra* note 78, at 17.

²⁸¹ See CARSON, *supra* note 13, at 33.

²⁸² See James Parsons, *The Introductory Lecture Delivered at The University of Pennsylvania by Professor James Parsons on October 1, 1875 at The Opening of The Annual Course In The Law Department*, LAW AS SCIENCE 3 (Oct. 1, 1875) (transcript available with the University of Pennsylvania Law School Archives).

law student might wonder, Parsons continued, “why he is called upon to admire the middle ages and to sigh over the decay of feudalism, when they are both as dead as Moses.”²⁸³ Answering his own question, Parsons opined that the nature of the common law with its reliance on precedent rendered it necessary that the American lawyer, and therefore the student of American law, “must survey the entire field of legal history, and make his argument square with every case, unless relieved from its binding force by virtue of a statute.”²⁸⁴

It comes as little surprise then that in the Annual Report to the Provost for 1883, the following description appears under the heading “Department of Law, Professor James Parsons”:

The graduate course of law in the Department of Philosophy is designed to supplement the practical course of instruction furnished by the Law Department. The higher branches of legal education could not be crowded into the legal course of two years, even if it were desirable to force all students to pursue studies which are not indispensable to their success as practitioners. A knowledge of the development and of the metaphysics of the law is not made part of the ordinary curriculum, which already compresses the practical essentials of legal education into the limited period devoted to preparation for admission to the bar, but is reserved for an after-course, in order to carry on only such students as have acquired the faculty of legal research and a disposition to master the theory of law and comparative jurisprudence.²⁸⁵

As noted by Professor Parsons, the University of Pennsylvania’s graduate law program was actually initially housed within the Department of Philosophy. A clearer distinction from coursework designed to prepare students for legal practice can hardly be imagined.

The timing of the establishment of a graduate program in Law at Penn is supported by another researcher who states without citation: “When the School’s first Post Graduate Course in Law was established by James Parsons in 1883, it arose more from a diffuse sense that Penn Law *ought* to have such a program than from any

²⁸³ *Id.* at 4.

²⁸⁴ *Id.*

²⁸⁵ UNIVERSITY OF PENNSYLVANIA ANNUAL REPORTS OF THE PROVOST AND TREASURER FOR THE YEAR ENDING OCTOBER 1, 1883, at 56. [hereinafter PROVOST 1883]

expressed need.”²⁸⁶ This would seem to indicate that a graduate program at Penn Law was born out of a sense, by some, that something was lacking in legal education at the time, and the degree was created at that institution as one way of addressing this shortcoming. Given the description of the degree provided by Patterson, as well as that contained in the 1883 Report of the Provost and Treasurer, it hardly seems a great leap to assume at least part of the motivation behind the establishment of this program was a desire to offer a path for those wishing to pursue a more academic inquiry into the law. Indeed, the Provost and Treasurer’s Report explicitly noted that the degree is designed for those who wanted to go beyond the “practical essentials of legal education” in order to “master the theory of law and comparative jurisprudence.”²⁸⁷

Further, in his description of the new post graduate program in the catalogue for the University of Pennsylvania from 1884-1885, Parsons describes the program as aiming “to broaden and deepen the foundation of legal education.”²⁸⁸ He continues: “The method adopted is a comparison of the systems of law which obtain in different countries, — the Roman, or the Civil Law, which is the basis of the Continental law of Europe, not to speak of other countries, and the Common Law, which serves as the groundwork of the law for the English race.”²⁸⁹ Among the reasons for offering the course, Parsons included: “The intercourse which now prevails between all parts of the world brings the citizens of different countries into contact with each other, and legal controversies arise out of the relation established.”²⁹⁰ In addition to this practical application of the knowledge to be obtained through this course of study, in his opinion there was:

little need to emphasize the importance of studying the Common law in its sources and in its history. The effect of taking Lord Coke [a Seventeenth Century English jurist] as a starting-point and of neglecting the earlier periods of development is felt to have been a fatal error, which has deadened

²⁸⁶ Davis, *supra* note 13, at 129.

²⁸⁷ See Provost 1883, *supra* note 285.

²⁸⁸ See The University of Pennsylvania, *Catalogue and Announcements 1884-1885*, at 112.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

the system. The modern effort has been to retrieve the mistake, and, by returning through history to the primeval structure of society, to reinfuse life into the law which has been isolated from its sources. . . . The legal thought and wealth of experience epitomized in the Anglo-Saxon law and extended through the Feudal system is an untold treasure. To utilize it is to revitalize the common law.²⁹¹

This two-year course of study involved a first year dedicated to the study Roman law followed by another devoted to the study of Common law beginning with Anglo-Saxon law and the Feudal system.²⁹²

Somewhat unsurprisingly, this less than riveting sounding course of study was awarded for the first time in 1886 to just one student.²⁹³ The year after its founding the program appeared in the university catalogue in the Philosophy department instead of the Law department, where it remained until 1890 when it switched back to the Law department. There it remained until in the 1896-1897 catalogue wherein the following cryptic note appeared: "Instruction in this course is suspended during the current year, pending certain modifications in the system. Announcement of these will be made in due season."²⁹⁴ This announcement was repeated in the in the catalogue for the following year, with the degree disappearing altogether thereafter until reappearing in the 1907-1908 Catalogue in the Law Department listed as "The Degree of Master of Law" over a terse description mandating simply that students remain in the program at least a year and produce a thesis "acceptable to the faculty."²⁹⁵ Clearly the University of Pennsylvania's initial foray into graduate legal education was not a smooth one, and appears to have come to life almost entirely through the vision and persistence of James Parsons. Nowhere is this better demonstrated than in the annual report of the Provost and Treasurer in the fall of 1885, which included the following description of the program:

²⁹¹ *Id.* at 112-13.

²⁹² *Id.* at 113.

²⁹³ See UNIVERSITY OF PENNSYLVANIA COMMENCEMENT NOTES (1986) ("The Master of Laws degree . . . was awarded for the first time at the Commencement of 1886 and, in this first instance, to just one graduate.").

²⁹⁴ See The University of Pennsylvania, *Catalogue and Announcements 1896-1897*, at 213.

²⁹⁵ CATALOGUE OF THE UNIVERSITY OF PENNSYLVANIA 1907-1908, at 359.

In order to afford an opportunity to graduates of this or other Law Schools, who wish to pursue an advanced study of the Roman Law and of the Common Law, a Post-Graduate course extending over two years, was established in 1883 under the charge of Prof. James Parsons. Classes of limited size have entered upon this valuable course under the immediate supervision of that Professor, to whose disinterested zeal in the cause of higher legal education the establishment of this course is due.²⁹⁶

Identifying the inception of the degree is certainly important in telling the story of Penn Law's graduate programs; however, by itself it tells us nothing with respect to how the degree was perceived. Some insight into how the degree was regarded during this period can be found in the Provost's Report eighteen years after its founding following the death of James Parsons. In the Annual Report for the academic year 1899 to 1900, his passing is noted by the Provost, stating:

For twenty-four years Professor Parsons held the chair of Commercial Law and Contracts in the Law Department, and was noted in the Faculty as one whose studies leaned rather to the fundamental and original principles of Law. So earnest was he in the desire to lead his students into these studies that he induced many to take them up in what was practically seminary work, to which he was willing to devote any amount of time and care. In the course of time this special work was recognized, not altogether wisely, as a course by itself, and for some years rewarded by the degree of Master of Laws.²⁹⁷

Without reflecting on the methods that might have been used to "induce" these hapless students, it is certainly worth noting that in the eyes of Penn's Provost at the turn of the twentieth century, the idea of a graduate course in law was so unpalatable that he felt compelled to note its inadvisability in the Eulogy of its founder. There seems little question then that the fledgling graduate law degree at Penn was not viewed favorably in all quarters.

²⁹⁶ ANNUAL REPORTS OF PROVOST AND TREASURER OF THE UNIVERSITY OF PENNSYLVANIA FOR THE YEAR ENDING OCTOBER 1, 1885, at 22.

²⁹⁷ UNIVERSITY OF PENNSYLVANIA ANNUAL REPORT OF THE PROVOST TO THE BOARD OF TRUSTEES FROM SEPTEMBER 1, 1899, TO SEPTEMBER 1, 1900, at 5.

Further evidence of this can be found in the minutes to the Trustees of the University from December 1894 in which the Committee on the Department of Philosophy requested that the program be discontinued, stating that the “course given as a Post-graduate course in Law, it being professional in character and given under circumstances and in surroundings that are professional, be not admitted as either a major or minor course in the Department of Philosophy.”²⁹⁸ Doubtless this is the reason the degree vanished from the university catalogues shortly thereafter. Ironically it appears that the Philosophy faculty objected to a degree that had been placed in its purview in order to distinguish it from the practical course work being undertaken in pursuit of the LL.B., on the grounds that it was somehow insufficiently scholarly, or in their words “professional in character.” In any event, graduate programs at Penn Law appear to have had a decidedly precarious existence in the years following their inception.

This rather insecure beginning is supported by historian Robert Stevens, who in discussing the ABA’s urge to “upgrade” the profession in the latter part of the 19th Century stated: “The University of Pennsylvania tried, as it was to do so often in later generations, to cover all its bases. It was close the profession, yet it was one of the earliest schools to offer degrees beyond the LL.B.”²⁹⁹ This would seem to indicate a sense, at least on the part of Stevens, that “degrees beyond the LL.B.” (i.e. graduate law degrees), were not something pushed for by practitioners when they first appeared and may have even been opposed by them, but were something favored by at least some legal academics. In other words, Penn Law attempted to “cover all its bases” by ensuring that it had opportunities for those seeking a more scholarly study of legal principles.

Having been discontinued in 1894 by the Philosophy Committee, by March 6, 1900, the Law Committee recommended that the Trustees empower the faculty of law to resurrect the degree within the law school in a course leading to the Master of Laws, once the Provost was satisfied that the Law Department was in a financial condition to establish such a course.³⁰⁰ Approval of this request was granted and Penn Law’s graduate course was reestablished in 1906

²⁹⁸ See Minutes of the Trustees of the University of Pennsylvania, December 4, 1894, University of Pennsylvania Archives Vol. A. 13, at 248.

²⁹⁹ Stevens, *supra* note 17, at 74.

³⁰⁰ Minutes of the Trustees of the University of Pennsylvania, March 6, 1900, University of Pennsylvania Archives Vol. A. 14, at 11.

and began admitting student in the 1907-1908 academic year. Why then did it re-emerge? A clue can be found in William Draper Lewis' explanation to the Provost in his report for the year 1898-1899. There Lewis notes that while the law school was not currently offering graduate instruction in law, "[a]s a step which may ultimately lead to the regular establishment of such a course . . . [the law school] requested [particular faculty] to prepare for the session of 1900 and 1901 seminar courses on Roman Law and the History of the Common Law."³⁰¹ Both of these courses lie squarely within the academic, as opposed to the practical, realm of legal study. Specifically identifying them as an attempt to offer something akin to graduate studies in the law would seem to indicate that, at least in the mind of Lewis, graduate legal studies at Penn Law would have a more scholarly focus than the required coursework for the LL.B.

In his Annual Report to the Board of Trustees for 1906-1907, the Provost represented that the Faculty of Law explicitly rejected the idea of the graduate course as being simply an additional year of legal coursework in either modern or ancient Roman or Greek Law.³⁰² Instead they determined that it:

should consist in work by the student on the original materials of the law, together with his orderly expression of the result of his researches. . . [I]t should not consist in attendance on lectures but rather, that the graduate student, under the guidance of a member or members of the Faculty, should labor over the raw material of the law with a view of increasing the stock of human knowledge. [It was designed for] the "true lover of the law" attempt[ting] to "ascertain and accurately state the principles of the law, trace their development in the past, or ascertain the lines on which they may wisely be reformed."³⁰³

By 1907-1908, the University's Law School Catalogue set forth the requirements for its "Graduate Course" stating that it was open to anyone with a Bachelor of Laws from Penn Law or an equivalent degree from a law school belonging to the Association of American

³⁰¹ University of Pennsylvania Annual Report of the Provost to the Board of Trustees from September 1898, to September 1, 1899, at 105.

³⁰² See University of Pennsylvania Annual Report of the Provost to the Board of Trustees from September 1, 1906 to September 1, 1907, at 130.

³⁰³ *Id.* at 131.

Law Schools.³⁰⁴ To receive the degree of Master of Law, students must remain in the program for at least one year and “under the direction of a member . . . of the Faculty” must write “a work worthy of being published under the auspices of the Law School of the University.”³⁰⁵

This second iteration of the Master of Law degree, it seems clear came amid the late nineteenth century push in American legal education in general, and at Penn Law in particular, for greater standards within the profession and its concurrent effort by those in the academy for a more scholarly approach to the study of Law. Clearly the recent criticism of graduate law degrees is not a new phenomenon but has, at least at Penn Law, been part of the story since they were first created. The skepticism captured in the Provost’s Report in 1900 was no doubt shared by others within the institution and doubtless contributed to its precarious existence in its early days. It also does not appear to have been a popular degree among students during this period,³⁰⁶ and while perhaps technically able to be conferred, was not actively pursued by many students for a number of years after it was introduced. As noted above this was an experience shared by other law schools of the day offering these programs. The somewhat ephemeral nature of Penn Law’s graduate law degree in its early days may also be attributed to the fluidity and uncertainty that co-existed with a sense of innovation and change throughout American higher education and American society in general in the latter half of the Nineteenth century.³⁰⁷ In any event, while it has undergone considerable changes, having been re-established in 1906-1907 the LL.M. degree at Penn Law has remained a part of its curriculum to the present day.

³⁰⁴ See UNIVERSITY OF PENNSYLVANIA LAW SCHOOL BULLETIN, 1907-08; see also Minutes of the Trustees of the University of Pennsylvania Oct. 16, 1907, University of Pennsylvania Archives Vol. A 14, at 516 (approving the language in the catalogue).

³⁰⁵ *Id.*

³⁰⁶ For example, the course catalogue from the academic year 1889-90 notes the existence of a graduate program stating: “The degree of Master of Laws is granted in the post-graduate course in Law.” However, none of the students listed among the matriculating students for that year appear to have participated in the program. University of Pennsylvania, *Catalogue and Announcements 1889-90*, at 32.

³⁰⁷ THELIN, *supra* note 51, at 151.

5. CONCLUSION

The market for legal services has undergone substantial changes in recent years, driven primarily by the collapse of the financial services market in 2008. The ensuing recession caused an enormous reduction in the need for new lawyers, particularly at the top of the market.³⁰⁸ As the debate rages on how best to educate lawyers in the current environment, an understanding of the genesis of graduate law programs may help inform the debate currently taking place over their value. That is not to say that anything discovered by this inquiry will go any distance toward satisfying the objections of those who feel law schools are somehow defrauding those who pursue many of these degrees. However, it seems clear that these programs were established for reasons other than making graduates more attractive in the traditional legal marketplace. They were born out of a sense that law schools had responsibilities beyond merely training students in the practical necessities of lawyering. They were a different kind of degree, designed to push the boundaries of current legal knowledge and prepare students interested in pursuing careers in academia, politics, philosophy or related professions.

Moreover, it seems likely that the recent storm of criticism over graduate legal programs is simply the latest iteration of a recurring debate linked to the very nature of "law" itself as an educational pursuit. For some practitioners it is a trade, while for others it is a public calling. For law professors it is often a scholarly enterprise much like philosophy or political science, and for students it can be both an opportunity to take up the fight for civil rights or against poverty, and/or a gateway to a professional career in the law or elsewhere with its attendant prospects for social advancement and economic stability. There has never been a consensus among practitioners, academics or outside observers on how best to train lawyers for any of these pursuits. Graduate law programs were born out of an attempt to compromise between one or more of these factions, and may straddle one or more them to this day. Labeling graduate legal programs as useless or a waste of time and/or money, not only infantilizes consumers of this type of education, it ignores the context out of which they arose and incorrectly lumps them into one cate-

³⁰⁸ See, e.g., Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 652 (2012).

gory with a perceived single purpose (i.e. to make holders of the degree more attractive to traditional legal employers). The utility of the degree can vary widely depending on the type of LL.M. obtained and the reason for seeking it and there exist numerous LL.M. graduates who are satisfied with their experience in these programs.³⁰⁹

Since their establishment in the latter part of the nineteenth century, the number and type of graduate legal education programs has exploded, with many bearing no resemblance to one another. Nonetheless, it is important that we gain a better understanding of where these programs came from. As Alexis de Tocqueville famously noted over a century and a half ago: “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” The vital role attorneys play in American society, as well as the enormous commitment in time and resources required of law students demands that serious consideration be given to how they are trained. It is therefore important that law school policy makers have a firm understanding of the nature and utility of the graduate programs they are offering. At the very least, a critical self-examination might reveal the best balance between the familiar calls for scholarly inquiry on the one hand and practically based professional training on the other.

³⁰⁹ See, e.g., John Treu, *Should You Go for an LLM Degree After Law School? It Depends*, FULLER PROFESSIONAL EDUCATION LAW BLOG (Jan. 16, 2014), <http://fulleredu.com/lawblog/should-you-go-for-an-llm-degree-after-law-school-it-depends/> [<https://perma.cc/2V5R-K7QU>] (noting the difference between seeking an LL.M. degree for specialized legal knowledge that can't be gained in the workplace versus seeking to improve one's job prospects or erase a poor J.D. academic record versus obtaining a license to practice in a new jurisdiction); Michelle Weyenberg, *How Beneficial is an American LL.M. Degree?*, THE NATIONAL JURIST, Nov. 2008, at 30 (quoting an American law school administrator saying “An LL.M. is becoming virtually indispensable for foreign students . . . It's a credential that is so valuable back home. It may not be a prerequisite for a top job, but it is something that governments and other entities look to as an important qualification”); Rebecca Larsen & Michelle Weyenberg, *Where are they Now?*, THE NATIONAL JURIST: GRADUATE ANNUAL 2013-2014, at 8 (highlighting American LL.M. graduates who valued their degrees twelve years later).