

DRAFT

More than Just Law School: Global Perspectives on the Place of the Practical in Legal Education

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The new Carnegie Report, *Educating Lawyers: Preparation for the Profession of Law*,¹ equates legal education with law schools. The rest of world does not; at one time the United States did not. In most modern legal systems legal education has two parts: one part is study in law schools. The other part is practical training in law offices. In the United States, as late as the year my father began law school, New York required that law students do both to be admitted to practice as lawyers.² The second Carnegie Report on legal education from 1920, the Reed Report, thought abandoning law office training to be “curious.”³

The new Carnegie Report asks whether university education in law must be “unmoored to practical experience?”⁴ It lauds medical education where “the practical apprenticeship has begun to emerge as the cutting edge of pedagogical advance.” It calls for legal education to integrate teaching of legal doctrine to become “part of learning to think like a lawyer in a practice setting.”⁵ Yet that integration is all to take place in the law schools and not in practice; there is no provision for participation by bench or bar.

Whatever may be the place of practice in law school, is not the natural and preferred place of apprenticeship for practice a law office or court? Contemporaneous with Langdell’s

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¹ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 192* (The Carnegie Foundation for the Advancement of Teaching, Preparation for the Professions Program, 2007) [hereinafter PPP Legal Education Report].

² Rules are Eased on Law Clerkship, *NEW YORK TIMES*, March 17, 1933, at p. 22.

³ ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA*, BULLETIN NO. 15, at 281 (1921)

⁴ PPP Legal Education Report 192.

⁵ PPP Legal Education Report 195.

initiation of the case method of legal instruction, the *Albany Law Journal* succinctly made the case for law office study: “the art of law must be learned in the office, and we cannot, as the medical teachers do, take the office into the school.”⁶ “The distinguishing feature of medical training ... is,” according to the new Carnegie Report, “that most of it is carried out in the settings of actual patient care.”⁷ Should not actual client care be the preferred setting to carry out legal training? The *Albany Law Journal* left no doubt where it stood on this choice: while medical schools might exhibit diseased men and women to their students, law schools were limited to simulations. “Mock courts exist,” observed the *Journal*, “but they are no more like real courts than a manikin is like a living man.”⁸ The development of legal clinics since Langdell’s day has changed this situation only with respect to a few practice areas.

In discussing the future of legal education in America, we should consider not only what should be taught, but also where it is best taught or, better, where it is best learned. The first Carnegie Report on legal education, the Redlich Report, recognized, that law schools are not the only place for legal education. It acknowledged that law schools cannot teach “all the practical knowledge of the law,” or all “the ethics of the legal profession or the peculiar instinct ... of the successful lawyer or judge.”⁹ It observed that “only the direct atmosphere of daily professional life can furnish to the beginner certain experiences and qualities which are of great practical importance.”¹⁰ It is not different in medical education, which the new Carnegie Report calls on us to emulate. According to the Deans of the nations’ medical schools, it is not in the medical schools, but in the hospital-conducted, post-medical school residency training where budding physicians “acquire the detailed knowledge, the special skills, and the professional attitudes needed to provide high quality care in medical practice.”¹¹

It behooves us, as legal educators, before we try to bring the law office inside the law school, to educate ourselves about how other legal systems provide practical training both within and without the law schools. To that end I would like to tell you about practical training in Canada, Germany and Japan. While conditions here are quite different, the challenges are similar: preparing lawyers for the profession of law.

I.

“Articling” in British Columbia: The Common Law Approach

In Canada practical training is called “articling.” I won’t spend much time on it, since many of you may already be familiar with it and since all of you can easily find out more about

⁶ *Law Apprenticeships*, 5 ALB. L.J. 97 (1872)

⁷ PPP Legal Education Report 81.

⁸ *Law Apprenticeships*, *supra* note 6,

⁹ JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULLETIN NO. 8 at 40 (1914). [Hereinafter, Redlich Report.] Reprinted with an introductory essay in JAMES R. MAXEINER, EDUCATING LAWYERS NOW AND THEN, AN ESSAY COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION AND A REPRINT OF THE 1914 REPORT (2008).

¹⁰ Redlich Report at 40.

¹¹ EDUCATING DOCTORS TO PROVIDE HIGH QUALITY MEDICAL CARE: A VISION FOR MEDICAL EDUCATION IN THE UNITED STATES. REPORT OF THE AD HOC COMMITTEE OF DEANS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES 4 (2004), available at <http://www.aamc.org>.

it. Articling is pretty much the norm throughout the former British Empire, i.e., those non-U.S. territories where the common law prevails. Today, I am only going to talk about articling in British Columbia. Although I believe practices there are close to those of other common law provinces of Canada and similar to those in other common law countries, I won't generalize today. I prefer to talk about specific legal systems. The principal reason that I have chosen British Columbia is because I want to tweak the Carnegie Foundation for *not* considering articling. It visited two Canadian law schools; one was the University of British Columbia.¹²

The Law Society of British Columbia oversees the province's articling program.¹³ Most students admitted to the bar first obtain an LL.B. degree and then complete the 12-month Law Society Admission Program. The program consists of nine months of apprenticeship "articles" with a lawyer principal, a 10-week Professional Legal Training Course and two qualification examinations. Students are responsible for finding their own principals.

In British Columbia a student and a lawyer designated "principal" enter into an "Articling Agreement" in which the principal agrees to ensure that the student is instructed in the practice of law and professional conduct, while the student agrees to provide services as an articulated student to the principal and other members of the principal's firm. The student is to work full time for the law firm. The principal is expected to provide the student with practical experience and training in ethics, practice management and lawyering skills in at least three specific practice areas as determined by the principal and student. The program enumerates practice skills as consisting of research, writing, drafting, advocacy, negotiation/mediation, interviewing and problem solving.

Any system that relies on a large number of individual lawyers to conduct training almost inevitably encounters quality control issue; the British Columbia program is no exception. The program's Articling Guidelines note that the Society receives complaints that "some principals use their students as runners and registry clerks to an excessive degree." The guidelines call for principals to limit these activities to four hours a week. The guidelines note that there are similar criticisms of excessive use of students in researching and writing opinions. The guidelines remind principals that "the purpose of the articling period is to give instruction in the practical application of the law and running a law practice." Holding the lawyers responsible for providing instruction is key to any system of law apprenticeships. This was a problem in New York when the system of law office training was in place. The *Albany Law Journal* reported that: "The principal gives no care or attention to the progress of his clerks and students, and the clerks and students consequently give not care or attention to it either."¹⁴

¹² <http://www.carnegiefoundation.org/general/sub.asp?key=1819&subkey=2304&topkey=1819>. The Foundation also visited Osgoode Hall Law School, York University, Toronto.

¹³ Unless otherwise noted, all information about articling in British Columbia reported here can be found on the website of the Law Society of British Columbia, <http://www.lawsociety.bc.ca/>. See also John Law, *Articling in Canada*, 43 S. TEX. L. REV. 449 (2002).

¹⁴ *Law Apprenticeships*, *supra* note 6, at 98.

II. The German *Referendar* (Trainee) Program

The German states established systems of practical training to train their civil servants. Today the state ministries of justice are responsible for practical training not only for judges but for the bar generally. As part of their control over admission to the bar, the ministries conduct practical training directly through judges and indirectly through lawyers that they oversee. They train all trainees firstly to be judges and only secondly to be lawyers, even though most trainees become lawyers and only a small minority become judges. The bar has grown increasingly critical of this orientation and the ministries have, to an extent responded, by increasing the proportion of law office as contrasted to in court training. The system varies only slightly from German state to German state. Here I limit my remarks to the state system that I have personally experienced: Bavaria.¹⁵

The practical training period is two years and follows university law studies that last typically four to five years. All students who pass the First State Bar Examination (an examination considerably more demanding than an American bar exam), are entitled to enter the practical training program. About two-thirds of students who take the First State Examination pass. In the two year practical training period, trainees take practice-oriented classes held principally at the courts while concurrently acting as apprentices in four mandatory practice positions (five months with civil judges, three months with criminal judges and prosecutors, four months with administrative authorities, and nine months with attorneys) and one elective internship—possibly abroad. During this time trainees study for the equally-demanding Second State Examination. They are paid by the Ministry of Justice a monthly stipend (base pay is presently about Euros 900 base, currently approaching \$1500/month, with additional family benefits possible).

The Bavarian program appears to me to be of high quality. While I have heard German trainees complain about their judges and their classes, and surely there is variation from judge-to-judge and even more from lawyer-to-lawyer, I have been quite impressed by what I have seen. The classes are relatively small: ten to thirty students. The students apprentice directly under judges. Judges take educational work seriously. They are officials of the Ministry of Justice and educating young lawyers is just one item in their job descriptions. Those judges that conduct classes are assigned those duties as particular job assignments; some are fulltime educators.

Judges coach trainees to act as judges. They teach trainees how to distill a mass of unstructured real-world facts from actual cases and analyze those facts for legal relevance. They show trainees how to make complicated procedures understandable; they teach trainees how to value conflicting interests objectively. They mentor trainees in acting judiciously and in projecting authority without creating barriers (“besonnen aufzutreten und Autorität auszustrahlen, ohne Barrieren aufzubauen”). Above all judges instruct trainees in the German legal method of relat-

¹⁵ Most of the information related here can be found at the website of the Bavarian State Ministry of Justice, www.justiz.bayern.de, in the brochure BAYERISCHES STAATSMINISTERIUM DER JUSTIZ, REFERENDARZEIT IN BAYERN. DER VORBEREITUNGSDIENST DER RECHTSREFERENDARE IN BAYERN, available at http://www.justiz.bayern.de/imperia/md/content/stmj_internet/buergerservice/broschueren/referendarzeit_aug05.pdf and in the governing law, Ausbildungs und Prüfungsordnung für Juristen (JAPO) of 13 October 2003, BAYERISCHES GESETZ- UND VERORDNUNGSBLATT 2003, at 758, available at http://www.justiz.bayern.de/imperia/md/content/stmj_internet/ljpa/japo/japo_2003_bayern.pdf.

ing law to facts (*Relationstechnik*). In this procedure trainees prepare memorandums that help judges structure court proceedings to decide cases. Trainees learn to take the substance of the law that they learned at the university, conduct legal proceedings that identify material facts and determine those in dispute, apply law to the facts so found, and write judgments that justify that application. In short, they learn to do what German judges do, for it is the mastery of the techniques of applying law to facts that defines the German judge.¹⁶

After the initial eight months spent with the civil and criminal courts, trainees pass on to four months with administrative agencies, nine months with attorneys and a concluding three to five months in elective positions. They continue to receive payment for their work. While the Ministry continues to have supervisory responsibility, it does not have the same level of control over educator-lawyers and educator-administrators that it has over educator-judges.

III. The New Japanese Law Schools

When at the end of the nineteenth century the Japanese government created its western-style legal system, it based much of that system, including the system of legal education, on the German system of day, including the German trainee system just described.¹⁷ The outward form of legal education in Japan was, until only a few years ago, very similar to that in Germany: four years university education in law (in Japan, usual, although not technically required), First State Examination, two years practical training at the courts and in law offices, and Second State Examination. The Japanese system had, however, one crucial difference: admission to practical training was limited to a very small percentage of all those who took the First State Examination: typically less than two percent. There was and is only one practical training center: the national Supreme Court's Legal Training and Research Institute in Tokyo. Restrictive opportunities for legal training meant that Japan had and has very few lawyers, although it has very many law faculty graduates.

To remedy the shortage of lawyers, the Japanese government decided to cut the training period at the Training Institute in Tokyo in half—to one year—thus doubling the Institute's capacity. To make up for the lost instruction, it mandated creation of American-style law schools. Since April 1, 2004 some 74 new law schools have begun operation in Japan.¹⁸ Law schools occupy an intermediary place between the undergraduate faculties of law and the national Legal Training and Research Institute. The undergraduate law faculties continue to offer undergraduate education in law, while the law schools—in combination with the national Institute—provide professional legal education. A principal goal of the change is to produce more lawyers. But law schools are charged not only with increasing numbers, but also with providing “practical education especially for fostering legal professionals.”¹⁹ The shortening of the time at the national Le-

¹⁶ ALFRED RINKEN, EINFÜHRUNG IN DAS JURISTISCHE STUDIUM 135 (1977).

¹⁷ Most of the information here can be found in James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools*, 13 PACIFIC RIM LAW AND POLICY JOURNAL 303 (2004).

¹⁸ See Justice System Reform Council, Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century, June 12, 2001, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

¹⁹ *Id.* at Chap. III, Part 2, 2(2).

gal Training and Research Institute from two years to one year is coupled with expectations that law schools pick up much of the classroom instruction that the Institute previously provided.²⁰

As an American familiar with both the American and German systems, I was perplexed by the Japanese action. To me it seemed that it would have made more sense to open many new training institutes rather than to open up 74 new law schools. My Japanese colleagues have never given me a satisfactory answer why the Japanese government did this. They have told me that the Supreme Court, which oversees the Training Institute, was not interested in getting involved in more legal education. Perhaps the strong American influence in Japan had a role.

The new law school system is already in danger. The original plan had anticipated that only fifteen or so undergraduate law faculties would spawn law schools. That was expected to lead to bar passages rates, i.e., admission to practical training, at levels similar to those in the United States and Germany, i.e., 70 to 80%. However, nearly every university that had an undergraduate law faculty felt compelled to create a law school. With nearly five times as many law schools as originally anticipated, yet no increase in practical training places, the passage rate in the first graduating classes has been closer to 20%.²¹ How long students will continue to pay high tuition for only a one-in-five chance of success is uncertain.

Just how the new Japanese law schools take over practical elements of legal education should be of interest to other modern legal systems. Since the Japanese program is so new, it is too early to identify precisely a focus and evaluate success. Will our Japanese colleagues put their energies into teaching what the Japanese call “the legal mind” and emphasize legal reasoning? Or will they seek to stress practice skills? Or will they try the kind of integrative approach that the new Carnegie Report recommends? Stay tuned.

IV. Conclusion

Foreign experiences remind us that legal education is not just law school. They inform us that we should seek for ways not just to integrate theoretical and practical teaching, but to assure that our students or our graduates get real experience with practice. The assumption that law schools are the exclusive place for preparation for the profession of law is bad for students, bad for bar, bad for law schools, bad for the legal system and bad for society. Law schools have their limits. Even if means were no consideration, they could not do it all. We will do our students a disservice if we assume that law schools can. We will bankrupt some students and close off others from the profession. We should look to see what we can do best and should encourage other institutions to do what they can do better.

²⁰ *Id.* at Chap. III, Part 2, 2(2)d (“Law schools should provide educational programs that, while centered on legal theory that takes into account reasonable solutions to problems arising in the world of practice, introduce practical education (e.g., basic skills concerning factual requirements or fact finding) with a strong awareness of the necessity of building a bridge between legal education and legal theory on the basis of systematic legal theory.”); Chap. III, Part 2(4)(1).

²¹ Keiichi Yamanaka, *Juristenausbildung in Japan—Law School japanischer Art, forthcoming* in REZEPTION UND REFORM IM DEUTSCHEN UND JAPANISCHEN RECHT, ZWEITE RECHTSWISSENSCHAFTLICHE SYMPOSIUM GÖTTINGEN - KANSAI, 11. BIS 13. SEPTEMBER 2006 (Jörg Martin Jehle, Volker Lipp & Keiichi Yamanaka, eds.).