

# Separated by a Common Law: American and Scottish Legal Education

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## I. INTRODUCTION

Law school education reflects the scope of the legal landscape. This paper is an impressionistic discussion of legal education in the United States, Britain, and, in particular, Scotland. The Scottish legal system is a mixed system that borrows heavily from England yet retains residual civilian characteristics and fundamental procedural law differences. While the function of legal education is to produce lawyers,<sup>1</sup> this paper acknowledges the social differences between Britain and the United States by contrasting the Scottish situation. Indeed, George Bernard Shaw quipped that Americans and the English were two peoples separated by a common language. Likewise, legal education in the United States and Britain is separated by a common law.

In Britain, much debate has been generated concerning decreased university funding coupled with an increase in student numbers. While England and Wales constitute a legal system influencing approximately 57 million people, Scotland comprises approximately 5 million people governed under a different, albeit minority system. Because of the relative numbers, little has been said recently about Scottish law school education. This does not mean that all is well in advocates' academe. In fact, Scottish law schools face a challenge with finances and enrollment as well as changes in the legal profession. This article attempts to discuss some of the salient issues from the perspectives of common law theory and my personal experience.

Common law theory is merely a buzz-word to describe those jurisdictions that follow or are influenced by the system of judicially

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1. *Non schola sed vita discimus* ("we learn not for school but for life"). On the other hand, arguably, the function of legal education is to provide cushy jobs for sherry-swilling law teachers! If the function of legal education is to produce lawyers, why are law schools allowed onto a university campus?

declared (judge-made) law developed in England. Most of the English-speaking world, such as the United States, Canada, Australia, and New Zealand received and modified the common law to accommodate each state's respective social and political ethos. Part of the so-called English-speaking world included territories which subjugated linguistic minorities, yet attempted the political palliative of appeasement by granting them "mixed jurisdiction" status. The primary examples include: Québec, (still) in Canada, following the British defeat of Imperial France in 1753; Louisiana, sold to the U.S. in 1803 by a cash-strapped Napoleon Bonaparte; and Dutch (Boer) civil law's influence on South Africa. These jurisdictions received common and retained civil law antecedents. Although Scotland was not linguistically different (aside from marked dialect differences and the Highland Gaelic language), it also shares a civilian influence due to the "Auld Alliance." Before 1707, England and Scotland had separate Parliaments. Before 1603 and James I (VI of Scotland), both countries had separate monarchies.

Brought into a modern context, education in all legal systems is being influenced by the technological miracles of the communications age and the concurrent collapse of Marxism in the former Soviet Bloc. Just as ontogeny recapitulates phylogeny,<sup>2</sup> the experience of the main actors in any legal system is accentuated by the fast pace of the "global village."<sup>3</sup> Like the "Wizard of Oz," reality is not always apparent. Lawyers in Scotland, as elsewhere, know more about their own "Kingdom of Oz" although the validity and utility of this information is controversial.

Global and domestic pressures are influencing change, including the increasing readiness of some western jurisdictions to entertain persuasive "foreign" authority. One possibility is that these pressures are inducing legal systems to imitate Oz so that lawyers appear to be "with it." More likely is the probability that these pressures revolve around the fast-paced change in global greed patterns. Competition is euphemistically said to create wealth, yet often results in negative interest group behavior.<sup>4</sup> Thus, the pressure to change a legal system invariably

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2. That is, the life of any species is molded by the genetic parameter of that species.

3. MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964). The Canadian communications guru of the 1960s coined this term after perceiving that quantitative and qualitative increases in the dissemination of information would radically alter society(ies).

4. "Competition, like other therapeutic forms of hardship, is by wide and age-long consent, highly beneficial to society when imposed upon - other people. Every

follows the impetus to increase trade across boundaries. The evolution and vitality of a legal system is determined by the allocation of resources, an incremental process that is not centralized nor proactive.

In Scotland, law practice attitudes<sup>5</sup> are slow to change because of tradition. Nevertheless, these staid attitudes are stirring like the bagpipers who play during weddings in Professor's Square at Glasgow University. For instance, the Law Society and Faculty of Advocates have made the study of European law compulsory for entry into either branch of the bifurcated legal profession in Scotland.<sup>6</sup> But bagpipe music is akin to changes in legal practice and legal education attitudes since they are not widely welcomed.

## II. SCOTTISH LEGAL PHILOSOPHY: HISTORICAL BACKGROUND

Scotland is a mixed legal system, part civil law, part common law, as is the nominal classification in Québec, Louisiana, or South Africa. Bellicose encounters with the English following the death of Alexander III in 1286 are one reason why Scotland looked to the continent for guidance in matters of law.<sup>7</sup> The expatriation of Scottish law students to the continent soon became common practice, in part also because of the paucity of legal education in Scotland. As a consequence, the independent development of Scottish law was stunted, and Roman law, popular on the mainland, began filtering into Scottish courts. The assimilation of Roman law into the Scottish legal system still influences the theoretical bent of Scots law and contrasts sharply with the theoretical approach to the law south of the River Tweed, although co-habitation with England has brought the two systems closer together in practice.

The Anglo-American practice is to derive a few ideas from close attention to the facts presented via induction, empirically building up

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industry that can afford a spokesman has emphasized both its devotion to the general principle and the over-riding need for reducing competition within its own markets because this [is] the one area in which competition works poorly." George Stigler, in STIGLER AND COHEN, *CAN REGULATORY AGENCIES PROTECT CONSUMERS?* 9 (American Enterprise Institute for Public Policy Research, 1971).

5. For instance, the absence of pretrial depositions in Britain (as opposed to Canada or the United States) arguably has an inhibiting impact on the substantive outcome of litigation. See A. J. Black, *Pretrial Discovery in Scotland, England and Canada*, 37 NETH. INT'L L.J. 267-90 (1992).

6. Christine Boch, *Using EC Law Before Scottish Courts*, 36 JOURNAL OF THE LAW SOCIETY OF SCOTLAND 6-9 (1991).

7. For the analysis of a former Cornell Law graduate, now a law professor, see Donald W. Large, *The Land Law of Scotland - A Comparison with American and English Concepts*, 17 ENVTL. L. 1 (1986).

a coherent body of case-law jurisprudence. Scotland supposedly proceeds by the so-called "rational" civil law method of deduction from *a priori* first principles, usually set out in "institutional" writings. For the seventeenth century institutional writer Viscount Stair, Roman law displayed the same sort of logical, crystalline purity that geometry did.<sup>8</sup> Stair believed that in law, as in geometry, one should be able to establish principles from which legal conclusions can be drawn using the art of deductive inference. The rationalist method attempts to increase predictability by simply applying a principle to a particular case and deducing the result, thereby theoretically avoiding the potentially contradictory reasoning-by-analogy approach employed by the common law.

In keeping with the continental/civil perspective which buttresses Scots law, it is to be expected that Scots, in theory at least, prefer principle to precedent. In this respect the Treaty of Union has brought England and Scotland into greater accord, partially as the result of the establishment of binding appellate jurisdiction in the House of Lords. Nevertheless, mainland vestiges remain, and Scots law differs in several important and substantive ways from English law.

Unlike the multiple federal-state (or provincial) jurisdictions in North America, the unitary form of British government coupled with the cultural island-orientated psychology<sup>9</sup> foists suspicions on "other" legal systems. Not surprisingly, there has been an attitude of paternalism from England towards Scotland. "One of the reasons why it is difficult to take seriously the claims of legal scholarship to be scholarship in any real sense is its very Englishness, even to the extent of excluding Scotland."<sup>10</sup>

8. Cf. Blackstone, who in *Perrin v. Blake*, conservatively said: "The Law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connections and nice dependencies: and he that breaks one link of the chain, endangers the dissolution of the whole." I.F. HARGRAVE, *TRACTS RELATIVE TO THE LAW OF ENGLAND* 489, 498 (1787).

9. British folk typically talk about going to "Europe" for holidays, etc. This suggests a separate geographical and cultural perception.

10. Geoffrey Wilson, *English Legal Scholarship*, 50 MOD. L. REV. 818, 829 (1989). Prof. Wilson says:

"The character of English law and the English legal system, judge led, pragmatic, and undoctinal, may mean both that there is little scope for legal scholars to contribute to the world of affairs in the way that legal scholars in other countries or scholars in other disciplines do and that it does not provide an adequate basis for an independent scholarship that can take its place by the side of other forms of scholarship. It is in other

However, Scots law retains distinct characteristics. For instance, its land law is fundamentally different from Anglo-American English-based land law. Unlike England, it is difficult to disentangle "equity" from law in Scotland.<sup>11</sup> Both these concepts have always been administered under general principles of Scots law using the same set of remedies existing in the Court of Session or Sheriff Court. Thus, while Scots law recognizes the substantive English law of judicial review, it procedurally uses general remedies and not the prerogative writs of certiorari or mandamus. Borrowing Professor Ashburner's fluvial metaphor, there is no separate channel of law called equity which does not commingle with common law waters.

Contract theory differs as between Scotland and England as well. Unlike English law, Scots law does not have a doctrine of consideration; contracts can be gratuitous; unilateral contracts are enforceable; and third parties may acquire rights under contracts. Conversely, "English law knows no *jus quaesitum tertio*."<sup>12</sup> Another difference is that Acts of the pre-1707 Scottish Parliament remain part of the law yet are subject to the challenge that they have fallen into "desuetude" or disuse and are no longer observed.<sup>13</sup> Although unlikely, the challenge of desuetude is possible and reflects the divergent etiology of Scotland's legal system. This difference is a result of a different cultural ethos. Although Scotland is politically unified with England, it has, according to the landmark work of George Elder Davie, been historically separate in ethics. In the seventeenth century, legal and educational development differed between the two countries. By around 1700, Scottish efforts had to some extent succeeded in reorganizing law and education on a rational basis. Conversely, Professor Davie argued that the English utilitarian reforms of law and education failed.

This superior state of Scottish institutional arrangements presumably accounted for the remarkable reservations introduced

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words neither sufficiently scholarly to be attractive to scholars nor sufficiently legal to be attractive to lawyers."

*Id.* at 819. But is it not a function of law schools to empower teachers to make law?

11. "It might be said that Scotland has never known equity but has long had equity in her legal system." David M. Walker, *Equity in Scots Law*, 66 JURID. REV. 103, 105 (1954).

12. *Dunlop Pneumatic Tyre v. Selfridge*, 1915 App. Cas. 847, 853 (H.L.) (per Viscount Haldane) ("only a person who is a party to a contract can sue on it . . . only a person who has given consideration may enforce a contract not under seal."). There are, of course, many exceptions to this inconvenient rule, such as trusts, agency and statutory provisions like the Bills of Exchange Act.

13. HECTOR L. MACQUEEN, *STUDYING SCOTS LAW* 6 (1993).

into the Treaty of Union, and throughout the eighteenth century, the Scots, at the same time as they congratulated themselves on the advantage of a common market with England, equally congratulated themselves on the advantage of their well-ordered progressive system of law and education (and of religion too) as compared with the stagnant and ill-ordered state of affairs in the South. In this way, submergence in the political-economic system of England was combined with a flourishing, distinctive life in what Marxists conveniently, if not perhaps aptly, call the social superstructure, and a Scotland, which was still national, though no longer nationalist, continued to preserve its European influence as a spiritual force, more than a century after its political identity had disappeared.<sup>14</sup>

In Davie's *THE DEMOCRATIC INTELLECT*, mention is made of the 1854 Report of the Faculty of Advocates on "the qualification of entrants":

[N]o circumstance has indeed tended so much to the formation of the single and intelligible system of Scotch law, as the liberal training of Judges who in former days made it. The Institutions of Lord Stair are largely indebted to the circumstance, that its author was once a professor of philosophy.<sup>15</sup>

The report cited Lord Woodhouselee, who said: "This profession, more than any other, requires an enlarged acquaintance with human nature - a knowledge not to be got but by philosophical study, etc., etc."<sup>16</sup> But this cultural difference, an arguable advantage, has been whittled down following political union with England.

### III. CONTEMPORARY BRITAIN

A large part of the legal superstructure in Britain stems from the constitutional settlement (or "unsettlement" as might be said). A written constitution with entrenched civil rights would stimulate the systematic development of legal principles. This would provide a "Charter of Rights and Freedoms," as in Canada, which has notionally ended the doctrine of Parliamentary Sovereignty and replaced it with Constitu-

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14. GEORGE ELDER DAVIE, *THE DEMOCRATIC INTELLECT: SCOTLAND AND HER UNIVERSITIES IN THE NINETEENTH CENTURY* 25 (2d ed. 1964).

15. *Id.* at 53.

16. *Id.* See also James Lorimer, *Scottish Universities* 4-5.

tional Sovereignty.<sup>17</sup> Instead of individual liberties being residual, after we have subtracted from the limitations imposed by statute, certain laws would be identified and could not be changed in the same manner as ordinary laws. Whether this would make judges "sovereign" is a vexed question which brings to mind the Wizard of Oz who was really a man pulling levers and bellowing through a loudspeaker.

Constitutional sovereignty concerns conceptions of democracy. It would spell out the distribution of powers between England and Scotland and provide an amending formula. Limited devolution of legislative powers could arguably better advance Scottish interests. Despite minority Scottish Nationalist Party support, the paradox of modern Scotland is its vibrant national identity yet popular political acceptance of central government located at Westminster. Yet Scots are not bloody-minded like modern day Serbs or the neutral Irish republic in World War II; instead, they are pragmatic and prefer to "get on with things."

At the same time, a written constitution would retain political conventions, as is the case in Canada's Parliamentary based system, including the rules of parliamentary procedure and debate. Judges would have a wider law-making role and be able, in appropriate cases, to invalidate otherwise valid Acts of Parliament which offend constitutionally enshrined rights.<sup>18</sup> Conversely, less scope is afforded British

17. However, Canada's "Charter" was concluded following an important political compromise. It enables Parliament or a Legislature to "override" § 2 or §§ 7-15 of the Charter if the statute contains an express declaration that it is to operate notwithstanding the civil liberties "enshrined" in the Charter. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is seminal American authority asserting federal court power to refuse to give effect to congressional legislation inconsistent with the Court's interpretation of the Constitution. In Canada, imposing a new constitution has proven difficult. "The Constitution Act of 1982, signed by every Canadian province except Québec, which protested date-rape, did manage to abolish the embarrassing power of the Parliament of Westminster to legislate for Canada. However its Charter of Rights and Freedoms guaranteed us no more, come to think of it, than we have always taken for granted: the right to freedom of thought, belief, opinion and expression, including freedom of the press and other media communication." MORDECAI RICHLER, *OH CANADA, OH QUÉBEC: REQUIEM FOR A DIVIDED COUNTRY* 11 (1992) (quoting CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms) § 2(b)). As part of the Canadian constitution repatriation compromise, the so-called "notwithstanding clause" (§ 33) was inserted in the Canadian Charter of Rights and Freedoms allowing the legislature of a province to declare that its legislation operates notwithstanding provisions in §§ 2, 7-15 of the Charter. Despite the federal enshrinement of English and French as the two official languages, Québec utilized the notwithstanding clause to prolong its "visage linguistique," the unilingual promotion of French.

judges. While judges do make law,<sup>19</sup> the scope of judicial activism is less in the United Kingdom. They are obliged to follow all unequivocal legislation such as provisions of the Official Secrets Act and attendant "gag orders," regardless of their effect on civil liberties.

Constitutionally enshrined rights that promote principled judicial activism might possibly reduce the potential for miscarriages of justice such as the infamous Birmingham six and Guildford four. Even so, Canada has its own shameful share such as the Donald Marshall case. Prisoners' rights appear to be more systematically elaborated by the judges who interpret the criminal law subject to the "Charter." With the foundation of a codified criminal law, Canadian courts use "Charter" principles to protect personal liberty by elaborating upon search, seizure, and arrest rules. This is not to say that miscarriages of justice will never happen again; this is shown by the United States Supreme Court prior to *Brown v. Board of Education*,<sup>20</sup> when it construed the Constitution and endorsed the provision of "equal but separate accommodations for the white and colored races" in *Plessey v. Ferguson*.<sup>21</sup>

In Britain, Charter 88 and other lobby groups have persuasively supported the creation of a written British constitution which would enshrine civil rights with the aim of lessening the frequency of miscarriages of justice. A 1989 conference at the University of Glasgow brought together leading lawyers and judges, including Justice William Brennan, formerly of the U.S. Supreme Court (pro) and Lord McCluskey of the Court of Session (contra). Much to the chagrin of proponents, the status quo prevails. Their spokespersons ask why "civil rights" merit a shrine and whether this will help poor people or liberal middle class types. Inertia seems to have set in under the old adage: "If it ain't broke, then don't fix it." The debate continues, in muted terms, concerning the performance of the legal machinery. Although not a panacea, this is an idea whose time has come despite the forces of inertia which inhibit it. Here, things are often done a particular way because they have always been done that way.

Framing a proper Bill of Rights would necessarily mean addressing thorny constitutional arrangements involving the apportionment of gov-

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19. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 456, 461 (1897). While this may sound like simplistic positivism, the scope of legal prophecy in Britain is arguably diminished by the lack of an omnibus-written constitution.

20. 347 U.S. 483 (1954).

21. 163 U.S. 537, 540 (1896).



ernmental power. A controversial constitutional interpretation is that, long ago, Scotland delegated its legislature to Westminster. The 1706 Treaty of Union entrenched Scots Law, the Church of Scotland, a different university system, and assured that laws affecting private rights would only be enacted for the vague-sounding "evident utility" of the people. Presumably, this assignment could be revoked by popular Scottish consent and replaced with a new mode of political representation. However, the present constitutional settlement is fuzzy. Unlike the federal system in Canada, there exists no "recognized" tier of government with whom Westminster is willing to speak.

#### IV. COMPARATIVE EDUCATIONAL REQUIREMENTS

In Scotland, the present initiation rites requirement is a three-year ordinary or a four-year Honors LL.B, coupled with a one-year diploma in legal practice, followed by two, or so, years "traineeship." Although the process is different in England, it is safe to say that the training of a British (that is, Scottish or English) lawyer takes six to seven years. This is roughly the time that it takes in Canada or the United States. This differs from the long-gone system of apprenticeship, and accompanying attitudes towards legal science. Sir Walter Scott wrote in his journal in December 1825:

There is a maxim almost universal in Scotland, which I should like much to see control. Every youth, of every temper and almost every description of character, is sent either to study for the Bar, or to a writer's office as an apprentice. The Scottish seem to conceive Themis the most powerful of goddesses. Is a lad stupid, the law sharpen him;—is he too mercurial, the law will make him sedate;—has he an estate, he may get a Sherifffdom;<sup>22</sup>—is he poor, the richest lawyers have emerged from poverty;—if a tory, he may become a deputy-advocate. . . .<sup>23</sup>

Since the 1960s, great emphasis is placed in Scottish university law schools on obtaining an honors degree. The extra "fourth"-year program offers in-depth study not obtainable in the three-year "ordinary"<sup>24</sup> degree. Many students nevertheless find that a three-year degree offers sufficient academic legal training.

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22. This is a judge of first instance.

23. PETER HAY, *THE BOOK OF LEGAL ANECDOTES* (1989).

24. The term "ordinary" is somewhat counter-intuitive since law degrees are not plain or undistinguished qualifications.

Before the 1960s the LL.B degree was taught on a part-time basis with lectures and practical work in lawyers' offices. A Bachelor of Laws (B.L.) previously existed through full-time study, yet was perceived as a poor-man's degree. The present Lord Chancellor, Lord McKay of Clashfern, graduated LL.B. with "distinction" from Edinburgh University because there were no honors degrees in law prior to the 1960s.

Before the 1960s, admission to an LL.B program required an undergraduate M.A.<sup>25</sup> degree, as is the present practice in Canada and the United States. It is a moot question whether this deficiency contributes to the accusation that law is a pseudo-intellectual autocracy. In addition to "black-letter" or core substantive law subjects like property or contract, the typical LL.B attempts to broaden a student with liberal doses of jurisprudence and other so-called "soft" law subjects. But some say that first year Scottish law students are too young at age 17 or 18. Mature or graduate students tend to perform better on average, but this may be due to broader academic experience as well as greater motivation.<sup>26</sup> Conversely, Scottish students tend to finish their secondary school education with better writing skills than American or Canadian high school students, some of whom cannot write after four years of college.

## V. METHODOLOGY AND CURRICULUM

A more obvious factor is the curriculum and method of instruction. Since the energy available for social regulation at any time and place is limited, control by law takes on an aspect of engineering.<sup>27</sup> It is

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25. In Scotland, the Bachelor of Arts degree is labelled as a "Master of Arts" degree which can fool Philistines across the Atlantic. Rather than proceed to a regular postgraduate degree like an American M.A., Scottish arts students proceed into a Ph.D. program. In England, an M.A. degree may sometimes be obtained by B.A.s who pay a fee after an interval, such as lawyers who take a B.A. in law from Oxford and after a year's work describe themselves as "M.A. (Oxon.)".

26. See Sandra Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMP. L.J. 601 (1991), for discussion of mandatory implementation of clinic type courses in American law schools as a means of replicating British apprenticeship requirement. This article also discusses *de facto* perfunctoriness of much of apprenticeship requirement.

27. "[L]aw operates under the principle of scarcity. The energy available for social regulation at any time and place is limited . . . Because of this fact, control by law takes on the aspect of engineering. We require . . . to invent such machinery as, with least waste, least cost and least unwanted by-products, will give most nearly the desired result." K. N. Llewellyn, *The Effects Of Legal Institutions Upon Economics*, 15 AM. ECON. R. 666 (1925).

highlighted by the common law case method which teaches a principled system of objective doctrines, albeit with mechanistic answers. Yet, the case study involves investigation of the solutions to problems, not how to solve new problems. Law schools promote reasoned judgement by lectures (or semi-dramatic monologues), seminars, and tutorials.

Lectures have historically dominated Scottish legal education, and most Scottish university disciplines due to the smallness of the jurisdiction. This difference was partly due to a paucity of adequate legal texts and casebooks, although the present information age has cured that defect. Lectures last 50 minutes and are fairly structured with main courses having three lectures per week, sometimes four. They are supplemented by tutorials (an innovation since the 1960s) every fortnight; thus the Scottish tradition contrasts with the predominance of a different tutorial structure at Oxford and Cambridge.<sup>28</sup> Yet, the value of a lecture, an important tool in legal education, is arguably underestimated, especially in its ability to inculcate structured and analytical legal argument. The value of a lecture consists partly in the communication of "vital lawyer-like skills and attitude by the lecturer as role model" promoting the approach to law being elicited by the whole educational program.<sup>29</sup> Some American law professors have reverted to variants of the lecture approach.

Seminars seem best for small groups (20 or so) of senior students whose legal research and comprehension skills are better developed. Tutorials are akin to a question-and-answer technique or "quiz." The same technique of case study, rather pretentiously known in the United States as the Socratic method,<sup>30</sup> is difficult and takes considerable effort to use effectively.

The case method fulfilled the latest requirements in modern education: it was "scientific," practical, and somewhat Darwinian. It was based on the assumption of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses. In theory, the case method was to produce mechanistic answers to legal questions;

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28. Alan J. Gamble, *Law Teaching: Lecture and Case Book*, in J.P. GRANT, ET AL., *LEGAL EDUCATION*: 2000 155, 157 (1988).

29. *Id.* at 158.

30. ROBERT STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 53 (1983). Cf. David Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 453, 455 (1943). "In the casebook study of cases, the student is studying solutions of problems, not how to solve problems." *Id.*

yet it managed to create an aura of the survival of the fittest."<sup>31</sup>

However, it is not settled that Socratic taught students end up "knowing" about the Kingdom of Oz better than the lecture or apprentice system. The Socratic method of law teaching is more like a Marine Corps Drill version of learning the legal ABC's. What would Socrates have thought about "a method" that resembles a Jane Fonda diet or exercise?

Professors with seating diagrams of students push participation in the classroom. The third or fourth failure to correctly answer a question could result in being expelled from the class, or, at the least, suffering ridicule from one's peers. However, proof of this exodus story is lacking in modern practice. Unfortunately, tutorials in Scotland are less motivated despite their mystique as being a medium for low ratio teacher-student interaction.

## VI. ECONOMICS AND LEGAL EDUCATION

Like the medicine men of tribal times, or priests in the middle ages, lawyers help run contemporary civilization.<sup>32</sup> In Britain, great post-secondary educational change is underway. The forty or so "universities" have been augmented by a similar number of "colleges" or "polytechnics" which have recently received University "status." A competitive higher education market-place is emerging in Britain. It consists of the new players as well as the ancient universities like Glasgow, Edinburgh, St. Andrews, Oxbridge (Oxford & Cambridge), Durham, the not so-ancient ones like London, the so-called "red-brick" universities established in the 1920s and 1930s (such as Reading), and the expansionary 1960s (such as Keele and Essex).

Especially considering the increased number of law degrees now available, it is fair to say that Scottish and English law students do

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31. STEVENS, *supra* note 30, at 55.

32. FRED RODELL, *Woe Unto You, Lawyers!* 3 (1939) reprinted in George D. Copen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987). "In tribal times, there were the medicine-men. In the middle ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade, jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running after its own pattern, the civilization of its day." *Id.*

not realize the value of their state subsidized law degree,<sup>33</sup> namely an economic opportunity cost of \$20,000-\$30,000 (which is true of all subjects). Admittedly, the term "economic opportunity cost" may not be used aptly here. Those who stay in school instead of earning income from jobs may be said to incur an opportunity cost (over and above the cash outlay and loans incurred) although in the long run it may be a sensible investment. Although the cost of subsidizing a student would not be counted as an opportunity cost, subsidization of students in general and law students in particular has an impact upon the infrastructure and ethos of the United Kingdom.

Most students receive a government grant for all tuition and almost all living expenses. Even British students from wealthy families receive state tuition funding although living expenses are means tested. It is no surprise that students regard the "grant" almost as of right. Following Prime Minister Thatcher's government(s), these subsidies are being reduced with the difference funded through student loans. The cost of state funding is arguably more if the student has previously completed an arts or science degree then opted for a "second first-degree," a counter-intuitive yet patently British label.<sup>34</sup> As with any "acquired right," students in the United Kingdom have perceived the "grant" as sacrosanct.

This value judgement often reflects the virulent political gulf between the free enterprise Conservative party and the socialist Labour party, and until recently, the elitism attached towards university study. Comparatively, it is safe to say that the two leading political parties in Canada or the United States are not so diametrically opposed ideologically and might instead be comparatively bland. North America's development has been spared the comparative obsequiousness and stratified class consciousness rife in England (less apparent in Scotland),

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33. Annual Tuition Fees 1993/94: All Home (Britain) and EC (European Community) Undergraduates in law who are self financing pay \$755. LL.B Graduate entry students are those who are not state funded for a so-called "2nd first" degree pay \$5,320 (as do overseas students). By contrast, all Home and EC Medical students pay \$7360 per pre-clinical year tuition and \$13,550 for clinical year tuition. In December 1992, the British government announced a 30% reduction in funding to Arts-based subjects (including Law) in attempt to promote science innovation and technology.

34. Compare Canadian universities which classify the LL.B. degree as a "higher degree," i.e., superior to a Bachelor's degree. Many aspects of British life differ from Canadian or American culture, such as the English habit of calling private schools "public schools" or by placing the salt in the multi-holed shaker and the pepper in the single-holed one.

which imposes a sort of social determinism upon individuals.<sup>35</sup> Indeed, the U.S. and Canada are young and restless as compared to the "old country," a term frequently used by immigrants from Europe. Yet this Anglo-Scotian generalization is not impervious to change, the global information age seems to be raising the estimation and demand for university education including law school education.

The increased demand for lawyers precipitated by the "global village," or at the very least the "European" village, makes all the more critical the efficient structuring of law studies in Britain. This process requires a national consensus because the structure of a legal system, including legal studies, leads to different outcomes as shown by the contrast between the United States and Japan.

The US has been criticised as being a [sic] 'over-regulated, over-lawyered, overly litigious society preoccupied with distributional conflicts at the expense of cooperative efforts to advance economic welfare and that the US economy is accordingly losing out in world competition with other nations, such as Japan, that have avoided these entanglements.'<sup>36</sup>

While Britain is certainly much closer to the United States in cultural values, important differences exist, such as the cradle-to-grave social safety net, the discouragement of high damages awards and the lack of a contingent fee system and class action form of litigation. Another factor involves the calibre of personnel who wander into the legal bramble bush.

A high-quality product requires the participation of top notch professors and top practicing lawyers. Roughly half of those in British legal academia have never practiced law, a factor which accentuates the gulf between ivory tower theory and real-life. Unfortunately, poor

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35. This view seems widespread. An Alberta lawyer wrote after graduate school in Cambridge and sabbatical in Strasbourg: "I was able to discover the advantage Canadian trained lawyers have over our international colleagues. As a rule, we are better trained, more well-rounded in our general knowledge base, work harder and generally have a stronger and more creative entrepreneurial spirit. I am not sure of the reason for this, but it probably has a lot to do with the standard of education we enjoy and the belief that if you work hard you can get ahead regardless of class." Bryan Mahoney, *Changing Times - Career Options*, 17 LAW SOCIETY OF ALBERTA NEWS-LETTER 4 (September 1992).

36. See D. Bok, *Report of the President of Harvard University 1980-1981* and L. Furto, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change* (1980) quoted in S.B. BREYER & R.B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (3rd ed. 1992).

funding is a substantial impediment in the way of achieving these goals. Full-cost fees and evening or part-time degrees for some students are being proposed as solutions to this dilemma; it is hoped that increased revenue will enable the attraction of a nobler breed of law lecturer. Law lecturers<sup>37</sup> should arguably command a salary level at a differential higher than other disciplines—as the external market for lawyers constitutes a demand that does not exist for philosophers, for example<sup>38</sup>—much like those who teach medicine and who are paid on “clinical” scales.

Poor funding has also retarded the development of vanguard subjects such as medical ethics law, European law, and energy and environmental law. The political structure of the European Community as well as Britain’s economic vitality necessitate a competence in these areas. Consequently, a redistribution of wealth may be a necessary means to the end. Conversely, the argument for higher salaries for law academics than other academics is subject to criticism. It is unclear whether higher salaries would bring in a “nobler” breed of law lecturer. Indeed, it would be ironic if higher salaries achieved this result.

## VII. COURSE ASSESSMENT

Attending the Course Examiners meeting for an Honors law degree is a somber and mysterious experience for a North American. Fortunately, it is usually followed by lunch. While course teachers usually set and examine candidate’s scripts, an external examiner from outside the particular university is appointed to vet the Honors as well as ordinary results. All the scripts in small classes of 10-15 may be sent for review while borderline passes and all failures would normally be sent along with a representative sample of the top and lowest performance. The external’s decision is usually final. Presumably, the external system arose in order to ensure fairness, especially since exams are not anonymously graded. The movement towards anonymous marking is only recently taking root.

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37. Law lecturers are classified as Assistant Professors in North America.

38. Cf. H.J. Glasbeek and R.A. Hasson, *Some Reflections on Canadian Legal Education*, 50 MOD. L. REV. 777, 790 (1987), who suggest that differentially higher (than other non-professional university teachers) remuneration justifies profession-supporting work. Consequently, this may advance the narrow needs of the profession rather than furthering university ideals of education and research. But to the extent that they see similarities in university study and vocational training, law schools do not necessarily see pedagogical aims being undermined.

Like some English Universities, Scottish ones generally choose to mark Honors courses by relative class position using the Greek Alpha-Beta system. Scottish law schools feel that this allows them to assess the student's quality without being tied to numbers. Proponents of the system (i.e., the majority of Faculty) say that the system gives fair weight to all papers and allows a consistent approach. The Honors system used at the University of Glasgow has the following parameters:

- 1st Class: Alpha 73-74, Alpha-minus 72, Alpha-double-minus 71, Alpha-beta 70.
- 2nd class upper: Beta-Alpha 69, Beta-double-plus 67-68, Beta-plus 66.
- 2nd class lower: Beta 65, Beta-minus 63-64, Beta-double-minus 61-62, Beta-gamma 60.
- 3rd Class: Gamma-beta 59, gamma-double-plus 57-58, Gamma-plus 55-56, Gamma 53-54, Gamma-minus 52, Gamma-double-minus 51, Gamma-delta 50 (a bare pass).

Scottish law faculties feel that a percentage or other numerical indices lacks subtlety. As a Scottish colleague explained, the manipulation of Alpha-Beta shows the preponderance of the Alpha quality. Clearly this is a different system than a grade-point average or percentage system which facilitates numerical performance positioning (i.e., top 5% of class). Samuel Johnson must have encountered something like this because he shrewdly recognized that "there are lies, damn lies and statistics."<sup>39</sup>

#### VIII. SEPARATION OF SUBSTANTIVE AND PROCEDURAL LAW

Another curriculum issue concerns "academic" law as opposed to "practical" law. In North American law schools, civil and criminal procedure are taught. In Scottish law schools, procedural law (with the exception of evidence courses) is not usually taught during the LL.B program since the curriculum concentrates on substantive rules of law. There also appears to be historical distrust among elements of the English legal profession who consider universities incompetent to teach "vocational" courses.<sup>40</sup> British university legal education "is responsible

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39. Klein, *supra* note 26, describing the relative merits and demerits of the American practice of putting so much stock in first-year grades. Many students at Cornell, for instance, feel that the results from their first year determine their overall ranking upon graduation.

40. E. Brunnet, *The Need for Legal Theory at all Stages of Legal Education*, in *LEGAL EDUCATION*: 2000, *supra* note 28, at 187, 190.



for the academic and theoretical development of legal principles.”<sup>41</sup>

In Scotland, it is anomalously left for the Diploma in Legal Practice to teach an element of what should be viewed as an integrated whole. The Diploma was officially instituted to remedy perceived deficiencies in a lawyer's schooling. It increases the basic standard of lawyers in relation to the increase of lawyers in the marketplace: the so-called numbers problem. However, it fails to address many practical points such as computerized document production techniques, file storage, and billing.

Besides lack of law school resources, part of the problem lies with the idea that law is a gentlemen's, or “old boy's game,” when it is in fact a profession-business. The profession alleges to support competition yet retains restrictive practices despite the palliative partial fusion of solicitors with advocates. In a fused profession, any lawyer can convey or plead in the highest court. As in a statistical distribution chart, lawyers in Canada or the United States find their own niche or specialty, or rise to their level of incompetence reflecting the “Peter principle.”

#### IX. CALEDONIA: CRITICISM OF SCOTTISH LEGAL EDUCATION

British law faculties fail to effectively advocate for themselves in the absence of concrete support from the profession. A good idea would be a few substantial scholarships for post-graduate study. The Law Society of Scotland should fund a yearly practitioner-in-residence in each law school. This would give the practitioner a sabbatical allowing cross-fertilization of ideas with ivory tower lawyers. In North America, academic lawyers are subtly expected to take up causes. Law schools should be more proactive (including relations with the Law Society) and promote social issues including the litigation of certain class actions. Unfortunately, the promotion of social issues involves political activism and to this extent has little to do with legal “education” and “learning.”

In the United States, the altruistic desideratum for lawyers is to “assume direction of all phases of the areas of human conflict inherent in a complex society and economy.” This may partially be due to the influence of American constitutional arrangements. Thus there is a need for lawyers who can advise their clients with foresight and provide leadership to society. A good lawyer is professional and versatile, having “acquired certain abilities that enable him or her to operate effectively

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41. *Id.* (citing Berger, *A Comparative Study of British Barrister and American Legal Practice and Education*, 5 NW. J. INT'L L. & BUS. 540, 563 (1983)).

in any enterprise . . . to diagnose its problems and to contribute significantly to solutions."<sup>42</sup>

His or her basic qualities should include fact consciousness, a sense of relevance, comprehensiveness, foresight, lingual sophistication, precision and persuasiveness of speech, and, most importantly, self-discipline in habits of thoroughness. These qualities can be inculcated from teacher to student although other qualities are native to individuals: insight, ingenuity, imagination, judgement, and ultimately "character."<sup>43</sup>

However, altruistic desideratums concerning social change written by lawyers are suspect since lawyers would want their cut of the action. After all, consider where lawyers rank in popular esteem—there may not be any neutral ground in law to assay law! Rational people would not believe DuPont about what should be done with the chemical industry, so why should a rational person believe lawyers regarding the legal system or their non-partners, law teachers?

Law is a service industry which provides information concerning rules, yet unlike most industries, is self-regulated. The legal industry faces increased competition for resources and reacts to global trade-bloc changes such as are occurring in the European Community, North America and Japan-Asia countries. As Lucretius said, the only thing that exists are atoms, space, and law, with the primary law being evolution and dissolution.

No single thing abides, but all things flow.

Fragment to fragment clings; the things thus grow.

Until we know and name them. By degrees

They melt, and are no more the things we know.<sup>44</sup>

Thus the economic squeeze throughout history helps explain civilization and rules which create a measure of predictability in a chaotic world. Lawyers reflect this psychological need for certainty, thus there are limits on what society can functionally expect from them. Even if some of the loftier goals were realized by society, lawyers or some other group would want their percentage of the transaction costs. Whether British or American legal education can achieve altruistic goals remains an enduring controversy.

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42. A. JAMES CASNER AND W. BARTON LEACH, CASES AND TEXT ON PROPERTY 1-2 (3rd ed. 1984).

43. *Id.* at 3.

44. *Lucretius on Life and Death*, paraphrase by Mallock, cited in WILL DURANT, THE STORY OF PHILOSOPHY: THE LIVES AND OPINIONS OF THE GREATER PHILOSOPHERS 96 (1962).