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ABSTRACT

In this Article, Mr. Ostertag compares German and United States legal education. He believes that the differences in the two educational systems result from such factors as the separate development of the respective educational programs, the different training goals each system has for law students, and the relative significance of code law instruction and case method instruction. The author perceives a dichotomy between legal theory and practice, and he believes that law schools could bridge this gap through a comprehensive internship program that would expose students to all aspects of legal practice.

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I. PROLOGUE

A United States law review last published articles comparing German and United States legal educational systems over forty years ago.[1] Contrary to this low interest by law reviews, every year many United States law graduates and even more German law graduates pursue LL.M. studies in the other country. German legal circles appear to be more informed about United States legal education because German legal publications frequently publish articles about legal studies in the United States.[2] Furthermore, discussions concerning the reform of German legal education often compare it with the United States system.[3] The lack of a systematic and historical description of German legal education and of a comparison of legal education of the two countries has led to misconceptions about German legal education. John Merryman's misconception of continental legal studies and his characterization of those as undergraduate studies[4] arises because his inquiry suffers from a bias toward his own

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1. *See* Stephen Riesenfeld, *A Comparison of Continental and American Legal Education,* 36 MICH. L. REV. 31 (1937) (presenting a now outdated detailed comparison of teaching methods and curriculum); Max Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany,* 1938 WIS. L. REV. 5 (including a short historical account of German legal education that emphasizes academic freedom); A.H. Campbell, *Comparison of Educational Methods and Institutions,* 4 J. LEGAL EDUC. 25 (1951) (presenting a short comparison of legal education in different countries, including form, content, teaching methods, and exams that stresses the importance of practical training). Shortly before the publication of this Article, a United States law review published an article on German legal education. *See* Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration,* 42 J. LEGAL EDUC. 399 (1992) (describing current legal education in detail and discussing various reform attempts in the past and present).

2. H. Jescheck, *Bedingungen und Methoden des Rechtsunterrichts in den Vereinigten Staaten von Amerika,* 97 JUR. STUDIENREIHE KARLSRUHE (1970) (comparing status and student/professor ratio, focusing on criminal law classes and criminal law); G. Casper, *Vergleichende Anmerkungen zu der Ausbildung der Juristen in der Bundesrepublik und den Vereinigten Staaten,* ZRP 116 (1984) (pointing out the difficulties of a comparison because of the vast differences).

3. *See* Klaus Bilda, *Zur Reform der Juristenausbildung,* JuS 681 (1989); Heinhard Steiger, *Deutsche Juristenausbildung,* ZRP 283 (1989); Winfried Hassemer & Friedrich Kübler, *Welche Massnahmen empfehlen sich - auch im Hinblick auf den Wettbewerb zwischen Juristen aus EG-Staaten - zur Verkürzung und Straffung der Juristenausbildung?,* Gutachten E für den 58. Deutschen Juristentag at E116 (1990) (Report on Legal Education for the German Bar's Annual Convention 1990).

4. John H. Merryman, *Legal Education There and Here: A Comparison,* 27 STAN. L. REV. 859, 865 (1975).

system. Comparative studies must overcome familiar labels and conceptions and must initially use a functional inquiry.[5]

Although a functional inquiry reveals different remedies or solutions to problems common to a number of legal systems, it only initiates the process of understanding the reasons for different remedies or solutions. One can only understand the different approaches to legal education in the United States and Germany with the background of a historical and social analysis of the structures of higher education. Additionally, each country's "legal honoratiores"[6] (judges in the United States and professors in Germany) have influenced the legal education. The scholars must isolate and compare these and other influences on legal education in both countries in order to understand the similarities and differences of both legal education systems. The second section of this Article will outline the particular problems of a comparison of legal studies in Germany and the United States as well as the framework of this comparison.[7]

The third section will describe and analyze the historical development of legal studies in Germany and in the United States and relate the development to the prevailing legal thought in each country. It will specifically discuss the idea of a mandatory liberal arts education prior to legal studies. It will demonstrate why in the nineteenth century the model of the German and the United States university developed structurally in opposite directions and assigned liberal arts education to different educational levels.

The fourth section will delineate the interrelation between the groups controlling legal education and the goals of legal education. This analysis forms the foundation for the classification of the models as "governmental" and "professional" controlled models of legal education. The labels "adjudicatory" and "adversary" models of legal education will pinpoint the disparity of the goals of legal education in both countries.

The focus on the subject of teaching, cases and codes, reveals in the fifth section the skills particularly demanded and taught. On this basis my distinction of "interpretative" and "analytical" technique crystallizes not only the disparity in skill training but also reveals its relationship to the subject of teaching.

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5. This is the basic method for comparative law: "The basic methodological principle of all comparative law is that of *functionality*." (Emphasis in original.) KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW I: THE FRAMEWORK 31 (Tony Weir trans., 1977).

6. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 198-223 (Max Rheinstein ed., 3d ed. 1968) (1925).

7. This comparison is also based on the personal experiences of the author, who has completed law studies in both Germany and the United States.

The last section addresses the approaches taken by both models to the problem of the relationship of theory and practice in legal education. Both models prepare the graduate for the legal practice and integrate theory and practice by examination and evaluation. The comparison will link each approach to the question of the relationship of teaching and scholarship.

The dichotomous description of differences appears formalistic and creates the impression that the isolated aspects are not interrelated. Comparative discourse, however, requires classifications. An adherence to the idea that the classifications are divine and absolute will thwart the purpose of the classification. As human creations, they must be open for revision or destruction and used with the knowledge of the reason for and the context of their creation. The same reasoning applies to the isolation of aspects. Each section points out the interdependency of aspects that have been isolated for comparative purposes.

II. INTRODUCTION

A comparison of legal education in Germany and in the United States faces particular difficulties. The United States is not just a nation but almost an entire continent[8] with fifty states all having their own bar requirements[9] and no federal uniform education requirements.[10] Furthermore, the law schools themselves vastly differ in their size, status, quality of teaching, quality of scholarship, resources, teaching goals, and in the social and educational background of their students.[11] Germany is the size of one of the smaller states of the United States with its public universities, law faculties, and federal law determining only the general

8. Grossfeld asserted that the United States is a continent and not a country in the "sense of our small-European [sic] imagination," BERNHARD GROSSFELD, MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG 96 (1984), to stress impact of the magnitude of the size of the United States on a legal comparison. This aspect of his analysis is cogent, but the equation of the United States with a continent is of course misleading because it omits Canada, Greenland, and the countries of Central America. The misnomer traces back to the beginning of the United States itself, to the two Continental Congresses in the late eighteenth century.

9. One should add the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Marina Islands, and the Navajo Nation to complete the list of possible different bar requirements.

10. Arguably, federal regulations regarding federally subsidized student loans have an indirect regulative effect.

11. A good summary of the current situation of law schools regarding the differences among law schools is given in ROBERT STEVENS, LAW SCHOOL, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 264 (1983).

framework and some specifics of the legal education. However, Germany also has differences among the German states regarding legal education.[12] A united Germany has only existed since 1871. Before 1871 the different German states organized or regulated legal education independently.[13] All the differences within and between the United States and Germany make generalizations necessary to highlight and to explain the major structural differences and similarities.

Legal education is embedded in the educational system of a country, thus the whole educational system and its characteristics must be considered in the comparison. The distinction of undergraduate and graduate studies in the United States education system surprises a German as much as the nonexistence of such a distinction in the German system surprises a citizen of the United States. The United States perspective might also find the "tripartition" of secondary education in Germany peculiar.[14] The successful completion of only one type of secondary school, the Gymnasium, leads students after thirteen years of study to the state uniform Abitur[15] examinations, which enable them to study at a university.[16] The German uniform state Gymnasium vastly differs from United States high schools, each of which has vastly different qualities and requirements. In the area of legal education, striking characteristics in the United States include tuition, the case method, the common law system, legal clinics, and the educational objective to produce lawyers. These characteristics contrast with the characteristics of German legal education in that the German system has tuition-free study, two bar (state) exams, two and one half years of preparatory service, major governmental influence, the lecture method, and the educational objective to make students qualified for judicial office.

This Article will examine and attempt to explain the historical devel-

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12. *Cf.* Deutsches Richtergesetz (DRiG) [German Judicial Office Act (federal law)] § 5(a)(1) (length of law study), (2) (subject of law study: core courses), 5(a)(4) (examinations during the study), 5(a)(5) (reference to state law for details).

13. An analysis of East German legal education would be interesting but would go beyond the scope of this Article because it would also require an analysis of a third legal system.

14. Following the elementary school, three types of schools, the Gymnasium, the Realschule, and the Hauptschule, lead pupils toward different careers.

15. Some German states do not have a state uniform Abitur but nevertheless an Abitur completes the studies at the gymnasium. Furthermore, in the new states only 12 years of school lead to the Abitur. This is only one of many differences between the old and new German states' school systems that have generated revived discussion on the subject.

16. Other ways to become eligible to study at a university exist; however, the way outlined in this text is the most common one.

opment of these major differences and the reasons why they exist. The underlying approach of this Article is that only through an understanding of the main characteristics of each country's legal education system and their sociological, historical, and jurisprudential interdependency can one determine which ideas are transferable.

II. THE PATH TO ACADEMIC LEGAL EDUCATION

A. *The Development of Modern German Legal Education*[17]

The beginning of legal education in Germany and in the United States have European roots. England and its apprenticeship system[18] form the basis of United States legal education while in Germany it emerged from the teaching of Roman Law at the University of Bologna in Italy.[19]

The law graduates of the Italian universities preferred employment at the emperor's court and the courts of the princes of the territorial states in Germany, which began their rise in the thirteenth century.[20] Later, the princes founded universities in their own territories to satisfy the growing need of well-educated personnel for the expanding financial, judicial, and economic institutions.[21] Thus these newly founded German universities stand in contrast to the University of Bologna, because they emphasized not only scholarship, but also teaching.[22] Scholarly universities taught Roman law; thus, the German universities founded legal education in Germany.[23] The continental medieval university considered law

17. This Article's development of legal education in Germany is more detailed than its account of the United States system because the author assumes the reader is more familiar with the United States system.

18. ALBERT HARNO, LEGAL EDUCATION IN THE UNITED STATES 14 (1953).

19. G. Köbler, *Zur Geschichte der juristischen Ausbildung in Deutschland,* JZ 768 (1971).

20. Rheinstein, *supra* note 1, at 6; Hans Hattenhauer, *Juristenausbildung - Geschichte und Probleme,* JuS 513, 514 (1989).

21. Rheinstein, *supra* note 1, at 6; David S. Clark, *The Role of Legal Education in Defining Modern Legal Profession,* B.Y.U. L. REV. 595, 611 (1987).

22. Rheinstein, *supra* note 1, at 6. *See also* Köbler, *supra* note 9, at 769 (pointing out that under the *universitas scholarium,* professors and students together governed the older Bologna university, whereas in the younger German universities the professor dominated the self-government from the beginning). One could link this fact to the dominant role of law professors in the legal community. *See* note 27 and accompanying text.

23. Modern German universities allowed the study of canon law for the first time in Heidelberg in 1385 and in Cologne in 1388. Shortly thereafter, the study of canon and Roman law began in Erfurt (1392), Würzburg (1402), Leipzig (1409), Rostock (1429), Greifswald and Freiburg (1456), Ingoldstadt (1472), and Mainz and Tübingen (1477). Köbler, *supra* note 19, at 768.

to be one of the classic faculties and therefore separate from theology and canon law.[24]

In addition to the teaching and scholarly function, the law faculties had a legal unifying function. The professors adjusted the Roman law of the Corpus Justinian to the needs of the time[25] while also holding the position of a kind of appellate court.[26] Both features show the early dominance of German law professors in the development of the law.[27]

The requirement of five years of law studies at a university and practical experience for judges at the highest court of the empire in 1455 developed next. The court even tested the candidates for judicial offices.[28] This examination served as a model for Prussia.[29] In 1693 Prussia[30] required state exams for judges at the higher courts[31] and, starting in

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24. *Id.* at 769. *See also* WEBER, *supra* note 6, regarding the separation of the secular law and theology from canon law.

25. Rheinstein, *supra* note 1, at 6.

26. The appellate function was founded through "[t]he 'transmission of the docket' of a case from a court of 'ultimate' appeal to a law faculty [which] became a fixed institution." *Id.* at 7.

27. *Cf.* Weber's analysis of the influence of "legal honoratiores" on legal theory. WEBER, *supra* note 6, at 198-213.

28. Hattenhauer, *supra* note 20, at 514. This development reflects the beginning of the replacement of nonacademic judges by academic judges.

29. WILHELM BLEEK, VON DER KAMERALAUSBILDUNG ZUM JURISTENPRIVILEG 74 (1972).

30. Prussia preceded the other German states in the next step towards modern German legal education. Several states formed Prussia, so its rulers wanted to unify Prussia through uniformly educated loyal civil servants. The uniform education of civil servants enabled Prussia to employ and to move them with every promotion throughout the state and thus avoid the development of loyalty to their home provinces. Hattenhauer, *supra* note 20, at 514; *see also* BLEEK, *supra* note 29, at 61-82. The regulation of legal education coincides with the formation of modern professional public servants; however, this article concentrates only on legal education. The same desire that led to the foundation of German universities in the 14th century caused princes in Germany in the 18th and 19th centuries not only to regulate legal education but also to establish university studies of cameralistics. BLEEK, *supra* note 29, at 65. These special studies did not exist independently in Prussia for a long period of time, whereas in Württemberg and Bavaria cameralism existed as part of an independent education of professional public servants in connection with the political science faculty until the end of the 19th century. *Id.* at 68. The Prussian model of one legal education for the judiciary and the administration led to a privilege of jurists in the administration, *id.* at 193, and the traditional employment of jurists in the government and administration ensured the jurist a privilege in high ranking civil service posts, *id.* at 308. It also formed a model for the German Reich and displaced the southern model of separate education for the administration and the judiciary. *Id.* at 193. Thus, the focus on Prussia allows a coherent presentation of German legal education from the 14th century to today.

31. BLEEK, *supra* note 29, at 74; *Arbeitskreis für Fragen der Juristenausbildung,*

1713, it required all judges to show adequate theoretical knowledge and practical experience by writing a *relatio pro statu cum voto* (statement of the facts and advisory opinion).[32] Furthermore, the order required the judges to obtain their practical experience by observing the courts at work.[33] This created the preparatory service requirement as part of the legal education in Germany.[34] Prussia required practical education after university studies because the graduates did not possess the necessary skills for judicial or other public offices.[35]

In 1749 Prussia's Codex Fridericiani Marchici established a detailed scheme of state exams and preparatory services for judges.[36] By 1793 the preparatory service had become mandatory for lawyers.[37] Starting in 1849, Prussia required advocates to possess the same legal education as the judges of the courts where they practiced.[38] In 1869 Prussia reorganized and unified legal education for all legal careers.[39]

The exams also reflected the separation of theoretical and general legal studies and practical training. The exam, taken after the completion of studies at the university, tested the knowledge of law, the general cognition of the nature and historical development of law, and those areas

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DIE AUSBILDUNG DER DEUTSCHEN JURISTEN 52 (1960) [hereinafter ARBEITSKREIS].

32. ARBEITSKREIS, *supra* note 31, at 52 (quotations omitted).

33. By 1723 Advocates were required to graduate from a university. BLEEK, *supra* note 29, at 74. Moreover, advocates were required to pass a public exam. ARBEITSKREIS, *supra* note 31, at 53.

34. ARBEITSKREIS, *supra* note 31, at 54.

35. Köbler, *supra* note 19, at 773.

36. The Codex Fridericiania Marchichi's scheme required (1) completed legal studies at a Prussian university; (2) pro auscultatore exam (prerequisites besides law studies included good reputation and sufficient financial resources since no compensation was provided during the whole preparatory service); (3) Auskultator service (one year); (4) pro referendariatu exam; (5) Referendar service (four years) (completion required for lower court judicial office); and (6) Assessor exam (required for higher judicial office). ARBEITSKREIS, *supra* note 31, at 52; *see also* Hattenhauer, *supra* note 20, at 515.

37. The Assessor exam, however, was not mandatory. ARBEITSKREIS, *supra* note 31, at 54.

38. Hattenhauer, *supra* note 20, at 517. Prussia extended the time period of the Auskultator service to 1½ years and shortened the Referendar service to 2½ years. ARBEITSKREIS, *supra* note 31, at 54.

39. For all legal careers, Prussia required three years of study at a university, the first state (bar) exam, one preparatory service of four years and a second state (bar) exam. ARBEITSKREIS, *supra* note 31, at 55. For a detailed account of the development of Prussian legal education, see *id.* at 52 and Hattenhauer, *supra* note 20, at 514. Hattenhauer also outlines the relationship between legal education regulations and the establishment and reforms of court constitutional acts in the 18th and 19th centuries. *Id.* at 517.

necessary for a general legal and political science education. In contrast, a practice-oriented exam after the preparatory service tested the ability to successfuly fulfil the necessary tasks of a judicial officer.[40]

In 1877 the Judiciary Constitutional Act established a framework for legal education for the entire German Reich.[41] This law established the system of two phase legal education. At the same time it unified the diverse state regulations regarding lawyers and legal education by establishing capability for judicial office as a requirement for all legal careers.[42] This model reflects the current two phase[43] German legal education as framed by the Federal Judicial Office Act[44] and regulated in detail by the states. Legal education consists today of at least three years of tuition-free law studies at the university-completed with the first state (bar) exam[45] and a two and a half year preparatory service[46] which is completed with the second state (bar) exam.

In summary, the university as the place of legal education has been

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40. ARBEITSKREIS, *supra* note 31, at 55. For a discussion regarding the problems of an exam oriented study and the tendency to test nonlegal subjects in the first exam during the first half of the 19th century, see BLEEK, *supra* note 29, at 53.

41. Gerichtsverfassungsgesetz vom 27. January 1877, RGBl I, 41 [hereinafter Court Constitution Act]. Hattenhauer, *supra* note 20, at 518.

42. Hattenhauer, *supra* note 20, at 518. Hattenhauer chooses the impartial judge as a model for legal education despite the prevalent position of professors in law. Regulations of legal education historically addressed judges first. At this time the predominating opinion also formalisticly separated lawmaking and law application. Under the formalistic rule of law the tasks of judges and of jurists in the administration consisted only out of deductive application of the law. BLEEK, *supra* note 29, at 300. Add to this the trait of neutrality and this portait begins to resemble the ideal jurist: the broadly educated and neutral jurist who only applies the law.

43. Many criticized the two phase legal education over time. In 1972 a ten-year experiment of a one phase legal education began which combined the theoretical and practical part. The experiment ended in 1984 when the majority of jurists and politicians concluded it had failed. Hattenhauer, *supra* note 20, at 519. However, the matter is still very controversial. For arguments in favor and for a description of the model, see Harald Weber, *Die Bielefelder einstufige Juristenausbildung - Reminiszenz oder Vorbild für eine zukünftige Juristenausbildung?*, JuS 678 (1989). For a sharp criticism of the goals of the one phase model in Hessia, see Helmut Coing, *Bemerkungen zu dem Modellentwurf für die einstufige Juristenausbildung in Hessen*, JuS 797 (1973).

44. *Deutsches Richtergesetz* (DRiG) § 5(a) [hereinafter Federal Judicial Office Act]. For a detailed account of the development in legal eduction from 1869 to the 1980s, see Hattenhauer, *supra* note 20, at 517.

45. The first state exam is now the final university examination and the entrance exam for the preparatory service. Representatives of the law faculty, bar, courts, and state administration administered it. *See* Hattenhauer, *supra* note 20, at 519. Currently, there is legislation pending that will reduce the preparatory service to two years.

46. The Referendare (persons in the preparatory service) now receive compensation.

established in Germany since the fourteenth century. The two phase legal education began in Prussia in 1713 with a required observance of the court senates at work by the aspirants for higher judicial office. One can then draw a direct line to the modern two phase legal education with two state exams and the educational objective to prepare students for judicial office.[47]

B. *The Development of United States Modern Legal Education*

The university-trained jurist had already gained a strong foothold in the most influential German state when in 1779 the College of William and Mary founded the professorship of law and policy.[48] This foundation could constitute the beginning of legal education at the university in the United States.[49] From its outset the idea of law studies at the university had a better chance of success than Blackstone's attempt at Oxford in 1758[50] because of the revolutionary atmosphere and the lack of a centrally organized guild in charge of the legal education.[51] Legal education at the College of William and Mary reflected a university-based model of legal education that concentrated not only on private law but also on constitutional law and statutory law.[52] This broad view of legal education spread very quickly to other schools[53] and culminated in David Hoffman's course of legal studies in 1817.[54]

The other United States model of legal education soon challenged this

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47. The Federal Judicial Office Act, *supra* note 43, § 5(a) states that a person is qualified for judicial office upon the completion of university studies, the first state (bar) exam, the preparatory service, and the second state (bar) exam. Lawyers must also be qualified for judicial office in order to practice law. *See id.*

48. STEVENS, *supra* note 11, at 9.

49. 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 116 (1921).

50. *Id.* Reed refers to the lack of support by the university as a reason for the failure of the project. *Id.*

51. On the successful prevention of "rational legal education" by the English solicitors and barristers, see WEBER, *supra* note 6, at 203. For a general overview of English legal education, see, e.g., E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency,* 1977 B.Y.U. L. REV. 767-94.

52. REED, *supra* note 49, at 116.

53. Charles McManis, *The History of First Century American Legal Education: A Revisionist Perspective,* 59 WASH. U. L. Q. 597, 612 (1981-82).

54. *Id.* at 616. Reed describes the subjects included in the course and quotes Justice Story's favorable remark that it would take seven years to complete this course. Reed, *supra* note 49, at 124.

broad model when the Litchfield School, founded in 1783,[55] refined the apprenticeship model of legal education.[56] The Litchfield School had a narrower approach to legal education, with lectures based only on Blackstones Commentaries, excluding criminal law and governmental agency.[57]

Competition between the two models existed for a long period of time. In the end, however, the broad idea of legal education as defined by Professor Wythe, encompassing not only common law but also international law, Roman law, and statutory law did not succeed. The narrower model of legal education successed and was later implemented at Harvard by Justice Story and completed by Langdell.[58] This "victory," however, did not conclude the development of legal education. The debate continues within United States law schools.

The narrower model succeeded because it was more economical[59] and because it was compatible with the dominance of judges in United States law,[60] formalism,[61] ideas of science, and general ideas of higher educa-

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55. STEVENS, *supra* note 11, at 3.

56. REED, *supra* note 49, at 128; Gee & Jackson, *supra* note 51, at 726.

57. REED, *supra* note 49, at 131. McManis bases the prevalence of the Litchfield School in the latter histories of the time on the better record-keeping of the Litchfield School. McManis, *supra* note 53, at 619.

58. Langdell completed the implementation. Currie traces "[t]he traditional attitudes of American law schools toward local law, legislation, and criminal law . . . [back] to decisions made in Story's reorganization." Brainerd Currie, *The Materials of Law Studies*, 3 J. LEGAL EDUC. 331, 364 (1951). In the 1950s, legal history as part of jurisprudence made a shift from concentrating on the Supreme Court, thus public law, to private law history. Willard Hurst began the refocusing process by an empirical study of the legal history of Wisconsin's lumber industry. *See* G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 4 (1978).

59. REED, *supra* note 49, at 147; Robert Stevens, *Two Cheers for 1870: The American Law School,* 5 PERSP. AM. HIST. 405, 444 (1971).

60. By 1820 judges began to conceive adjudication as "law making and not merely discovering legal rules." Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSP. AM. HIST. 287, 288 (1971) [hereinafter Horwitz, *Instrumentalism*].

The dominance of judges did not change with the rise of formalism in 1840, Morton J. Horwitz, *The Raise of Formalism,* AM. J. LEGAL HIST. 251, 257 (1975) [hereinafter Horwitz, *Formalism*], despite the rejection of the "Grand Style," KARL N. LLEWELLYN, THE COMMON LAW TRADITION - DECIDING APPEALS 35 (1960) and the notion that judges only discover law because of the idea that principles of law can be found in case law, CHRISTOPHER LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871) and the general antilegislative attitude of formalism, Horwitz, *Formalism*, *supra*, at 257. Elizabeth Mensch connects the preference of common law with the rejection of natural law theory and its idea of "natural reason of the sovereign people." Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW 18, 20

tion in the second half of the nineteenth century.

The concentration of judge-made law (case law) reinforces the dominance of judges and also reflects the antilegislative tendency of the courts. This antilegislative tendency existed before the days of formalism, yet it gained special importance because the distribution of wealth and power had to be defended against legislative actions.[62] The courts successfully avoided changes in the unequal distribution of wealth by the application of formal criteria[63] and the dismissal of adjudication in the "Grand Style."[64] Behind the idea of formal equality and the antilegislative movement stands the acceptance and preservation of substantial inequality.[65] The notion that principles of law can be found in cases[66] fits into both thoughts: it monitored the legislature, and it restrained the judges.[67]

(David Kairy ed. 1982). Regarding "judicial activism" during the twentieth century, see GRANT GILMORE, THE AGES OF AMERICAN LAW 93 (1977).

61. Formalism was at the time of Story's reorganization of Harvard in its beginning stages, but dominated United States legal thought at Langdell's arrival at Harvard.

62. Horwitz, *Formalism, supra* note 60, at 257. History develops in a dynamic process. Horwitz marks the beginning of formalism as occurring in the 1840s and the 1850s, roughly the time described as the "Grand Style" period (1820-1860) in LLEWELLYN, *supra* note 60, at 37. This view of legislation describes instrumentalism or Grand Style and formalism. The reasons for the shift from instrumentalism to formalism are disputed. *See* William Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in the Nineteenth Century America,* 87 HARV. L. REV. 513, 516-19 (1974) (describing the shift of judicial reasoning and arguing that the shift resulted neither out of the increased availability of English and United States precedent, nor from the better promotion of economic growth through formalism, but rather out of the antislavery movement).

63. Horwitz, *Formalism, supra* note 60, at 254.

64. LLEWELLYN, *supra* note 60, at 35. The rule of law decides cases and not policy. *Id.* at 38.

65. Horwitz, *Formalism, supra* note 60, at 254.

66. LANGDELL, *supra* note 60, at vi.

67. For a discussion of stare decisis in Langdell's method and its restraining effect on judges, see Thomas Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1, 26 (1983). As Kairy points out, the stare decisis doctrine as a justification for judicial legitimacy appears and disappears frequently in United States legal history. Situations where the "legitimacy and power of the courts . . . [were] enhanced by openly rejecting continuity" led courts to drop conveniently the doctrine of stare decisis. David Kairy, *Legal Reasoning, in* THE POLITICS OF LAW 16 (David Kairy ed., 1982). This phenomenon parallels the convenient drop of positivism by German judges after the revolutionary changes in Germany during the twenties when they had to apply statutes created by a left-of-center coalition in parliament. *See* Christian Joerges, *Politische Rechtstheorie and Critical Legal Studies: Points of Contact and Divergences, in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 597, 604 (Christian Joerges & David M. Trubek eds. 1989) [hereinafter Joerges].

Thus, Langdell's case method became the method of formalism.[68] Langdell's empirical[69] and geometrical method[70] used to discern the historically developed principles of law[71] closely approximated contemporary ideas of science. Additionally, the deductive legal reasoning connected with case law underlined the predominating formalism in its antilegislative and anti-Grand Style judging objectives. The United States has used the idea of law as science as a justification for its study and teaching at the university level from the beginning.[72] However, by the end of the nineteenth century, this idea gained specific momentum. The connection of law with geometry and the utilization of the deductive method as a principle of legal reasoning fit perfectly into the objectives of the times.[73] The scientific conceptual law system promised a desired predictability,[74]

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68. GILMORE, *supra* note 60, at 48. Gilmore refers to an "instinctive" cooperation of judges and theorists towards the same goal. *Id.* at 92. *See also* McManis, *supra* note 53, at 649.

69. Hoeflich points out the empiricism of Eliot in M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell,* 30 AM. J. LEGAL HIST. 95, 119 (1986).

70. The history of syllogistic reasoning in law goes back to Leibniz, Descartes, and Bacon. *Id.* at 99. Hoeflich calls this way of reasoning deductive, *id.* at 96, whereas Grey calls the reasoning deductive and inductive because the principles of law must first be derived deductively from a number of cases. Grey, *supra* note 67, at 16.

71. Langdell's thought that the principles of law are a product of history has similarities with the Historical School in Germany and Darwin's evolution theory. David S. Clark, *Tracing the Roots of American Legal Education - A Nineteenth Century German Connection,* RabelsZ 331, 327 (1987). EDWIN PATTERSON, JURISPRUDENCE - MEN AND IDEAS OF THE LAW 419 (1953) uses "historical growth" to describe Langdell's idea of how principles developed. This historical development notion makes Langdell's concept of law more a dynamic concept and not a static concept as Hurst asserts. *Cf.* Willard Hurst, *Changing Responsibilities of the Law School: 1868-1968,* 1968 WIS. L. REV. 336. The notion of law as the product of history, however, also led Holmes to his famous sentence: "The life of the law has not been logic: it has been experience." OLIVER W. HOLMES, THE COMMON LAW 1 (1881). Holmes' historical approach is described as the beginning of the attack against formalism. MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 15-18 (1957).

72. Already the Litchfield School claimed to teach law as a science, REED, *supra* note 49, at 132, and also Blackstone justified his lectures of common law at Oxford with this notion, Currie, *supra* note 58, at 348.

73. Grey, *supra* note 67, at 38.

74. Grey, *supra* note 67, at 33. Grey doubts science fully satisfied classifical legal business interests because the major threat for big business interests came from the side of public law not seen as scientific. *Id.* at 33-34. Grey differs with Duncan Kennedy's opinion that Lochner v. New York, 198 U.S. 45 (1905) was representative of classical legal thought because Grey posits the classical legal science was not in alliance with big business. *Id.* at 34, 134. However, "modern conservatives" and big business certainly share common interests, *id.* at 35, such as the desire of predictable law and antilegislative, i.e. antimajoritarian attitude.

"determinate answers," "a bridge between lawyers' urge to feel that they practice a learned profession and the need of the new universities for an alliance with the rich and influential bar."[75] Additionally, it gave the common law a scientific basis and stripped it of its "English feudal past."[76] Thus, the case method underlined the notion of law as a science.[77]

The narrower model also fit into the desire to create law as an exclusive profession. The idea of a professional school after a general education at a college coincided with the general movement to create the United States university as a place for undergraduate and graduate or professional education.[78] Only a special academic school could teach broad and abstract principles and "the scientific mode of reasoning necessary to apply them."[79]

The powerful combination of all these ideas and forces resulted in the triumph of the Harvard model.[80] Older ideas like Parker's idea of a graduate professional school and Story's focus on private case law and

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75. Grey, *supra* note 67, at 37-38.

76. Mensch, *supra* note 60, at 25.

77. Patterson notes the inconsistency of the idea of "useless cases," LANGDELL, *supra* note 60, at vi, with the idea of science because science does not know of useless data. PATTERSON, *supra* note 71, at 419. Charles Eliot favored the case method and the Socratic method because they stimulate the student's own thinking. Anthony Chase, *The Birth of the Modern Law School,* 23 AM. J. LEGAL HIST. 329, 345 (1979) (citing Charles Eliot, *Langdell and the Law School,* 33 HARV. L. REV. 518, 523). Chase shows the major role of Eliot in the reformation of the Harvard University. Eliot's pedagogical ideas emerged from ideas of Pestalozzi and Rousseau and the French medical education of the nineteenth century. *Id.* at 343.

78. At the end of the nineteenth century the United States university model was created. One institution contained undergraduate and graduate studies instead of separate institutions as in Germany. *See infra* part II.B. Schlegel points out the similar professionalization of other disciplines. John H. Schlegel, *Between the Harvard Founders and the American Legal Realist: The Professionalization of the American Law Professor,* 39 J. LEGAL EDUC. 311, 313 (1989). *See also* JEROLD S. AUERBACH, UNEQUAL JUSTICE 74 (1976) (emphasizing the concurrent development of the full-time professor); G. Brian S. Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform,* 44 VAND. L. REV. 1135 (1991) (providing a helpful distinction between German and English schools).

79. Hoeflich, *supra* note 69, at 118.

80. The Harvard model includes a full-time professional professor, Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective,* 1968 VA. L. REV. 689, 716 (1968); Stevens, *supra* note 59, at 442; Schlegel, *American Law Professor, supra* note 78, at 315, the case method—with later changes in its justification, Russell L. Weaver, *Langdell's Legacy: Living with the Case Method,* 36 VILL. L. REV. 517, 518 (1991), focus on private law, and three year graduate law studies. *See generally* STEVENS, *supra* note 11, 35-51.

the case method combined with the idea of law as a science at the very right point in time to create a synergetic effect and became successful.[81]

Such a justification for a university-based legal education did not occur in Germany because beginning in the fourteenth century the university taught law and thus there was no comparable need to justify university legal education in the nineteenth century. Bologna and Florence already had "a guild of legal professionals in the early 13th century."[82] Thus, the process of professionalization occurred much earlier on the continent and in Germany and closely coincides with the reception of the Roman law in Germany. The professionalization occurred because the abstract and academic Roman law[83] was taught at the medieval university and not the casuistic and less rational German law.[84]

C. *Location of Liberal Arts Education*

The German university in its beginning differed from "secondary" schools, if such existed, only through the kind of degree bestowed by the universities. Consequently, the age of the students ran from nine to twenty-five years.[85] The students started university studies generally with the study of *artes liberales*[86] at the art faculty in preparation for further study at the "higher" faculties[87] of medicine, theology, or law. After reforms of the school's curriculum and the constitution of compulsory education, Prussia established in 1788 a state exam for all those

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81. Chase's assertion of the birth of modern law school, *supra* note 77, pins down a point in time that marks an important step. *See* Chase, *supra* note 77. In its simplification, however, it omits important prior developments and also important later developments like the execution of the prerequisite of a bachelor's degree which did not occur until 1909 and of the three year law program which was not implemented until 1899. *See* Stevens, *supra* note 59, at 427.

82. Clark, *supra* note 21, at 608 n.67.

83. Hoeflich, *supra* note 69, at 98.

84. WEBER, *supra* note 6, at 212. The need for rationalism in Roman-law educated jurists in the German princes' administrations helped establish Roman law as a university subject in the first German universities. *See id.* at 275.

85. Köbler, *supra* note 19, at 770.

86. *Artes liberales* meant the seven arts of medieval education as they have developed out of Hellenistic thought since the seventh and eighth centuries. They included the three linguistic arts (grammar, rhetoric, and dialectics) and the mathematics arts (arithmetic, geometry, music, and astronomy). 1 DTV-BROCKHAUS 283 (1982) ("artes liberales").

The baccalaureate completed the study at the art faculty. Köbler, *supra* note 19, at 770. The structural similarity to modern higher education in the United States is apparent.

87. Köbler, *supra* note 19, at 769.

who graduated from school and applied to the university.[88] This development also resulted in the promotion of the art faculty to a "higher" faculty of philosophy in the nineteenth century. From this point on, students obtained their general education at the Gymnasium. Successful completion of the Gymnasium became a prerequisite for studies at the university.[89]

Thus, German students immediately begin a professional or graduate study upon their entry to the university. The earlier completion of the liberal arts education at the Gymnasium allows more time to be allocated to the study of law, which is a much broader study than in the United States.[90] A classification of the German law studies as under-

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88. The regulation of preuniversity education raised the average entrance age of the students to nineteen years. *Id.* at 770.

89. Köbler, *supra* note 19, at 770.

90. *See, e.g.*, Regulation of Legal Education and Examination by the State Government of Baden-Württemberg of July 9, 1984 (amended Dec. 1985 and Oct. 1987):

> § 4(1) During the studies at university the student shall acquire knowledge of the legal system with its historical, sociological, economic, and philosophical foundations. He [sic] shall familiarize himself with dogmas of the jurisprudence and shall develop the ability to apply the law. . . .
>
> § 4(3) The normal duration of the university study is eight semesters . . . .
>
> § 5(2) The obligatory courses are subject of the exam . . . .
>
> § 5(3) Obligatory courses are 1. civil law [general doctrines, property law, law of obligations, employment contract law, the main features of family law, wills and estate, commercial law, business organization, commercial paper, organized labor law, private international law, civil procedure, noncontentious jurisdiction, bankruptcy law, and judicial execution] . . . 2. criminal law [general doctrines and offenses of the criminal code, and the main features of the criminal procedure act] . . . 3. public law [constitution and law of government, general administrative law, administrative procedure law, from special administrative law municipal law, police law, urban development law, building code, and the main features of public service law, administrative court procedure and constitutional court procedure] . . . 4. foundations [political science, economics for jurists and the main features of legal history, constitutional law history, philosophy of law, and of sociological jurisprudence] . . ."

Commentators criticize this extensive list. Linked with this criticism is the criticism of the long study period of an average of eleven to twelve semesters. *See* Klaus Bilda, *Zur Reform der Juristenausbildung*, JuS 681 (1989) (criticizing the length of the study and amount of subjects); Bernhard Grossfeld, *Das Elend des Jurastudiums*, JZ 357 (1986) (adding to Bilda's criticism of a too detailed exam knowledge requirement); Heinhard Steiger, *Deutsche Juristenausbildung*, ZRP 283 (1989) (emphasizing the need of a Euro Jurist); Hassemer & Kübler, *supra* note 3 (praising the United States model because of its short education period which makes it possible to complete legal education by age 24). The authors, however, have not taken notice of the actual length of college and legal education. Only 18.8% of the high school class of 1982 finished college after four years. Anthony Flint, *College Taking Longer to Finish*, BOSTON GLOBE, Nov. 11, 1991, at 10.

graduate study completely ignores the structure of the German educational system and its history.[91] The placement of liberal arts education in the Gymnasium abolished the combination of graduate and undergraduate studies at one institution.[92] The liberal arts department became the "higher" philosophy department, then the model for the United States graduate program of arts and sciences.[93]

The creation of the modern United States law school as a graduate program cannot be separated from the general development of undergraduate and graduate studies in the United States. The development of professional schools in the United States reflects the idea of liberal arts education as a prerequisite of any professional education.[94] Professor Wythe did not require students to have a liberal arts education prior to their legal education because he and Jefferson believed that the knowledge of law belonged to the general education of a citizen.[95] This idea of a combined liberal arts and legal education reflects the idea of a broad legal education, the other most significant difference from the school of

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Thus, 80% of college graduates could not finish a legal education in seven years. Thus, the average time of eight and a half years of study for a German legal education does not seem as bad as the authors picture it.

91. Merryman's statement that law is an undergraduate study in the civil law university is incorrect. Merryman, *supra* note 4, at 865. Such a classification does not exist in Germany and even in the past when liberal arts education was placed in the university, the law faculty was considered a "higher" faculty. Köbler, *supra* note 19, at 770. Additionally, the studies at an Italian university, which serves as a basis for Merryman's comparison, requires an Abitur (diploma di maturita classica) similar to Germany. Hassemer & Kübler, *supra* note 3, at E43.

92. The impact of the German university and academic freedom on the development of the United States graduate schools and the struggle of German-educated scholars to model the United States graduate schools after the German model are described in JUERGEN HERBST, THE GERMAN HISTORICAL SCHOOL IN AMERICA 23 (1965).

93. *Id.* at 30.

94. Currie sees the "effective motivating purposes" of prelegal education "on the educational side, to provide a homogeneous and literate body of law students, and on the side of the profession and the public interest, to prevent such an over-crowding of the bar." Currie, *supra* note 58, at 371. Schlegel adds to the criticism of the elitist notion of the emerging AALS and ABA a comparison with the parallel development in other professions. Schlegel sees the professionalization "as an attempt of the middle class to improve its social and economic position through a strategy of market control." Schlegel, *American Law Professor, supra* note 78, at 319. First underlines this analysis by the detailed examination of the AALS in its policy of raising standards. Harry First, *Competition in the Legal Education Industries (I),* 53 N.Y.U. L. REV. 311 (1978); Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) [hereinafter First I and First II].

95. Whythe's lectures were part of a program of "parallel professional and liberal studies." McManis, *supra* note 53, at 611.

thought arguing for the narrower model of legal education. Issac Parker first outlined the separation of general or liberal arts education and legal education and the requirement of a liberal arts education as a prerequisite for law studies in the United States.[96] This idea became prevalent and successful with Langdell's reformation of the Harvard Law School and its adoption by the American Bar Association (ABA) and The American Association of Law Schools (AALS).[97]

The concept of the United States university, which fostered research and academic studies as well as a liberal arts education, resulted in the creation of a research-minded graduate program in the arts and sciences and professional schools connected with a core college.[98] The United States model of undergraduate and graduate studies views both as two stages of the same institution and does not copy the German university model of exclusively providing academic education and research.[99]

Regardless of the structure, the studies of law in both countries require a general or liberal arts education prior to law studies. Thus, both models reflect, in contrast to the British model of legal education,[100] the need for a prior liberal arts educational background. The basic idea of a general liberal education as a prerequisite for any professional or graduate studies in both countries implies that this part of education prepares everyone for any professional or graduate studies. The content of such a general liberal education varies with the changing needs of the time, but the basic task—preparation for further studies at a higher level—remains the same.

Admissions standards have risen not only because of recognition of

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96. Parker stated his idea of law as a graduate study after college education in his inaugural address of 1816 at Harvard Law School. REED, *supra* note 49, at 138.

97. The AALS had more problems with the college education requirement for law school admittance than with other conditions for membership in the AALS. First I, *supra* note 94, at 344. Thus, the college education requirement was not adopted until 1922 as a condition for membership in the AALS. The ABA adopted this requirement in 1924. *Id.* at 360.

98. In 1904 the majority of the Association of American Universities favored keeping liberal arts education and graduate studies together, while German educated scholars desired the separation of both. The university idea of research and organized facilities forced upon the college a reformation. To build the "American University" meant not only creating graduate programs but also reforming the college. HERBST, *supra* note 92, at 48-51. Jefferson's idea of a university with parallel general education and professional studies contravenes such separation. *See* REED, *supra* note 49, at 117. Jefferson's idea of parallel studies influenced the University of Virginia until 1851. *See* McManis, *supra* note 53, at 625-26.

99. HERBST, *supra* note 92, at 48-49.

100. *See* Hassemer & Kübler, *supra* note 3, at 50-51.

inadequate education but also because of the overt or hidden desire to exclude minorities, immigrants, and women from the bar.[101] At the beginning of this century, the ABA wanted to keep the bar free from Jews and other "undesirable" groups, and the AALS wanted to form an elite law school to eliminate the competition by the proprietary and night law schools.[102] Consequently, a discussion of raising standards or establishing additional prerequisites for legal studies must include a thorough examination of its necessity for improving legal education and its impact on the student body. It must consider whether everyone can achieve the prerequisites, especially if equal access to quality elementary and secondary education is not achieved by the educational system. It must evaluate the impact of changes on the student body. The discriminatory motives of the past must not recur. Additionally, prerequisites have always had a homogenizing effect; therefore, one must ask whether this effect excludes important diverse backgrounds in the legal profession.

Because legal education builds upon prior education, a discussion about the prerequisite for a legal education cannot exclude the discrimination—intended or occurring—against persons at the prelegal educational level. A look only at the admission procedure at the law school level leads to incorrect conclusions. Merryman's assertion that in "most civil law countries . . . higher education . . . [is made] available to everyone without distinction" is not true in practice.[103] He should have considered the early selective process by a "more rigorous and demanding system of secondary education"[104] and its influence on the admittance to university. Lack of knowledge excuses this omission. However, the assertion that the admittance to a United States law school is based only on academic standards[105] does not comport with reality. Classifying the continental university admission policies as a model of democracy and the United States law school admission as a model of meritocracy does not only ignore important discriminating and screening factors at the elementary and secondary level, but also at the university level.

Thus, only a reform of the whole educational system to provide everyone according to one's talents and not to one's financial background or family connections, with a quality education can avoid a discriminatory

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101. *See* AUERBACH, *supra* note 78, at 106; RONALD CHESTER, UNEQUAL ACCESS 9-11 (1985).

102. STEVENS, *supra* note 11, at 175; AUERBACH, *supra* note 78, at 106. *See also* First I, *supra* note 94, at 342 (pointing out the economic interests behind legal education).

103. Merryman, *supra* note 4, at 861.

104. *Id.* at 862 n.5.

105. *Id.* at 861.

impact of higher admissions standard. A major problem of United States higher education is that the system treats it as a commodity, thus the market rules it. Those offering the commodity, the law schools, and those having the commodities, the legal profession, determine the access and the price of the commodity. Thus, the system serves their interests and not the interests of the society or those not having the commodity.

III. The Control and Goal of Legal Education

A. *The Controlling Groups*

The most apparent characteristic of German legal education is the influence of the government on the content and format of the legal education. Although law schools are affiliated with public universities in the United States, the ABA, AALS, and the state supreme courts control legal education. Thus, one could use the terms "government controlled" and "profession controlled" to describe the two models.

History created the role of the government in the legal education in Germany. At the beginning, Germany desired to ensure an adequate education and training of jurists for the administration and the bench. The university study of law alone was inadequate. The future civil servants had to engage in preparatory service to ensure adequate and equal training for every aspirant for civil service or judiciary positions.[106] A broad and general legal education produced the greatest flexibility regarding work assignments of the future jurists. In 1793 future lawyers in Prussia also had to do preparatory service. Finally in 1869 Prussia established the same education requirements for all legal careers.[107]

The government control of legal education in Germany still exists through detailed federal and state legislation. Every major change of legal education must gain federal and state approval. This structure makes

106. The history of German legal education contains many accounts that it is inadequate. In 1455 the highest court of the empire administered its own test for applicants. Hattenhauer, *supra* note 20, at 514. By 1797 the trade-like learning of private (Roman) law at the university and its focus on private law was criticized. Bleek, *supra* note 29, at 113. Roughly forty years later the preparatory service had become the main part of legal education because students neglected their studies at the universities. *Id.* at 53. With the reform of legal education in 1869 establishing seven years for legal education, four years were allocated for the preparatory service demonstrates the importance of the preparatory service in Prussia. The extensive growth of the subjects to be covered by the university studies in the last fifty years changed the allocation of two one half years for the preparatory service. Hattenhauer, *supra* note 20, at 519.

107. Arbeitskreis, *supra* note 31, at 54.

it more difficult to introduce change. However, the quality of legal education is basically uniform throughout Germany.[108] Thus, the reputation of the university does not play as significant a role as it does in the United States where the law schools compete against each other and have different resources.[109]

In contrast to the German model, the form and content of the United States legal education is less influenced by the government. The judiciary, as part of the government, exercises regulatory power only over lawyers and the bar admission. The inherent power doctrine establishes their exercise of control.[110] The control is exercised by judges and they are legal profesionals. Yet, in practice the "state supreme courts serve as the largely passive sounding boards and official approver or disapprover of initiatives . . . taken by . . . [the] bar."[111] Additionally, in 1876 the state supreme courts began to establish statewide boards of bar examiners and delegate to them the control of the bar admission. The state bar associations "almost invariably" controlled those boards.[112] Consequently, the bar regulates itself.[113]

In colonial times "the bar organizations exercised a great deal of control . . . over legal education and . . . admission to practice."[114] The control of the bar organizations diminished with the dissolution of local bar associations during the 1820's and 1830's and the beginning of state

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108. The quality of education also depends on the individual professor's teaching capability and competency.

109. The reputation of the law faculty depends on the special competency of individual professors or special research institutes. Furthermore, certain law faculties are considered more liberal than others.

110. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 24-25 (1986).

111. *Id.* at 33.

112. STEVENS, *supra* note 11, at 94. Stevens speaks of a pattern of delegation: from state legislature, to state supreme court, to board. However, whether the state legislature is directly involved depends on the interpretation of the inherent power doctrine, especially of its negative impact on the state legislature in the particular jurisdiction. WOLFRAM, *supra* note 110, at 27. Nevertheless, the state supreme courts with the boards of bar examiners control bar admissions.

113. The argument of the separation of powers and the need to control "important court operatives—lawyers" justify the inherent power doctrine. WOLFRAM, *supra* note 110, at 26. The first argument assumes that the court acts in a governmental function. Chief Justice Taney used the second argument which now demonstrates the traditional control of lawyers by the court in *Ex parte* Secombe, 60 U.S. (19 How.) 9 (1856). This traditional control helped preserve decorum and the respectability of the profession. *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824). Thus the traditional argument reveals more of a professional controlling function.

114. Gee & Jackson, *supra* note 51, at 727.

regulations of bar admissions.[115] Attorneys formed local bar associations again in 1870 and founded the American Bar Association in 1870. From its beginning, the ABA sought to advance the science of jurisprudence.[116] Thus, the organization of the profession coincided with the scientification of legal education and reform of law schools. The reformed law schools with their academic professors soon influenced legal education. The ABA and "reputable law schools"[117] had different interests to protect and to advance. This led to the formation of the American Association of Law Schools. From the beginning the ABA and AALS pushed for higher legal education standards and started to raise their accreditation standards.[118]

Yet, the state supreme courts still set the bar admission standards. The pressure from revived state bar associations[119] and the establishment of statewide boards of bar examiners controlled by the local bars raised the bar standards. In order to better coordinate the work of the individual state boards, the ABA helped found the National Conference of Bar Examiners in 1930.[120] The time of the Great Depression in the 1930s roughly marks the turning point. The state supreme courts and state legislatures changed their attitudes and began to require not only bar exams but also higher educational prerequisites.[121] The rise of standards ran concurrently with the rise of realism.[122] Thus, the heyday of formalism helped the Harvard model succeed whereas realism helped standard-

115. *Id.* at 728. Stevens points out that despite the decline in legal education standards and dissolution of bar organizations, leading lawyers played an important role in the big cities. He refers to the fact that during this period Llewellyn found the "grand style" judges and Gilmore described it as the "Age of Discovery." STEVENS, *supra* note 11, at 9.

116. Gee & Jackson, *supra* note 51, at 744.

117. Gee & Jackson, *supra* note 51, at 739 (quoting Henry Wade Roger's initiated resolution of the Section on Legal Education in 1899). Roger's resolution suggested organization of law schools. It showed the growing influence of academic lawyers and their differing interests. STEVENS, *supra* note 11, at 96.

118. STEVENS, *supra* note 11, at 172-80; Gee & Jackson, *supra* note 51, 739-43; First I, *supra* note 94, 332-401 (examines the AALS under the perspectives of antitrust law).

119. Gee & Jackson, *supra* note 51, at 744.

120. *Id.* at 753; STEVENS, *supra* note 11, at 177.

121. STEVENS, *supra* note 11, at 174-78 (pointing out the connection between the increases in standards and the stronger competition caused by the increasing number of schools and declining numbers of students and the fear of the effect of the depression on the bar and legal education).

122. The New Deal sought to raise the standards and linked over-production of lawyers with the "Old Deal." First I, *supra* note 94, at 373 (quoting Robert Jackson, 1934 AALS PROC. 77, 117); STEVENS, *supra* note 12, at 178.

ize this kind of legal education. In 1970, the ABA and AALS standards of three years law school and four years college education became almost a nationwide standard.[123]

Today, the regulative actions of the state supreme courts and state legislatures concentrate on formal requirements. Only the subjects of the bar exam influence the content of legal studies. In the 1970s and early 1980s, the dispute over required courses in law schools once again displayed the diverging interests of the ABA and the AALS.[124] This discussion revealed again the major players in United States legal education: the courts, the ABA, and the AALS.

Every change in bar admission requirements, law school standards, and curriculum directly or indirectly depends on the approval of legal professionals (bar and bench) and law schools. The legal profession has determinative control over bar admissions and an essential influence on legal education. Thus the legal education is controlled by the legal profession.

Both legal studies at a law department of a German university and legal studies at a United States law school differ from other studies at the same level. The German government regulates legal studies more than other university studies. Similarly, legal studies at a United States law school differ from other graduate studies because of the law school's character as a professional school and the influence of the profession. The influence of two external entities led to a loss of academic freedom akin to university studies. However, legal studies at German universities have retained more academic freedom than United States law schools. The absolute governmental control over the preparatory service, thereby reducing the government's need to regulate legal studies, and the traditional strong position of professors may have caused this. Furthermore, the United States law school was planned as a place for the education of lawyers, thus a professional school, and not as a place of purely academic studies and research similar to the graduate studies in the arts and the science.

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123. STEVENS, *supra* note 11, at 209. Even today some states do not require law school or four years of college for admission to the bar. AMERICAN BAR ASSOCIATION, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 75 (1990).

124. Statutes in Indiana and South Carolina require law schools to offer mandatory law courses. Those are exceptions, however. The AALS prevailed over the attempt of the ABA to require courses in professional skills. STEVENS, *supra* note 11, at 239-40; First II, *supra* note 94, at 1064.

B. *Goals of Legal Education*

The controlling groups have an impact on the goal of legal education. Thus, United States law schools seek "to educate [individuals] for becoming lawyers"[125] and German law schools seek to prepare students for judical office.[126] This ultimate goal influences legal education. German law schools train the student to approach a case in the way a neutral judge would approach the case by only applying the statutory law. The method teaches students to find the appropriate applicable law, subsume the facts of the legal problem, argue for or against subsumption by using the appropriate interpretation techniques, consider the consequences of each possible decision, consider gaps in the law, and consider whether an analogy is possible. The United States lawyer looks for the appropriate cases, tries to find a congruent case, distinguishes or equates the cases, states the rule, and makes possible arguments including policy arguments or arguments for change of the rule.[127] The focus of the training of the United States lawyer is on advocacy skills whereas the focus of the German model is on adjudicative skills.

The difference in focus reveals a different idea law behind of both models of legal education. The neutral application of legal principles relates to the idea of law as a science whereas the utilization of law for the

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125. Robert A. Gorman, *President's Message,* NEWSL. AALS, Nov. 1991, at 2 (quoting 1979 ABA Report on Lawyers' Competency). For criticism asserting inadequate lawyering skills of graduates, see e.g., Arch M. Cantrall, *Law Schools and the Layman: Is Legal Education Doing its Job?,* 38 ABA J. 909 (1952); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?,* 35 J. LEGAL EDUC. 343 (1989). Yet, the objective lawyer can be further discerned: "lawyers representing large organizations" and general practitioners. STEVENS, *supra* note 11, at 281 n.19 (citing John P. Heinz & Edward O. Lauman, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies,* 76 MICH. L. REV. 1111, 1118 (1978)). The first mainly attend the higher-ranking law schools, whereas the latter mainly attend the lower-ranking law schools.

126. *See* Federal Judicial Office Act, *supra* note 44, § 5(a).

127. A description of the difference between reactive lawyering and activist lawyering shows how the activist lawyer questions the "legitimacy of the . . . arrangement." BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 24 (1984). An acceptance of the arrangement as done by the reactive lawyer only "blind[s] the reactive lawyer to the very existence of the systematic failures. . . ." *Id.* at 31. For the activist lawyer those failures represent "[t]he proper place to begin the normative argument." *Id.* This description shows how a common lawyer must make arguments that question doctrines and the system. The activist lawyer is not limited to a "situation where the citizenry no longer holds that the country's . . . problems can take care for themselves." *Id.* at 28. Ackerman equates a socially concerned lawyer with an activist lawyer. *Id.* at 28-29. This equation presents the major premise of his argument. His activist lawyering typifies good common-law lawyering.

promotion of various interests relates to the idea of law as a political instrument. The idea of neutral application of legal principles also fits into Langdell's idea of law and has a conserving effect on power and wealth distribution. Such a conserving effect benefits the government, the group in power.

Not surprisingly, the nationwide creation of the educational goal of neutral justice coincided with the rise of the German brand of formalism, positivism. This positivism subjected the judges[128] to the reign of law as created by the legislature and rejected all other sources of law.[129] Judges applied law neutrally and did not consider other factors in their decision. Positivism never existed in its purest form since the jurist of the nineteenth century also used "elements of pre-positive elements of legal decision-making" such as Savigny's spirit of the Volk or conceptual jurisprudence's deductive methods to complete the incomplete statutes.[130] Positivism also did not create the notion that judges only apply law neutrally; positivism transferred this notion from a political theory to a legal methodology to disguise the political character of this concept. Ogorek clearly demonstrated that the concept of an apolitical judge who only applies law deductively was not created by theories of interpretations or sources of law but by theories of government and state outlining political competencies.[131] The desire of the bourgeois to establish an independent civil court system at the beginning of the nineteenth century and the German princes' fear that independent courts would claim lawmaking power led to the concept of judges who only apply law. This delineated the spheres of power.[132] During the end of the nineteenth century the rising positivism absorbed the political character of this theory.

However, the ideological or political character of positivism and of the concept of neutral judges became manifest after the revolution in 1918-19. Conservative jurists did not object to the subjection of the judiciary under statutory law as long as the order in the state complied with their ideas.[133]

The blanket clause in Civil Code section 242 establishing the principle of good faith for all obligations functioned long before the demise of positivism as a door for the utilization of other sources of law but served

128. Not only the judges, but also the administration portrayed themselves as neutral, law-applying executors of the demands of the law.

129. Manfred Walther, *Rechtspositivismus im Nationalsozialismus*, KRITISCHE JUSTIZ 263, 267 (1988).

130. Joerges, *supra* note 67, at 604.

131. REGINA OGOREK, RICHTERKÖNIG ODER SUBSUMTIONSAUTOMAT? 369 (1986).

132. *Id.*

133. *See* Walther, *supra* note 129, at 267.

then as a basis for the judicial demand that statutory law must comply with general principles of good faith.[134] Additionally, the establishment of the objective theory, which played down legislative intent by emphasizing teleological interpretation, liberated judges from the restraints of legislative intents and goals.[135] However, Germany only abandoned the principle of the subjection of the judiciary to the statutory law during this period; it upheld the notion that judges are neutral and unpolitical.[136]

After the end of the Nazi regime, commentators found positivism to be the main reason for the support of the Nazis by the jurists. Many accepted this thesis despite the fact that the judiciary and the jurisprudence had already begun to abandon positivism during the Weimar Republic.[137] Consequently, this theory helped in the constitutional debates to proscribe that the judiciary is bound by statutes and law[138] and thereby reduced the subordination of the judiciary to positive law. However, German scholars still intensely debate the issue of how much judge's decisions are subject to statutory reaction. It appears that the political origins of the theory again play a more important part because of the focus on a separation of powers argument and democratic theories.[139] The debate also plays an important role in attempts to reform German

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134. Hans Hattenhauer, *Richter und Gesetz 1919-1979*, ZEITSCHRIFT D. SAVIGNY STIFTUNG F. RECHTSGESCHICHTE 46, 52 (1989); Ralph Weber, *Entwicklung und Ausdehnung des § 242 BGB zum "königlichen Paragraphen"*, JuS 631, 633 (1992).

135. *See* Walther, *supra* note 129, at 265.

136. *See* Walther, *supra* note 129, at 268. It does not lack of irony that the liberals in the nineteenth century also furthered the idea of an impartial, nonpartisan judge to establish control and rule of law over the administration. *See* Joerges, *supra* note 67, at 604.

137. *See generally* Walther, *supra* note 129. Walther explains the reason for the acceptance of the thesis and concluding that the success of this thesis distracted from the true reasons for the support of the Nazis by a majority of the jurists. Walther describes it as tragic that the author of this thesis, Gustav Radbruch, was one of the few upright jurists during the the time of the Nazi regime. *Id.* at 280.

138. Basic Law, art. 20 III. *See also* Hattenhauer, *supra* note 134, at 65 (describing the different drafts of Art. 20 III and constitutional discussions). Problematic is the relation between Art. 20 III and Art. 96 I; art. 96 I makes judges only subject to statutes.

139. *See* OGOREK, *supra* note 131, at 2-4 (summarizing the current discussion regarding judges and statutory law and stating that the often political and ideological undertones of the discussions prevent an approach to reconcile the tensions between the indetermancy of statutes and democratic principles). *See also* Eduard Picker, *Richterrecht und Rechtsdogmatik - Alternativen der Rechtsgewinnung I*, JURISTEN ZEITUNG (JZ) 1-12 (1988); *Richterrecht und Rechtsdogmatik-Alternativen der Rechtsgewinnung II*, JURISTEN ZEITUNG [JZ] 62-75 (1988) (stressing the systematic advantages of legislation in his argument against case law).

legal education. Some jurists see the principle of judicial subordination to statutes and the rule of law threatened by the emphasis on the study of social science during the legal education and by the educational goal of the "social engineer."[140] The abandonment of the one-phase model of legal education marks an end of attempts to reform the educational goal of neutral judge for the present time.

Although the development over the last hundred years led to a reacceptance that law is also developed by the judiciary, the principle that judges only apply law has not changed. Thus, German judges apply law. If the application of the law leads in the individual case to an unjust result, the judge can "correct" the result with the help of the blanket clause of Civil Code section 242.[141] Consequently, the objective of German legal education entails the teaching of adjudicative skills and not of advocacy skills.

Both adjudicative and advocacy skills require some of the same analytical skills. However, the difference in objectives and their impact on expected skills results in the different orientation in skill training. The differences between German and United States legal education becomes more apparent if one looks at the focus of the law studies: code or statutes and case law.

IV. Cases and Code

The focus of law studies best demonstrates the influence of legal thought and the legal system on legal education. The idea that the subject of teaching has an influence on the method of teaching seems banal. However, United States legal education has focused on the case method for one hundred and twenty years. Thus, the subject alone does not determine the method.

The sources of the law determine the subject of legal education. Both the legislature and the courts create law in the common-law system, whereas the legislature forms most law in Germany. In certain situations, decisions of the constitutional court have statutory power.[142] Constitutional theories subordinating judges to statutory law complement this theory of legal sources. Thus, German mainstream legal thought views judges as basically applying the law and not being sources of law.

Not only the kind of sources of law, courts, and legislatures, but also the number of sources of law factor into legal education. In Germany,

140. Coing, *supra* note 43, at 797.

141. *See* Weber, *supra* note 134, at 634.

142. Grundgesetz (Basic Law) art. 92(2); Bundesverfassungsgerichtgesetz (Constitutional Court Act), § 31(2).

the federal legislature delineates the major substantive private law areas such as contracts, torts, property, and criminal law. In the United States, the individual states' courts and legislatures have the competencies to make law in these areas. No federal common law exists.[143] Consequently, national law schools teach common principles of law in torts, contracts, property, and criminal law. Although more similarities than differences exist among the states, case law and statutory law of over fifty jurisdictions expose law students to the existence of various approaches and remedies and show them the relativity of law. This exposure demystifies and politicizes law. This contrasts with the situation in Germany, where the schools teach only one civil code and one criminal code. The focus on the positive law in Germany results in the neglect of other legal concepts or solutions necessary to realize the relativity of German legal solutions.[144] The concentration on common principles or the *Restatements* in the various areas of law in the United States and diverse state legislation in Germany mitigates to some extent the effect of this structural difference. However, the focus on one specific legal solution, the civil code or the criminal code, bears the danger of disguising the relativity of law and helps to uphold its mystic character.

The study of law entails learning how to deal with the sources of the law. As discussed above, the United States jurist mainly learns how to analyze cases, whereas the German jurist mainly learns how to interpret codes or statutes. In short, one could label each respective model the analytical model and the interpretive model.[145]

The fact that court decisions are sources of law does not fully explain the focus on case law because statutes are also sources of law. The antilegislative attitude as expressed in Story's reorganization of the curriculum created the focus on case law.[146] The use of the case method as the main method comes out of formalism,[147] thus formalism still determines the teaching method.[148] Realism and the subsequent legal thought move-

143. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

144. My experiences of studying law in both countries underline the fears of Kunkel, who labeled the focus on the civil code as an education to the faith in the single possible curing power of the German civil code. *See* Wolfgang Kunkel, *Grundsätzliche Überlegungen zur Problematik der Juristenausbildung,* JZ 637, 641 (1956).

145. Of course these labels overgeneralize, because every legal education entails analysis and interpretation.

146. Currie, *supra* note 58, at 364.

147. McManis, *supra* note 53, at 649.

148. The justification for the case method changed shortly after its introduction by Langdell and is seen today more as a method to teach analytical skills. Mark Spiegel, *Theory and Practice in Legal Education: an Essay on Clinical Education,* 34 UCLA

ments added other aspects to the curriculum and other methods have been utilized. However, the basic structure of the curriculum remains the same as introduced by Story and Langdell. Until recently, the traditional curriculum and many state bar exams neglected statutory and administrative law.[149]

One reason why the realists did not change the focus on case law might lie in their admiration of great judges. Formalists, realists, and their successors admired judges.[150] Other than the common admiration of judges, the explanation for the failure to change the curriculum might lie in the failure to create a new concept of law that could have replaced Langdell's concept of law. Grey links the lack of general conceptual schemes of law with the disinterest of scholars based on the realist finding that the concepts "can not supply decisive major premises for legal judgments."[151] However, the law and economic theories including the Coase theorem and legal process theories attempt to build new concepts.[152] Ackerman asserts that the Coase theorem implies the use of a new language and a new approach to facts and thus avoids the further use of the classical or "reactive" lawyer talk.[153] As examples he notes that the treatment of contract no longer focuses on the classic ideas of mistake, impossibility, and the like, but includes systematic failures of the concepts.[154] However, the legal process movement and the law and economics movement have not yet changed the curriculum structure nor have the other legal thought movements.

The use of classical language and concepts has a certain staggering impact for change. Grey notes that all modern attempts to change the

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L. REV. 577, 582 (1987). Additionally, instead of discovering the principles of law, the goal is today to find a case on all fours. STEVENS, *supra* note 11, at 133.

149. The formalistic classification of law in contract, tort, and property still determines the first-year curriculum. Realism failed in transforming legal education. The number of criticisms is uncountable and comes from all different sources. Anthony Chase, *American Legal Education Since 1885: The Case of the Missing Modern,* 30 N.Y.L. SCH. L. REV. 519, 537-40 (1985) (quoting several scholars stressing the surviving of classical legal education); Currie, *supra* note 58, at 62; Ronald Chester & Scott Alumbaugh, *Functionalizing First-Year Education,* 25 U.C. DAVIS L. REV. 205 (1991) (stressing the inadequacy of the formalistic first year curriculum because of its failure to stress cross-substantive law fields cutting general principles which are applied by a lawyer in practice facing a legal problem and its failure to include statutory and regulatory norms despite the expansion of the regulatory state).

150. *Cf.* LLEWELLYN, *supra* note 60, at 35.

151. Grey, *supra* note 67, at 49.

152. ACKERMAN, *supra* note 127, at 38, 46-47.

153. *Id.* at 46-60.

154. *Id.* at 62.

concept of law utilize classical terms such as rules and principles. In addition, the desire for certainty, rules, and principles still has its attraction.[155] Frank believes this desire for "unrealistic certainty in law" is caused by "the not yet relinquished . . . childish need for an authoritative father."[156] However, the search for concepts and systematization should not be discounted just because of unquestioned faith in them in the past. Arbitrariness in a legal system is not a lesser evil. Concepts of law and systematization can further the understanding of the nature of law and its effect on society. Although the creation of concepts and systematization, including substantive value choices without flight to empirical acceptance of the power and resources distribution, is very difficult in a multicultural society, scholars should respond to the challenge and search again for concepts of law that not only describe the current situation but also attempt to offer legal solutions.[157] The enthusiasm for empirical research and social science coincides with the "fact-sensitivity of American lawyers."[158] However, it seems that the fear of value choices caused the retreat to empirical research and the "fact-sensitivity" made the flight only easier.

As long as the critics can not replace the model, a change in the curriculum seems inconceivable. Even a new concept of law would not solve the problem of the unrealistic focus on cases per se. The problem lies in the common law itself. However critics define law, they accept that judges make law.[159] Consequently, cases are sources of law and must be studied. Even the increasing importance of statutory law has not created an urgent need to adjust the method, since judges interpret every law. The legislature can exert itself and regulate every detail, only to have

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155. Grey, *supra* note 67, at 51-53.

156. JEROME FRANK, LAW AND THE MODERN MIND 22 (Anchor Book ed. 1963) (1930).

157. See Note, *Legal Theory and Legal Education,* 79 YALE L.J. 1153 (1970), in which the author describes the failure of the realists to develop an adequate concept of law with substantive values replacing the formalistic concept of law as science with neutral principles. The author refers to Frank's "individual equity," and Llewellyn's "right reason," as going beyond empirical work but did not create either a "theoretical or intellectual framework" explaining the reason for studying part of the reality or supplying "the concepts and values through which" the observations might be evaluated. *Id.* at 1155-72.

158. GILMORE, *supra* note 60, at 48.

159. The concept of judicial activism recurs throughout United States legal history. Gilmore refers to the "activism" of the Warren court as a "rebirth" and connects the "rebirth" of judicial activism with the "rebirth" of the "federalizing or nationalizing principle." GILMORE, *supra* note 60, at 93.

judges decide the opposite.[160] The legislature in Germany also faces problems with unwanted interpretation by courts, yet the courts do not see themselves as law making, thus, their approach defers more to the legislature. Additionally, the civil code is abstract in its character; consequently, the courts have broad room for interpretation and adjusting without giving the appearance of making law. Beginning with the New Deal statutes were drafted on federal as well as on state levels in "a style . . . aimed at an unearthly and superhuman precision."[161] This style necessitates judicial "activism" since no room exists for interpretation adjusting legislation to changing needs.[162] Consequently, despite the changes, even the jurists of the realist epoch must study cases and can avoid reliance on statutes, unless a new concept of law can address the relationship of case law and statutory law and include both appropriately in the curriculum.

Judges have had an important influence on the development of the law in the United States, whereas in Germany academically educated professors have most influenced the law. Their influence began with the reception of Roman law. Law professors adjusted Roman law to the needs of the time, influenced the outcome of cases by the institution of faculty adjudication, and finally had a major influence on the civil code.[163] German legal education consequently includes discussion of learned opinions of professors in situations of difficulties in the interpretation of the codes[164] as well as court opinions. Court decisions, which are not sources of law, do not challenge the focus on the codes, yet the schools include court decisions because they are very persuasive authorities in questions of interpretations. However, German schools generally do not analyze facts, arguments, and policy reasons of court decisions as United States schools do.[165] Thus, the lecture as a method[166] of the inter-

160. Weber refers to the "special pain" the English legislature must take to exclude all possible construction by judges. WEBER, *supra* note 134, at 203.

161. GILMORE, *supra* note 60, at 97.

162. *See id.* (revealing a preference for case law because it can be more easily adjusted to change).

163. Rheinstein, *supra* note 1, at 6. As Weber pointed out, "legal honoratiores" have a major influence on the legal system. WEBER, *supra* note 6, at 52 n.25. Law professors tend to systematize the law, thinking in a very abstract and rational way whereas judges tend towards a more realistic and case-oriented approach. *Id.* at 204-05.

164. As used in this context, code(s) encompasses all statutory norms, and not just the German civil code. Thus, it encompasses the criminal code, the administrative procedure act, and the civil procedure act.

165. Their lack of adequate training in the university in working with cases will become more apparent in the future when German lawyers have to deal with the decisions of the European Court of Justice, which is one of the main forces in the develop-

pretative model does not focus as much on the code or statutes as the case method focuses on cases.

Additionally, the comparison of both models seems to indicate the analytical model is more bound to the case method because of the dominant role of judge-made law in the United States. The interpretative model does not rely as much on one method because it is not tied so completely to one method.

In summary, formalism, with its concentration of judge-made law, created the focus on case law in the United States. The curriculum and the unrealistic concentration on judge-made law will only change with a concept of law that includes a classification of the weight of the sources of law. In Germany, the teaching of the codes includes not only court decisions but also the learned opinions of professors. The single source of law and the concentration on German positive law blinds students to the relativity of law and its political character.

V. THEORY AND PRACTICE

A. *Practical Training and Theoretical Education—A Dichotomy?*

In Germany[167] and in the United States[168] legal education faces the criticism that it fails to prepare students adequately for practice. In Germany the universities can refer to the preparatory service as the place of

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ment of European law.

166. Other exercises entail papers, exams, seminars with detailed papers, oral presentations, and class discussions.

167. *See* Klaus Bilda, *Zur Reform der Juristen-ausbildung*, JuS 681 (1989) (criticizing the separation of theory and practice); Bernhard Grossfeld, *Das Elend des Jurastudiums*, JZ 357 (1986) (criticizing the long period of study and expectation of too much detailed knowledge for the state exam); K.-H. Koch, *Die Juristenausbildung braucht neue Wege*, ZRP 282 (1989) (suggesting specialization during legal education and abolishment of government-supervised education); Heinhard Steiger, *Deutsche Juristenausbildung und das Jahr 1992*, ZRP 283 (1989) (stressing the need of the "euro-jurist," and proposing exams administered by professors at the end of course as substitute for the all-encompassing state exam at the end of the studies).

168. *See* Arch M. Cantrall, *Law Schools and the Layman: Is Legal Education Doing its Job?*, 38 A.B.A.J. 909 (1952) (claiming law graduates lack adequate lawyering skills); Chester & Alumbaugh, *supra* note 129, 201-62 (claiming law graduates are not taught to think like practitioners because of classification of law in first-year curriculum); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591-95 (1982) (criticizing legal education for perpetuating legal and economic hierarchies); Karl Llewellyn, *On What is Wrong with So Called Legal Education*, 35 COLUM. L. REV. 653 (1935) (criticizing the sole use of the case method in the first year and lack of practical education and referring to the German preparatory service).

practical training, whereas United States law schools cannot deflect this criticism so easily. First, the United States does not separate theoretical and practical areas of legal education. Second, the law students pay for their education. Third, the source of the criticism—mainly the professionals—has a great influence on the law schools through the board of bar examiners and the ABA.

Thus, United Staes law schools are more inclined to include practical skill training in their curriculum[169] than the German university where this same criticism has led only to a mandatory or voluntary internship during the semester break.[170] However, it appears that the United States law school has not overcome the gap between theory and practice despite the more practical approach during law school. The gap is rooted in the successful start of the Harvard model when Langdell created the "Ames" professor.[171] Professors do not need practical experience to teach the science of law, only the experience of having travelled the road of legal education.[172]

The pure theorist denounces the idea of training law students in practical skills as "Hessian" training[173] and not the business of the law school. On the other extreme side stands the notion that scholarship or theory is not essential and that law schools should merely teach students how to practice law and make them professionally competent.[174] The

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169. Most United States law schools have legal writing classes and moot court classes or competitions where students learn to write a brief or to argue orally in front of judges. Additionally, law schools have legal clinics where students can actually practice law and handle cases.

170. They are known as practical study periods. Hassemer & Kübler, *supra* note 3, at E19.

171. In 1873 Ames became an assistant professor at Harvard after graduating from Harvard Law School. STEVENS, *supra* note 11, at 38.

172. Christopher Columbus Langdell, *Speech at the "Quarter-Millinial" Celebration of Harvard University,* 3 LAW Q. REV. 123, 124 (1887).

173. Bergin defines Hessian training as "training for private practice at the bar." Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself,* VA. L. REV. 637, 638 (1968).

174. Elson argues in a long and theoretical article that law schools have the primary duty to educate students for professional competency and that "traditional arguments for the priority of legal scholarship" like "instilling students with the moral virtues of truth seeking" and "social utility" do not justify a "preeminence of legal scholarship," Alex Elson, Canon 2—*The Bright and Dark Face of the Legal Profession,* 12 San Diego L. Rev. 306, 347, 356. Legal scholarship is probably preeminent in some schools but certainly not in the majority of the schools because of the monopoly of legal education. At the end of his article he suggests a balance between the two. However, this sounds disingenuous after his fundamental arguments against scholarship on the previous pages. An obvious irony is that Elson's work is itself the product of legal scholarship.

extreme gap between both positions might suggest that a professor must be "schizophrenic" to teach at a law school.[175]

However, both positions assume a formalistic separation of theory and practice. A definition of "academic" or "theoretical" and "practical" or "vocational" represents only a limited picture of reality because of the necessity to generalize and the perspective of the person defining the concept.[176] Yet, definitions or classifications can help discourse and understanding, if defined clearly. Without clear and consistent definitions, the purpose of furthering fruitful discourse and understanding will be lost. Even worse, unclear classifications can create the image of incompatibility, which makes scholars like Bergin struggle to bridge the gap and waste time and energy. Bergin builds his conclusion that a law professor must be schizophrenic to teach at a law school upon the assumption that both tasks—training for private practice and being "an authentic academic"—cannot be combined.[177]

I will use the term "academic" with the following meaning: a teacher at a school or university or solely theoretical teaching.[178] Furthermore, I prefer the term "vocational training" over "training for private practice" because it is not as narrow as "training for private practice." "Vocational training" is the preparation of someone for a specific vocation or profession.[179] Therefore, if the training for the profession of law is not possible at a school or university, then legal education and academic education would be incompatible. The practice of law requires an understanding of theory and of concepts, both of which an academic can teach. Furthermore, an academic can also teach certain practical skills like analyzing. Consequently, being an academic does not necessarily contradict the task of training someone for the vocation of a lawyer, even if not all dexterities of a lawyer are taught. These skills can not be taught in a school anyway.

However, Bergin's unclearly discerned classifications touch on tension

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175. Bergin, *supra* note 173, at 639.

176. *Cf.* Spiegel, supra note 148, at 589 (pointing out that the definition of theory and practice is contingent upon time or legal thought).

177. Bergin, *supra* note 173, at 638. At the beginning of his article Bergin defines Hessian training as "training for private practice at the bar." *Id.* Yet, Bergin later equates Hessian training with the broader term vocational training. *Id.* at 640. Additionally, what does private practice mean? Does it exclude government lawyers and public law teachers? His definition lacks clarity. Similarly, Bergin equates academics with scholars without qualification. Every scholar is an academic, but not every academic is necessarily a scholar.

178. *See* WEBSTER'S NEW WORLD DICTIONARY 7 (2d ed. 1980).

179. *See id.* at 1590.

that exists between teaching and scholarship. First, the meaning of the word "scholar" must also be clarified because of its multiple meanings.[180] I use the following definition of a "scholar": a scholar in law is a learned person with systematized knowledge and who works to enhance the knowledge in law.[181] Now the tension between teaching and scholarly work becomes clearer: it is mainly a question of time. How much of the available time is spent for teaching students for studies in pedagogy and for the development of the practice and theory of law and how much time is spent enhancing scholarship in law in general? Furthermore, the definition of scholar also reveals the reason why scholarship is necessary for teaching: the possession of systematized knowledge is important for competent teaching.

A thorough understanding of concepts and principles of the law and how it works includes both theory and practice. The theory must find a concept of law including substantive value decisions readily tested in practice and the experience gained through the practice.[182]

The recognition of the interplay between theory and practice does not solve the problem of how legal education should deal with the apparent tendency of theorists and practitioners to separate theory and practice formally. Legal education can and must attempt to outline and explain this interplay and teach students the necessary skills to apply and test the theories in practice. A fruitful dialogue between theory and practice would then develop, and each side could appreciate the values of both and realize the interdependency of theory and practice. Such a dialogue could also result in a better integration of theory and practice in legal

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180. *Id.* at 1274 (student; learned person; specialist in a particular academic discipline).

181. *Id.*

182. An example of a theoretical work gained out of practice or reality is CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). Such "[t]heoretical legal scholarship has been most influential in altering legal doctrine, institutions, and behavior [because] it has been grounded in a penetrating analysis of the underlying facts. . . ." Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 35 J. LEGAL EDUC. 323, 329 (1989) (discussing Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964)); for an example of the impact of legal scholarship on civil liberty, see Sylvia Law, *Economic Justice, in* OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTY 134, 139-143 (Norman Dorsen ed. 1984). MacKinnon's work and feminist legal theory goes beyond law and economics and legal process because the feminist observation of reality is value-based, does not accept reality contrary to the underlying values, and attempts to change substantially situations without assuming procedural equality alone would achieve substantial change.

education.[183]

However, schools can not teach students all the necessary dexterities to survive as practitioners. An academic approach teaches certain skills while practical training and experience teaches others.[184] The German model with the separation of practical and theoretical training seems to reflect the formalistic separation of theory and practice. Yet, the preparatory service also includes classes that attempt to connect theory and practice.[185] A major problem with the preparatory service is its focus on training judges and administrators but not advocates.[186] Therefore, students must learn many needed skills for successful lawyering after the preparatory service, despite the fact that a part of the preparatory service is spent with a lawyer.[187] This practical education occurs after students go through four to five years of theoretical studies without any significant practical underpinnings. The reform in the seventies establishing the one phase legal education attempted an earlier integration of practice in the German legal education. This model streamlined German legal education by establishing intervals of theoretical and practical legal education.[188] However, the gains of the inclusion of social science and the integration of practice and theory carried the price of a further loss of the university's autonomy and ideals of freedom of teaching and learning.[189] The integration of both social sciences and practice in the university studies cannot be achieved without extensive governmental regulations and without a departure from academic freedoms akin to a

183. Spiegel suggests that the "unitary nature of theory and practice" is reflected in all parts of legal education and that the "conception of theory and practice can be broadened" would lead to a possible new organization of legal education. Spiegel, *supra* note 148, at 610.

184. "The life of the law has not been logic: it has been experience." HOLMES, *supra* note 71, at 1. Holmes did not have the practical training of lawyers in mind when he wrote this statement, but it reflects a fundamental concern that an adequate understanding of law must include practical experience.

185. *See, e.g.*, JAPRO Baden-Württemberg § 33;]§§ A V-VI, B I & V Regulation (October 15, 1987) to JAPRO § 33 (by the Attorney General).

186. *See generally* K.-H. Koch, *Überlegungen zur Reform der Juristenausbildung,* ZRP 44 (1990) (suggesting different preparatory services organized by the bar, administration, and courts which would also administer an exam at the end of the preparatory service); Hein Kötz, *Glanz und Elend der juristischen Einheitsausbildung,* ZRP 94 (1980) (same); Stefan Pieper, *Leid und Elend der Referendarszeit,* ZRP 201 (1989) (describing the current problems of the preparatory service). For an older critical evaluation of the German model in English, see Llewellyn, *supra* note 59, at 657.

187. Germany allevates five of the thirty months of preparatory service to the lawyer station. *See* § 30 (1) JAPRO Baden-Württemberg.

188. *See* Weber, *supra* note 43, at 680.

189. *See* Hassemer & Kübler, *supra* note 3, at E83.

university.

Even without dismantling the two phase legal education, schools could integrate theory and practice at an earlier time of the legal education. Legal clinics accompanied by classes that are attuned to the clinics are a good example of an earlier integration of practice that preserves without governmental regulations.[190] In legal clinics, practical experience guides the understanding of law and legal theories.

However, the basic idea of a guided beginning in practice after the successful completion of legal studies at law school remains important. The focus changes: instead of academic studies of law underpinned by practical education, classes underpin practice. Additionally, legal clinics cannot bring the students into all the different fields in which lawyers work because of the limited resources of a university or law school. A mandatory internship accompanied by classes, however, would reach all students. Working closely together with judges, government lawyers, lawyers in private or corporate practice, and prosecutors would enable the law graduate to see the whole picture of the legal system at work. Such internships could teach law graduates the skills of a practicing attorney.

Such an internship would also relieve law schools from the pressure to produce lawyers who are ready to practice law and who know all the dexterities of a practitioner. This would enable law schools to enjoy more the benefits of an academic institution: the teaching of concepts and theories of law and scholarly work to enhance the legal system with theories that explain the system and improve it.

Not only a few should have the privilege to intern with judges, especially if this privilege depends on grades achieved during the first year. Therefore, a mandatory internship theoretically ensures a better practical education for all students than the United States law schools can achieve with their more practical oriented legal eduction. The bar and law schools should organize a paid intern program or "residency" requirement exposing all students to different areas of practice and financially support it by higher income-based bar membership fees.[191] The

190. *See* Stephn F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 MINN. L. REV. 619, 627-28 (1991) (describing a coordination of traditional classroom teaching and clinical legal education in domestic abuse law and public interest law).

191. As long as some firms pay their summer associates up to $1600 per week, it seems that all law students/graduates could have access to appropriate practical experience. In 1990 the California Bar discussed a proposal to require practical experience for bar applicants. Rex Bossert, *Bar Considers Mandatory Clerkship*, L.A. DAILY J., March 21, 1990, at 7.

internship could start in the third year of law school, interrupted by enough time to prepare for the bar exam, and could continue until the results of the bar exam are sent out.[192]

An integration of theory and practice needs more than just the integration of both in legal education. As the clinical movement in the United States has shown, complete integration requires the equal acceptance of a clinical faculty. This issue reveals a problem present in all spheres of the society: the respect which one grants certain occupations over others. The practice of law is just as important as the further development of legal theories. One may be more talented in one field, but that does not justify giving a higher respect for the field. Therefore, the United States can only achieve a complete integration if it can overcome the perceived dichotomy of theory and practice and if all work in jurisprudence, practical or theoretical, is granted the same respect and rewards.

B. *Teaching and Scholarship*

The tension between teaching and scholarship often combines with the perceived dichotomy of theory and practice. Comparing German and United States legal education reveals the differences in the required qualifications of professors other than competency in his or her field. An understanding of the subject does not warrant the ability to teach or, using in the terms of Langdell, having once travelled the road does not make one a good guide.[193]

In Germany, tenure does not depend on the teaching qualities of a professor. The main focus is on his or her academic and scientific ability, thus the admittance to "the community of academic scholars" depends on the "scholarly ability and achievement."[194] Germany does not evaluate the teaching qualities of a professor as in the United States. In the United States, the tenure of a professor generally hinges upon the professor's teaching qualities and scholarly achievements. The emphasis on teaching quality emerges from the case and Socratic method. These methods require many more skills to be successfully applied, whereas a lecture itself does not necessarily require that much skill.[195] The compe-

192. Such an extension of legal education is less drastic than it appears because law graduates have to wait until they receive the results of the bar exam. In Massachusetts, law graduates who sat for the bar in July 1992 waited until the end of November to receive notice of their results.

193. LANGDELL, *supra* note 60, at 124.

194. Rheinstein, *supra* note 1, at 12.

195. REED, *supra* note 49, at 382.

tition between the law schools for the students as paying consumers also underlies the importance of teaching competency. However, in law schools with higher reputations, one can see a lesser emphasis on teaching competencies because the reputation of the law school is mostly built upon scholarship and not upon teaching compentencies.[196] These highly ranked law schools feed mostly to large law firms with the resources to provide practical training. Yet, the majority of law schools must find a compromise between teaching and scholarship.

Additionally, the idea of the German university as a scholarly institution where academic freedom consisting of freedom to teach and freedom to learn is very important despite or especially because of the governmental control partly explains the difference between the two systems.[197] This system puts a much higher responsibility on the individual student, since the institutions expect that the student acquire the necessary knowledge and do not require class attendance despite the requirement of passing exams.[198] Here again the United States law school reveals its basic character: a special mixture between an academic institution and a professional school.[199]

The stronger emphasis on teaching in the United States reveals more strongly the tension between scholarly work and teaching than in Germany. The question of time allocation and talents underlies this tension. Not everyone is gifted in both areas of teaching and scholarship. However, if the practice of law requires an understanding of concepts then teaching requires the development of concepts of law, thinking about them, and understanding them. Practitioners, academics, and scholars all must understand them. A formalistic separation between all three might help to explain specific facets of each perspective, but a separation which destroys the common link cannot be a goal. Such a formalistic separation forms the ground for a formalistic and abstract concept by scholars, and it results in casuistic and unsystematic law practiced by practitioners, which creates schizophrenic teachers because they must teach contradictory and incompatible theoretical law and law in practice. Thus, only the nurturing of the link can result in an synergetic effect.

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196. *See* Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 376 (1990) (discussing the impact of scholarship emphasis on classroom teaching).

197. Rheinstein, *supra* note 1, at 11, 13-14.

198. Depending on the university, seminars or special courses accompanying the lectures of the first semesters do require attendance. For a discussion freedom of learning as part of academic freedom, see Rheinstein, *supra* note 1, at 14.

199. David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109, 117 (1989).

VI. Conclusion

This comparison reveals the structural differences of the two legal education models in the United States and Germany. The word pairs "governmental" and "professional" controlled, "adjudicative" and "advocacy" model, and "interpretative" and "analytical" technique pinpoint those differences. These terms attempt to crystalize the structural differences of the German and the United States legal education systems. Both models are the result of a historical development and their structural differences cannot be understood without knowledge of their backgrounds.

However, the study also shows similarities. Legal studies on both sides require a prior liberal arts education, indicating the idea that the quality of a jurist correlates to his or her general education. In both countries discussions abound about the integration of theory and practice. Clinical legal education with parallel classes in the underlying substantive law provide a good model for the integration of theory and practice. Yet, the question remains how to ensure that all law graduates have practical experience and still preserve the law school as an academic institution with its academic freedoms. Only a kind of residency requirement that exposes all law students to experience the various areas of legal practice can ensure that all law graduates have the necessary practical skills.