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# The Rise of an Academic Doctorate in Law: Origins Through World War II

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## THE RISE OF AN ACADEMIC DOCTORATE IN LAW: ORIGINS THROUGH WORLD WAR II

*Gail J. Hupper\**

*The rise of the academic doctorate in law (a degree most U.S. scholars have either ignored or deprecated) is an important chapter in the story of law's coming of age as an academic discipline in the first half of the 20<sup>th</sup> century. Drawing in part on continental European models, the architects of the degree shaped it into a vehicle for training a new class of law teachers, producing research into the nature and functioning of the legal system, and spreading emerging conceptions of law to a broader national audience. Notable among these conceptions were the "sociological jurisprudence" of Harvard's Roscoe Pound and the Legal Realism of Columbia and Yale. This "missionary" function, however, was in tension with the implication of advanced scholarly work inherent in the degree's name, and ultimately helped set the stage for the doctorate's decline after World War II.*

*While today it is much more common for U.S. law teachers to have pursued doctoral study in a discipline **other than** law, a U.S. doctorate in law is an increasingly attractive credential for foreign-trained lawyers who hope to teach in their home countries. This article is the first installment of a larger study that traces how U.S. legal education borrowed practices from overseas to create the degree, digested and modified them to suit the needs of a rapidly evolving legal system, then redirected the flow of ideas elsewhere. As such, the study is a story of the coming of age of U.S. legal education not just at home, but on a world stage.*

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\* Director, LL.M. and International Programs, Boston College Law School. Most of the work for this article was done while the author was a Visiting Scholar at Harvard Law School between 2003 and 2006. Warmest thanks go to Bill Alford, Dan Coquillette, Jane Bestor, Larry Cunningham, Frank Garcia, Bruce Kimball and the participants in the the Harvard Law School History Project for their support and for comments on previous drafts of this article. The author also wishes to thank the staffs of the archival collections at Columbia University, George Washington University, Harvard University, the University of Michigan, New York University, the University of Wisconsin and Yale University for making the research for this article possible.

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### I. Introduction

The U.S. academic doctorate in law – commonly called the S.J.D. or J.S.D. degree -- is a strange phenomenon. Many legal academics in this country are unaware of its existence,<sup>1</sup> Unlike the Ph.D. degree in the arts and sciences disciplines, it is not a requirement for a university-level teaching position. Indeed, fewer than 5% of those teaching in U.S. law schools today hold the degree. By contrast, in countries like Israel, Taiwan and Korea, the story is very different. Close to half of the law faculty of

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<sup>1</sup> Moreover, the most extensive published treatment of the degree has deprecated it. See Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law* 8 S. CAL. INTERDISC. L. J. 1 (1998-1999). Other discussions of the degree include Henry D. Gabriel, *Graduate Legal Education: An Appraisal*, 30 S. TEX. L. REV. 129, 159-62 (1990); Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47 (1999).

Israel's Tel Aviv University hold the degree.<sup>2</sup> So do close to 25% of the law faculty at both National Taiwan University in Taiwan and Seoul National University in Korea.<sup>3</sup>

Moreover, the situation is one of divergence rather than convergence. Fifty years ago, the situation in the U.S. was comparable to what it is in some countries today. During the 1950s, as much as 20% of Harvard Law School's faculty held the degree, as did some 25% of Yale's.<sup>4</sup> Today, by contrast, a comparable proportion hold a Ph.D. degree in *another* discipline – i.e., economics, political science, etc. In the 1950s, Tel Aviv University did not yet exist. The faculty at National Taiwan University and Seoul National University held doctorates in law, but many more had earned those degrees in either their home countries or in Germany.

Finally, more and more U.S. law schools are now offering the degree. The twenty or so that offered the degree as of 1990 included the country's most prestigious schools, and most had established their programs before or shortly after World War II.<sup>5</sup> By 2006, the number of schools offering the degree had increased to close to 35, and their ranks included schools like Pace, Widener and Golden Gate Universities.<sup>6</sup> The

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<sup>2</sup> Tel Aviv University, Buchman Faculty of Law, Members, <http://www.tau.ac.il/law/member.htm> (last visited March 7, 2007).

<sup>3</sup> National Taiwan University, Faculty of Law, Full Time Faculty, Professors, [http://www.law.ntu.edu.tw/english/faculty/yh\\_03full\\_time\\_professors.htm](http://www.law.ntu.edu.tw/english/faculty/yh_03full_time_professors.htm) (last visited March 7, 2007); National Taiwan University, Faculty of Law, Full Time Faculty, Associate Professors, [http://www.law.ntu.edu.tw/english/faculty/yh\\_03full\\_time\\_associate\\_professors.htm](http://www.law.ntu.edu.tw/english/faculty/yh_03full_time_associate_professors.htm) (last visited March 7, 2007); National Taiwan University, Faculty of Law, Full Time Faculty, Assistant Professors, [http://www.law.ntu.edu.tw/english/faculty/yh\\_03full\\_time\\_assistant\\_professors.htm](http://www.law.ntu.edu.tw/english/faculty/yh_03full_time_assistant_professors.htm) (last visited March 7, 2007); Seoul National University, College of Law, Faculty, <http://law.snu.ac.kr/English/inform/inform1.asp> (last visited April 25, 2005).

<sup>4</sup> See Harvard University, *The Law School Including Courses of Instruction for the Academic Year 1950-51*, OFFICIAL REG. HARV. U., April 1950, at 3-4; Yale University, *Law School For the Academic Year 1956-57*, BULL. YALE U. 1956, at 6-7.

<sup>5</sup> The following schools had programs before 1990: University of California/Berkeley, University of Chicago, Columbia University, Cornell University, Duke University, George Washington University, Georgetown University, Harvard University, University of Illinois at Champaign/Urbana, University of Michigan, New York University, Northwestern University, University of Pennsylvania, Southern Methodist University, Stanford University, Tulane University, University of Virginia, Washington University in St. Louis, University of Wisconsin/Madison, and Yale University. See Gabriel, *supra* note 1; GARY A. MUNNEKE, BARRON'S GUIDE TO LAW SCHOOLS (9<sup>TH</sup> ED. 1990); Earl C. Arnold et al., *Committee on Advanced Academic and Professional Degrees*, HAND BOOK ASS'N AM. L. SCH. & PROC. 34<sup>TH</sup> ANN. MEETING 302, 307-08 n. 39, 41 (1936) (hereinafter 1936 AALS Report). In addition, by 1990 the University of Washington Law School was offering a Ph.D. in Asian and Comparative Law, and Indiana University at Bloomington Law School was offering an interdisciplinary Ph.D. in law and the social sciences. See Munneke, *supra*.

<sup>6</sup> The following schools established programs after 1990: American University/Washington College of Law, University of Arizona, University of California at Los Angeles, University of Florida, Golden Gate University, Indiana University at Bloomington, McGeorge/University of the Pacific, Loyola University of Chicago, Notre Dame University, Pace

number of degrees being conferred is still very small (according to the American Bar Association, only 60 doctoral degrees were awarded in 2005),<sup>7</sup> but it has grown considerably in the past 25 years.<sup>8</sup> And the vast majority of students seeking the degree received their initial legal training in countries other than the U.S.

This article is part of a larger study that addresses two primary questions: Why is it that the U.S. doctorate in law is a degree primarily for foreign-trained students? What are its prospects for the future? The study addresses those questions from the perspective of the seven schools that have conferred the most doctorates during the degree's close to 100 years in existence: Columbia, George Washington, Harvard, Michigan, NYU, Wisconsin and Yale. All seven schools established their doctoral programs before World War II to train American law graduates for careers in the United States – in most cases as legal academics. By the 1970s, program enrollment in all but two of the schools consisted primarily of international students, and by 1990 enrollment at all seven consisted primarily of international students. This article will trace how and why the programs were established during the first half of the twentieth century, leaving to future publications the story of the programs' shift in orientation after World War II.

Briefly stated, the rise of U.S. doctoral legal education is a chapter in the story of the coming of age of law study as an academic discipline – something that takes place in universities rather than law offices. Beginning in the late 1800s, a few university law schools in the U.S. began experimenting with three ideas imported from continental Europe. The first was the idea of law as a “science” – a system of principles that could logically be deployed in relation to each other and external phenomena, and as such a field of study that belonged in a university. The second was the idea of the full-time law professor – the normal practice in continental Europe, but unusual in the U.S. In the U.S., even university law schools were staffed by people who were practitioners first, and teachers second. The third was the idea of advanced study for individuals who hoped to

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University, University of Pittsburgh, and Widener University. Compare Munneke, *supra* note 5, with LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2007 ed.) (hereinafter 2007 Official Guide); see also Widener University School of Law, Graduate Legal Admissions, <http://www.law.widener.edu/admissions/graduate.shtml> (last visited March 7, 2007); University of Pittsburgh School of Law, Academics <http://www.law.pitt.edu/academics/programs/cilejsdprogram.php> (last visited March 7 2007).

<sup>7</sup> See 2007 Official Guide, *supra* note 5, at 832.

<sup>8</sup> The following historical data on number of degrees conferred serves as a comparison: 1980: 19; 1985: 29; 1990: 34; 1995: 39; 2001: 59. See CARL A. AUERBACH, HISTORICAL STATISTICS OF LEGAL EDUCATION 44 (1997) (as to numbers prior to 2001); LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 816 (2003 ed.) (as to 2001)

become legal scholars, much as Ph.D. degrees were evolving for individuals planning to become scholars in other disciplines. 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.

In this context, the doctorate functioned as a vehicle for training a new class of full-time law teachers and for producing research into the nature and functioning of the legal system. As part of this, the doctorate also performed a kind of “missionary” function – i.e., it helped spread the schools’ (and certain faculty members’) conceptions of law to a broader national audience. The original sponsor of this view of the doctorate was Roscoe Pound, who viewed Harvard’s degree as a vehicle for spreading his vision of a “sociological jurisprudence.”<sup>9</sup> By the mid-1920s the degree was functioning as a laboratory for Legal Realist experiments at Columbia and Yale. More generally, it was a mechanism for training prospective teachers in the burgeoning field of public law, and a way of promoting a more jurisprudential understanding of law in general.

Like any educational enterprise, however, the doctorate was not simply a matter of conveying knowledge; it necessarily came with practical entanglements. Specifically, the doctorate took recent law graduates and young law teachers from schools around the country, offered them coursework that generally was not available to LL.B. students, and required them to complete a research project that became more and more extensive as time went on. The inherent limitations of some of that coursework (notably joint seminars between the law schools and social science departments at Columbia and Yale) have been well documented.<sup>10</sup> However, two other points emerge from a focus on the doctorate as the locus of instruction. First, despite some faculty members’ ambitions for the degree, it was never more than a sideline in an enterprise devoted to professional education. Second, the missionary idea – which implied enrolling students from the

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<sup>9</sup> See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1911-12); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912) (hereinafter collectively Pound, *Sociological Jurisprudence*).

<sup>10</sup> See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979) (hereinafter Schlegel I); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980) (hereinafter Schlegel II); John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: the Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985) (hereinafter Schlegel III); LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986); Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 350-61 (1951) (hereinafter Currie I); Brainerd Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. 1 (1955) (hereinafter Currie II).

educational hinterlands -- was in tension with a *doctoral* degree's implication of advanced scholarly work.

At Harvard, Yale and Columbia, matters came to a head in the 1930s, and the missionary idea began to recede in the face of a more scholarly view of the degree. The idea did not completely disappear, however. In 1943, for example, a committee of the Association of American Law Schools (AALS), made up of faculty from Columbia, Harvard, Michigan, NYU and Yale, would maintain that the degree should both encourage a view of law as social engineering and raise the standard of legal education elsewhere in the country.<sup>11</sup> In addition, the sheer number of law teachers around the country who held the degree ensured its propagation in a second generation of schools – among them Wisconsin and George Washington. With these new degrees came both the ideas and the practicalities that had shaped their predecessors.

That, of course, was part of the problem. As I will argue in the remainder of this study, the doctorate as it had then evolved was ill suited to the needs of U.S. legal education in the postwar period. By the 1970s, the basic U.S. law degree (by then renamed “J.D.”) was quite clearly a graduate degree, and the academic doctorate had passed from view as a teacher training vehicle for the U.S. market.<sup>12</sup> However, a new horizon for the degree began to emerge after the war: the exploding field of international legal studies. As the doctorate slowly became part of the schools' international portfolios, so did its goals: training teachers, producing research, and a new “missionary” function. Furthering those goals was much more complicated in the international arena than in the domestic one, and the period from the end of World War II through the 1960s was largely one of fits, starts, and abortive experiments. By the 1970s the missionary function had largely won out, and students from developing countries represented the lion's share of those who earned the degree. That pattern

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<sup>11</sup> See Frederick J. de Sloovere et al., *Committee on Graduate Work in Law*, HANDBOOK ASS'N AM. L. SCH. 148 (1943) (hereinafter 1943 AALS Report).

<sup>12</sup> Specifically, one of the major obstacles the degree faced was the fact that U.S. legal education was viewed primarily as training for a profession. Thus schools remained interested in hiring faculty who had practice experience, and prospective teachers would have a choice between pursuing graduate work and gaining practice experience (which was more lucrative). U.S. legal education is not simply professional training, however, and I argue that the pure law doctorate was out of step with two important developments in postwar legal education, *viewed purely as an academic discipline*. The first was the growing recognition that the basic law degree (originally called “LL.B.” and subsequently renamed “J.D.”) was itself a graduate degree, and that it therefore could support advanced work of a kind originally reserved for doctoral students. The second was growing interest in interdisciplinary legal scholarship, which was best supported by work in disciplines other than law. See Gail J. Hupper, *The Rise, Fall and Rise of an Academic Doctorate in Law: A Case Study of a Legal Transplant Part I* (Draft of August 21, 2006) (unpublished manuscript on file with the author).

began to change only after a new cycle of international exuberance took hold in the 1990s.<sup>13</sup>

The initial impetus for this study was an intuition that, as of the early 2000s, the U.S. doctorate in law is playing an increasingly important role internationally. In its current form, the study is intended as a contribution to two bodies of literature. The first is literature on the history of legal education. In particular, the study explores the ways in which the doctorate (a degree most authors have viewed as marginal) has helped shape important developments in American legal thought. The second is literature on the processes by which norms from one legal system are incorporated into another – so-called “legal transplants.” As the above discussion suggests, the history of the U.S. doctorate in law is partly a story of how U.S. legal education borrowed practices from continental European legal education, then digested and modified them to suit the needs of a rapidly evolving legal system. It is also a story of how, after World War II, U.S. law schools redirected the flow of transplants elsewhere. The particular contribution of this study is an examination of how the academic doctorate – itself a kind of educational transplant – has functioned as a vehicle for the transplantation of legal ideas and legal norms.

## II. The Rise of an Academic Doctorate in Law

The development of the U.S. academic doctorate in law was closely tied to the development of legal education in the U.S. after the Civil War. More specifically, it was closely related to the development of today’s model of legal education: i.e., a three-year degree, done in a university, by people who already have a college degree in another discipline. Prior to the Civil War, the predominant model of legal education was apprenticeships in law offices. There were also a number of independent law schools run by practitioners (commonly called “proprietary schools”), some of which were loosely affiliated with universities but most of which were not. None of these schools required a prior college degree, and many did not require even a high school diploma. During the latter part of the 19<sup>th</sup> century, a small group of eastern schools started a movement away from this model. It is at this time that postgraduate university education in law began to develop.<sup>14</sup>

The growth of university legal education seems to have been fueled by a combination of factors: the demand for lawyers able to handle the

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<sup>13</sup> See Gail J. Hupper, *The Rise, Fall and Rise of an Academic Doctorate in Law: A Case Study of a Legal Transplant Part II* (Draft of December 3, 2006) (unpublished manuscript on file with the author)

<sup>14</sup> My discussion of the history of legal education in general draws heavily on Stevens, *supra* note 10.



increasingly complex legal needs of a rapidly industrializing society; the emergence of a professional class that wished to identify itself as an elite;<sup>15</sup> and the rise of the research university in the U.S. There also seems to have been a resurgence of the idea of university legal training as training for citizenship more generally.<sup>16</sup> None of these factors in isolation necessarily required universities to take over professional legal education – for example, the demand for better trained lawyers arguably could have been satisfied by the proprietary schools, as long as bar admissions requirements were toughened at the same time. However, working together the factors produced a potent dynamic.

One of the most durable elements of the dynamic was the tension between legal education conceived as training for practicing a profession, versus legal education conceived as an academic discipline. The prior model of legal education in the U.S. was very much training for a profession, and (notwithstanding Tocqueville’s comments about lawyers as a “natural aristocracy”) quite a motley one at that. However, the involvement of universities in the new model made the emergence of a more academic conception almost inevitable. What clinched this was the fact that the university presidents of the late 1800s were looking to the universities of continental Europe for insights as to how to mold their own institutions. In continental European universities, law was one of the primary faculties, and law was taught as a “science”, not a profession.

The extent to which the emerging university law schools drew on the continental model is subject to debate. In many ways, what the university schools did was simply to respond to calls for a better trained legal elite in the face of competition from the proprietary schools. However, echoes of the continental approach are readily apparent in three areas important to this project: (i) the idea of law as a “science”; (ii) full-time legal scholars for whom teaching is but one part of an entire professional role; and (iii) the idea of advanced study by individuals planning to become legal scholars. These features not only had a major impact on mainstream legal education, but also fueled the creation of doctoral degrees.

#### **A. Background: the rise of university legal education**

Prior to the Civil War, American universities existed essentially as liberal arts colleges. Often run by ministers, these institutions viewed their mission as training students for moral citizenship rather than imparting particular knowledge. The curriculum was a classical one: Latin, Greek,

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<sup>15</sup> This had a sinister side, as established native-born lawyers worked to differentiate themselves from the waves of recent immigrants seeking advancement. *See id.*; JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

<sup>16</sup> This was a Jeffersonian idea that was repressed in the wake of Jacksonian democracy. *See Stevens, supra* note 10, at 4-5; Currie I, *supra* note 10.

mathematics, and moral philosophy. In general, the schools conferred only bachelor's degrees, and did so through a very small number of departments.<sup>17</sup> A few universities had law schools attached to them, but the affiliations were quite loose and the law schools were essentially indistinguishable from independent proprietary schools.<sup>18</sup>

The rapid wave of industrialization, scientific discovery and professionalization after the Civil War began to change the liberal arts model. There was a growing sentiment that this model was not sufficient to support either the pursuit of abstract research or the roles citizens would be filling in a changing society. In addition, scientific discovery meant that there was more and more knowledge to communicate, and more and more fields came to be viewed as within the purview of academic study. A few universities installed academics (often scientists) rather than ministers as Presidents in the latter half of the nineteenth century with the mission of overhauling their charges accordingly.<sup>19</sup> Others, such as Stanford, Cornell and Chicago, were established during the period with a similarly broad view of the roles they should play.

Several of these new Presidents, including Charles Eliot of Harvard, Andrew Dixon White of Cornell, and William Rainey Harper of Chicago,<sup>20</sup> looked to continental models for inspiration. Eliot, who became President of Harvard in 1869, was one of the most influential of the group. Eliot was a chemist who had taught at Harvard before the Civil War; according to one source, his classes were the first at Harvard to include actual laboratory experimentation. He left Harvard in 1863 to travel to Europe and study modes of education there, particularly in France and Germany. He apparently was quite impressed by the way that the sciences were taught there; in particular, European universities employed experimentation and other hands-on modes of learning more than did their U.S. counterparts. Upon his return in 1866, he helped establish MIT, then moved to Harvard three years later. Once there, he worked hard to strengthen scientific education and the professional schools, particularly the law school and the medical school.<sup>21</sup>

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<sup>17</sup> See generally LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 2-36 (1965); Stevens, *supra* note 10.

<sup>18</sup> Stevens, *supra* note 10, at 35.

<sup>19</sup> See generally Veysey, *supra* note 17; BURTON J. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* (1976); WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 84 (1978).

<sup>20</sup> FRANK L. ELLSWORTH, *LAW ON THE MIDWAY: THE FOUNDING OF THE UNIVERSITY OF CHICAGO LAW SCHOOL* 21-31 (1977).

<sup>21</sup> See generally Anthony Chase, *The Birth of the Modern Law School*, 23 *AM. J. LEGAL HIST.* 329, 334-44 (1979).

In the case of the law schools, the continental model was quite different from the American one.<sup>22</sup> The typical European university of the time was divided into four faculties: theology, law, medicine, and philosophy (i.e., the liberal arts and natural sciences).<sup>23</sup> The “law” faculty, like the others, was viewed primarily as a site of scholarship, and professors viewed themselves as scholars first and teachers second.<sup>24</sup> Courses were taught in lecture format to huge audiences, although a few smaller seminars and “exercise” groups were also available. What was taught under the rubric of “law” was extremely broad, encompassing some version of political science, economics, sociology, etc.<sup>25</sup> Many of the “law” courses were more historically and philosophically oriented than vocationally oriented. In this context, law studies were designed as training for varied careers in both the public and private sectors, and in fact only a small proportion of graduates actually would go on to practice law.<sup>26</sup>

In Germany, for example, students would arrive at the university at the end of their gymnasium studies (roughly equivalent, in the U.S., to high school plus a year or two of college work),<sup>27</sup> and were free to take almost any courses they pleased. What they did while at the university depended on what they wanted to do afterwards. Students hoping to practice would have to include certain courses in their curriculum, take a special “referendar” examination at the end of three years, do three years of apprenticeships outside of the university, then take a second comprehensive examination. Note that this track did not involve the conferring of a degree. Students who hoped to teach would actually pursue the university degree, called the Dr. Jur.; this required the writing of an extended paper and a series of degree examinations.<sup>28</sup> Once they received the degree, they would write the “habilitation”, a more extended paper on the area in which they hoped to specialize. Along the way, they would participate in seminars and other advanced courses normally shunned by their less academically oriented colleagues.<sup>29</sup> Once they passed the habilitation, they would become a “Privatdozent”, who could take on limited teaching

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<sup>22</sup> And the English one, which also took place largely outside of universities. JAMES BARR AMES, *The Vocation of the Law Professor*, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354, 355-57 (William S. Hein Co. 1986) (1913).

<sup>23</sup> Max Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 12 n.17 (1938); Stefan Riesenfeld, *A Comparison of Continental and American Legal Education*, 36 MICH. L. REV. 31, 33 (1937).

<sup>24</sup> Rheinstein, *supra* note 23, at 5-6.

<sup>25</sup> *Id.* at 12 n.17.

<sup>26</sup> Riesenfeld, *supra* note 23, at 39-40. For people in these other careers, the law degree was also a mark of prestige. Currie I, *supra* note 10, at 342.

<sup>27</sup> Edward V. Reynolds, *Legal Education in Germany*, 12 YALE L.J. 31 (1902).

<sup>28</sup> *Id.* at 32.

<sup>29</sup> Participation in seminars and exercises later seems to have become required. Riesenfeld, *supra* note 23, at 42.

responsibilities and become eligible for a full-time academic appointment at a university.<sup>30</sup>

I mention German legal education in particular, because it was by far the most influential foreign model for U.S. legal scholars in the late 1800s and early 1900s.<sup>31</sup> The German model was influential in the development of the American research university in general,<sup>32</sup> but in the legal context it held particular attraction. One set of reasons lay in the achievements of 19<sup>th</sup>-century German legal scholars in rationalizing the legal practices of a plethora of Prussian principalities into a coherent whole.<sup>33</sup> This so-called “historical school”, which relied on the work of Friedrich von Savigny, then became the basis for the German Civil Code in 1896. At the time the code was hailed as a model of clarity and rationality, and it came to be widely imitated in other countries. There was also interest in the work of later scholars like Rudolf Von Jhering, who considered law in relation to neighboring disciplines such as sociology and philosophy. To U.S. legal scholars struggling to rationalize their own country’s burgeoning volume of court decisions and new legislation, the German approach was an enticing one.<sup>34</sup>

Perhaps the most influential aspect of the German model was the idea of law as a “science.” To a certain extent, the “science” appellation was simply code for law as academic study – something that takes place in a university and is related to other things that go on in a university.<sup>35</sup> As such, it was the university educators’ rallying cry as against what the proprietary schools were doing, and a legitimation of their own role as members of a broader university community. But there was more content to the idea than this. In general, the idea of law as “science” denoted a

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<sup>30</sup> See *id.* at 47-48; see generally JOSEF REDLICH, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 67-72 (1914).

<sup>31</sup> For excellent discussions of the influence of German models on U.S. legal education and legal thought during this period, see generally Mattias Reimann, *A Career In Itself – The German Professoriate as a Model for American Legal Academia*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920* (Mattias Reimann ed.,1993) (hereinafter Reimann); James E. Herget, *The Influence of German Thought on American Jurisprudence, 1880-1918*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920* (Mattias Reimann ed.,1993) (hereinafter Herget).

<sup>32</sup> See Veysey, *supra* note 17, at 10.

<sup>33</sup> Rheinstein, *supra* note 23, at 18; Schlegel I, *supra* note 10, at 475 n.86.

<sup>34</sup> See, e.g., Oliver Wendell Holmes, *The Use and Meaning of Law Schools, and their Methods of Instruction*, 20 AM. L. REV. 919, 921-22 (1886); Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?* 1914 ASS’N AM. L. SCH. HANDBOOK 76, 89-92 (1914); Ames, *supra* note 22, at 368.

<sup>35</sup> See Ames, *supra* note 22, at 354; Christopher Columbus Langdell, *Harvard Celebration Speeches*, 9 L. Q. REV. 123, 124 (1887). It was also a product of the growing scientific realism of the era in general. See Veysey, *supra* note 17; John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812, 816-17 (1916).

comprehensive system whose principles were logically connected to each other and to the human conduct law was designed to regulate.<sup>36</sup> The system could be strictly legal/historical, as in the work of Savigny and his followers, or (following Von Jhering) it could look to neighboring disciplines such as the social sciences, which were also taught in the continental law faculties.<sup>37</sup> It also denoted the idea of knowability – i.e., the relevant principles could be ascertained, often through empirical observation and testing – and neutrality – i.e., the system and its components did not vary with the eye of the beholder. It is easy to understand the attractiveness of these ideas at a time of proliferation of legal norms, increasing conflict concerning the purposes those norms were to serve, and growing problems with the actual administration of justice.

This “scientific” idea manifested itself in a variety of ways. One of the most influential pedagogically was the case method, developed around 1870 by Harvard Law School’s then Dean, Christopher Columbus Langdell, with the encouragement of President Eliot. It was wholly unlike legal educational techniques on the continent, but did bear some resemblance to continental medical education, which (unlike American medical education) was relying increasingly on the examination of actual patients. In Langdell’s understanding, judicial decisions performed a similar “clinical” role as exemplars of basic legal principles.<sup>38</sup> Taken together, these principles constituted a self-contained body of norms that could be logically deployed to produce the correct result in a particular case.<sup>39</sup> Thus virtually everything a lawyer needed to know would be in those cases – the “printed books” in universities.<sup>40</sup> While this version of Langdell’s “scientific” method was disputed, the case method slowly caught on at other schools due to its merits as a pedagogical technique (and helped along considerably by Harvard’s clout).

Another area in which the “scientific” fad manifested itself was an increasing interest in the study of “jurisprudence,” broadly understood to subsume legal history, theory, comparative law, relationship of law to other

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<sup>36</sup> See Riesenfeld, *supra* note 23, at 46-47 (“The law is presented as an historically developed body of rules of human conduct, covering in more or less well considered and elaborate detail, all types of human conduct”); Rheinstejn, *supra* note 23, at 18-19; Reimann, *supra* note 31, at 169-70 (defining “science” as “a set of ‘principles’” and noting that American scholars of the period “extolled German professors as scholars who had created a true legal science in their historical and systematic works”); Schlegel III, *supra* note 10, at 322 (defining “science” as “a body of systematic principles resting on evidence”).

<sup>37</sup> See Herget, *supra* note 31.

<sup>38</sup> See CHRISTOPHER COLUMBUS LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS*, PREFACE TO THE FIRST EDITION (1879); Chase, *supra* note 21.

<sup>39</sup> This is the conventional understanding of Langdell’s view of “science”. See, e.g., Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); ANTHONY T. KRONMAN, *THE LOST LAWYER* 170-74, 185 (1993). But see Bruce A. Kimball, [to come].

<sup>40</sup> Langdell, *supra* note 35, at 124.

disciplines, judicial administration, etc.<sup>41</sup> In this vein, in the late 1800s some rather foreign-sounding courses from the German curriculum -- Roman law, canon law, comparative law and international law -- began to appear in U.S. law schools, primarily in the context of optional third years of study.<sup>42</sup> These subjects were viewed as helping the student understand law as a system of principles of greater or lesser universality and specificity.<sup>43</sup> As such, these so-called “cultural” courses could function, first, as a basis for better understanding law in general (and therefore one’s own legal system), and second, as sources of positive norms one might consider adopting.<sup>44</sup> They also served to enrich law study as a training ground for a variety of occupations, including public service, and as general training for participation in a democratic system.<sup>45</sup>

The idea of law as a “science” also created a framework for the scholarly activity of the law professoriat. In a 1901 speech at the University of Pennsylvania Law School, Harvard’s then Dean, James Barr Ames, envisaged the professor’s vocation as having three components. The first was teaching, which by that time the American law schools were doing much more intensively than were their continental counterparts. The second was writing, which would give the professor “an exceptional opportunity to exert a wholesome influence upon the development of the law, ”<sup>46</sup> particularly judge-made law. Here Ames particularly urged the writing of “treatises on all the important branches of the law”, an art in which German scholars far surpassed their American counterparts.<sup>47</sup> Third, professors were to act as consultants to legislative drafting projects, as German scholars did so effectively in connection with the formulation of the German Civil Code.<sup>48</sup>

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<sup>41</sup> See generally Hohfeld, *supra* note 34; Wigmore, *supra* note 35.

<sup>42</sup> Often these courses were taught by scholars – Francis Lieber, John Burgess, Ernst Freund, and others – who had studied in Germany. See JULIUS GOEBEL, JR., FOUND. FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 46, 69-70 (1955); Ellsworth, *supra* note 20, at 36; Reimann, *supra* note 31; Herget, *supra* note 31.

<sup>43</sup> Roman law in particular was a system that had been articulated to an enormous degree in both substance and administration.

<sup>44</sup> See Holmes, *supra* note 34; Hohfeld, *supra* note 34; Wigmore, *supra* note 35.

<sup>45</sup> See, e.g., Hohfeld, *supra* note 34, at 115; FREDERICK C. HICKS, HISTORY OF THE YALE LAW SCHOOL TO 1915 134-35 (Lawbook Exchange 2001) (1935-38) (speech by former Yale President Theodore Dwight Woolsey at Yale’s 1874 Commencement); Ellsworth, *supra* note 20, at 92-93 (Chicago); SANDRA P. EPSTEIN, LAW AT BERKELEY: THE HISTORY OF BOALT HALL 23 (1997) (Berkeley). See generally Currie I, *supra* note 10 (discussing university training in law as general education).

<sup>46</sup> Ames, *supra* note 22, at 364.

<sup>47</sup> See *id.* at 364-66 (citing Savigny, Windscheid, Jhering and Brunner in the German context, and Blackstone and Kent elsewhere).

<sup>48</sup> *Id.* at 367-68.

Ames' expansive view of the professorial role, grounded as it was in the continental model, was a sharp break from prior U.S. practice. Even in university-affiliated law schools of the time, law was taught primarily by practicing lawyers who devoted a few hours to teaching each week. The full-time professor began to appear in the late 1800s, both at existing university-affiliated schools such as Harvard<sup>49</sup> and Michigan,<sup>50</sup> and at newly-established university law schools such as Cornell,<sup>51</sup> Chicago<sup>52</sup> and Stanford.<sup>53</sup> The reasons were various: a desire to improve standards, the difficulty of teaching using Langdell's new method,<sup>54</sup> and the fact that the mere proliferation of legal norms meant it took much more time than before to stay current. As importantly, the model represented the law faculty's attempt to evolve a professoriate that more closely resembled those in other university disciplines, and thereby strengthen their own standing within their host universities.<sup>55</sup>

It is difficult to overemphasize the importance of these influences to the development of postgraduate degrees in law, particularly doctoral degrees. The continental influence provided a way to conceptualize law, portions of an actual curriculum, and a professorial role to be filled. For as long as those who taught in law schools were practitioners first and teachers second, there would be no need for special teacher training programs. Once the role of the full-time teacher existed, however, those filling it would both see the need to train their successors and, out of a desire to self-replicate, want to do so. As the role of the full-time teacher spread, demand for new teachers gave teacher training programs a reason to exist. These, then, were a final continental import.

## **B. Graduate legal education: early beginnings**

The preceding section's focus on the rise of university education, important as it is, only tells part of the story of legal education in the late 1800s and early 1900s. University law schools, which were where

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<sup>49</sup> Indeed Ames himself was radical in this respect: he had been appointed as a full-time member of the Harvard faculty in 1873, immediately after receiving his LL.B. and with no practice experience. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967* 184 (1967).

<sup>50</sup> See ELIZABETH GASPAR BROWN, *LEGAL EDUCATION AT MICHIGAN 1859-1959* 68-80, 467-68 (1959).

<sup>51</sup> Harry B. Hutchins, *The Cornell University School of Law*, 1 GREEN BAG 473, 476 (1889).

<sup>52</sup> Ellsworth, *supra* note 8, at 92. The movement was not a universal one, however. For example, as of the 1890s, Wisconsin maintained that law teachers should be experienced practitioners who also did some part-time teaching. Johnson, *supra* note 19, at 105.

<sup>53</sup> See MARION R. KIRKWOOD & WILLIAM B. OWENS, *A BRIEF HISTORY OF THE STANFORD LAW SCHOOL, 1893-1946* (1961).

<sup>54</sup> Auerbach, *supra* note 8, at 75.

<sup>55</sup> See Schlegel III, *supra* note 10 (also noting the rise of "academic professionalization" in other university departments); Reimann, *supra* note 31, at 192-94.

graduate degrees tended to develop, were not simply educational institutions, but economic actors as well.<sup>56</sup> As such, they were subject to a variety of competitive pressures. Perhaps the most important competitive forces were other venues for getting a legal education, notably the proprietary schools and law offices. University schools could offer (in many cases) a higher quality education than could the alternatives, but they were also more expensive and time-consuming. In some states, bar admission requirements worked actively against the universities – for example, New York’s requirement that applicants do at least a year of training in a law office initially prevented Cornell from extending its law course to three years.<sup>57</sup> These factors tended to exert downward pressure on what schools could require of their students and a push towards more professionally oriented training.

At the same time, other factors tended to support a general raising of standards and movement towards a more academic conception of law study. Among these was the AALS, founded by 25 university law schools in 1900 with the express purpose of raising the general standard of legal education. Over time the AALS (and later the American Bar Association) pushed law schools to toughen eligibility requirements, lengthen the period of law study, standardize the curriculum, and make the entire undertaking more rigorous.<sup>58</sup> More generally, there seems to have been tremendous competition for prestige among University law schools. Beyond prestige’s obvious psychic rewards, the stakes seem to have been competition for students in an increasingly national admissions pool, and competition for the increasingly mobile professional law teacher.

These forces are important to the development of doctoral programs, because they had a tremendous impact on both what schools *wanted* to undertake and what they *could* undertake. The main event at university law schools was the professional degree, but the professional degree could not absorb everything the schools’ faculty wanted to do. In this context, a graduate degree (whether master’s or doctoral) could function at once as an educational initiative that had intrinsic merit, a source of funds and prestige for the school, a means for the new professorial class to experiment, and a substitute for extending the basic law degree. This point had considerable practical impact, since any move by the university law schools to require college education before law school, lengthen the period

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<sup>56</sup> See generally Harry First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978).

<sup>57</sup> Edwin H. Woodruff, *History of the Cornell Law School*, 4 CORNELL L.Q., 91, 94-95 (June 1919).

<sup>58</sup> Given competition from the proprietary schools, the AALS also pushed state bar officials to change admission requirements in order to make the changes work at the school level. Stevens, *supra* note 10, at 96-100. For a discussion of the anticompetitive nature of the AALS’s and its members schools’ activities, see generally First, *supra* note 56.



of law study, or otherwise raise academic standards meant that the university schools risked losing students to other forms of legal education. Thus graduate degrees first emerged as a substitute for the extension of the LL.B. degree from two to three years, and later from three to four years.

The first such degrees were short-lived offerings by Columbia and Harvard during the 1860s and 1870s. These were followed by Yale's longer-lived M.L. and D.C.L. (both established in 1876). The first, a one-year M.L., was an outgrowth of a correspondence course the school had run in 1874 or so.<sup>59</sup> The new degree was viewed essentially as an add-on to the LL.B., which at the time was a two-year degree. Indeed Frederick Hicks, who wrote a series of pamphlets concerning the school's early history, explicitly calls it "the forerunner of the three-year course."<sup>60</sup> The other degree, a so-called "Doctor of Civil Laws," or D.C.L., required two years of advanced study and, according to Hicks, "was intended to embrace genuine graduate work."<sup>61</sup> Both degrees were primarily oriented towards coursework, although both also required a written thesis. The coursework options for both included some training in Roman law, jurisprudence, and legal history, but beyond this the M.L. was more vocational in nature and the D.C.L. more jurisprudential.<sup>62</sup> The eligibility requirements for the D.C.L. were also more rigorous: the degree required a prior bachelor's degree, higher standing in one's law studies, and knowledge of Latin and either French or German.<sup>63</sup>

Yale's offerings were followed by a proliferation of different degrees at a wide range of schools, some of which called themselves graduate degrees and some of which were variations on the basic professional degree. Among the seven schools addressed by this article, Columbia established an LL.M. in 1891 (having lengthened the LL.B. to three years at the same time), and began considering a doctorate in 1908. George Washington established an LL.M. in 1877, initially as a third year to supplement a two-year LL.B.<sup>64</sup> In 1898 the LL.B. became three years, the LL.M. became a fourth, and a new D.C.L. was established. Michigan established an LL.M. in 1889 as a third year to supplement a two-year LL.B.; this became a fourth year to supplement a three-year LL.B. in 1895.

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<sup>59</sup> ALFRED ZANTZIGER REED, *CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 176 (William S. Hein Co. 1986) (1921) (hereinafter *Reed I*). The move also seems to have had a "me-too" quality: Hicks reports that the letter submitted to the Corporation indicated that "the practice . . . was already in vogue in the law schools of Harvard and Boston University." Hicks, *supra* note 45, at 140. As indicated earlier, these experiments were discontinued shortly thereafter.

<sup>60</sup> Hicks, *supra* note 45, at 141.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 142-43. Yale's LL.B. curriculum also included some "cultural" courses at this point. See Currie I, *supra* note 10.

<sup>63</sup> Hicks, *supra* note 45, at 141, 144.

<sup>64</sup> Reed I, *supra* note 59, at 176.

NYU established a third-year LL.M. in 1891 to supplement a two-year LL.B., and a three-year J.D. (which required a prior academic bachelor's degree) as an alternative to a two-year LL.B. in 1902. The school also considered establishing a "Doctor of Common Law" starting in 1907. Wisconsin considered establishing an LL.M. in connection with a package of 1888 reforms to the Law Department, but ultimately did not do so.<sup>65</sup>

The result was a veritable alphabet soup of degrees – B.C.L., D.C.L., LL.M., M.L., J.D. etc. Often "graduate" and "undergraduate" degrees (as the latter were then called) were hard to distinguish – a degree that nominally was a four year course would also be offered as a graduate degree. And the "graduate" appellation itself was sometimes a stretch – at some schools, a master's degree was available to people who held no prior degree at all as long as they had sufficient legal practice experience.<sup>66</sup> In addition, at a few schools (including Columbia by 1908) a Ph.D. in law was available through another university department.<sup>67</sup>

These early degrees tended to involve some combination of course work and writing.<sup>68</sup> The courses tended to fall into four categories for which there was either inadequate room in the normal LL.B. curriculum, or which were not deemed sufficiently useful to the practicing lawyer. The first category embraced such subjects as Roman law, comparative law, international law, legal history and jurisprudence – the "cultural" subjects that were mainstays of the curriculum in Europe. In the U.S., they had appeared in Jeffersonian-era legal education as a way of training students for citizenship, but had since fallen out of favor as part of the basic LL.B. curriculum.<sup>69</sup> They reappeared towards the end of the 19<sup>th</sup> century under the rubric of the so-called "scientific" study of law, primarily as graduate courses but also elsewhere in some cases.<sup>70</sup> A second category embraced such emerging fields of law as public law and legislation, which had both academic and professional applications but were not yet taught in the

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<sup>65</sup> For a discussion of the other schools that offered graduate degrees during this period, *see id.* at 176-77.

<sup>66</sup> Only Harvard seems to have required both a B.A. and LL.B. as prerequisites. *Id.*

<sup>67</sup> *See* Columbia University, *School of Law Announcement 1908-09*, COLUM. U. BULL. INFO., [date] 1908, at 8 (hereinafter Columbia 1908-09 Bulletin).

<sup>68</sup> Hutchins, *supra* note 51, at 488-89.

<sup>69</sup> *See* Currie I, *supra* note 10, at 150-161.

<sup>70</sup> *See, e.g.,* Hicks, *supra* note 45, at 142 (discussing courses for Yale's M.L. and D.C.L.); UNIV. OF MICHIGAN DEPT. OF LAW, ANNUAL ANNOUNCEMENT 1903-04 AND CATALOGUE OF STUDENTS FOR 1902-03 25 (1903) (hereinafter Michigan 1903-04 Bulletin) (listing courses in graduate curriculum); Brown, *supra* note 50, at 497-505; Goebel, *supra* note 42, at 73-75, 85-87 (discussing internal conflicts over whether cultural courses should be included in graduate or LL.B. curriculum); Columbia 1908-09 Bulletin, *supra* note \_\_, at 17 (listing courses in LL.B. curriculum); Ellsworth, *supra* note 20 (noting that cultural courses were part of curriculum for Chicago's basic law degree).

regular LL.B. curriculum at most schools.<sup>71</sup> The third category embraced advanced versions of more vocational subjects, including the traditional private law subjects of the LL.B. curriculum.<sup>72</sup> Finally, a fourth category -- coursework in other University departments -- was available at a few schools (including Yale and Columbia) that had close relationships with those departments.<sup>73</sup>

As the LL.B. degree was extended, some of the graduate degrees did not survive. Iowa, for example, offered an LL.M. program from 1874 to 1882, a time at which its LL.B. was only one year. It lengthened the LL.B. to two years shortly after dropping its LL.M.<sup>74</sup> The University of Pennsylvania had a two-year LL.B. to which it added a two-year LL.M. in 1883. The LL.M. lasted until 1897, by which time the LL.B. had been lengthened to three years.<sup>75</sup> Cornell had a two-year LL.B. as of 1889, when it added a one-year LL.M. The LL.M. lasted until the school implemented a three-year LL.B. in the fall of 1897.<sup>76</sup> Stanford offered a one-year M.A. when it instituted its LL.B. program in 1893, but the experiment lasted only about two years.<sup>77</sup>

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<sup>71</sup> See, e.g., Hicks, *supra* note 45, at 142 (discussing course offerings for M.L. and D.C.L.); Brown, *supra* note 50, at 497-505; Michigan 1903-04 Bulletin, *supra* note 70, at 25; Columbia 1908-09 Bulletin, *supra* note 67, at 17 (listing courses in LL.B. curriculum).

<sup>72</sup> Schools offering this included Yale, see Hicks, *supra* note 45, at 142 (discussing course offerings for M.L.); Michigan, see Brown, *supra* note 50, at 497-505; and [NYU and GW]. **Verify and add sources**

<sup>73</sup> Columbia's law and political science departments had been a single faculty until 1880, and the LL.M. degree was jointly administered by the law and political science departments from 1893 to 1915. For at least part of this period LL.M. candidates were required to do coursework in political science. See Goebel, *supra* note 42, at 87-91; Harlan F. Stone, *Annual Report of the Dean of the Law School for 1915-16*, COLUM. ALUMNI NEWS, December 8, 1916, at 6-7 (hereinafter Columbia 1915-16 Dean's Report. Yale included social science courses in the graduate curriculum from that degree's beginnings until 1912. See Hicks, *supra* note 45, at 142; compare YALE UNIV., DEPARTMENT OF LAW (YALE LAW SCHOOL) 1900-01 5, 8, 14-15 (1900) with YALE LAW SCH., LAW DEPARTMENT OF YALE UNIVERSITY 1912-13 24-27 (1913). The close relationship between the Law School and Yale College was partly a function of the Law School's lack of full-time faculty: the College faculty took up the slack. See John H. Langbein, *Yale's Distinctive Path in the Later Nineteenth Century*, in HISTORY OF THE YALE LAW SCHOOL 53, 67 (Anthony T. Kronman, ed., 2004).

<sup>74</sup> Reed I, *supra* note 59, at 176-77 n.4.

<sup>75</sup> *Id.* The University of Pennsylvania's LL.M. was entirely jurisprudentially oriented. C. Stuart Patterson, *The Law School of the University of Pennsylvania*, 1 GREEN BAG 99,107 (1889).

<sup>76</sup> By that time the school had conferred 60 LL.M. degrees. Woodruff, *supra* note 57, at 102-03.

<sup>77</sup> See Kirkwood & Owens, *supra* note 53, at 4, 9.

### C. The turning point: 1910 through early 1920s

By the early 1900s three years had become the standard for the duration of the LL.B. While the AALS did not yet require a three-year course as a condition of membership, most of the leading schools of the time were doing so.<sup>78</sup> In addition, a few schools – including Harvard, Columbia and Chicago – were requiring a prior academic bachelor’s degree as a condition of admission to the LL.B., and others were considering such a requirement. At several schools, attention was turning to whether four years of study should be required for the basic law degree. At this point Harvard, which had largely stayed out of the graduate degree business, weighed in.

In a turning point for doctoral education, Harvard established its S.J.D. degree (as it came to be known) in 1910. Harvard was the 900-pound gorilla of legal education at the time. It was then one of the largest university law schools and, with Columbia, the most prestigious. Its case method had revolutionized the teaching of law since Langdell introduced it in 1871. As such, it was a favored supplier of teachers to other schools.<sup>79</sup> The faculty began considering “a possible optional fourth year course” in late 1906,<sup>80</sup> and a “doctor of laws” degree was approved by the faculty and the Harvard Corporation in 1910.<sup>81</sup> The S.J.D. was nothing like today’s academic doctorate: while there was some informal opportunity to do written work,<sup>82</sup> the degree was then a one-year course-based degree that concentrated in the “cultural” subjects, public law and legislation. This selection of courses was not particularly new to graduate degrees of the time, but it was new to Harvard. Specifically, the graduate curriculum’s

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<sup>78</sup> See Sutherland, *supra* note 49, at 170-71 (as to Harvard); Goebel, *supra* note 42, at 145-46 (Columbia); Brown, *supra* note 50, at ix (Michigan); Epstein, *supra* note 45, at 36 (Berkeley); Ellsworth, *supra* note 20, at 60 (Chicago); JAMES A. RAHL & KURT SCHWERIN, NORTHWESTERN UNIVERSITY SCHOOL OF LAW – A SHORT HISTORY TO COMMEMORATE ITS CENTENNIAL 1859-1959 17 (1960) (Northwestern); Johnson, *supra* note 19, at 100 (Wisconsin); Woodruff, *supra* note 57, at 102-03 (Cornell).

<sup>79</sup> See COMM. OF THE FACULTY OF THE HARVARD LAW SCH., REPORT ON ADVANCED DEGREES IN LAW 8 (1933) (hereinafter 1933 Harvard Report); Sutherland, *supra* note 49, at 215; Schlegel II, *supra* note 10, at 221-22.

<sup>80</sup> See Minutes of the Harvard Faculty, October 2, 1906, in Harvard Law School, Minutes of Faculty Meetings, 1870-1965 (available in the Harvard Law School Library). Hereafter these minutes are cited simply as “Harvard [date] Minutes”; Harvard 12/18/06 Minutes; Erwin Griswold, *Graduate Study in Law*, 2 J. LEGAL EDUC. 272 (1950).

<sup>81</sup> See Harvard 4/29/10 Minutes; Ezra Ripley Thayer, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1909-10 136, 140-41 (1911) (hereinafter Harvard 1909-10 Dean’s Report); Griswold, *supra* note 80, at 272.

<sup>82</sup> See Harvard 4/29/10 Minutes; Harvard 1909-10 Dean’s Report, *supra* note 81, at 140-41; Ezra Ripley Thayer, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1910-11, OFFICIAL REG. HARV. U., April 2, 1912, at 130, 134 (hereinafter Harvard 1910-11 Dean’s Report). A student did not need to be pursuing the S.J.D. degree to pursue the curriculum. See Harvard 4/29/10 Minutes.

jurisprudential orientation was in marked contrast to the private law focus of the school's LL.B. curriculum.<sup>83</sup>

Harvard's S.J.D. sparked similarly-structured degrees at several other schools within a few years. Yale, for example, began offering a one-year "Jur.Dr." in 1910. Like Harvard's S.J.D., it required a prior college degree and LL.B., and, like Harvard's S.J.D., it required coursework in Roman law.<sup>84</sup> Like Yale's other graduate degrees of the time, it also required a writing project, but this was a distinctly small part of the whole.<sup>85</sup> NYU, which had lengthened the LL.B. to three years in 1911, voted to establish "a permanent fourth-year course" culminating in a "Doctor of Common Law" around the same time.<sup>86</sup> Renamed "J.S.D." in 1912,<sup>87</sup> the degree was intended to "bear on the scholarly and juridical study of the law rather than upon its active practice, and shall include such subjects as jurisprudence, the theory and history of law, and legislation."<sup>88</sup> Michigan did not immediately offer a graduate doctorate, but it did make corresponding changes to its long-standing LL.M. In 1912-13 the school

<sup>83</sup> See, e.g., Harvard 1909-10 Dean's Report, *supra* note 81, at 138-39; Harvard University, *The Law School 1910-11*, OFFICIAL REG. HARV. U., June 8, 1910, at 6-7.

<sup>84</sup> See YALE LAW SCH., LAW DEPARTMENT OF YALE UNIVERSITY 1910-11 52 (1911) (hereinafter Yale 1910-11 Bulletin); Henry Wade Rogers, *Department of Law*, in REPORTS OF THE PRESIDENT AND SECRETARY OF YALE UNIVERSITY AND OF THE DEANS AND DIRECTORS OF ITS SEVERAL DEPARTMENTS FOR THE ACADEMIC YEAR 1909-1910 210-11 (1910). The Yale faculty recommended the establishment of the degree a month after the corresponding vote of the Harvard faculty. See Minutes of the Faculty of Yale Law School, May 30, 1910, in Minutes of the Faculty, Governing Board and Board of Permanent Officers, Yale Law School (RU 450) (available in Manuscripts and Archives, Yale University Library). Hereafter minutes of faculty meetings are cited simply as "Yale [date] Minutes", and other documents included in the collection are identified with a cross reference to "Yale Minutes."

<sup>85</sup> The Jur.Dr. was basically the same as Yale's LL.M., but the former required a prior college degree for admission, and degree requirements included Roman law and higher academic performance. See Yale 1910-11 Bulletin, *supra* note 84, at 44-45, 52. Admission to Yale's LL.B. started requiring a prior college degree in 1911. See YALE LAW SCH., YALE LAW SCHOOL ALUMNI DIRECTORY vii (1980)

<sup>86</sup> See Clarence D. Ashley, *Report of the Dean of the School of Law*, in ANNUAL REPORTS OF NEW YORK UNIVERSITY FOR THE YEAR 1910-11, N.Y.U. BULL., March 1912, at 66 (hereinafter NYU 1910-11 Dean's Report); New York University Law School, Report of the Curriculum Committee (February 4, 1911), in New York University Law School, Faculty Minutes (available in the New York University Archives, Elmer Holmes Bobst Library). Hereafter documents included in the collection are identified with a cross reference to "NYU Minutes"; Letter from Lesley J. Tompkins, Secretary of the Curriculum Committee, to Clarence D. Ashley, Dean (10/20/11), in NYU Minutes, *supra*.

<sup>87</sup> This was in response to Harvard's adoption of the "Juridicae Scientiae Doctor" nomenclature for its own doctorate. See NYU 1910-11 Dean's Report, *supra* note 86, at 68.

<sup>88</sup> Letter from George A. Strong, Secretary of the Council of New York University, to Dean Clarence A. Ashley (February 16, 1912), in NYU Minutes, *supra* note 86. The school's graduate curriculum, first offered in 1916-17, also included such vocational subjects as Municipal Corporations, Administrative Law and Officers, Public Utilities, and Conflict of Laws. See New York University, *University Law School Announcements for the Eighty-Second Year 1916-17*, N.Y.U. BULL., April 29, 1916, at 14-15.

definitively dropped that degree's thesis requirement and started requiring courses in Roman law and jurisprudence.<sup>89</sup> It also introduced four-year degrees – J.D. and LL.M. – that required these courses in 1915-16.<sup>90</sup> Neither required a prior college degree, and the degree the student received depended entirely on his academic performance.<sup>91</sup> Meanwhile, the school continued to offer a three-year J.D. degree to college graduates.<sup>92</sup>

What were the justifications for these degrees at the time? They seemed to fall under a combination of educational and institutional headings. The basic educational reason seemed to be covering subjects that did not fit into the three-year curriculum, which was designed to cover what a student most needed to know in order to become a practicing lawyer. As before, the courses fell into three categories: “cultural” courses, public law courses and legislation, and advanced versions of more traditional vocational subjects. But there was a more specialized reason as well, particularly at Harvard: teacher training.

Harvard's S.J.D. was not originally conceived as exclusively a teacher training degree, but within a few years of Roscoe Pound's ascension to the Deanship in 1916 this had become its clear orientation.<sup>93</sup> Roscoe

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<sup>89</sup> Compare University of Michigan, *Department of Law Annual Announcement, 1907-1908, and Catalogue of Students 1906-1907*, U. BULL., [March] 1907 (LL.M. requirements include a thesis) and University of Michigan, *Department of Law Annual Announcement, 1911-1912, and Catalogue of Students 1910-1911*, U. BULL., [March] 1911 (LL.M. degree requirements are quite fluid), with University of Michigan, *Department of Law Annual Announcement, 1912-1913, and Catalogue of Students 1911-1912*, U. BULL., March 1912, at 25 (LL.M. degree requirements include Roman law and jurisprudence courses).

<sup>90</sup> University of Michigan, *Law School Annual Announcement, 1915-1916, and Catalogue of Students 1914-1915*, U. BULL., June 1915, at 19-21.

<sup>91</sup> *Id.* at 21.

<sup>92</sup> *Id.* at 19. It is unclear whether Michigan also continued to offer a one-year LL.M. Compare *id.* at 21 (describing a four-year LL.M. curriculum, of which the last two years must be completed at Michigan), with *id.* at 31 (describing a one-year LL.M. degree).

<sup>93</sup> Compare Ezra Ripley Thayer, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1911-12, OFFICIAL REG. HARV. U., February 20, 1913, at 135, 139-40 (hereinafter Harvard 1911-12 Dean's Report) (the degree is designed for those planning careers in scholarship, teaching, and “grappling with problems of legislation or administration”); Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1915-16, OFFICIAL REG. HARV. U., March 26, 1917, at 140-43 (hereinafter Harvard 1915-16 Dean's Report) (the graduate curriculum is intended to train “lawyers who shall be useful socially as well as professionally”) with James F. Clark, *The Harvard Law School Deanship of Roscoe Pound, 1916-1936* 48 (1999) (unpublished seminar paper, available in the Harvard Law School Library) (quoting Roscoe Pound to Richard Ames, 9 July 1918, as to Pound's desire to “pass the better law teachers of the country through our mill”); Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1921-22, OFFICIAL REG. HARV. U., February 26, 1923, at 157, 158 (noting “Our doctor's degree is intended for teachers and its requirements are fixed accordingly.”). Indeed, Pound called “the increasing number of graduates of other law schools coming to this school for a fourth year of study, who are not and do not intend to be teachers of law” a growing problem for the school. *Id.*

Pound is an important figure in the story of Harvard's S.J.D.: he seems to have viewed the degree as a vehicle for spreading his vision of a "sociological jurisprudence" – i.e., a pre-realist understanding of law that rejected the idea of law as a closed system and looked towards how it functioned in society.<sup>94</sup> Pound's vision allied the school's traditional teacher training function with his own sociological jurisprudence at a time when, in Ezra Ripley Thayer's words, "a new period of liberalization in our legal system brings the student face to face with fundamental questions of the nature and possibilities of law."<sup>95</sup> According to one writer, Thayer (who was then Dean) recruited Pound to Harvard in 1910 in part based on representations that he could shape the new degree largely as he saw fit,<sup>96</sup> and when Pound became Dean he made the degree a central priority. He was one of the relatively few faculty members who taught graduate courses at the time, and his signature courses were the required Jurisprudence and Roman Law courses.

This then leads to the institutional reasons for the degree. As the preceding discussion suggests, Harvard's S.J.D. performed a kind of missionary role for Pound and the school as a whole: it helped propagate a particular vision of law and legal education at other schools across the country. The capacity was certainly there: by the end of 1919, 24 people had earned the degree – all of them graduates of U.S. law schools, and half of them graduates of Harvard itself. Some 75% of the graduates pursued academic careers. By 1923 another 26 people had earned the S.J.D., and again most would go into teaching. Notable graduates included Morton Campbell, Manley Hudson, and Francis Sayre, all of whom taught at Harvard; Frederick de Sloovere, a Pound protégé<sup>97</sup> who would lead NYU's graduate program; Burke Shartel, Grover Grismore and Hessel Yntema, all of whom taught at Michigan; Edwin Patterson, who would lead Columbia's graduate program, and William Van Vleck, who would become George Washington's Dean for over 20 years.<sup>98</sup>

Yale also had missionary pretensions during this period, despite the school's decidedly undistinguished reputation. As Laura Kalman has documented, beginning in 1916 Arthur Corbin and Thomas Swan were spearheading efforts to make the school a national law school with a two-pronged educational message: "First, a new and distinctive method of legal analysis . . . that makes possible the simplification of complex problems . . .

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<sup>94</sup> See generally Pound, *Sociological Jurisprudence*, *supra* note 9.

<sup>95</sup> Harvard 1911-12 Dean's Report, *supra* note 93, at 139-40.

<sup>96</sup> Clark, *supra* note 93, at 17-18.

<sup>97</sup> Norman Dorsen, *Frederick J. De Sloovere, Textual Interpretation of Statutes*, 11 *N.Y.U. L.Q. Rev.* 538 (1934), 75 *N.Y.U. L. Rev.* 1519 (2000).

<sup>98</sup> See Gail J. Hupper, Database of S.J.D. Graduates (May 2, 2006) (unpublished listing of graduates derived from archival and other materials, on file with the author) (hereinafter Database).

. Secondly, we have here at Yale an ungrudging recognition of the fact that law is merely one of the many forms of expression of the mores of human society; that it is not merely a doctrine etched upon a brass plate, but is a living, growing, changing organism . . .”<sup>99</sup> Its ambitions for this message were evidenced by a “school of jurisprudence” idea that was the centerpiece of a \$2.5 million fundraising campaign initiated in 1917.<sup>100</sup> The brochure for that campaign contemplated a role for graduate work in spreading this idea, although that role was not explicitly in the nature of teacher training.<sup>101</sup> The J.D.’s early history had not performed well in this respect (its first ten years of existence had yielded only seven graduates),<sup>102</sup> but the school constituted a committee in 1918 to restructure the degree.<sup>103</sup> The school dropped the degree’s Roman law and thesis requirements by 1920,<sup>104</sup> and in the ensuing three years conferred a total of 18 J.D. degrees. One of the recipients was Karl Llewellyn.<sup>105</sup>

Otherwise the degree seems to have functioned primarily as a means of image enhancement. Michigan’s four-year J.D. also had teacher training pretensions,<sup>106</sup> but few or none seem to have conferred.<sup>107</sup> At NYU,

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<sup>99</sup> Arthur L. Corbin, The Function of the Yale Law Journal in the Development of the School of Law 4-5 (December 1918), in Yale Minutes, *supra* note 84.

<sup>100</sup> Yale Law School, *A Program for the Expansion of the Yale School of Law into a “School of Law and Jurisprudence,”* YALE ALUMNI WKLY. (supplement March 1917) (hereinafter Yale Pamphlet 1917). The “school of jurisprudence” idea had been aired at Berkeley, Chicago and perhaps elsewhere in the late 1800s, and therefore was not new to Yale. *See, e.g.,* Epstein, *supra* note 45, at 23; Ellsworth, *supra* note 20, at 31-32. Wesley Hohfeld’s 1914 speech to the AALS, however, contained perhaps its most ambitious statement to date. *See* Hohfeld, *supra* note 34.

<sup>101</sup> Yale Pamphlet 1917, *supra* note 100.

<sup>102</sup> *See* Database, *supra* note 98.

<sup>103</sup> *See* Yale 12/18/17 Minutes; Letter from Thomas W. Swan to Arthur L. Corbin (January 8, 1918), in Yale Minutes, *supra* note 84.

<sup>104</sup> Compare SCH. OF LAW OF YALE UNIV., ANNOUNCEMENT 1919-20 19-20 (1919) (requiring J.D. candidates to take Jurisprudence, Roman Law, Comparative Law and Legal History and to write a thesis) with SCH. OF LAW OF YALE UNIV., ANNOUNCEMENT 1920-21 (1920) (hereinafter Yale 1920-21 Bulletin) (no longer requiring thesis and Roman law). As of 1920-21 Lorenzen was teaching five of the twelve graduate courses. *See id.* at 26-29.

<sup>105</sup> Llewellyn, who was awarded the J.D. in 1920, seems to have received credit towards the degree for work on the Yale Law Journal work and as a teaching fellow. *See* Yale 4/22/19 Minutes. This seems to have been part of the school’s effort to appoint faculty loyal to the school and the “school of jurisprudence” idea. *See* Arthur L. Corbin, In re Yale Law School Faculty (April 21, 1919), in Yale Minutes, *supra* note 84; Kalman, *supra* note 10, at 102-03.

<sup>106</sup> *See* University of Michigan, *Law School Annual Announcement, 1917-1918, and Catalogue of Students 1916-1917*, U. BULL., May 1917, at 10-11 (“While the primary function of law schools is to train men to practice law, nevertheless in order that there may be opportunity for the training of law teachers, scholars and writers the time has undoubtedly come when instruction of an advanced nature should be offered in some of the university law schools. To meet this requirement the Law School offers *advanced* instruction in jurisprudence, the comparative study of law, history of law, philosophy of law, the Roman law and other related subjects.”)



graduate work in general was tied to the school's efforts to upgrade academically<sup>108</sup> and bring the school more into contact with other University departments.<sup>109</sup> The school's Dean, Frederick Sommer, would emphasize the graduate work's selective nature in his pleas to the President for funds for graduate professorships.<sup>110</sup> But in fact it was not very selective. The school awarded 25 J.S.D. degrees during this time, most of them graduates of New York metropolitan area schools. It also had an LL.M., which differed from the J.S.D. in the sole fact that the LL.M. was available to people who did not hold a college degree. The LL.M. was conferred much more often.<sup>111</sup>

#### **D. The transition to research: early 1920s through early 1930s**

The degrees discussed above were primarily course-based degrees, even if they included some opportunity for research. By the early 1920s, however, the idea of a research degree was in the air. This interest was partly a function of the growing prominence of the "research" idea in the law professoriate beginning during the 1920s. As a general matter, "research" was viewed as investigation that made a contribution to knowledge, involved some specialized skill, and went beyond just collecting and discussing decided cases. It was viewed as a way of making sense of

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<sup>107</sup> Because the J.D. was offered in both three-year and four-year versions during this period, distinguishing those who received the three-year degree from those who received the four-year degree is difficult. However, very few people (if any) seem to have received the four-year version. A conflict with the arts & sciences faculty over degree names in 1917 seems to refer only to the three-year version, and the school's 1970 alumni directory lists only two "graduate" J.D.s. See Minutes of the Faculty of the University of Michigan Law School, November 2, 1917, in Law School (University of Michigan) collection, subseries Faculty Minutes, 1859-1960, box 60 (available in the University of Michigan Archives, Bentley Historical Library). Hereafter these minutes are cited simply as "Michigan [date] Minutes"; UNIV. OF MICHIGAN, LAW SCHOOL ALUMNI DIRECTORY 1859-1970 418 (1970). There were very few LL.M. graduates around this time either, and some of those who did complete the degree were foreigners. See *id.*

<sup>108</sup> As of 1923 NYU did not require any prior college work for the LL.B., and 80% of first-year law students in fact do not have a college degree. The school's law review was not established until 1924. Most of the faculty during this period were part-time. NEW YORK UNIV., THE NEW YORK UNIVERSITY SELF-STUDY: FINAL REPORT 60 (1956) (hereinafter 1956 NYU Report); Frank H. Sommer, *Report of the Dean of the School of Law*, in NEW YORK UNIV., REPORTS OF OFFICERS 1920-21, 1921-22 147, 149-151 (1923) (hereinafter NYU 1920-22 Dean's Report); Frank H. Sommer, *Report of the Dean of the School of Law*, in NEW YORK UNIV., REPORTS OF OFFICERS 1922-23, 1923-24 129, 133-34 (1925) (hereinafter NYU 1922-24 Dean's Report); Frank H. Sommer, *Report of the Dean of the School of Law*, in NEW YORK UNIV., REPORTS OF OFFICERS 1925-26 33 (1927) (hereinafter NYU 1925-26 Dean's Report).

<sup>109</sup> See, e.g., NYU 1920-22 Dean's Report, *supra* note 108, at 150 (noting that courses on the relationship between law and social/economic problems have enriched graduate work).

<sup>110</sup> See *id.*

<sup>111</sup> See NYU Bulletins for 1917-18 through 1923-24 *verify*.

the law and contributing to its rationalization at a time that the legal system was growing more and more complex, as a way of advancing a progressive law reform agenda, or both.<sup>112</sup>

Typically the research idea was framed in reference to one or both of two themes: the growing body of public law and legislation, and the “functional” study of law – “an attempt to understand law in terms of its factual content and economic and social consequences.”<sup>113</sup> Among the seven schools, an interest in public law was most pronounced at Harvard<sup>114</sup> and Michigan,<sup>115</sup> and later at Wisconsin and George Washington.<sup>116</sup> The functional study of law was most pronounced at Columbia and Yale, where it became the centerpiece of the legal realist movement. However, it was also present at Harvard in the form of Pound’s “sociological jurisprudence”

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<sup>112</sup> See, e.g., Columbia 1915-16 Dean’s Report, *supra* note 73, at 7-9; Harlan F. Stone, *Annual Report of the Dean of the Law School for 1918-19*, in ANNUAL REPORT OF THE PRESIDENT AND TREASURER TO THE TRUSTEES WITH ACCOMPANYING DOCUMENTS FOR THE YEAR ENDING JUNE 30, 1919, COLUM. UNIV. BULL. INFO. 1920, AT 100-02 (hereinafter Columbia 1918-19 Dean’s Report); Harlan F. Stone, *Annual Report of the Dean of the Law School 1923*, COLUM. UNIV. BULL. INFO., November 3, 1923, at 13-14 (hereinafter Columbia 1922-23 Dean’s Report) (*nb I’m missing Columbia 1921-22, 1923-24, and 1924-25 DRs*); Harvard 1915-16 Dean’s Report, *supra* note 93, at 140-144; Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1924-25, OFFICIAL REG. HARV. U., January 20, 1926, at 177, 179-80 (hereinafter Harvard 1924-25 Dean’s Report); Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1925-26, OFFICIAL REG. HARV. U., March 9, 1927, at 185, 189-91 (hereinafter Harvard 1925-26 Dean’s Report); Henry Wade Rogers, *School of Law*, in REPORTS OF THE PRESIDENT AND SECRETARY OF YALE UNIVERSITY AND OF THE DEANS AND DIRECTORS OF ITS SEVERAL DEPARTMENTS FOR THE ACADEMIC YEAR 1914-1915 319-20 (1915); Yale Pamphlet 1917, *supra* note 100, at 2-3; Even at NYU there was some additional focus on research work during this period. Examples include an increasing emphasis on faculty scholarship and the establishment of a law review around 1924. See NYU 1920-22 Dean’s Report, *supra* note 108, at 151; NYU 1922-24 Dean’s Report, *supra* note 108, at 133-34; NYU 1925-26 Dean’s Report, *supra* note 108, at 41.

<sup>113</sup> Kalman, *supra* note 10, at 3. For discussions of functionalism, see generally *id.* at 3-44; Currie II, *supra* note 10 (discussing Columbia’s attempt to reorganize its entire curriculum along functional lines in the late 1920s).

<sup>114</sup> See, e.g., Harvard 1915-16 Dean’s Report, *supra* note 93, at 140-41 (referring to the need for professorships in criminal law, legislation and administrative law); Sutherland, *supra* note 49, at 272-73 (discussing Harvard survey on criminal justice in Cleveland); Mary Bridg McManamon, *Felix Frankfurter: The Architect Of “Our Federalism”*, 27 GA. L. REV. 697, 740-44 (1993) (discussing Frankfurter’s work during this period); Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1, 12-14 (2000) (same).

<sup>115</sup> Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT’S REPORT FOR THE YEAR 1921-22 227 (1923); Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT’S REPORT FOR THE YEAR 1923-24 199, 205-06 (1925) (hereinafter Michigan 1923-24 Dean’s Report).

<sup>116</sup> See *infra* notes 279-98 and accompanying text.

and Felix Frankfurter's social science approach to public law.<sup>117</sup> At Michigan, the idea of functional study formed the basis for a series of civil procedure reform projects led by Edwin Sunderland,<sup>118</sup> and both public law and functionalism were central to an LL.B. curricular review begun in the late 1920s.<sup>119</sup> At Wisconsin, it took the form of consulting projects for state government – the genesis of the school's "law in action" idea.<sup>120</sup>

Both the research idea in general and the research doctorate in particular also had to do with the growing integration of the law schools with their host universities. This was attempted at a substantive level – i.e., through collaboration across disciplinary lines – with varying degrees of intensity and success. But it also had symbolic importance: research was what made one a scholar in the sense that one was a scholar in other departments.<sup>121</sup> Social science departments had developed their Ph.D. degrees, and now it was the law schools' turn. Thus "research" – what doctoral students did – was sometimes defined in contrast to "search" -- what the schools' LL.B. students did.<sup>122</sup> The contrast became more and more important as increasing numbers of LL.B. students themselves had prior college degrees.<sup>123</sup>

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<sup>117</sup> See Pound, *Sociological Jurisprudence*, *supra* note 9; Harvard 1925-26 Dean's Report, *supra* note 112, at 190 (noting the importance of research into "law in action"); McManamon, *supra* note 114, at 740-44; Ernst, *supra* note 42, at 12-14.

<sup>118</sup> See Brown, *supra* note 50, at 338-43.

<sup>119</sup> See Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT'S REPORT 1927-28 107, 113-14 (1929) (hereinafter Michigan 1927-28 Dean's Report); Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT'S REPORT 1928-29 61, 67 (1930) (hereinafter Michigan 1928-29 Dean's Report).

<sup>120</sup> See Auerbach, *supra* note 13, at 83-84.

<sup>121</sup> See, e.g., Michigan 1923-24 Dean's Report, *supra* note 113, at 205-06 (citing the growing alignment between graduate study in law and graduate study in other disciplines at the University); Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT'S REPORT FOR THE YEAR 1924-25 113, 120-22 (1926) (hereinafter Michigan 1924-25 Dean's Report); Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT'S REPORT FOR THE YEAR 1925-26 77, 83-84 (1927) (hereinafter Michigan 1925-26 Dean's Report); Frank H. Sommer, *Report of the Dean of the School of Law*, in REPORTS OF OFFICERS TO THE CHANCELLOR OF THE UNIVERSITY FOR THE ACADEMIC YEAR, 1928-29, N.Y.U. BULL., April 26, 1930, at 51, 53-55 (hereinafter NYU 1928-29 Dean's Report); Minutes of the Faculty of the University of Wisconsin Law School, March 13, 1930, in University of Wisconsin Law School, Faculty Minutes (available in the University of Wisconsin Archives, Memorial Library). Hereafter these minutes are cited simply as "Wisconsin [date] Minutes", and other documents included in the collection are identified with a cross reference to "Wisconsin Minutes"; George Washington University Law School, Reorganization of the course leading to the degree of Master of Laws (February 4, 1932) (memorandum available in the George Washington University Archives, Gelman Library).

<sup>122</sup> See, e.g., Harvard 1925-26 Dean's Report, *supra* note 112, at 189; 1936 AALS Report, *supra* note 3, at 314-15; Earl C. Arnold et al., *Special Committee on Advanced Academic and Professional Degrees*, in HAND BOOK ASS'N AM. L. SCH. & PROC. 35<sup>TH</sup> ANN. MEETING 292, 318-19 (1937) (hereinafter 1937 AALS Report).

<sup>123</sup> See, e.g., Michigan 1927-28 Dean's Report, *supra* note 119, at 133 (noting that a prior college degree has just become a prerequisite to LL.B. admission); Frank H. Sommer, *Report*

Columbia was the first major school to establish a doctorate based primarily on a research project. The initiative had had a long and tortured history. By 1908 students at Columbia could do a Ph.D. in law through the Political Science department, and the law school faculty had tried to put together a “Doctor of Law” beginning in that year. They submitted a joint proposal (with the Political Science department) for a research-based degree to the Trustees in 1911, but were turned down. The school’s then Dean, Harlan Fiske Stone, kept stressing the need for such a degree in subsequent Dean’s Reports as a way to train teachers and scholars, and to promote investigation into the way law functions on the ground.<sup>124</sup> Although the social science Ph.D. existed, Stone argued that it would not attract enough law-trained people to have the requisite impact. The Trustees finally approved a research-based “J.D.” (understood as a graduate degree) under the joint jurisdiction of the law school and the political science department in May 1923. A course-based (and less demanding) LL.M was approved at the same time.<sup>125</sup>

Other schools quickly followed, initially with watered-down versions of Columbia’s degree. Yale’s faculty had begun considering the idea of a research degree in 1918, and the following year it voted to abolish the LL.M. and make the D.C.L. the school’s primary research degree, at least nominally.<sup>126</sup> In 1924 the school abolished the Jur Dr. in favor a new “J.S.D.” designed for law teachers. The degree required at least 12 credits of course work, including Roman law and either Jurisprudence or Legal Analysis, and a thesis worth at least 2 credits, all of which was to be completed in one year. At the same time, the school reinstated a course-based LL.M. (this degree had been abolished in connection with the 1920 reforms).<sup>127</sup> By 1927-28, however, the school was characterizing both the LL.M. and the J.S.D. as research-oriented, and the capacity to do “creditable

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*of the Dean of the School of Law for the Year 1933-34, in* REPORTS OF OFFICERS TO THE CHANCELLOR OF THE UNIVERSITY FOR THE ACADEMIC YEARS 1932-33 AND 1933-34, N.Y.U. BULL., August 24, 1935, at 62-63; NEW YORK UNIV., REPORT OF THE CHANCELLOR FOR THE YEAR 1933-34 40 (1935) (hereinafter NYU 1933-34 Chancellor’s Report) (J.S.D. is restructured as a research degree, in part because more and more basic degree students were college graduates).

<sup>124</sup> See Columbia 1915-16 Dean’s Report, *supra* note 73, at 9-11; Columbia 1918-19 Dean’s Report, *supra* note 112, at 100-01; HARLAN F. STONE, COLUMBIA LAW SCH., REPORT OF THE DEAN FOR THE ACADEMIC YEAR ENDING JUNE 30, 1920 75-76 (1920).

<sup>125</sup> See generally Goebel, *supra* note 42, at 292-296.

<sup>126</sup> Yale 12/19/19 Minutes. The thesis requirement for the J.D. was eliminated at the same time. *Id.* The faculty also dropped the Roman law requirement for the D.C.L., probably to make it more viable as a research degree. See Yale 1920-21 Bulletin, *supra* note 104, at 20. Nobody earned the D.C.L. for the next 15 years, however. See Database, *supra* note 98.

<sup>127</sup> YALE UNIV., CATALOGUE OF THE SCHOOL OF LAW 1924-25 15-18 (1924) (hereinafter Yale 1924-25 Bulletin).

research work” was added to both degrees’ admissions requirements.<sup>128</sup> With this new emphasis, which of the two degrees a student earned now depended entirely on the quality of his work.<sup>129</sup> The school also retained the D.C.L., which now would be “conferred only in very exceptional cases for brilliant and important research and will in general demand two years of work.”<sup>130</sup>

Michigan also began considering research in connection with graduate work around 1922, having turned down a suggestion by the arts and sciences faculty to establish a Ph.D.-like research doctorate several years earlier.<sup>131</sup> Part of the reason for this new interest was the school’s first funding from William W. Cook, an alumnus who had become counsel to several New York robber barons, to support research at the school.<sup>132</sup> Extensive faculty consideration of the possibility culminated in the establishment of a new S.J.D. in 1925. Admission required a prior LL.B. or J.D. “completed with high rank,” and candidates were required to complete at least one year of study in residence “with distinction.”<sup>133</sup> In addition, candidates were required to “demonstrate[] their capacity for independent research in law by completing and preparing for publication an approved original study upon some subject chosen after consultation with the instructor in charge and the Committee on Graduate Instruction. The original study may be submitted at any time within two years after the completion of the required year of resident graduate study.”<sup>134</sup>

At Harvard, the process took longer. While S.J.D. credit for research work had been permitted informally for some time,<sup>135</sup> it was not

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<sup>128</sup> YALE UNIV., CATALOGUE OF THE SCHOOL OF LAW 1927-28 14, 17-18 (1927) (hereinafter Yale 1927-28 Bulletin). Indeed, by 1926 the school seemed to be requiring both LL.M. and J.S.D. students to do half of their credits for the degree in the form of research. See Ernest G. Lorenzen, Graduate Degrees (September 1926), in Yale Minutes, *supra* note 84; Yale 10/28/26 Minutes.

<sup>129</sup> See Robert Hutchins, *School of Law*, in REPORTS TO THE PRESIDENT OF YALE UNIVERSITY 1926-1927, BULL. YALE U., January 1, 1928, at 117-18 (hereinafter Yale 1926-27 Dean’s Report); Yale 1927-28 Bulletin, *supra* note 128, at 16.

<sup>130</sup> Yale 1927-28 Bulletin, *supra* note 128, at 16.

<sup>131</sup> See Michigan 11/2/17 Minutes.

<sup>132</sup> Henry M. Bates, *Report of the Law School*, reprinted from THE PRESIDENT’S REPORT, UNIVERSITY OF MICHIGAN, 1932-33 3 (1934) (Cook research funding began in 1924-25).

<sup>133</sup> University of Michigan, *Law School Annual Announcement, 1925-1926, and Catalogue of Students 1924-1925*, U. BULL., February 21, 1925, at 22 (hereinafter Michigan 1925-26 Bulletin). Admission did not require a prior college degree, as the school still only required two years of college study before LL.B. admission. See Brown, *supra* note 50, at x (three years of college work became a prerequisite to LL.B. study in 1926-27).

<sup>134</sup> Michigan 1925-26 Bulletin, *supra* note 133, at 22.

<sup>135</sup> One notable example was in connection with the school’s Research Scholarship, instituted in 1911. See Harvard 1910-11 Dean’s Report, *supra* note 82, at 134; Harvard University, *The Law School 1911-12*, OFFICIAL REG. HARV. U., May 20, 1911, at 11-12. In 1912 the faculty voted that “the dissertation for the Research scholarship, if satisfactory, be counted as one course towards the degree of J.S.D.” Harvard 9/25/12 Minutes. By the early

until 1924 that the school's Catalog formally began to recognize the practice.<sup>136</sup> Pound's Dean's Reports began to stress the importance of research around the same time,<sup>137</sup> and the school's first "seminary" courses appeared that year.<sup>138</sup> The S.J.D. still did not require a research project, however.<sup>139</sup> By 1927 there was a difference of opinion within the school as to best to promote research. The resolution (effective 1928) was to require a research project of S.J.D. candidates, and to encourage more people to come to the school for non-degree research work.<sup>140</sup>

At NYU, there was no suggestion of initiating a research degree in the early 1920s, and the school's jurisprudentially-oriented graduate curriculum was increasingly swamped by more vocational work.<sup>141</sup> However, by the late 1920s a few graduate courses were functioning as laboratories for legislative reform proposals,<sup>142</sup> and in 1929 two "special problem" courses and a seminar appeared in the Bulletin. Finally, in 1932 the school established a full-time graduate division whose course offerings were more "culturally" and jurisprudentially oriented than those in the part-time (evening) division. Both LL.M. and J.S.D. students in this new division had the option of submitting a "thesis" that would substitute for two of the 12 required hours a week of course work for the year.<sup>143</sup>

Meanwhile, there was still no graduate work at Wisconsin, and still no graduate doctorate at George Washington.<sup>144</sup> However, several other

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1920s the practice of giving credit for research work had become more widespread. See Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1922-23, OFFICIAL REG. HARV. U., February 29, 1924, at 188 (hereinafter Harvard 1922-23 Dean's Report).

<sup>136</sup> Harvard University, *The Law School 1924-25*, OFFICIAL REG. HARV. U., March 27, 1924, at 10-11 (hereinafter Harvard 1924-25 Bulletin).

<sup>137</sup> See Harvard 1924-25 Dean's Report, *supra* note 112, at 179-80.

<sup>138</sup> See Harvard University, *The Law School 1925-26*, OFFICIAL REG. HARV. U., March 26, 1925, at 8-9.

<sup>139</sup> See *id.* at 11-12.

<sup>140</sup> See *infra* notes 229-35 and accompanying text.

<sup>141</sup> The number of practice-oriented graduate courses NYU offered grew considerably during the mid-1920s. Compare New York University, *School of Law Announcements for the Ninety-First Year 1925-26*, N.Y.U. BULL., April 24, 1925, at 18, with New York University, *School of Law Announcements for the Ninety-Third Year 1927-28*, N.Y.U. BULL., March 26, 1927, at 19. By 1929 the school's graduate division was the largest in the U.S. See 1956 NYU Report, *supra* note 108, at 94.

<sup>142</sup> See Frank H. Sommer, *Report of the Dean of the School of Law*, in REPORTS OF OFFICERS TO THE CHANCELLOR OF THE UNIVERSITY 1927-28, N.Y.U. BULL., January 5, 1929, at 31-32; NYU 1928-29 Dean's Report, *supra* note 108, at 55.

<sup>143</sup> New York University, *School of Law Announcements for the Session 1932-33*, N.Y.U. BULL., February 8, 1932, at 15-16, 21 (hereinafter NYU 1932-33 Bulletin).

<sup>144</sup> However, in 1928 George Washington began to require a prior college degree as a condition of admission to the LL.M., and LL.M. degree requirements began to include a thesis. George Washington University, *Catalogue 1928-29*, GEO. WASH. U. BULL., March 1928, 135, 139 (hereinafter GW 1928-29 Bulletin). These disappeared in 1931 because of the increasing understanding that the research degree should be a doctorate. Minutes of the

schools -- including Berkeley, Cornell, Duke, Georgetown and Northwestern -- introduced research-based doctorates by the early 1930s.<sup>145</sup>

### E. Teacher training?

At least four of these research-oriented programs had an important goal in common: teacher training. By the mid 1920s, Harvard, Michigan and Yale were explicitly orienting their programs towards current or prospective teachers,<sup>146</sup> and Columbia was doing so by the end of the decade.<sup>147</sup> Of these schools, Columbia, Harvard and Michigan were viewed (with Chicago) as the leading schools of the era, and as such produced the lion's share of the country's law teachers at the time (Harvard most of all).<sup>148</sup> Graduate training was a highly efficient way to augment this base. The school would take people who either already were teaching or who were interested in teaching, give them a year of specialized training, and send them back out to teach. This was important for Columbia, which lost many of its top LL.B. graduates to New York's (far more lucrative) law practice.<sup>149</sup> It was even more important for Yale, which was still an upstart

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Dean's Council, November 24, 1931, George Washington University Law School Record Books (available in the George Washington University Archives, Gelman Library). Hereafter these minutes are cited simply as "GW [date] Council Minutes".

<sup>145</sup> See 1936 AALS Report, *supra* note 3, at 307-08 n. 39, 41 (listing schools); *id.* at 310 (same); 1937 AALS Report, *supra* note 122, at 311-12 n. 39, 41 (same); *id.* at 314 (same). The list also included Nebraska, Washburn and Catholic, none of which currently offer the degree. Stanford also began to offer an S.J.D. in 1932-33, but none were conferred until after World War II. Kirkwood & Owen, *supra* note 53, at 67.

<sup>146</sup> See *supra* notes 93-98 and accompanying text (concerning Harvard); Yale 9/26/22 Minutes; Michigan 1924-25 Dean's Report, *supra* note 121, at 120.

<sup>147</sup> See Harlan F. Stone, *Report of the Dean of the Law School for 1928*, COLUM. UNIV. BULL. INFO., December 1, 1928 (hereinafter Columbia 1927-28 Dean's Report) (noting that seminars will help attract prospective teachers to the school's graduate program); Memorandum on the Situation of the Graduate School 4-6 (undated) (available in Columbia University School of Law, Faculty Reports and Studies Including Material on the Curriculum 1928-31, Columbia Law School Library) (hereinafter Anonymous Memorandum); Report of Committee on Graduate Instruction 20-21 (April 1930) (available in Columbia University School of Law, Faculty Reports and Studies Including Material on the Curriculum 1928-31, Columbia Law School Library) (hereinafter 1930 Columbia Report).

<sup>148</sup> See Harvard 1925-26 Dean's Report, *supra* note 112, at 188-89 (Harvard trained 143 of 605 teachers listed in the most recent AALS directory, and Harvard-trained teachers predominated in five of the six other schools that trained a substantial number of the listed teachers); James Parker Hall, *The Law School*, in THE UNIVERSITY OF CHICAGO, THE PRESIDENT'S REPORT COVERING THE ACADEMIC YEAR ENDING JUNE 30, 1916 (1917) (noting that some five percent of the school's graduates were teaching in AALS-eligible schools, a proportion that was much higher than for Harvard and Columbia graduates); Schlegel III, *supra* note 10, at 319 (the "big time" schools as of around 1915 were Chicago, Michigan, Columbia and Harvard); Alfred Z. Reed, *Legal Education, 1925-27*, 6 AM. L. SCH. REV. 765, 769-70 n.5 (1926-30) (hereinafter Reed II) (listing schools, including Yale).

<sup>149</sup> See 1930 Columbia Report, *supra* note 147, at 20-21.

trying to make a reputation. Although by this time it was producing some teachers from among its LL.B. graduates, its graduate program was a much more efficient vehicle for doing so.<sup>150</sup>

I focus on teacher training because this was what the leading schools were doing before the war, and because most of the remaining schools adopted this goal shortly after the war. But what do we mean by “teacher training”? Why do it? Who was being trained? And how?

**1. Why train teachers?** At the most general level, teacher training was an extension of the schools’ basic missions of training practicing lawyers and contributing to knowledge and understanding. By training teachers and scholars, the schools were producing people who in turn would train more lawyers and produce more scholarship. Harvard seems to have placed particular emphasis on the teacher training responsibilities of the national law schools, given the perceived need to upgrade legal education at the time.<sup>151</sup> But the teacher training interest was also the flip side of the schools’ interest in promoting research and a more academic approach to legal education: the people most likely to want to do this are prospective scholars, and a prospective scholar tends to be a prospective teacher.<sup>152</sup>

More specifically, success in attracting and placing students performed a kind of missionary function for the doctoral school: it helped the school propagate its faculty’s conception of law and legal education at other schools across the country. As suggested above, this had been the case for Harvard’s S.J.D. in the 1910’s. Harvard’s degree, and increasingly Columbia’s and Yale’s, performed similar functions through the early

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<sup>150</sup> See Kalman, *supra* note 10, at 104 (noting that “the school recruited faculty chiefly from its own recent graduates between 1920 and 1955,” in part due to dramatic improvements in its student body); ASS’N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1940-41 (1940) (hereinafter 1940-41 AALS Directory) ([60] Yale LL.B. graduates and 63 doctoral graduates from the 1920s and 1930s were teaching in AALS member schools as of 1940-41). Indeed, by the late 1920s Yale had joined the other top schools as a leading supplier of law teachers. See Reed II, *supra* note 148, at 769-70 n.5.

<sup>151</sup> See Harvard 1925-26 Dean’s Report, *supra* note 112, at 187; 1933 Harvard Report, *supra* note 79, at 23 (“The Committee places a high value on the advantage to the School and to the cause of legal education of having so many Harvard-trained men on the faculties of other schools.”). Columbia was aware of this need, but does not seem to have emphasized it as much. See Anonymous Memorandum, *supra* note 147, at 5-6 (noting that other schools are improved when their faculty members come to Columbia for graduate study).

<sup>152</sup> See Michigan 1924-25 Dean’s Report, *supra* note 121, at 120; Michigan 1927-28 Dean’s Report, *supra* note 119, at 111-12; Felix Frankfurter, Some Observations on Graduate Work 1 (May 23, 1927) (memorandum available in papers of Theodore Plucknett, Miscellaneous memos to the HLS faculty, 1927-30, Harvard Law School Library) (hereinafter Frankfurter Memorandum) (Harvard’s “most effective contribution to legal scholarship comes from the graduate work insofar as it is a recruiting school of law teachers”); cf. Columbia 1927-28 Dean’s Report, *supra* note 147, at 23-24; Thomas W. Swan, *School of Law*, in REPORT OF THE PRESIDENT OF YALE UNIVERSITY 1923-1924, BULL. YALE U., September 1, 1924, at 122-24 (hereinafter Yale 1923-24 Dean’s Report).



1930s.<sup>153</sup> At Harvard, Pound was no longer the only player: beginning around this time, Felix Frankfurter was training a new cadre of administrative law scholars in his graduate seminar in the field.<sup>154</sup> He also established a Research Scholarship under which a recent graduate would pursue the S.J.D. under Frankfurter’s supervision, then clerk for Supreme Court Justice Louis Brandeis the following year.<sup>155</sup> Note that these two visions were in stark contrast to the LL.B. curriculum, which remained firmly anchored in traditional private law courses. At Columbia, Dean’s Reports of the era include the recurring comment that graduate training was a way to spread the school’s “influence.”<sup>156</sup> The available sources do not state the exact nature of that influence, but it can be inferred from its faculty’s early Realist scholarship and accompanying attempts to reorganize the entire LL.B. curriculum along functional lines.<sup>157</sup> At Yale, teacher training was quite consciously a mechanism for conveying its educational gospel to a broader audience.<sup>158</sup>

There was also a more cynical side to the missionary function: naked power. Source materials from the period – not only at Harvard, Yale and Columbia, but at Michigan as well – are full of references to the fact that having so many graduates on the faculty of other schools would help the school develop “influence.”<sup>159</sup> This phenomenon both fueled and was

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<sup>153</sup> See *supra* notes 97-105 and accompanying text; Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 LAW & HIST. REV. 370, 374 (1994) (according to Hurst, Harvard’s graduate work in the early to mid-1930s “was conducted pretty much on a sort of missionary theory. They would bring in promising heathen from the outer lands of the United States and expose them to a year of Harvard. But it wasn’t much of a graduate year I thought.”)

<sup>154</sup> For example, some one-third of Harvard’s S.J.D. graduates during the 1920s wrote papers or theses in administrative law. See Database, *supra* note 98.

<sup>155</sup> The scholarship first appeared in 1924. See Harvard 1924-25 Bulletin, *supra* note 112, at 14-15. In an arrangement between Frankfurter and Brandeis, the scholarship would be conferred on people whom Brandeis had already selected to clerk for him. See Hartog, *supra* note 153, at 374. Brandeis himself is said to have donated at least part of the funds for the scholarship. See James M. Landis, *Mr. Justice Brandeis and the Harvard Law School*, 55 HARV. L. REV. 184, 189 (1941).

<sup>156</sup> See, e.g., YOUNG B. SMITH, COLUMBIA UNIV., REPORT OF THE DEAN OF THE SCHOOL OF LAW, WITH A REPORT OF THE FACULTY COMMITTEE ON THE SELECTION OF STUDENTS, FOR THE PERIOD ENDING JUNE 30, 1937 (1938) (hereinafter Columbia 1936-37 Dean’s Report); Columbia 1939-40 Dean’s Report.

<sup>157</sup> See Harry W. Jones, Tribute, *Edwin Wilhite Patterson: Man and Ideas*, 57 COLUM. L. REV. 607, 607-10 (1957) (noting the influence of Edwin Patterson, the legal pragmatist who Chaired Columbia’s Graduate Committee for over 25 years, on Columbia’s graduate students); see generally Currie II, *supra* note 10.

<sup>158</sup> See Yale 1/10/23 Minutes (noting demand among law teachers for Yale graduate work at the recent AALS annual meeting and proposing a summer program to facilitate this); Yale 1923-24 Dean’s Report, *supra* note 152, at 122-24. *find other sources for the “quite consciously” idea.*

<sup>159</sup> See 1933 Harvard Report, *supra* note 79, at 23 (noting that “having so many Harvard-trained men on the faculties of other schools” increases the school’s “influence”); *supra* note

fueled by what John Henry Schegel has called the state of “inter-university warfare” that existed among Harvard, Yale and Columbia at the time,<sup>160</sup> and was a continued presence in decisions about matters such as recruiting, degree requirements and fellowship awards for the schools’ doctoral programs.<sup>161</sup> Since Michigan was largely out of this competition, its motivation in the influence department is probably better described as keeping up with the Joneses. As Dean Henry Bates would say in his 1924-25 Dean’s report, the school’s lack of fellowships for graduate students (particularly compared to those offered by Harvard and other schools) “cannot be tolerated if we hope to take our rightful place among the law schools of the country and to make our proper contribution to the jurisprudence of the future.”<sup>162</sup>

**2. What to teach.** What the schools taught was tied to both the specific goal of training teachers and the broader goal of promoting research. First, the schools offered two kinds of coursework: courses designed to promote a better understanding of the legal system as a whole, and advanced courses in particular fields. Second, the schools required students to complete a research project, though the nature and scope of that project varied considerably. Finally, pedagogical training was available to some extent, but it was a distinctly minor part of the whole.

*Coursework.* The first component was coursework that would help the student better understand the nature and philosophy of law and the operation of the legal system as a whole.<sup>163</sup> Initially, the schools viewed

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156-57 and accompanying text (concerning Columbia); Charles E. Clark, *The School of Law, Reports of the Dean and of the Librarian*, BULL. YALE U., supplement [date], 1933, at 22 (hereinafter Yale 1932-33 Dean’s Report) (noting that the presence of a large number of Yale graduate degree holders on the faculties of other schools “is a source of strength to” Yale); Michigan 1925-26 Dean’s Report, *supra* note 121, at 83 (through graduate work, “the influence of the School will be greatly extended, through the placing of its graduates in teaching positions throughout the country”).

<sup>160</sup> See Schlegel I, *supra* note 10, at 472.

<sup>161</sup> See Anonymous Memorandum, *supra* note 147, at 2-6 (concerning recruiting tactics of the three schools); Yale 11/6/23 Minutes (noting requirements for Harvard’s graduate degrees); Report of the Committee on Graduate Curriculum (November 28, 1923), in Yale Minutes, *supra* note 84 (hereinafter 1923 Yale Report) (recommending creation of the new J.S.D. based in part on practices at “a neighboring school of high rank”); Yale 3/17/32 Minutes (noting “The danger of competition from other schools, in the event that the Yale Law School measurably increased the difficulty of obtaining a graduate degree.”) In the spring of 1933 the Deans of the three schools met to establish a framework for cooperation in these areas. See Yale 4/13/33 Minutes; Yale 5/18/33 Minutes. See also *infra* notes 215-225 and accompanying text.

<sup>162</sup> Michigan 1924-25 Dean’s Report, *supra* note 121, at 121. See also *id.* at 122 (citing the need for graduate fellowships if Michigan is to “maintain its relative position among the law schools of the country”).

<sup>163</sup> See 1933 Harvard Report, *supra* note 79, at 26 (“[T]he Faculty should emphasize the importance of a knowledge of more than one system of law, and of an understanding of the philosophy of law. . . .”); Young B. Smith, *Training the Law Teacher Through Graduate Work*, 29 ASS’N AM. L. SCH. PROC. 93, 94 (1931).

this purpose as best served by the classic “cultural” courses: Roman law, jurisprudence, comparative law and legal history.<sup>164</sup> (Indeed both Harvard and Yale initially required Roman law for the doctorate.)<sup>165</sup> How exactly these courses were taught is unclear, but two basic possibilities suggest themselves. One would be to treat law essentially as a closed system, except that by looking at other legal systems and other periods in time the student would be encouraged to draw inferences of a more universal nature.<sup>166</sup> Another would be to use the examples of history and other legal systems as lenses through which to view law in relation to its social context. Although the lens itself would be essentially backward-looking, this latter view could form a basis for the functional study of law.

Over time, however, the emphasis began to shift. Columbia’s doctorate never relied on the classical continental approach, and instead offered a seminar, taught by legal pragmatists Edwin Patterson and John Dewey, entitled “Logical and ethical problems of the law: An introduction to legal philosophy” beginning in 1924.<sup>167</sup> This was forerunner of the school’s seminar in legal philosophy, which became a requirement for the J.S.D. in the mid-1930s.<sup>168</sup> By 1927-28, Yale was not even offering Roman law as a graduate course, and specific course requirements for the doctorate no longer appeared.<sup>169</sup> Harvard dropped its Roman Law requirement for the S.J.D. around the same time.<sup>170</sup> The mix would change even more in the 1930s.

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<sup>164</sup> See Harvard 1925-26 Dean’s Report, *supra* note 112, at 188-89; NYU 1932-33 Bulletin, *supra* note 143, at 21 (courses offered in full-time graduate division); Michigan 1925-26 Bulletin, *supra* note 133, at 28-29.

<sup>165</sup> Harvard required the course through the 1927-28 academic year, see Harvard University, *The Law School 1927-28*, OFFICIAL REG. HARV. U., MARCH 21, 1927, at 11-12, and Yale required it through 1926-27, see YALE UNIV., CATALOGUE OF THE SCHOOL OF LAW 1926-27 18 (1926) (hereinafter Yale 1926-27 Bulletin).

<sup>166</sup> As Pound would comment in 1926, “In each case the universal enduring element in the law is emphasized, rather than the local and ephemeral. In each case the law is subjected to a critique, if not of a general comparative law, at least of a comparative law of English-speaking peoples. In each case the paths to improvement of the law are made straight by breaking down the dogmatic assumption of the apprentice-trained lawyer that the details of local practice and of local judicially declared precepts are the legal order of nature.” Harvard 1925-26 Dean’s Report, *supra* note 112, at 188-89.

<sup>167</sup> See Columbia University, *School of Law Announcement 1924-25*, COLUM. U. BULL. INFO., [August] 1924, at 16 (hereinafter Columbia 1924-25 Bulletin).

<sup>168</sup> See YOUNG B. SMITH, COLUMBIA UNIV., REPORT OF THE DEAN OF THE SCHOOL OF LAW FOR THE ACADEMIC YEAR ENDING JUNE 30, 1938 8-9 (1938) (hereinafter Columbia 1937-38 Dean’s Report); Young B. Smith, Elliott Cheatham, John Hanna, and Edwin W. Patterson, Special Report of the Committee on Graduate Instruction, Faculty of Law (Confidential) 12 (February 1941) (available in Special Collections, Columbia Law School Library) (hereinafter 1941 Columbia Report); Jones, *supra* note 157, at 609.

<sup>169</sup> See Yale 1927-28 Bulletin, *supra* note 128, at 16.

<sup>170</sup> It was retained, however, as a requirement for the LL.M. degree. See Harvard University, *The Law School 1928-29*, OFFICIAL REG. HARV. U., MARCH 23, 1928, at 14 (hereinafter Harvard 1928-29 Bulletin).

The second component was advanced coursework developed specifically for graduate students -- indeed some designed primarily with doctoral students (as contrasted with LL.M. students) in mind. Here the most important development was the “seminar” or problem course, which began appearing in force at the same time that the research component of the degree began to grow. These new offerings were pedagogically oriented, to be sure, but they were also a device for exploring new fields of study and new ways of thinking about law.<sup>171</sup> As others have noted, some were important parts of the schools’ early Legal Realist experiments.<sup>172</sup> Columbia, for example, began offering a graduate seminar in business organization, taught jointly by professors in the law school and the department of economics and business, as early as 1924,<sup>173</sup> and added a joint seminar in industrial relations (also taught with the economics and business department) in 1925.<sup>174</sup> Yale first began offering “problem” courses to graduate students in 1923-24 -- a “commercial banking problems” course taught by Llewellyn, and “problems in procedure”, taught by Morgan and Clark.<sup>175</sup> During the next few years the number of such courses grew, and by 1930 the school was offering joint seminars with other departments as well.<sup>176</sup> At Harvard (hardly a Realist bastion), the joint seminar was never part of the curriculum as long as Pound remained Dean. However, Frankfurter’s seminar in Administrative Law, first offered in 1916, has been called an incubator for Frankfurter’s social science approach to the field.<sup>177</sup> By the mid-1920s Edmund Morgan was offering a seminar in problems in evidence law, and Thomas Reed Powell was offering a seminar in constitutional problems.<sup>178</sup>

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<sup>171</sup> Pedagogical benefits included the small numbers of students, opportunity for more individual contact with professors, and the opportunity to pursue guided research rather than a strictly set curriculum. *See, e.g.*, Brown, *supra* note 50, at 212-13; 1933 Harvard Report, *supra* note 79, at 14 (discussing graduate courses’ different pedagogical approaches); Goebel, *supra* note 42, at 337-38 (opening seminars to LL.B. students enhanced individualized instruction of these students).

<sup>172</sup> *See, e.g.*, Kalman, *supra* note 10, at 75-76; Currie II, *supra* note 10, at 8.

<sup>173</sup> *See* Columbia 1924-25 Bulletin, *supra* note 147, at 31.

<sup>174</sup> *See* Columbia University, *School of Law Announcement 1925-26*, COLUM. U. BULL. INFO., [August] 1925, at 31 (hereinafter Columbia 1925-26 Bulletin).

<sup>175</sup> *See* YALE UNIV., CATALOGUE OF THE SCHOOL OF LAW 1923-24 23-25 (1923).

<sup>176</sup> *See, e.g.*, Yale University, *The School of Law for the Academic Year 1930-31*, BULL. YALE U. 16-20 (1930) (hereinafter Yale 1930-31 Bulletin) (listing the joint seminar “Legal, Psychological and Psychiatric Aspects of Crime”); Yale University, *The School of Law for the Academic Year 1933-34*, BULL. YALE U. 21-23 (1933) (listing three joint seminars).

<sup>177</sup> *Get cite.* At Michigan, seminars began to be offered to S.J.D.s, selected LL.M.s, and selected third year LL.B. students in 1925-26. *See* Michigan 1925-26 Bulletin, *supra* note 133, at 28-29.

<sup>178</sup> *See* Harvard University, *The Law School 1925-26*, OFFICIAL REG. HARV. U., March 26, 1925, at 8-9. In addition, the school had offered a “problem” course in international law since 1915-16, but it was taught by more traditional scholars such as Manley Hudson and

Beyond this, schools varied in the coursework they would allow students to pursue.<sup>179</sup> One set of questions concerned whether students would be permitted to do coursework in other university departments. This was permitted at Columbia<sup>180</sup> and initially at Yale,<sup>181</sup> but not at the other schools.<sup>182</sup> Another question concerned whether students could take LL.B.-level courses in addition to graduate courses. Study in LL.B. courses was permitted at Harvard (the school that was the slowest to incorporate research work into the degree)<sup>183</sup> and Columbia (as for other courses, only as support for the student's research project).<sup>184</sup> Yale vacillated. Initially such courses were permitted with the Dean's consent, but this provision was deleted in connection with the 1927 reforms to the degree.<sup>185</sup> By the early 1930s, several faculty members were arguing that students should be permitted to do LL.B. coursework in order to expose them to the Yale faculty's ways of thinking about law, and the policy was changed again.<sup>186</sup> At Michigan, only graduate level courses counted towards the student's required coursework.<sup>187</sup>

*Research.* The second major component was research. This took three primary forms: independent projects conducted under faculty supervision, papers written in conjunction with seminars, and student work that was part of a larger faculty-run research project. In general, they were far from today's conception of a doctoral dissertation as an extended monograph. The goals of research work were similarly diffuse, and faculty expectations of a given student would vary with the goal. For example, one

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Eugene Wambaugh. *See* Harvard University, *The Law School 1915-16*, OFFICIAL REG. HARV. U., March 22, 1915, at 8.

<sup>179</sup> To some extent this depended on whether the coursework was intended primarily as support for the student's research project, as contrasted with work that had intrinsic merit.

<sup>180</sup> *See* Columbia 1923-24 Bulletin, *supra* note 180, at 16.

<sup>181</sup> *See, e.g.*, Yale 1924-25 Bulletin, *supra* note 127, at 25 (courses in other University departments may be taken with the Dean's consent); Yale 9/24/23 Minutes (credits for an Economics course can count towards a particular student's J.D. degree). The practice appears to have been discontinued in 1927-28. *Compare* Yale 1926-27 Bulletin, *supra* note 145, at 25 (including language about taking such courses with the Dean's consent) *with* Yale 1927-28 Bulletin, *supra* note 128, at 22 (deleting the prior language).

<sup>182</sup> *See, e.g.*, Harvard 1924-25 Bulletin, *supra* note 136, at 11-12.

<sup>183</sup> *See id.* at 10-11; Harvard 1928-29 Bulletin, *supra* note 170, at 14.

<sup>184</sup> Columbia 1923-24 Bulletin, *supra* note 180, at 15; Columbia 1922-23 Dean's Report, *supra* note 112, at 13-14; 1941 Columbia Report, *supra* note 168, at 12.

<sup>185</sup> *Compare* Yale 1924-25 Bulletin, *supra* note 127, at 25 (courses in other University departments may be taken with the Dean's consent); Yale 1926-27 Bulletin, *supra* note 145, at 25 (same) *with* Yale 1927-28 Bulletin, *supra* note 128, at 22 (deleting the prior language).

<sup>186</sup> Yale 1/15/31 Minutes; Yale 2/26/31 Minutes; Charles E. Clark, *The School of Law, Reports of the Dean and of the Librarian*, BULL. YALE U., [date], 1931, at 16-17 (hereinafter Yale 1930-31 Dean's Report); Yale University, *The School of Law for the Academic Year 1931-32*, BULL. YALE U. 13 (1931) (hereinafter Yale 1931-32 Bulletin).

<sup>187</sup> *See* Michigan 1925-26 Bulletin, *supra* note 133, at 22 ("in general only fourth-year seminar courses will be approved for the programme of resident study").

way of understanding research in the doctoral context was simply as training in research methods and techniques, in order to prepare graduates for similar work in their subsequent careers. Since the focus of this approach was training, it might carry modest expectations as to the actual written product the student produced.<sup>188</sup> A second way of understanding research in the doctoral context was the actual production of valuable research by the student.<sup>189</sup> Since the focus of this approach was on the product, it carried higher expectations -- including in some cases a publication requirement.<sup>190</sup>

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<sup>188</sup> See Smith, *supra* note 143, at 94-95 (one aim of graduate work is “improving one’s capacity to engage in fruitful research and to interpret data when it is found”); Columbia 1937-38 Dean’s Report, *supra* note 168, at 8-9 (“The final aim of graduate work is training for productive scholarship which will ultimately add to the body of useful knowledge and which will enrich and enlighten the teaching of law.”); Harvard 1925-26 Dean’s Report (“We should train in the investigating function of the teacher of law . . .”); Roscoe Pound, *The Law School*, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1926-27, OFFICIAL REG. HARV. U., March 9, 1928, at 185-86 (hereinafter Harvard 1926-27 Dean’s Report) (referring to “training in research”); Roscoe Pound, Suggestions for Organization of Graduate and Research Work (undated memorandum available in papers of Theodore Plucknett, Miscellaneous memos to the HLS faculty, 1927-30, Harvard Law School Library) (hereinafter Pound Memorandum) (“we can do little more than give the preliminary training on which effective research work may proceed later”); Yale 2/26/31 Minutes (despite the doctorate’s research requirement, “many teachers of law are unable to do real research work”).

<sup>189</sup> See Young B. Smith, *Report of the Dean of the School of Law for the Period Ending June 30, 1935*, COLUM. UNIV. BULL. INFO., February 15, 1936, at 17 (hereinafter Columbia 1934-35 Dean’s Report) (“Our requirements for the Doctor’s degree are resulting in the production of original and important scholarly studies of many different legal problems.”); Harvard 1925-26 Dean’s Report, *supra* note 112, at 189 (calling graduate student research “important for its own sake”); Harvard 1926-27 Dean’s Report, *supra* note 188, at 186-88 (noting that some graduate students may make actual research contributions); Pound Memorandum, *supra* note 188 (same); Michigan 1925-26 Dean’s Report, *supra* note 121, at 83 (“contributions of value to original scholarship, through theses and other papers which it is our aim to publish, may be confidently expected”); Hessel Yntema, Stray Comment on Graduate Study 5 (October 30, 1934), in Law School (University of Michigan) records 1852-1999 collection, Subseries: Topical Files, box 102 (memorandum available in the University of Michigan Archives, Bentley Historical Library) (“The emphasis in graduate study, strictu sensu, should be upon original investigation. This thesis is implicit in the foregoing proposals, but its basis deserves to be more explicitly indicated. The underlying ideas are: first, that the law school has a definite function to perform in advancing the scope and accuracy of legal knowledge; second, that the professional course offers an adequate general background, which warrants a change of emphasis to research in graduate work; third, that it is extremely desirable for post-graduate students, who are looking forward to teaching or other advanced work in law, to be required to demonstrate their aptitude for research in and mastery of some particular subject.”)

<sup>190</sup> Columbia had a publication requirement, and Harvard considered implementing one. See Young B. Smith, *Report of the Dean of the School of Law for the Period Ending June 30, 1930*, COLUM. UNIV. BULL. INFO., January 31, 1931, at 21 (hereinafter Columbia 1929-30 Dean’s Report); Harvard 12/16/30 Minutes; 1933 Harvard Report, *supra* note 79, at 33. When Yale first introduced the J.S.D. in 1924, the D.C.L. rather than the J.S.D. was envisaged as the degree that would result in worthwhile publishable product. See 1923 Yale Report, *supra* note 141; Yale 1924-25 Bulletin, *supra* note 127, at 17-18; cf. Yale 1927-28

A third way of understanding research in the doctoral context was research assistance to faculty. This approach had the benefit of both training students to do research and ultimately resulting in a worthwhile research product – the faculty member’s. Not surprisingly, the approach was quite interesting to some faculty members, and was sometimes justified on the basis that students receiving fellowship support from the school should be giving something back.<sup>191</sup> However, it begged the question whether the student was receiving adequate training to produce his or her own research, and also could be subject to abuse by the faculty supervisor. Here the schools took different positions. Michigan openly permitted this kind of work,<sup>192</sup> and Columbia did to some extent as well.<sup>193</sup> Harvard never officially recognized the practice, but it clearly occurred.<sup>194</sup> Yale faculty occasionally used graduate students for research support beginning in the early 1930s, and some faculty members encouraged the school to do more of this.<sup>195</sup> Others, however, were skeptical as to whether high-caliber graduate students could be induced to come to the school if doing so meant working on faculty projects rather than their own.<sup>196</sup>

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Bulletin, *supra* note 128, at 16 (the D.C.L. “is conferred . . . for brilliant and important research”) Michigan also contemplated publication, but did not explicitly require it. *See* Michigan 1925-26 Bulletin, *supra* note 133, at 22 (contemplating that candidates “prepar[e] for publication an approved original study”).

<sup>191</sup> *See, e.g.*, Yale 2/25/32 Minutes (remarks of Wesley Sturges).

<sup>192</sup> For example, William Wirt Blume (S.J.D. 1928) assisted a Sunderland research project on procedural reform during the 1927-28 academic year. *See* Brown, *supra* note 50, at 339-40. *See also* Michigan 12/3/26 Minutes (graduate work is “to supplement . . . the work to be done by this Faculty in research”); Michigan 1928-29 Dean’s Report, *supra* note 119, at 67 (“Much of [the graduate work] is likely to take the form of co-operative research in law”); University of Michigan, Report of Committee on Graduate Work 320 (February 1936) (memorandum attached to Michigan 3/13/36 Minutes) (hereinafter 1936 Michigan Report) (contemplating that some faculty research assistants would be graduate degree candidates).

<sup>193</sup> *See, e.g.*, Columbia 1928-29 Dean’s Report, *supra* note 193, at 28 (noting that some graduate students are working as research assistants to faculty); Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1929-30*, COLUM. U. BULL. INFO., September 14, 1929, at 7 (hereinafter Columbia 1929-30 Bulletin) (noting that the opportunity exists); Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1930-31*, COLUM. U. BULL. INFO., August 23, 1930, at 21-23 (hereinafter Columbia 1930-31 Bulletin) (noting opportunities for graduate students to work on ongoing legal history and legislative drafting projects).

<sup>194</sup> *See* Becker to Clarke (describing his work on cases in which Professors Frankfurter and Chafee were involved) *can’t use this*; Ernst, *supra* note 114, at 16-18 (describing Willard Hurst’s work as Frankfurter’s Research Fellow); cf. Harvard 11/30/37 Minutes (proposal to hire research assistants and to compensate them in part through award of a graduate degree).

<sup>195</sup> *See* Report of Committee on Summer Work in the Yale Law School (October 9, 1930), in Yale Minutes, *supra* note 84 (recommending that graduate students be hired to assist faculty on summertime research projects); Yale 10/16/30 Minutes (adopting the report’s recommendations); Yale 1/15/31 Minutes (Douglas remarks); Yale 2/25/32 Minutes (Sturges remarks); Schlegel II, *supra* note 10, at 271 (Underhill Moore hired J.S.D. candidate Charles Callahan as a research assistant).

<sup>196</sup> *See* Yale 2/25/32 Minutes.

*Pedagogical training.* The schools' support for pedagogical training, on the other hand, was quite limited. Harvard offered an Ezra Ripley Thayer teaching fellowship beginning in 1916,<sup>197</sup> and Yale seems to have offered teaching fellowships occasionally as holes in the curriculum required.<sup>198</sup> Yale and Columbia also offered instruction in how to put together and present teaching materials.<sup>199</sup> Otherwise students were expected to learn pedagogical techniques largely by osmosis – by being exposed to the masters. It has been said that this is how Armistead Dobie, who became Dean at the University of Virginia Law School shortly after completing his Harvard S.J.D. in 1922, brought the case method of instruction to that school.<sup>200</sup>

How these components fit together was partly a question of the goals of the program. If the program's goal were primarily teacher training, it might best be structured as coursework pursued for its own sake, a limited research project, and pedagogical training. If its goal were primarily the production of useful research, it might best be structured by placing an extended research project at the core of the requirements, with appropriate support from coursework as needed.<sup>201</sup> Of course, there would be a corresponding impact on what the student took away from the experience: the broadening effect of coursework in “cultural” fields versus the narrowing effect of a research project and advanced work in one's own areas of specialization. Striking the right balance would be difficult,<sup>202</sup> and

<sup>197</sup> See Harvard University, *The Law School 1916-17*, OFFICIAL REG. HARV. U., May 3, 1916, at 5. In at least one some case, teaching duties were effectively credited towards the S.J.D. degree requirements. See Harvard 2/19/18 Minutes (faculty vote to award the degree to a student “who was prevented from taking his fourth year examinations . . . because of his duties as Teaching Fellow”).

<sup>198</sup> See, e.g., Yale 4/22/19 Minutes (Karl Llewellyn); Yale 1/17/35 Minutes (J.W. Moore). In Llewellyn's case, these teaching duties counted towards his J.D. degree requirements. See Yale 4/22/19 Minutes.

<sup>199</sup> See Thomas W. Swan, *School of Law*, in REPORTS OF THE PRESIDENT, PROVOST AND SECRETARY OF YALE UNIVERSITY AND OF THE DEANS AND DIRECTORS OF ITS SEVERAL SCHOOLS AND DEPARTMENTS FOR THE ACADEMIC YEAR 1922-1923 298-99 (1913) (hereinafter Yale 1922-23 Dean's Report) (quoting a faculty resolution on the proposed summer session); Columbia 1930-31 Bulletin, *supra* note 193, at 41. Columbia's Dean Smith indicated that this was intended to expose students to “problems of legal education” of the type discussed in AALS meetings, rather than pedagogical technique. See Smith, *supra* note 143, at 95.

<sup>200</sup> W. HAMILTON BRYSON, *LEGAL EDUCATION IN VIRGINIA 1779-1979: A BIOGRAPHICAL APPROACH* 1948 (1982).

<sup>201</sup> See, e.g., Columbia 1922-23 Dean's Report, *supra* note 112, at 13-14; Columbia 1929-30 Dean's Report, *supra* note 190, at 20; Report of the Committee on Post-Graduate Study (probably written by Harvard Law School Professor Joseph H. Beale in May 1927) (available in papers of Theodore Plucknett, Miscellaneous memos to the HLS faculty, 1927-30, Harvard Law School Library) (hereinafter Beale Memorandum). *But see* Yale 1924-25 Bulletin, *supra* note 127, at 17-18 (D.C.L. degree requires considerable coursework in addition to the thesis).

<sup>202</sup> For the differing views of Harvard's Joseph Beale, Felix Frankfurter and Roscoe Pound on the subject in 1927, see Beale Memorandum, *supra* note 201; Frankfurter Memorandum, *supra* note 152; Pound Memorandum, *supra* note 188; See also 1933 Harvard Report (noting



how to do so would depend in part on the prior experience of a school's graduate student body.

**3. Who are the students?** This leads to the next category of issues: who would be pursuing these programs? At a minimum, the schools hoped to attract people of high intelligence who had done well in their prior law studies.<sup>203</sup> As research became an increasingly important component of the degree, schools made the capacity to pursue original research a prerequisite for admission.<sup>204</sup> This was partly about candidates' ability to do the work the degree required, but it also had to do with a side benefit of offering a teacher training degree: it gave faculty the opportunity to teach people who resembled themselves.

More concretely, the schools were interested primarily in people who were already teaching. At Harvard and Yale, people who were already teaching were a significant proportion of the doctoral candidates during this period,<sup>205</sup> and Columbia attracted increasing numbers of teachers beginning in the early 1930s.<sup>206</sup> Existing teachers, it was felt, were the ones most

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that rigid course requirements detract from research); 1930 Columbia Report, *supra* note 147; Yale 1/15/31 Minutes; Yale 2/26/31 Minutes; Ernest G. Lorenzen, Report of Graduate Curriculum Committee (February 26, 1931), in Yale Minutes, *supra* note 84 (hereinafter Lorenzen Memorandum 2/31); Charles E. Clark, *The School of Law, Reports of the Dean and of the Librarian*, BULL. YALE U., supplement [date], 1932 (hereinafter Yale 1931-32 Dean's Report) (discussing the faculty's decision to extend the time for completing the thesis).

<sup>203</sup> See, e.g., Columbia 1923-24 Bulletin, *supra* note 180, at 15 (selective admission of J.D. candidates); Columbia 1929-30 Dean's Report, *supra* note 190, at 21-22 (reciting academic achievements of graduate fellowship recipients); Harvard 1924-25 Bulletin, *supra* note 136, at 10-11 (admission to graduate curriculum requires completion of prior law degree "with high rank", and receipt of S.J.D. requires completion of examinations with "distinguished excellence"); Frankfurter Memorandum; Yale 1924-25 Bulletin, *supra* note 127, at 15 (admission to graduate work requires completion of prior law degree "with high rank"); Robert Hutchins, *School of Law*, in REPORTS TO THE PRESIDENT OF YALE UNIVERSITY 1927-1928, BULL. YALE U., January 1929 116 (hereinafter Yale 1927-28 Dean's Report) (contrasting the hoped-for caliber of graduate students with the reality of those who enrolled); Michigan 1925-26 Bulletin, *supra* note 133, at 22 (admission to S.J.D. requires a prior LL.B. or J.D. "completed with high rank"); Michigan 1925-26 Dean's Report, *supra* note 121, at 83 (the school's graduate work "is attracting the attention of a superior type of students").

<sup>204</sup> See, e.g., 1930 Columbia Report (*go back to actual text*); Harvard 1928-29 Bulletin, *supra* note 170, at 14 ("fitness for legal research" becomes an S.J.D. admission requirement); Yale 1927-28 Bulletin, *supra* note 128, at 14 (the ability to do "creditable research work" becomes a requirement of graduate admission).

<sup>205</sup> See, e.g., Harvard 1926-27 Dean's Report, *supra* note 188, at 185-87; Roscoe Pound, *The Law School*, in REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORTS OF DEPARTMENTS 1929-30, OFFICIAL REG. HARV. U., February 24, 1931, at 198, 200; Thomas W. Swan, *School of Law*, in REPORTS TO THE PRESIDENT OF YALE UNIVERSITY 1924-1925, BULL. YALE U., [date], 1925, at 89 (hereinafter Yale 1924-25 Dean's Report) (noting presence of teachers in summer program); Yale 2/26/31 Minutes; Lorenzen Memorandum 2/31, *supra* note 202.

<sup>206</sup> See Columbia 1936-37 Dean's Report (for the past five years the graduate program has been attracting a number of candidates who are already teaching in other schools, and who

likely to put their training to work, so teaching them would have an immediate impact. They were also the ones most likely to benefit from the year in residence and make useful contributions to the seminars. Here the theory was that a few years of teaching experience helped a person's LL.B. education settle into perspective and give the student a sense of what the teaching enterprise entailed.<sup>207</sup> Because of this experience, they also were the people of whom it was most reasonable to expect a publishable research product.<sup>208</sup>

But there were also some high-performing recent graduates. This was Columbia's experience by default until around 1932; before that the school had been unable to attract many experienced teachers to the degree.<sup>209</sup> At Harvard, it was part of a deliberate attempt to interest some of the school's high-performing graduates in teaching. This group included Erwin Griswold (S.J.D. 1929), who went on to become Dean of the school from 1946 to 1967. Others included the recipients of Frankfurter's Research Fellowship, including James Landis (S.J.D. 1925), Malcolm Sharp (S.J.D. 1927), Harry Shulman (S.J.D. 1927), Wilber Katz (S.J.D. 1930), Henry Hart (S.J.D. 1931), Paul Freund (S.J.D. 1932), David Riesman (1934-35), and Willard Hurst (1935-36).<sup>210</sup> Yale also was interested in attracting its own top graduates, but seemed to have less success in this respect than did Harvard. The school did, however, manage to attract several Americans who had studied law at Oxford on Rhodes scholarships.<sup>211</sup> These included Myres McDougal (J.S.D. 1931) and Daniel Boorstin (J.S.D. 1940).

In all, the numbers of graduates were quite astonishing. Harvard conferred some 135 S.J.D. degrees between 1924 and 1933, of whom some

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plan to return to teaching after conferral of the interim LL.M. degree.). Some of Michigan's early graduates – including Fowler Harper, William Wirt Blume, and Chesterfield Oppenheim – also had teaching experience prior to pursuing the S.J.D.

<sup>207</sup> See Memorandum from Karl Llewellyn to Committee on Seminars, "Seminar on Law and Society" (March 20, 1930) (available in Columbia University School of Law, Faculty Reports and Studies Including Material on the Curriculum 1928-31, Columbia Law School Library) (people who had done some teaching tended to do better in his seminar than LL.B. students who had not); Smith, *supra* note 143, at 96-97 (comments of Joseph Beale).

<sup>208</sup> See Harvard 1926-27 Dean's Report, *supra* note 188, at 186-88; 1933 Harvard Report, *supra* note 79, at 26 ("under no circumstances should men just out of law school be admitted as candidates."). Cf. Letter from Burke Shartel to Lewis Simes (February 23, 1939), in Law School (University of Michigan) records 1852-1999 collection, Subseries: Topical Files, box 102 (available in the University of Michigan Archives, Bentley Historical Library) (hereinafter Shartel to Simes) (graduate students with experience in "teaching, practice or business" are generally more capable than students admitted immediately after LL.B. study). *But see* Yale 2/26/31 Minutes ("real research work" was too much to ask of many teachers); Lorenzen Memorandum 2/31, *supra* note 202 (same).

<sup>209</sup> See, e.g., Columbia 1929-30 Dean's Report, *supra* note 190, at 21-22 (implying that 1930-31 fellowship holders were recent law school graduates).

<sup>210</sup> See Ernst, *supra* note 114, at 17; Database, *supra* note 98. Neither Riesman nor Hurst pursued the S.J.D. through the fellowship, however.

<sup>211</sup> See Yale 2/11/32 Minutes.

two-thirds went into teaching (or spent some time teaching) after graduation. Yale conferred some 83 J.D.s and J.S.D.s during the same period, of whom approximately 60% went into teaching. Michigan conferred 23 S.J.D.s during this period, of whom approximately half went into teaching.<sup>212</sup> For reasons that are discussed below, Columbia's numbers were much lower: the school conferred only four J.D. degrees during this period. Two of the four J.S.D. graduates went into teaching, as did some of the candidates who did not actually receive the degree.<sup>213</sup> NYU, whose J.S.D. was not a teacher training vehicle, conferred 76 degrees during the same period.<sup>214</sup>

**4. How to get them there.** Hoping for students was one thing, but enticing them to one's school was quite another. Reputation helped, of course: Harvard, Columbia and Michigan were among the era's most prestigious law schools, and Yale was working hard to join them. But convincing the most talented students to take a year out of their lives for graduate work, and convincing them to attend one's own school rather than one of the others, required focused efforts.

The first requirement was an active recruiting program. In one particularly colorful example, a Columbia professor (possibly Edwin Patterson) wrote in the late 1920s of Harvard's "well organized publicity machinery" for recruiting graduate students. According to the memorandum, Harvard's tactics included addresses by Dean Pound at the opening of other schools' new buildings, and having an unnamed professor spend much of his time going to different colleges in the west and noting what seemed to be promising recruits. The memorandum continued that "each school visited by this professor is permitted to send on to Harvard, on fellowship, one of their professors to do graduate work. This does not always redound to the benefit of the Law School, but the situation is clear." The author went on to make suggestions for Columbia's own recruiting efforts, including (i) more personal contact by Columbia faculty with prospects at AALS (which, according to the memorandum, had worked for Yale); and (ii) an arrangement with Deans of other schools providing that recent LL.B. graduates of those schools who were about to teach there could come to Columbia for a year of graduate work, supported by Columbia fellowship funds. This would not only attract promising students, but also

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<sup>212</sup> See Database, *supra* note 98. Harvard's graduates included a considerable number of foreign-trained students, and Michigan's and Yale's included a few as well.

<sup>213</sup> Of the 108 candidates who commenced J.D. or J.S.D. study at Columbia between the program's inception and 1940, only 10 actually received the degree. All but one or two of the doctoral graduates went into teaching, as did a number of people who earned the LL.M. but never finished the doctorate. See 1941 Columbia Report, *supra* note 168.

<sup>214</sup> See Database, *supra* note 98.

might result in “permanent affiliations with various of the schools of the Association.”<sup>215</sup>

As the previous paragraph suggests, a second critical element was fellowship support. Most recent graduates and young law teachers would be unable to fully support their tuition and living expenses on their own, and it was up to the schools to make up the difference. The Dean’s Reports of the era thus are laden with pleas to their respective Universities’ presidents for additional support, and thanks when that support materialized.<sup>216</sup> At Yale, University funding came in the form of Sterling Fellowships for research beginning in 1926.<sup>217</sup> Columbia began advertising University and Morris Fellowships for its J.D. students around the same time.<sup>218</sup> Harvard’s program seems to have relied primarily on the school’s ability to raise money from alumni and others.<sup>219</sup> At Michigan, the University provided some fellowship funding in the program’s early years, but the amount seems to have been quite limited.<sup>220</sup> By that time the remaining schools found themselves competing with each other for top students on the basis of the size of fellowship awards.<sup>221</sup>

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<sup>215</sup> Anonymous Memorandum, *supra* note 147. Michigan was less aggressive in recruiting during this period, and its program was somewhat smaller than those of the other schools. Michigan 1927-28 Dean’s Report, *supra* note 119, at 112; Michigan 1928-29 Dean’s Report, *supra* note 119, at 66-67.

<sup>216</sup> See Columbia 1927-28 Dean’s Report, *supra* note 147, at 24; Yale 1923-24 Dean’s Report, *supra* note 152, at 122-24; Yale 1926-27 Dean’s Report, *supra* note 129, at 119; Michigan 1924-25 Dean’s Report, *supra* note 121, at 121; Michigan 1925-26 Dean’s Report, *supra* note 121, at 84; Henry M. Bates, *The Law School, in UNIV. OF MICHIGAN, THE PRESIDENT’S REPORT FOR 1929-30* 161, 167 (1931) (hereinafter Michigan 1929-30 Dean’s Report).

<sup>217</sup> See Yale 1926-27 Bulletin, *supra* note 145, at 32-33.

<sup>218</sup> See Columbia University, *School of Law Announcement 1926-27*, COLUM. UNIV. BULL. INFO., [July] 1926, at 18-19.

<sup>219</sup> See, e.g., Ezra Ripley Thayer, *The Law School, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1912-13*, OFFICIAL REG. HARV. U., April 20, 1914, at 120, 126-27 (describing a recent bequest); Roscoe Pound, *The Law School, in REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1919-20*, OFFICIAL REG. HARV. U., March 3, 1921, at 163, 169-70 (noting new Emmons and Meyer scholarships); Harvard University, *The Law School 1920-21*, OFFICIAL REG. HARV. U., March 18, 1920, at 11-12 (first appearance of Pugsley scholarship); Ernst, *supra* note 42, at 16-17 (Frankfurter himself raised the funds for the research scholarship he supervised); Sutherland, *supra* note 49, at 270 (describing fundraising campaign inaugurated in 1926).

<sup>220</sup> See Michigan 1925-26 Dean’s Report, *supra* note 121, at 84; Michigan 1929-30 Dean’s Report, *supra* note 216, at 167; Henry M. Bates, *The Law School, in UNIV. OF MICHIGAN, THE PRESIDENT’S REPORT FOR 1931-32* 64-65 (1932) (hereinafter Michigan 1931-32 Dean’s Report) (limited funding forces the school to keep the number of graduate students low).

<sup>221</sup> Anonymous Memorandum, *supra* note 147, at 1-2; Yale 9/25/30 Minutes; Yale 1/7/32 Minutes; Yale 3/16/33 Minutes. The Deans of the three schools seem to have discussed the situation at their meeting in the spring of 1933. See Yale 4/13/33 Minutes; Yale 5/18/33 Minutes.

Third, those who were already teaching required either leaves of absence from teaching or some other mechanism to complete the required year in residence at their school of choice. To the extent that the doctoral school had relationships with the school at which the candidate taught, this normally could be arranged. Where a leave of absence was not available, students had the option of pursuing an innovative summer program at Yale. This program, which was offered from 1924 through 1930, enabled students to complete the residency requirement over a period of three summers.<sup>222</sup> It combined selected courses in the graduate curriculum with the opportunity to work with Yale faculty and use the Yale facilities, just as in the regular academic year. It apparently had been the idea of several young professors at George Washington, who approached Yale's Dean Thomas Swan at the 1922 AALS annual meeting.<sup>223</sup> Exactly how many students received the J.S.D. through this route is unclear, but by the summer of 1926 fifteen students had participated in at least one session.<sup>224</sup> In any event, Roscoe Pound was not amused. According to the late-1920s memorandum at Columbia, "Thus, also, when Yale, at the instance of several men teaching at George Washington, had undertaken to start a graduate summer school in three sessions, thereby making possible the completion of graduate work during the summer, the appearance of Dean Van Vlecht on the field resulted in definite intimation to the men intending to come to Yale that they would not only not further, but might even hurt their prospects at George Washington by carrying out that proposed program. The travel to Cambridge then began."<sup>225</sup>

#### **F. Early 1930s: The birth of an academic doctorate**

The period between the mid-1920s and early 1930s was one of tremendous energy, but not all was going well. First, the doctoral programs were not attracting as many top-notch students as the sponsoring schools had hoped. Second, the structure of the degree inhibited the production of the kind of research in which many faculty were interested. The schools responded by making the doctorate smaller, more selective, and more

<sup>222</sup> See Yale 1922-23 Dean's Report, *supra* note 199, at 298-99; Yale 10/2/30 Minutes. Coursework was not offered in the summer of 1929, however. See School of Law of Yale University, *Summer Session 1929*, BULL. YALE U. (supplement 1929).

<sup>223</sup> Yale 1/10/23 Minutes; Anonymous Memorandum, *supra* note 147.

<sup>224</sup> See Thomas W. Swan, *School of Law*, in REPORTS TO THE PRESIDENT OF YALE UNIVERSITY 1925-1926, BULL. YALE U., October 1, 1926, at 111-12; Yale 1924-25 Dean's Report, *supra* note 205, at 89 (ten teachers from eight schools attended the 1925 session). One of Yale's J.S.D. graduates who completed his residency during the summer session was Russell Niles, who later became Dean of NYU Law School. See Yale 10/29/31 Minutes; *infra* notes 310 and accompanying text.

<sup>225</sup> Anonymous Memorandum, *supra* note 147. George Washington's then Dean, William Van Vlecht, held a Harvard S.J.D.

rigorous. The resulting degree more closely resembled a Ph.D. degree in other university departments, but at the price of its capacity to produce the next generation of law teachers.

**1. Growing pains.** The preceding discussion refers to the “missionary” function of the programs at Harvard, Yale and to a lesser extent Columbia. This function came at a price, however. First, the sheer number of students trained was in tension with the idea that the degrees were intended for “advanced”, high-quality students. Second, the “advanced” appellation invited comparison of the graduate students with the respective schools’ LL.B. students, and there is considerable evidence that graduate students did not always shine in the comparison. The phenomenon was not universal, as is evidenced by the number of graduates who ended up teaching at well-respected schools.<sup>226</sup> Moreover, in at least some quarters the degree seems to have been prestigious.<sup>227</sup> That prestige, however, may have been as much a function of the conferring schools as the degree itself. From the perspective of the conferring schools, the difficulties were quite real.

The problems seem to have been particularly acute at Harvard and Yale, which had by far the largest programs among the top schools.<sup>228</sup> At Harvard, Felix Frankfurter would argue in May 1927, “The fact is that men have been in attendance on graduate work within the last few years who were unfitted for it, and thereby have seriously impaired the pace and quality of the work undertaken with a group whose standards the unfit depress. We have too many men of inadequate undergraduate legal training who are truly not equipped to do even B work in our third year, who form an indigestible lump in graduate classes.”<sup>229</sup> At Yale, Robert Hutchins would observe in his 1927-28 Dean’s Report that “All the institutions which offered graduate work are dissatisfied with the caliber of the men to whom it appeals . . . With a few notable exceptions graduate study appeals to second-

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<sup>226</sup> Indeed, clusters of graduates taught at the seven schools addressed by this study. *See infra* notes 302-10 and accompanying text. Other schools that hired a handful of graduates each included Chicago, Cornell, Duke, Indiana, Iowa, Minnesota, Missouri, Ohio State, Tulane, and Washington University. *See Database, supra* note 98.

<sup>227</sup> *See* 1936 AALS Report, *supra* note 3, at 318-19 n.92 (“A few years ago the best men whom [Harvard, Chicago, Michigan, Columbia and Yale] recommended for teaching positions held LL.B.’s; today they hold S.J.D.’s”); 1937 AALS Report, *supra* note 122, at 322 n.92 (same); William Van Vleck, Report of the Dean to the Faculty of the Law School on the Occasion of the 75<sup>th</sup> Anniversary 13-14 (attachment to letter from Dean William Van Vleck to President Cloyd Marvin (January 7, 1941)) (available in the George Washington University Archives, Gelman Library) (hereinafter GW 1941 Dean’s Report) (noting that the number of S.J.D. degree holders on George Washington’s faculty was part of what made the school stronger than Georgetown at the time).

<sup>228</sup> Columbia also had some difficulties during this period. *See, e.g.*, Columbia 1927-28 Dean’s Report, *supra* note 147, at 38 (of twelve graduate students enrolled that year, eight flunked out).

<sup>229</sup> Frankfurter Memorandum, *supra* note 152, at 1-2.

class men who must have some decoration to make them attractive. Although each year the Faculty has rejected more applicants and withheld more degrees, it must still be admitted that any graduate student who exhibits reasonable industry is certain to secure a higher degree, even though he may be inferior in training and capacity to good candidates for the LL.B.”<sup>230</sup>

And it was most acute to the extent one took the “research” idea seriously – i.e., expected a written product that actually made a contribution to legal scholarship. Thus when Harvard began considering a reorganization of its graduate degrees in the spring of 1927, a memorandum from its Sub-Committee on Graduate Study (probably authored by Joseph Beale) noted that both the S.J.D. as then structured fell more under the heading of “advanced study” than “research.” Going forward, the memorandum argued, the degree should remain substantially unchanged, and publishable research product should be promoted by creating a new category of “research student.” This category of student would be largely free of formal requirements, but each student would be assigned to a newly created “department” within his field, much along the lines of the Continental approach.<sup>231</sup> Frankfurter responded that the solution was not to create a new category of student, but rather to reduce the total number of students in favor of a smaller, much more qualified group, relax the applicable course requirements, and otherwise structure the degree to promote close working relationships between students and individual faculty members.

Part of the solution was to structure the LL.M. in a way that took up the slack and to offer still other venues for promoting research work. In 1923, Harvard resurrected its long-dormant master’s degree<sup>232</sup> as a kind of catchall to accommodate foreign-trained lawyers, graduate students who were not interested in teaching, and S.J.D. candidates whose performance did not warrant the conferral of that degree.<sup>233</sup> When the LL.M. first appeared in the 1924-25 Bulletin, it was distinguished from the S.J.D. primarily by the fact that it carried a lower grade requirement.<sup>234</sup> The

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<sup>230</sup> Yale 1927-28 Dean’s Report, *supra* note 203, at 115-16.

<sup>231</sup> Beale Memorandum, *supra* note 201. Beale also would have assigned these research students to continental-style “departments”.

<sup>232</sup> There is no record in the Harvard 1922-24 faculty minutes of the faculty having recommended the creation of an LL.M. degree. The resurrection of the post-civil war M.L. appears to be the only way of explaining this.

<sup>233</sup> The first LL.M.s were conferred in June 1923, on S.J.D. candidates who had not met the grade requirements for the degree. *See* Harvard 6/18/23 Minutes. At the same meeting, the faculty voted to admit to LL.M. candidacy one student trained at Oxford, *see id.*, and at a subsequent meeting another trained in the Philippines. Harvard 9/25/23 Minutes. *See also* Harvard 1922-23 Dean’s Report, *supra* note 135, at 191 (noting that the LL.M. is primarily for practitioners).

<sup>234</sup> *See* Harvard 1924-25 Bulletin, *supra* note 112, at 10-11.

outcome of the Frankfurter-Beale debate in 1927 (in which Pound was also an active participant) was to leave the LL.M. as the course-based graduate degree, require a thesis for the S.J.D., and establish a new category of Research Fellowships for faculty from other schools who would work on research projects at Harvard on a non-degree basis.<sup>235</sup> At Yale, the LL.M. was already in existence as a course-based degree as of 1924. However, in 1927 graduate work was restructured so that students were “admitted to the graduate department generally, rather than candidates for a particular degree.”<sup>236</sup> At this point whether the student earned the LL.M. or the J.S.D. depended entirely on the quality of his performance during the academic year.<sup>237</sup> Two years later, Yale arranged for a Ph.D. track to be available to “exceptionally qualified students.”<sup>238</sup>

But it was not enough. Part of the difficulty, the schools were finding, was that the top graduates of elite schools did not need graduate work in order to obtain teaching positions. Moreover, many of them found no need to upgrade their credentials through graduate work once they were already teaching. So the talents of many who pursued graduate work were far from what schools like Harvard, Yale and Columbia hoped.<sup>239</sup> In addition, at the smaller schools teachers spent the vast majority of their time teaching, and therefore had little experience with research work. Once enrolled in a graduate program they faced the dilemma of wanting to sample courses taught by some of the leading scholars of their day, learning new ways of thinking about law and producing a publishable thesis – all in the same year. Finally, Yale’s solution of using the LL.M. as a kind of “academic wastebasket”<sup>240</sup> did not solve the problem: the school felt pressure to award the J.S.D., even for inferior performance, rather than send an embarrassed teacher back to his employer with an LL.M.<sup>241</sup>

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<sup>235</sup> See Harvard 1928-29 Bulletin, *supra* note 170, at 17-19.

<sup>236</sup> Yale 4/14/27 Minutes.

<sup>237</sup> Yale 1927-28 Bulletin, *supra* note 128, at 16; Yale 1926-27 Dean’s Report, *supra* note 129, at 117-18.

<sup>238</sup> YALE UNIV., CATALOGUE OF THE SCHOOL OF LAW 1929-30 12-13 (1929).

<sup>239</sup> See 1933 Harvard Report, *supra* note 79, at 19-23; Anonymous Memorandum, *supra* note 147, at 4 (“I am thoroughly satisfied that nothing of great moment is going to come out of the Harvard Graduate School in the near future.”); Clark, *supra* note 93, at 48 (commenting on the tension between quality and quantity), Yale 9/25/30 Minutes; Yale 10/2/30 Minutes; Yale 1/15/31 Minutes; Yale 2/26/31 Minutes; Lorenzen Memorandum 2/31, *supra* note 202; Yale 11/19/31 Minutes; Yale 2/11/32 Minutes.

<sup>240</sup> Here I am borrowing Hessel Yntema’s term from an October 1939 memorandum to Michigan’s faculty. See Memorandum from Hessel Yntema to Faculty of University of Michigan Law School (October 27, 1939) in Michigan Minutes, *supra* note 240 (hereinafter Yntema Memorandum 10/39).

<sup>241</sup> See Yale 2/26/31 Minutes; Lorenzen Memorandum 2/31, *supra* note 202; 1941 Columbia Report, *supra* note 168, at 23 (almost all of the graduate degrees Yale conferred were J.S.D.s).



Columbia's and Michigan's problems were somewhat different. First, both schools had difficulty attracting experienced candidates to their programs. At Columbia, the primary difficulty seems to have been that the name "J.D." (which at some schools referred to a first law degree) was not as prestigious as "S.J.D." or "J.S.D."<sup>242</sup> At Michigan, the University made some fellowship funds available to the law school, but it was not enough to sustain more than a few students a year.<sup>243</sup> Second, Columbia's requirement that the dissertation be published kept many students who completed an otherwise acceptable dissertation from earning the degree.<sup>244</sup> That requirement was in place because the arts and sciences graduate school's rules governed the law school's doctorate as well as the graduate school's Ph.D.<sup>245</sup> But academic publishing in the social sciences embraced book-length manuscripts in a way that law reviews (the primary venue for legal publication) did not. The school made some attempt to redress the problem by establishing a series entitled "Columbia Legal Studies" and setting up a small publication fund,<sup>246</sup> and it also began conferring an interim LL.M. degree on students who had met certain requirements by the end of the year in residence.<sup>247</sup> However, the basic problem remained.

**2. The response.** For Yale, Columbia and Harvard, matters came to a head in the early 1930s. Columbia and Yale acted first, despite the risk that any move to make their own degree requirements more stringent would risk defections to Harvard. In 1932, both schools provided that the degree should be extended to two years, with the first year spent in residence and the second year spent working on the dissertation, normally out of

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<sup>242</sup> 1930 Columbia Report, *supra* note 147; Young B. Smith, *Report of the Dean of the School of Law for the Period Ending June 30, 1933*, COLUM. UNIV. BULL. INFO., February 10, 1934, at 19-20 (hereinafter Columbia 1932-33 Dean's Report).

<sup>243</sup> Henry M. Bates, *The Law School*, in UNIV. OF MICHIGAN, THE PRESIDENT'S REPORT FOR 1930-31 103, 108 (1931); Michigan 1931-32 Dean's Report, *supra* note 220, at 65. Relatively few of Michigan's graduates between 1930 and 1934 pursued academic careers. See Database, *supra* note 98.

<sup>244</sup> Columbia 1929-30 Dean's Report, *supra* note 190, at 21; Columbia 1934-35 Dean's Report, *supra* note 189, at 17; YOUNG B. SMITH, COLUMBIA UNIV., REPORT OF THE DEAN OF THE SCHOOL OF LAW FOR THE PERIOD ENDING JUNE 30, 1936 20 (February 15, 1937) (hereinafter Columbia 1935-36 Dean's Report); 1941 Columbia Report, *supra* note 168, at 16.

<sup>245</sup> See 1930 Columbia Report, *supra* note 147; 1941 Columbia Report, *supra* note 168, at 16.

<sup>246</sup> See Columbia 1925-26 Bulletin, *supra* note 174, at 22 (the first appearance of Columbia Legal Studies); Columbia 1929-30 Dean's Report, *supra* note 190, at 21 (noting the establishment of the publication fund); Columbia 1934-35 Dean's Report, *supra* note 189, at 17 (expressing desire for more publication funds); Columbia 1935-36 Dean's Report, *supra* note 244, at 20 (same); Columbia 1937-38 Dean's Report, *supra* note 148, at 9 (same).

<sup>247</sup> See Columbia 1929-30 Dean's Report, *supra* note 190, at 21; Columbia 1930-31 Bulletin, *supra* note 193, at 8-9.

residence.<sup>248</sup> At the same time, Yale also made provision for the award of fellowships for a second year to particularly talented students.<sup>249</sup> At the same time, Columbia renamed its degree “J.S.D.” to avoid confusion with the first law degree at other schools.<sup>250</sup>

Harvard took longer, and the process was much more painful. In a rebuke to Pound, the faculty insisted on the appointment of a special committee to do a thorough review of the school’s graduate work. The resulting report, published in December 1933, was scathing. It noted that several faculty members supported the complete abolition of graduate degrees, on the following grounds: “That they bring to the School degree hunters who by their presence lower the standards of work . . . That they are ‘false certificates of distinguished excellence.’ . . . That many graduate students are inferior to the A men among the candidates for a bachelor’s degree. . . . That the marks in graduate courses are higher than those in second- and third- year courses.”<sup>251</sup> The committee’s response to these arguments was measured, but it leveled a broadside attack on the S.J.D. in particular: “[T]he degree . . . ought to be given only to mark a real attainment in juridical science. At the present time the degree is debased by the large number of recipients, many of whom have never published any scientific work and have merely submitted theses which are not ready for publication and which will never see the light of day.”<sup>252</sup> In response to the report, the Harvard faculty voted to sharply restrict admission to the S.J.D., make the dissertation requirement more rigorous, and require that the dissertation be submitted no earlier than six months after the end of the year in residence.<sup>253</sup>

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<sup>248</sup> Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1932-33*, COLUM. U. BULL. INFO., August 13, 1932, at 18-19; Columbia 1929-30 Dean’s Report, *supra* note 190, at 21; Yale 5/26/32 Minutes; Yale 1931-32 Dean’s Report, *supra* note 202, at 18-19; Yale University, *The School of Law For the Academic Year 1932-33*, BULL. YALE U., [date], 1932, at 12-13.

<sup>249</sup> Yale 5/26/32 Minutes.

<sup>250</sup> Columbia 1932-33 Dean’s Report, *supra* note 242, at 19-20; Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1934-35*, COLUM. U. BULL. INFO., August 11, 1934, at 9.

<sup>251</sup> 1933 Harvard Report, *supra* note 79, at 20-21.

<sup>252</sup> *Id.* at 26. There also was an implicit sense that control of the degree had been too concentrated -- hence the report’s proposed institution of term limits for graduate committee members. *Id.* at 32.

<sup>253</sup> See Harvard 2/20/34 Minutes; Harvard Law School, Committee on Graduate Degrees, Recommendations of the Committee on Graduate Degrees (February 27, 1934) (report available in Harvard Law School Library); Harvard University, *The Law School, Including Courses of Instruction for 1934-35*, OFFICIAL REG. HARV. U., April 30, 1934, at 14-15 (hereinafter Harvard 1934-35 Bulletin).

Within a few years (and with some help from each other)<sup>254</sup> the schools were feeling the results. Columbia began attracting more qualified students (including experienced teachers) to its degree, and by 1937 Dean Young Smith was reporting that, “of the twenty-two graduates of the School who have entered law teaching since 1927, nineteen are holders of graduate degrees. It is also worthy of note that of this group, three have recently become deans of the faculties of law in their respective universities.”<sup>255</sup> At Harvard, the annual number of S.J.D. graduates dropped precipitously shortly after the reforms went into effect.<sup>256</sup> Pound stepped down as Dean in 1936, and by 1938 his successor James Landis would report that “The standards for the S.J.D. degree have been radically altered, so that that degree today is a better mark of true scholarly distinction. At the same time emphasis has been placed upon the pursuit of research for the sake of research alone without regard to degrees.”<sup>257</sup> At Yale, the number of graduates dropped as well (though less sharply than at Harvard), and the faculty seemed somewhat more satisfied with the caliber of their graduate students and the quality of their work product.<sup>258</sup>

Michigan began going through a similar process in 1936, when fellowship funds from the Cook bequest finally became available. At this point it had conferred only one S.J.D. since 1933, and there is evidence that it was not happy with the quality of its students.<sup>259</sup> Effective in the 1936-37

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<sup>254</sup> Beginning in 1933, the three schools were cooperating with each other in selecting applicants, awarding fellowships, setting degree requirements, and the like. See Yale 4/13/33 Minutes; Yale 5/18/33 Minutes; Charles E. Clark, *Reports of the Dean and of the Librarian of the School of Law for the Academic Year 1933-1934*, BULL. YALE U., supplement [date], 1934 (hereinafter Yale 1933-34 Dean’s Report); Yale 10/14/37 Minutes; Yale 11/18/37 Minutes.

<sup>255</sup> Columbia 1936-37 Dean’s Report, *supra* note 156, at 14. Since Columbia had conferred only nine J.D. and J.S.D. degrees by this time, 19 of those teachers would have held only LL.M. degrees. See Database, *supra* note 98.

<sup>256</sup> See Database, *supra* note 98.

<sup>257</sup> James M. Landis, *Law School*, in ISSUE CONTAINING THE REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORTS OF DEPARTMENTS FOR 1937-38, OFFICIAL REG. HARV. U., February 28, 1939, at 192, 199.

<sup>258</sup> See Charles E. Clark, *Reports of the Dean and of the Librarian of the School of Law for the Academic Year 1934-1935*, BULL. YALE U., supplement [date], 1935; Yale 3/1/34 Minutes; Yale 9/27/34 Minutes; Yale 2/11/37 Minutes; Yale 9/28/39 Minutes; Yale 9/26/40 Minutes. Comments in an October 1937 faculty meeting, however, suggest that there were limits. There, “[t]he Dean suggested that the Graduate Curriculum Committee should consider as soon as possible the question of whether an LL.M. degree should be required in all cases, including those of applicants for the degree of J.S.D.” Yale 10/14/37 Minutes. This was one of the questions discussed in a meeting with Columbia and HLS Deans shortly thereafter. See Yale 11/18/37 Minutes. The school does not seem to have done anything about this before World War II.

<sup>259</sup> As a 1936 report of Michigan’s Graduate Committee observed, “The Committee believe that a certain number of fellowships should be available for each year. Whatever may be the number of fellowships available, however, the Committee are of the opinion that awards should be made only to those applicants whose credentials unmistakably make them eligible

academic year, the school began to require a prior college degree as a condition of admission, and the period for completion of the dissertation became one to five years after completion of the year in residence.<sup>260</sup> Michigan also instituted teaching fellowships as a recruiting tool around the same time.<sup>261</sup> However, it was not enough. By 1939 Lewis Simes, then Chair of the Graduate Committee, would report to his colleagues that “[a] considerable proportion of those who have been candidates for the S.J.D. degree do not appear to have the capacity to turn out a really first class piece of research in compliance with the requirements for the degree. In some instances these persons never in fact submit any thesis. In other instances the thesis may be revised over and over again, and finally approved, more on the basis of effort than of achievement.”<sup>262</sup> After an attempt to address the problem by tightening admission requirements,<sup>263</sup> the school adopted Yale’s solution of making the LL.M. a consolation prize for students who had failed (or were unlikely) to satisfy the requirements for the S.J.D.<sup>264</sup> A year later, it added Columbia’s solution of awarding an interim LL.M. to ongoing S.J.D. candidates who had made substantial progress on their dissertation.<sup>265</sup>

Even NYU, which generally was not training teachers, jumped on the bandwagon. In 1934 the school restructured its J.S.D. to require a year of course work in residence and a thesis that was “sufficiently scholarly and broad in scope to be worthy of publication”, to be submitted after the year in residence.<sup>266</sup> The University’s Chancellor crowed in his 1933-34 report to

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under the requirements. There should be no more letting down of the standards because there are more fellowships available than the number of clearly desirable candidates.” 1936 Michigan Report, *supra* note 192, at 320.

<sup>260</sup> University of Michigan, *Law School Announcement, 1936-1937 with List of Students, 1935-1936*, U. MICH. OFFICIAL PUBLICATION, May 20, 1936, at 21.

<sup>261</sup> Lewis Simes, Report of Committee on Graduate Work 444 (December 1937) (memorandum attached to Michigan 12/10/37 Minutes); University of Michigan, *Law School Announcement, 1938-1939 with List of Students, 1937-1938*, U. MICH. OFFICIAL PUBLICATION, September 14, 1938, at 33 (hereinafter Michigan 1938-39 Bulletin).

<sup>262</sup> Lewis Simes, Report of Committee on Graduate Work (March 1939) (memorandum attached to Michigan 3/24/39 Minutes). *See also* Shartel to Simes, *supra* note 208 (complaining about the performance of S.J.D. candidates admitted immediately after completion of LL.B.).

<sup>263</sup> *See* Michigan 1938-39 Bulletin, *supra* note 261, at 21-22.

<sup>264</sup> *See* University of Michigan, *Law School Announcement 1940-1941*, U. MICH. OFFICIAL PUBLICATION, March 13, 1940, at 16-17 (graduate student “classification in regard to degree candidacy is determined after a period of residence. Ordinarily the determination will be made at the end of the first semester of residence upon the basis of the performance of that semester.”) *See also* Yntema Memorandum 10/39, *supra* note 240 (calling the LL.M. “a sort of academic waste-basket . . . to take care of cases which do not comply with the requirements for the S.J.D.”).

<sup>265</sup> *See* University of Michigan, *Law School Announcement 1941-1942*, U. MICH. OFFICIAL PUBLICATION, April \_\_, 1941, at 22.

<sup>266</sup> New York University, *School of Law Announcements for the Session 1934-35*, in NEW YORK UNIVERSITY BULLETIN, February 12, 1934, at 17.

the Regents that this new J.S.D. “with heightened requirements . . . will make it comparable in distinction to our highest doctorates.”<sup>267</sup>

The net result of these reforms was to coax the schools’ S.J.D. and J.S.D. programs away from a model that was broadly available and relatively quick to complete (i.e., course work plus some writing, all of which could be completed in a year or two), and towards a model that was more selective at the admissions stage,<sup>268</sup> was primarily research oriented, could involve a second screening after the first year,<sup>269</sup> and took two or more years to complete.<sup>270</sup> This latter model fit the idea of the doctorate as an advanced scholarly degree, and was consistent with the model that had by now emerged in other university disciplines.<sup>271</sup> However, it less clearly fit the idea of the doctorate as a means of preparing the next generation of teachers in professional schools.

## G. The run-up to World War II

As the 1930s progressed, two phenomena took shape. First, the schools’ graduate programs increasingly became incubators for the idea of law as social engineering. At Yale and Columbia, the graduate seminars were an important site of experimentation for legal realist ideas. At Wisconsin and George Washington, a functional understanding of law laid the foundation for those schools’ own doctoral programs. Second, by the eve of World War II there were significant clusters of doctoral degree holders on the faculties of the leading schools. Some of these graduates would have a profound influence on the evolution of U.S. legal education following World War II.

**1. The shift of emphasis.** As has been suggested above, throughout the prewar period graduate education had included “cultural”

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<sup>267</sup> NYU 1933-34 Chancellor’s report at 40. *See also* 1934-35 NYU Dean’s Report of the Dean of the Faculties at 7 (noting with approval the professional schools’ development of graduate degrees “in the history and science of their leading subjects of instruction.”).

<sup>268</sup> *See e.g.*, Columbia 1936-37 Dean’s Report, *supra* note 156, at 13 (noting improvements in quality of graduate student body in early 1930s); Columbia 1934-35 Dean’s Report, *supra* note 189, at 16-17 (noting “our settled policy of admitting for advanced degrees only a limited number of exceptionally qualified” candidates); Yale 1930-31 Dean’s Report *supra* note 186, at 16-17 (comparing number of applicants and admits to graduate class); Yale 1932-33 Dean’s Report, *supra* note 159, at 22 (same); Yale 1933-34 Dean’s Report, *supra* note 254, at 23 (same).

<sup>269</sup> *See* 1941 Columbia Report, *supra* note 168, at 13-14 (describing a “matriculation” decision at the end of the year in residence); Harvard 1934-35 Bulletin, *supra* note 253, at 14-15 (requiring oral and written examinations at the end of the year in residence).

<sup>270</sup> *See supra* notes 248, 253 and accompanying text; 1936 AALS Report, *supra* note 3, at 322-25. *But see* 1937 AALS Report, *supra* note 122, at 303-04 (backing off from 1936 AALS Report’s proposal that the doctorate require two years of resident study).

<sup>271</sup> *See* 1936 AALS Report, *supra* note 3, at 313-17, 323-24; 1937 AALS Report, *supra* note 122, at 317-21, 326-28.

courses designed to give students a broader understanding of law and the legal system as a whole. The extent to which this included an understanding of law in its social context is not clear, but as our view turns to the 1930s the question becomes less important. As the 1930s progressed, the graduate curriculum reflected the schools' growing interest in public law and legislation and increasing treatment of law as a tool of social engineering rather than an autonomous discipline.

This was particularly the case at Columbia and Yale, where graduate seminars functioned as laboratories for some of the early legal realist ideas. At Columbia, one common form was the "problem" course in a particular field (international law, constitutional law, public utilities, etc.),<sup>272</sup> and the school also offered a few explicitly interdisciplinary seminars in such areas as "economics, law and politics" and "law in society."<sup>273</sup> By the late 1930s, Columbia's Dean Young Smith would note "it is essential that the student . . . study those broader aspects of the law which are to be found in its relations with philosophy, government, economics, and other social sciences. . . ."<sup>274</sup> For this purpose, the school was requiring J.S.D. candidates to take two seminars taught by noted legal realists: Seminar in Legal Philosophy (taught by Edwin Patterson) and either the Seminar in Legal Institutions (taught by Karl Llewellyn) or the course Legal Factors in Economic Society (taught by Robert Hale).<sup>275</sup> Yale offered "problem" seminars as well, but took the interdisciplinary idea several steps further. By the early 1930s, the school was offering seminars, taught jointly by faculty from the social science departments, on such topics as "the judicial process from the point of view of social psychology" (Arnold, Dession, Frank and Robinson) and "psychiatry in law administration" (Dession, Kahn, Thompson, Vance). Other offerings included "law and society" (Nelles); and "methods of social and legal research" (Thomas).<sup>276</sup>

At Harvard and Michigan, the seminars tended to be more of a pastiche: advanced versions of the private law curriculum, additional work in public law, and more classic "cultural" courses. But at least some were taught from a functional perspective. At Harvard, these included

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<sup>272</sup> E.g., Columbia 1929-30 Bulletin, *supra* note 193, at 36-39.

<sup>273</sup> *Id.*

<sup>274</sup> Columbia 1937-38 Dean's Report, *supra* note 168, at 8-9.

<sup>275</sup> E.g., Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1938-39*, COLUM. U. BULL. INFO., August 20, 1938, at 42-45; 1941 Columbia Report, *supra* note \_\_, at 12. By this time the school was also requiring students to take a Seminar in Legal Education, which was first offered in 1935. *See id.*; Columbia University, *Announcement of the School of Law for the Winter and Spring Sessions 1935-36*, COLUM. U. BULL. INFO., September 7, 1935, at 43-46; Elliott E. Cheatham, *A Seminar in Legal Education*, 1 J. LEGAL EDUC. 439 (1949).

<sup>276</sup> *See, e.g.*, Yale 1930-31 Bulletin, *supra* note 176, at 16-20; Yale 1931-32 Bulletin, *supra* note 186, at 16-20.

Frankfurter's seminar in administrative law and Thomas Reed Powell's seminar on Constitutional Law Problems as before, plus Sheldon Glueck's course Criminology in Relation to Criminal Law and Procedure, and Sam Bass Warner's course Administration of Criminal Justice.<sup>277</sup> Beginning in 1938 Michigan required graduate students to do a seminar in comparative law, taught by Hessel Yntema and John Dawson, and a seminar entitled "Legal Method," taught by Burke Shartel from a functional perspective.<sup>278</sup>

**2. Second-generation variations.** This new model of graduate work was also apparent in two second-generation programs that were established before World War II: those at Wisconsin and George Washington. These were not the only additional programs established during this period,<sup>279</sup> and they are noted here to primarily to complete the roster of schools addressed by the study of which this article is a part. While neither program was designed to train teachers, they illustrate how some of the patterns that were first developed at the elite schools found homes elsewhere. In both cases, the programs built on the intellectual and programmatic strengths of their respective schools.

*Wisconsin and the "law in action" idea.* As of the early 1930s the University of Wisconsin Law School was a well-regarded school with a distinctive orientation. Under the leadership of Dean Harry Richards beginning in 1903, it had grown from a former dumping ground for students who were too weak to qualify for the university's other departments<sup>280</sup> into an institution that Roscoe Pound would call "one of the great law schools of

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<sup>277</sup> See, e.g., Harvard 1934-35 Bulletin, *supra* note 253, at 10-11. A review of the course syllabi is beyond the scope of this study, but both the titles and the instructors' names suggest a functional perspective. Ironically, the school's Jurisprudence seminar, which Pound taught through the end of the decade, was less so. Willard Hurst, who audited the seminar in 1935-36, called the seminar "by and large a rather fruitless enterprise, very didactic, very abstract." See Hartog, *supra* note 153, at 374.

<sup>278</sup> See Michigan 1938-39 Announcement at 22-23. A memorial written after Shartel's death observed, "Skeptical of abstruse systems of philosophic thought, impatient with dogma and authoritarian thinking, Burke Shartel approached legal philosophy as a pragmatic social scientist. His concern was to penetrate into, portray and illuminate the basic characteristics of our legal system, the function it serves in our social order, the values it conserves and advances, the means whereby law is created and interpreted, the process whereby the law operates, and the basic norms and concepts which both undergird and inform the legal structure." University of Michigan Law School Faculty, Memorial, *Burke Shartel*, 66 MICH. L. REV. 1089, 1090 (1968).

<sup>279</sup> See *supra* note 145 and accompanying text. When George Washington established its S.J.D. in 1940, for example, one of the stated reasons was the large number of schools that already offered the degree. Reasons for Establishing the Degree of Doctor of Juridical Science (undated memorandum attached to memorandum from Henry W. Hertzog, Assistant Comptroller, to Cloyd Marvin, President (February 23, 1940)) (available in the George Washington University Archives, Gelman Library) (hereinafter 1940 GW Report).

<sup>280</sup> See 1 MERLE EUGENE CURTI AND VERNON ROSCO CARSTENSEN, *THE UNIVERSITY OF WISCONSIN: A HISTORY* 453-54 (1949); W. Scott Van Alstyne, Jr., *The University of Wisconsin Law School 1868-1968: An Outline History*, 1968 WIS. L. REV. 321, 323 (1968).

the country” in 1929.<sup>281</sup> The school had a long history of consulting work for the state government (on whose premises the school was located until the early 1900s) and training public officials -- the so-called “Wisconsin Idea”.<sup>282</sup> The school also had an early history of cooperation with other University departments; indeed as early as 1908 Dean Harry Richards was testing the waters as to whether the law school might start offering an “advanced course” in public and comparative law in conjunction with the university’s social science departments.<sup>283</sup> The proposal was never adopted, but within a few years Ph.D. students in other departments were permitted to pursue a “minor” in the law school, and the law school was offering “cultural” and public law subjects in the LL.B. curriculum.<sup>284</sup>

The school’s S.J.D. degree fit squarely within the Wisconsin Idea. In the fall of 1933, Wisconsin’s new Dean, Lloyd Garrison, established four Graduate Fellowships for a fourth year of (non-degree) study, beginning in the fall.<sup>285</sup> The fellowships were designed “to turn out into the bar each year a group of promising men, who will have received training more thorough than can be given the whole student body and who will have acquired some understanding of administrative problems and of the responsibility of the bar in connection therewith. The plan is designed to produce leaders of the bar with a broad intellectual background and a sense of public obligation.”<sup>286</sup> The fellowships involved “intensive study” in some field (presumably, though not explicitly, in coursework at the school), a thesis, and one or more apprenticeships in a state agency.<sup>287</sup> In May 1934, the law school faculty and the Trustees authorized the granting of an S.J.D. degree to the three Fellows who then remained.<sup>288</sup> By 1939, the degree

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<sup>281</sup> 3 EDMUND DAVID CRONON AND JOHN W. JENKINS, *THE UNIVERSITY OF WISCONSIN: A HISTORY* 733 (1994).

<sup>282</sup> See Auerbach, *supra* note 15, at 83-84.

<sup>283</sup> HARRY S. RICHARDS, *REPORT OF THE DEAN OF THE COLLEGE OF LAW FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1908* 155 (University of Wisconsin 1908) (citing as reasons “[t]he growing complexity of administrative governmental machinery” and “[t]he importance of a knowledge of the historical origin and development of legal doctrine, in throwing light on modern legal problems”).

<sup>284</sup> See Wisconsin 11/1/11 Series; 2 MERLE EUGENE CURTI AND VERNON ROSCO CARSTENSEN, *THE UNIVERSITY OF WISCONSIN: A HISTORY* 440-41 (1949).

<sup>285</sup> Letter from Dean Lloyd K. Garrison to President Glenn Frank (November 10, 1933), in Wisconsin Minutes, *supra* note 121 (hereinafter Garrison to Frank, 11/10/33). According to Garrison, the immediate impetus for establishing the fellowships was the resignation of Professor Sharp, which yielded extra funds. LLOYD K. GARRISON, *UNIVERSITY OF WISCONSIN, REPORT OF THE DEAN OF THE LAW SCHOOL FOR THE ACADEMIC YEAR 1932-33* 2 (December 15, 1933) (hereinafter Wisconsin 1932-33 Dean’s Report).

<sup>286</sup> Wisconsin 1932-23 Dean’s Report, *supra* note 285, at 2-3.

<sup>287</sup> *Id.*

<sup>288</sup> Wisconsin 5/5/34 Minutes; Minutes of a Board of Regents Meeting of the University of Wisconsin, May 7, 1934, in Wisconsin Minutes, *supra* note 121; Letter from Dean Lloyd K. Garrison to President Glenn Frank (May 15, 1934), in University of Wisconsin Chancellors and Presidents, President Glenn Frank General Correspondence Files, 1933-34, G-Har,



required course work in legal history and jurisprudence, and the thesis component had become more serious.<sup>289</sup> The same year, the President's Report was describing with enthusiasm the legislative proposals that had grown out of the students' work.<sup>290</sup>

*George Washington and public law.* The story at George Washington was somewhat bumpier. When William Van Vleck (Harvard S.J.D. 1921) became Dean in 1923, he began a concerted effort to upgrade academic standards at a school that was then quite weak. The school's long-standing LL.M. degree, which catered to lawyers in government practice, was but one of the programs requiring improvement. The faculty added requirements of a prior B.A. and a thesis to the LL.M. in 1927, partly for "the development of legal scholars equipped for independent legal research."<sup>291</sup> But by 1931 both requirements had disappeared for the stated reason that "there should be a fundamental difference between the requirements for the degree of Master of Laws and the degree of Doctor of Laws."<sup>292</sup> Although the school did not then offer a doctorate, its faculty knew how graduate work had evolved elsewhere: LL.M. degrees were primarily coursework-oriented, and doctorates were primarily research-oriented. The faculty committee that had recommended the change did not explicitly take a position as to "research work," except as follows: "If later it should be found feasible to add research work, it may be done."<sup>293</sup>

The school spent the next several years trying to build a research program. In 1932 Forrester Davison (Harvard S.J.D. 1929) had established the school's law review, which was dedicated to public law study.<sup>294</sup> By 1935 Van Vleck had appointed a faculty committee to study the questions of graduate and research work. By 1938 the faculty was proposing a Graduate Division of Public Law, which would build on the school's growing public law curriculum by adding facilities for advanced instruction and research.<sup>295</sup> In late 1939 the faculty voted to establish an S.J.D. degree as the vehicle

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Series 4/13/1, box 147, folder "Dean Lloyd K. Garrison" (available in the University of Wisconsin Archives, Memorial Library); Garrison to Frank, 11/10/33, *supra* note 285.

<sup>289</sup> Wisconsin 1/13/38 Minutes; University of Wisconsin, *Law School Announcement of Courses 1939-40*, BULL. U. WIS., September 1939, at 17-18.

<sup>290</sup> Wisconsin also offered a Ph.D. in law for a few years. See University of Wisconsin, *Law School Announcement of Courses 1935-36*, BULL. U. WIS., August 1935, at 12, through University of Wisconsin, *Law School Announcement of Courses 1938-39*, BULL. U. WIS., September 1938, at 17.

<sup>291</sup> GW 1928-29 Bulletin, *supra* note 144, at 135, 139.

<sup>292</sup> GW 11/24/31 Council Minutes.

<sup>293</sup> *Id.*

<sup>294</sup> O.S. Colclough, Speech to Alumni of George Washington University Law School 5-6 (March 18, 1950) (available in the George Washington University Archives, Gelman Library); Oliver Gasch, Tribute, *J. Forrester Davison (1902-1972) An Appreciation*, 40 GEO. WASH. L. REV. 823 (1971-72).

<sup>295</sup> Letter from Dean William Van Vleck to President Cloyd Marvin (February 28, 1938) (available in the George Washington University Archives, Gelman Library).

that would promote this kind of research.<sup>296</sup> Part of the justification was the fact that “Lawyers in Government service have expressed a desire to work for a doctor’s degree. Such a degree it is reported will be given special recognition in the various departments of the Government.”<sup>297</sup> Otherwise, it would give the school’s most talented graduates – whatever their career interests -- an opportunity for further specialized study in a degree track that was more prestigious than the LL.M.<sup>298</sup>

**3. Taking stock.** With the addition of Wisconsin and George Washington, our roster of schools is complete. Before we close the decade, it is worth taking stock of where matters stood as of 1940.

One striking fact of the prewar period is the sheer number of doctoral graduates the various schools had produced.<sup>299</sup> By 1940 Harvard had produced a total of 218 graduates, some 70% of whom were teaching, and Yale had produced 139 graduates, of whom half were teaching. Michigan had produced some 29 graduates, of whom about half were teaching. Columbia had conferred only 10 J.S.D. degrees, but its graduate program had trained some 50 teachers (including 7 of the 10 J.S.D. graduates).<sup>300</sup> The more than 250 teachers produced by these programs alone represented a significant proportion of the roughly 1300 people teaching at AALS member schools as of 1940.<sup>301</sup> Outside of the teaching profession were most of NYU’s 181 graduates and most of Wisconsin’s 10 graduates.

Second, there were significant clusters of graduates at some schools, including those covered by this study. Some of these played a direct role in the propagation of the degree elsewhere.<sup>302</sup> At George Washington, for example, nine of eleven full-time faculty had the degree as of 1941, and that cluster of graduates had been largely responsible for the creation of the S.J.D. at the school.<sup>303</sup> As has been suggested above, then Dean Van Vleck

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<sup>296</sup> Minutes of a Faculty Meeting of the George Washington University Law School, December 5, 1939, George Washington University Law School Record Books (available in the George Washington University Archives, Gelman Library).

<sup>297</sup> 1940 GW Report, *supra* note 279.

<sup>298</sup> *Id.*

<sup>299</sup> Most, but not all, of these graduates were U.S.-trained and would remain in the U.S. See Database, *supra* note 98.

<sup>300</sup> 1941 Columbia Report, *supra* note 168, at 14, 24. The 50 figure excludes most of the 24 LL.B. holders and all of the Ph.D. holders listed in that report.

<sup>301</sup> 1940-41 AALS Directory, *supra* note 150, at 7-20.

<sup>302</sup> In addition to George Washington and Wisconsin, Pennsylvania, Virginia and (later on) Southern Methodist University established doctoral programs shortly after World War II. At Penn and SMU, the programs were established during the administrations of Deans who themselves held the degree. *verify*

<sup>303</sup> See GW 1941 Dean’s Report, *supra* note 227, at 13-14. During 1938 and 1939 the Dean’s Council, the faculty body that ran the school, consisted of nine members who held the doctorate and two who did not. See GW 3/22/38 Council Minutes; GW 3/7/39 Council

strongly encouraged faculty to do their doctorates at Harvard, and the six who did so (Hector Spaulding, Walter Moll, Forrester Davidson, Charles Collier, Carville Benson and William Van Vleck himself) all studied administrative law under Frankfurter.<sup>304</sup> At Wisconsin, five of the school's 11 full time faculty members had the degree by 1935: William Page, William Rice, Ray Brown, Richard Campbell, and Jacob Beuscher.<sup>305</sup> In addition, Willard Hurst, who joined the faculty in 1937, had held the Research Fellowship under Frankfurter at Harvard – a path which had led to the S.J.D. degree for several other holders.<sup>306</sup>

But these clusters were not limited to the smaller schools. For example, by 1940 ten of Harvard's 32 full time faculty members held S.J.D. degrees: Eldon James (the school's first S.J.D. graduate), Manley Hudson, Morton Carlisle Campbell, James Bradley Thayer, James McCauley Landis (who was then Dean), Erwin Griswold (who would become Dean in 1940), William Edward McCurdy, Samuel Bass Warner, Henry M. Hart, and Paul Freund. All held the Harvard S.J.D. and, with the exception of Eldon James and Charles Fairman, all of these professors had Harvard LL.B.s as well.<sup>307</sup> At Yale, five of 24 full time faculty members (21%) held the degree by 1940: Wesley Sturges (who would become Dean in 1946), Harry Shulman (who would become Dean in 1954), Charles Callahan, Myres McDougal, and James William Moore.<sup>308</sup> At Michigan, the number was five of eighteen: Burke Shartel, Grover Grismore, Hessel Yntema, William Blume and Lewis Simes.<sup>309</sup> At NYU, the proportion was four of eighteen: Russell Niles (who would become Dean in 1948), Frederick de Sloovere, Lawrence

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Minutes; GW 11/21/39 Council Minutes; GW 11/28/39 Council Minutes; GEORGE WASHINGTON UNIV., LAW ALUMNI DIRECTORY 1866-1952 2-8 (1953).

<sup>304</sup> See Database, *supra* note 98. The Frankfurter connection is intriguing: he had a tendency to create disciples, and it seems plausible that some of this group at George Washington were among them. Indeed, Frankfurter and Davison co-authored an administrative law casebook. See FELIX FRANKFURTER AND J. FORRESTER DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (1932). Moreover, by the time George Washington established its doctorate, Frankfurter was even in Washington – he had joined the Supreme Court in 1939.

<sup>305</sup> University of Wisconsin, *General Announcement of Courses 1935-36*, BULL.U. WIS., July 1935, at 338.

<sup>306</sup> See *supra* notes 155, 210 and accompanying text.

<sup>307</sup> See 1940-41 AALS Directory, *supra* note 150. Only one holder of an S.J.D. other than Harvard's seems to have made it to the big time. This was Andrew James Casner, LL.B. Illinois, J.S.D. Columbia 1941. Casner was already on the Harvard faculty at the time he earned his J.S.D. See Sutherland, *supra* note 49, at 373-74.

<sup>308</sup> See 1940-41 AALS Directory, *supra* note 150.

<sup>309</sup> See *id.*

Simpson (all of whom were hired in 1928) and George Clark.<sup>310</sup> And that does not begin to address the schools that are not covered by this study.<sup>311</sup>

More broadly, graduate work in general, and the doctorate in particular, had produced a cadre of teachers who had a broader understanding of the legal system in general, a more jurisprudential orientation towards law, an inclination to look outside of law itself, and the ability to teach subjects that were not part of the traditional curriculum. With respect to non-traditional subjects, for example, the 1920s and 1930s had seen the addition of public law to the curriculum, initially at the elite schools but increasingly elsewhere as well.<sup>312</sup> Harvard's S.J.D. program alone had trained more than 50 teachers who completed theses in administrative law, constitutional law and related subjects before World War II, and they almost certainly participated in this evolution.<sup>313</sup> Some of these scholars would have a profound impact on the direction of legal education after World War II.

### III. Epilogue: The War Years

Then World War II began. After the U.S. joined the war in 1941, there ensued a major hiatus in American legal education. Enrollments plummeted across the board as students joined the armed forces, and many faculty members also participated in the war effort in various capacities. Those who remained behind taught a stripped-down version of the curriculum to a dwindling student body, and most schools stopped offering graduate work in any systematic way.<sup>314</sup> At the schools with high pre-war

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<sup>310</sup> See *id.* At Columbia, by contrast, only four of 28 full-time faculty members held the degree: Francis Déak, Arthur Schiller, Karl Llewellyn and Edwin Patterson. *Id.*

<sup>311</sup> For example, Paul Raymond, who was Dean at Stetson before World War II, has written of the five members of the full-time faculty at the time. Of the five, four had S.J.D.s and one had a Ph.D. in another discipline. Paul E. Raymond, "A Labor of Love": A Final Interview with Dean Paul E. Raymond, 30 STETSON L. REV. 57, 59 (2000). Four of the fourteen or so members of Duke's full-time faculty as of the mid-1930s held S.J.D. or J.S.D. degrees. W. BRYAN BOLICH, ALUMNI ASS'N OF DUKE UNIV., ALUMNI DIRECTORY DUKE UNIVERSITY SCHOOL OF LAW 1935 xv (1935).

<sup>312</sup> Stevens, *supra* note 10, at 159 and 160 n. 40.

<sup>313</sup> See Database, *supra* note 98.

<sup>314</sup> See, e.g., Columbia University, *Announcement of the School of Law for the Summer, Winter and Spring Sessions 1942-43*, COLUM. U. BULL. INFO., July 25, 1942; George Washington University, *The Catalogue Issue*, GEO. WASH. U. BULL., June 1943 ("graduate curriculum" has disappeared from Law School section of the University Bulletin); Harvard University, *Harvard Law School, Special Announcement: Changes Effective June, 1942* OFFICIAL REG. HARV. U., January 29, 1942, at 10-11; University of Wisconsin, *Law School Announcement of Courses 1942-43*, BULL.U. WIS., [September] 1942 (no mention of S.J.D. degree); Yale 1941-42 Dean's Report at 7-8. One notable exception was NYU, which conferred 25 J.S.D. degrees between 1941 and 1945. See Database, *supra* note 98. In

doctoral enrollments, a few students who had begun their studies before the war finished their degrees during the war, but once these students were through the pipeline few others came through.<sup>315</sup>

For those who remained behind there was an opportunity to take stock. In particular, a special committee of the AALS – made up Yale’s then Dean and of the Columbia, Harvard, Michigan, and NYU faculty members responsible for graduate work<sup>316</sup> – convened twice during the war, preparing reports in both 1943 and 1945.<sup>317</sup> The 1943 report in particular represents a fascinating snapshot of how these individuals viewed the enterprise in which they were engaged.

First, the committee members articulated their view of the aims of graduate work. They reaffirmed the generally understood objective of training people for careers in law teaching, government service, private practice. To these they added two others: encouraging “legal authorship” and “social planning or social engineering”, both of which could be pursued in the context of other careers.<sup>318</sup> With respect to the latter, the committee noted that “The peculiar contribution of graduate work in law should be a broader and deeper study of the functioning of law in society, with greater emphasis, for most students at least, upon making legal knowledge effective in implementing social values.”<sup>319</sup> More broadly, the committee noted that “[t]he development of graduate work in law in the United States during the past thirty years is a further manifestation of the urge to get away from the trade school conception of legal education. Through the establishment of courses in jurisprudence and similar philosophic or scientific disciplines

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addition, Michigan’s Hessel Yntema ran a group research project on Latin American commercial law during the war years, and several of the participants completed graduate degrees in connection with the project. *See* Michigan 4/19/43 Minutes.

<sup>315</sup> Columbia suspended its graduate fellowships in 1941. By 1945, seven students who had done their residency before 1941 earned the degree. George Washington conferred S.J.D.s on two women in 1942, and conferred no further S.J.D.s until 1948. Harvard conferred 11 S.J.D.s during the war years, and the few graduate courses it continued to offer were lumped together with third-year courses. During the same period, Michigan conferred five S.J.D.s, Wisconsin conferred three, and Yale conferred four, but otherwise all three schools largely suspended graduate work. *See* Database, *supra* note 98.

<sup>316</sup> These were NYU’s Frederick de Sloovere (Harvard S.J.D. 1917), Yale’s Ashbel Gulliver, Harvard’s Thomas Reed Powell, Michigan’s Lewis Simes (Yale J.S.D. 1927), and Columbia’s Edwin Patterson (Harvard S.J.D. 1920). *See* 1943 AALS Report, *supra* note 11.

<sup>317</sup> The war years were not the first occasion on which the AALS had considered the question of graduate degrees. The subject had been addressed several times before, most recently in 1936-37 by faculty from Vanderbilt, Cincinnati, Notre Dame, Berkeley, Michigan and Pennsylvania. The primary reason for that review had been the proliferation of graduate degrees with wildly different requirements and degrees of academic rigor, and an attendant concern that this proliferation would injure the law schools’ standing in their host universities. *See* 1936 AALS Report, *supra* note 3, at 313-17, 323-24; 1937 AALS Report, *supra* note 122, at 317-21, 326-28.

<sup>318</sup> 1943 AALS Report, *supra* note 11, at 150.

<sup>319</sup> *Id.* at 150-51.

graduate work has influenced undergraduate law teaching and the interests of undergraduate law students, both in the schools which emphasize graduate work and in the schools to which graduate students go as law teachers.”<sup>320</sup>

Second, the committee affirmed that the doctorate in particular should be primarily designed to prepare candidates for careers in law teaching. This position is not surprising given the teacher training orientation of four of the five schools’ programs, but it was a new position for NYU. And the “vocation of the law professor”, as the committee conceived it, was precisely as Ames had described that vocation forty years earlier.<sup>321</sup> According to the committee, the vocation of the law professor included, but was not limited to, classroom teaching. The vocation also included writing books and articles, and “participation in public affairs, in drafting legislation, in advising officials or serving on part-time official boards and in providing leadership and guidance for what we have called ‘social planning.’”<sup>322</sup> To these elements the committee added a new one: “to take part in the deliberations of his faculty and to help direct the planning and administration of a law school. For this he needs an understanding not only of law but of legal education.”<sup>323</sup>

Should a doctorate be required for a career in teaching? The report noted that “University presidents and law deans have come to place considerable emphasis upon the attainment of a graduate degree in law, just as presidents and academic deans commonly insist upon a Ph.D. was a prerequisite to advancement in the college of liberal arts.”<sup>324</sup> However, the committee did not believe that a graduate degree should become a prerequisite for teaching in the way that a Ph.D. was required in the arts and sciences. The committee noted that most schools did not absolutely require graduate work, and that “Those law schools which attract the largest number of graduate students preparing for law teaching have been the least insistent upon graduate work as a qualification for appointments to their own faculties.”<sup>325</sup> The primary reason for this pattern was the still-vocational nature of legal education, and the attendant view that experience in practice was beneficial preparation for teaching. The committee believed that graduate work was better preparation for teaching than was practice, but it also acknowledged that the doctorate was unlikely to become the sole route to teaching: hiring committees still preferred brilliant candidates who had not pursued graduate work to less brilliant candidates who had pursued it.<sup>326</sup>

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<sup>320</sup> *Id.* at 178.

<sup>321</sup> *See generally* Ames, *supra* note 22.

<sup>322</sup> 1943 AALS Report, *supra* note 11, at 154-55.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 152.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 153-54.

Third, the committee emphasized that the central task of the doctorate should be research and writing “for the purpose of producing some original insights or novel clarifications of the subject matter.”<sup>327</sup> Research was part of the vocation of the law professor, and the committee particularly encouraged the incorporation of non-legal materials: “[t]he cross-fertilization between law and the other social sciences or philosophy has more deeply influenced the outlook and interests of the law professor than it has influenced the specific content of most undergraduate law curricula.”<sup>328</sup> However, the committee recommended caution in the undertaking of topics at the borderline between law and the social sciences because such projects were rarely successful.<sup>329</sup> While the committee noted that the doctorate’s emphasis should be on *training* for research, the standard they recommended for the completed dissertation was a high one: “Would the dissertation, in so far as its quality is concerned, be suitable for publication by a first-class law review?”<sup>330</sup>

Otherwise, the primary component of the doctorate was coursework, particularly (a) “more intensive study in special fields of law,”<sup>331</sup> primarily through graduate seminars;<sup>332</sup> (b) “specialization in non-legal subject matter,” primarily through the joint seminar; (c) legal education, understood as “the history, methods and objectives of law schools and of legal education” (for this a “joint seminar in legal education,” watching the masters in action, and perhaps conducting one or more seminar sessions, would suffice);<sup>333</sup> and (d) “[p]hilosophic or general studies”: -- i.e., jurisprudence and philosophy of law.

In all, the 1943 AALS committee report was an aspirational document that captured the schools’ hard-fought battles of the prior decade. On the one hand, the committee’s view of the ideal law professor was an elitist one. In addition to the basic Ames paradigm, the committee opined that “The law teacher should . . . be an educated man, a person of wide and diversified interests and tastes. To say that every university professor should

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<sup>327</sup> *Id.* at 157. In the committee’s view, work that essentially supported a professor’s project rather than the student’s own should be avoided. However, it noted, “the research program of a law school may be so correlated with its graduate work that a graduate student may work out as his own an integral segment of a larger research job and offer it as his dissertation.” *Id.* at 177.

<sup>328</sup> *Id.* at 156.

<sup>329</sup> *Id.* at 168-69 (“Rarely does one find a student who is exceptionally competent in both law and social science.”).

<sup>330</sup> *Id.* at 171. The committee declined to take a position as to whether actual publication should be a condition of conferral of the degree, however. *Id.* at 171-72.

<sup>331</sup> 1943 AALS Report, *supra* note 11, at 155.

<sup>332</sup> The committee called seminars “by far the preferable method of instruction for graduate students, especially for the doctoral candidates.” “Undergraduate courses” were much less desirable – candidates should take no more than “one or two which will contribute directly to his research.” *Id.* at 165.

<sup>333</sup> *Id.* at 157-58.

be a cultured gentleman is one way of stating an old-fashioned but by no means discredited idea. The law teacher will be a better teacher and a better man if knows how to enjoy his leisure.”<sup>334</sup> Achieving that paradigm required a highly selective admissions process and generous financial support along the way.<sup>335</sup> On the other hand, the authors acknowledged that their efforts to date had not been completely successful in this respect: “Successful candidates for this degree are not infrequently less superior in ability than the top ten per cent of the third-year undergraduate class of the school.” This divergence did not necessarily mean that the degree should be made more difficult to get, however. “The graduate schools of law can elevate the standards of a law teaching career only slowly and indirectly, and they should not meanwhile forego their useful function of training the men who choose and are chosen for that career.”<sup>336</sup> The missionary function of the doctorate was alive and well.

#### IV. Conclusion

This article has traced how the academic doctorate in law supported law’s coming of age as an academic discipline in the first half of the 20<sup>th</sup> century. Drawing in part on continental European models, the architects of the degree shaped it into a vehicle for training a new class of law teachers, producing research into the nature and functioning of the legal system, and spreading emerging conceptions of law to a broader national audience. Notable among these conceptions were the “sociological jurisprudence” of Harvard’s Roscoe Pound and the Legal Realism of Columbia and Yale. More generally, the degree was a mechanism for training prospective teachers in the burgeoning field of public law, and a way of promoting a more jurisprudential understanding of law in general.

Like any educational enterprise, however, the doctorate was not simply a matter of conveying knowledge; it necessarily came with practical entanglements. Two in particular helped set the stage for the degree’s decline after World War II. First, despite some faculty members’ ambitions for the degree, it was never more than a sideline in an enterprise devoted to professional education. Second, the missionary idea – which implied enrolling students from the educational hinterlands -- was in tension with a *doctoral* degree’s implication of advanced scholarly work.

While today it is much more common for U.S. law teachers to have pursued doctoral study in a discipline *other than* law, a U.S. doctorate in law is an increasingly attractive credential for foreign-trained lawyers who hope

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<sup>334</sup> *Id.* at 159.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 172.



to teach in their home countries. This article is the first installment of a larger study that traces how U.S. legal education borrowed practices from continental Europe to create the degree, digested and modified them to suit the needs of a rapidly evolving legal system, then redirected the flow of ideas elsewhere. As such, the study is a story of the coming of age of U.S. legal education not just at home, but on a world stage.