BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Carol Harlow. *Compensation and Government Torts.* London: Sweet & Maxwell, 1982. Pp. xv, 173 [$29.00 cloth; $17.75 paper]. Reviewed by David K. Allen.*

This book, one of the Modern Legal Studies series, examines the difficult and often delicate problems raised by the issue of the nature and extent of government liability to the citizen. As Dr. Harlow indicates at the outset, more is involved than simply traditional tort law.[1] Much has changed since the days when the King could do no wrong and the only effective recourse open to the injured citizen was to proceed against the individual Crown servant, usually a fruitless exercise. Prior to the enactment of the *Crown Proceedings Act, 1947*,[2] whereby the Crown was rendered liable for the torts of its servants, it was argued that the Crown should be governed by the same rules as its subjects; more recently, as the Welfare State has extended the scope of its activity, the plea has been made that as the law of torts is incapable of controlling the juggernaut, special rules of government liability are necessary.

Dr. Harlow rightly takes time to consider the extent to which the law of torts is actually or potentially capable of meeting the challenge posed by the extension of state involvement in the life of the individual citizen. We live increasingly in an age of public law; are private law rules capable of solving the problems raised by cases where loss has been suffered allegedly as a consequence of government action or inaction; indeed, are such rules appropriate to the resolution of these problems?

Dr. Harlow provides a clear analysis of the limitations of the law of negligence, and the near-Byzantine complexities of applying negligence principles to the exercise of discretionary powers, as exemplified in *Anns* v. *Merton L.B.C.*.[3] She also canvasses the extent to which the common law is capable of developing or extending existing principles to meet the problems posed by cases such as *Hammersmith Railway* v. *Brand*[4] and *Dunlop* v. *Woollahra Municipal Council.*[5] It is argued that abuse of rights, breach of

*Of the Faculty of Law, University of Leicester.

[1]C. Harlow, *Compensation and Government Torts* (1982).

[2]10 & 11 Geo. 6, c. 44.

[3][1978] A.C. 728, [1977] 2 All E.R. 492.

[4](1869) L.R. 4 H.L. 171, [1861-73] All E.R. Rep. 60.

[5][1981] 2 W.L.R. 693, [1981] 1 All E.R. 1202.

statutory duty and the risk principle all have to varying degrees, the potential to fill existing gaps. Dr. Harlow recognizes the limits on the operation of the abuse of rights doctrine, given the discretion that would still be available to the court, and the likelihood of a subjective test of malice and suggests that it would be unwise to expect the doctrine to be relied upon. Breach of statutory duty, however, despite the extremely uneven treatment it has received at the hands of the courts, appears to have a greater potential as a cause of action. To bring this potential to fruition would require making considerable demands upon judicial creativity. At least a likely consequence of activism by the courts in this area though would be to persuade the Legislature to provide expressly whether or not civil liability ensues following breach of a duty under the statute. As Dr. Harlow indicates, risk, as a basis of liability, is likely to result from statutory rather than case law development; fault is too firmly secured in our civil law to be replaced at this stage. The effective demise of *Rylands* v. *Fletcher*[6] liability underlines this point.

A particularly interesting section of the book considers the possibility of creating special rules of administrative liability in tort to cover those cases where a plaintiff goes uncompensated because existing rules of tort do not provide for damages. In a typical case a planning decision is implemented and later discovered to be *ultra vires*. If the decision has already been acted upon, and the building constructed, quashing the decision would be useless as a remedy since the court would be disinclined to order the demolition of the building. Damages are surely the only acceptable remedy in such a case, but Dr. Harlow indicates a number of difficulties that would hinder an attempt to frame an appropriate cause of action on these facts. Frequently, the wrong lies in a procedural defect which, if corrected, does not bar a statutory authority from reaching an identical decision following a procedurally correct re-hearing. What is the loss in such a case? Clearly, any test which requires the administrative act to be the cause of the loss will run into difficulties. Also, if a criterion for recovery is that the administrative act be unlawful, what would follow if the decision were characterised as merely voidable? This problem is exemplified all too clearly in *Hoffman-La Roche* v. *Secretary of State for Trade and Industry*.[7] The drafting difficulties here are formidable, quite apart from the question of whether this is the best mode of compensating the citizen.

In her discussion of the capacity of the common law to develop and meet the problem of the uncompensated citizen, Dr. Harlow is careful to leave open the question of whether the law of torts is the appropriate means

[6](1868) L.R. 3 H.L. 330, [1861-73] All E.R. Rep. 1.

[7]*Hoffmann-LaRoche* v. *Secretary of State for Trade and Industry* [1974] 3 W.L.R. 104, [1974] 2 All E.R. 1128.

of devising a solution. For an important theme of this book is the decline of tort as a means of compensation for loss or damage resulting from administrative action. In part this decline has occurred because in so many instances the state has taken upon itself the responsibility of providing compensation where the common law does not impose liability;[8] in part because of *damnum sine injuria* cases where the common law cannot or will not impose liability and the state has not intervened; in part because the mechanism of the tort system is simply not equipped to cope — indeed the machinery of the judicial process is not equipped to cope — with the problem of compensation. Dr. Harlow does not regard the role of the courts as being played out. She sees them as forming part of a mixed system, with the bulk of their work consisting in the interpretation of the many statutes governing different compensation schemes regulating most cases of government liability.

Dr. Harlow is equally at home in her discussion of administrative practices and in her skillful analysis of case law and statute. Her exposition of the historical development of government tort liability is lucid and thoughtful. Her abilities as a comparative lawyer are also clearly displayed, for example, in the discussion of the restricted applicability of the *Couitéas* and *La Fleurette* decisions within their own jurisdiction and her analysis of the potential of "l'égalité devant les charges publiques" in the common law.[9]

Professor Harlow takes a realistic view of the difficult problems raised by the question of compensation for unlawful government action. Rather than bemoan the fact that the tort system is ill-equipped to cope with many of these cases, she rightly prefers to examine the available alternative mechanisms, criminal injuries compensation schemes and *ex gratia* payments; she describes their powers and procedures and makes recommendations for their more efficient operation. While not neglecting the importance of judicial review and tort law, this important book emphasizes that the nature of the game is changing. Public and private lawyers alike must be alert to adapt to these changes.

---

[8]For example, in the area of criminal injuries compensation.

[9]*Supra*, note 1, 102-7.

Michael Jackson. *Prisoners of Isolation* [:] *Solitary Confinement in Canada.* Toronto: University of Toronto Press, 1983. Pp. xii, 330 [$35.00 cloth; $12.50 paper]. Reviewed by Stephen Fineberg.*

Prisoners of Isolation is the first book on Canadian prison law to appear since John Conroy's groundbreaking reference work of 1980.[1] Both publications grew out of their authors' pioneering labours in British Columbia, and it is interesting to note how differently they have treated their common subject and commitment. Mr. Conroy's invaluable two volume loose-leaf edition with update service was intended to provide persons already active in prison law with a research tool covering all aspects of the field.

Professor Jackson has, by contrast, woven legal analysis and less technical materials into a general text, wherein lies the thread of the argument, while a wealth of supplementary Canadian, British, American, and international jurisprudence and doctrine is explored in the footnotes. This felicitous organization invites the attention of several other disciplines as well as the legal; nor has the concerned non-academic reader been excluded. The transparent intention is to galvanize potential legal and lay recruits.

If Professor Jackson's approach is broader in appeal than that of the earlier work, it is narrower in another respect. He arrives at prison law through his preoccupation with the "principles and processes that have been designed, primarily by lawyers, to protect the individual against the abuse of state power."[2] That same concern explains the specific focus on solitary confinement: "as the ultimate exercise of state authority over a prisoner, it can be seen as a litmus test of the morality and legitimacy of the state's dealings with prisoners in lesser exercises of authority."[3] Accordingly, such 'lesser exercises' as the practice of gating and the denial of legal counsel before a disciplinary tribunal are touched on only incidentally, while hotly-contested issues such as double-bunking, arbitrary transfers, parole, medical care, access to education and training, protection against arbitrary punishment, sentence calculation and the right to vote are not broached at all.

A second and perhaps less intentional limitation on the book's scope is the imbalance of testimony in favour of the west coast. The distinctive features of most other regions are entirely overlooked. As for Quebec, we are informed in a passing observation that the national headquarters of the Correctional Service, desirous of implementing policy in its super-maximum

*LL.B., B.C.L., McGill University.

[1]J. Conroy, *Canadian Prison Law* (1980). For a review of this book, see Buchanan, (1981) 27 McGill L.J. 129.

[2]M. Jackson, *Prisoners of Isolation* [:] *Solitary Confinement in Canada* (1983) ix.

[3]*Supra*, note 2, 3.

establishment at Laval, was "putting pressure" on the prison's administration in 1980.[4] This oblique reference is the book's only hint at the stubborn independence of Quebec's federal wardens and their special brand of institutional lawlessness. Nor does the brief comparison of solitary confinement in the British Columbia Penitentiary and the super-maximum establishment at Laval complete the picture of the peculiar hardships of Quebec's federal prisoners.[5]

One notices also that the text is based at all times on the experience of male prisoners, while the special problems of Canada's more than 200 female federal prisoners[6] are ignored. Finally, the reader is reminded that the provincial prison systems are not studied here.

The practice of solitary confinement, also known as segregation or 'the hole' within the prison walls, is divided by Canada's Penitentiary Service Regulations into 'punitive dissociation'[7] and 'non-punitive dissociation'.[8] The latter is composed of two categories: protective custody, which is almost always requested by the prisoner in question, and administrative segregation, which is imposed by the institutional head under section 40 of the Regulations "for the maintenance of good order and discipline in the institution." It is this second category of isolation, conferring on the penitentiary wardens "virtually untrammelled discretion over the lives of prisoners," that occupies Professor Jackson's attention.[9]

The subject is rendered in historical terms. In search of the precursors of contemporary practice, we are taken back to the San Michele House of Correction, commissioned by Pope Clement XI in 1703, and other early penal institutions on the Continent. The English and American experience of the eighteenth and nineteenth centuries is then explored and particular attention is given to the prison regime developed at Auburn, New York, which, together with the English Penitentiary Act of 1779, served as a model for Canada's first Penitentiary Act in 1834 and the organisation of Kingston Penitentiary in 1835.

In 1894 we encounter for the first time the modern conception of administrative segregation. In that year a new wing known as the Prison of Isolation was opened at Kingston Penitentiary. Its regime was not intended

---

[4]*Supra*, note 2, 180.

[5]*Supra*, note 2, 178 *et seq.*

[6]Correctional Services of Canada, *Female Population Profile Report* (1983).

[7]*Penitentiary Service Regulations*, 13 C.R.C. 1978, c. 1251, s. 38.

[8]*Penitentiary Service Regulations*, 13 C.R.C. 1978, c. 1251, s. 40.

[9]*Supra*, note 2, 44. For further explanation of Professor Jackson's thoughts on punitive segregation, see Jackson, *Justice Behind the Walls — A Study of the Disciplinary Process in a Canadian Penitentiary* (1974) 12 Osgoode Hall L.J. 1.

to mold the general population, nor was it designed as punishment for specific infractions of the institutional rules. Closely foreshadowing section 40 of the current Penitentiary Service Regulations, the governing Regulation ordained that "any male convict whose conduct is found to be vicious, or who persists in disobedience. . .or who is found to exercise a pernicious influence" may be segregated "for an indefinite period."[10] Curiously, Professor Jackson neglects to explain this transition to modern practice, stating merely that between 1888, when the Prison of Isolation was conceived on an earlier model, and 1894, the original understanding of its function "had undergone revision."[11] Similarly, the author fails to explain how this regime spread to other institutions. The text supplies the superintendent of penitentiaries' claim in 1933 that solitary confinement no longer existed in Canada and then jumps ahead to the modern "Age of Corrections," in which every federal establishment has its "hole" and the authority to dissociate on administrative grounds.[12]

If this history of solitary confinement (and incidentally, the rise of the prisoners' rights movement)[13] admits certain gaps, the overall impression is one of careful scholarship. All the pertinent literature has been digested and invoked. One must furthermore applaud Professor Jackson's method of viewing judicial and legislative utterances against the moving backdrop of developing juridical trends. In assessing the Federal Court's decision in the *McCann*[14] trial, for example, Mr Justice Heald's "clear judicial reluctance to become involved in the ongoing review of prison decision-making" is situated and understood within the context of the Federal Court of Appeal's "hands-off approach" of the period.[15] The plaintiffs' notion of a flexible "fairness" doctrine, ignored in 1975, went on to find acceptance at a more propitious moment in the Supreme Court decision in *Martineau (No. 2)*.[16]

Professor Jackson takes his analysis of developing trends to its logical conclusion by attempting to indicate the arguments which will succeed in future prison litigation, particularly with reference to the *Canadian Charter of Rights and Freedoms*.[17] This aspect of his book of course will require

---

[10]*Supra*, note 2, 37.

[11]*Ibid.*

[12]*Supra*, note 2, 42 *et seq.*

[13]See, for example, *supra*, note 2, 16 and 82-3.

[14]*McCann* v. *The Queen* [1976] 29 C.C.C. (2d) 337.

[15]*Supra*, note 2, 125.

[16]*Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* [1980] 1 S.C.R. 602. Referred to in Jackson, *supra*, note 2, 124 *et seq.*

[17]Part I of Schedule B, *Canada Act 1982*, 1982 c.11 (U.K.). *Supra*, note 2, 81 *et seq.*, 277, fn. 20, 293-4, fn. 183.

constant re-evaluation in the light of the rapidly accumulating body of *Charter* jurisprudence.

Prisoners of Isolation is built around the circumstances, arguments and judgment of the *McCann*[18] case, which has been called "undoubtedly the most ambitious prisoners' rights action ever brought in Canada."[19] *McCann* sends tentacles throughout the text: from Charles Dickens' 1842 denunciation of solitary confinement, cited by the plaintiffs in 1975,[20] to the future litigation of section 12 of the *Charter*,[21] where the plaintiffs' arguments, according to Jackson, "will provide a surer guide to a principled approach to the limits of carceral authority."[22] The author is writing from a special vantage point, having played a key role in the *McCann* case, and it is the reader who benefits. We witness the full gestation of a Federal Court decision, from the plaintiffs' initial contact with Professor Jackson, through the elaboration of courtroom strategy and the presentation of legal arguments, to Justice Heald's reasons for judgment. The first-hand nature of the account lends an air of immediacy to the text, at times even a note of high drama: "[t]he day before the trial started [one of the plaintiffs] . . . escaped when he arrived at Vancouver Airport. He was still at large when the Court convened the next day."[23]

The Court in *McCann* declared the conditions of confinement in the British Columbia Penitentiary's Special Correctional Unit to be cruel and unusual punishment or treatment within the meaning of section 2(b) of the *Canadian Bill of Rights*.[24] A year later that unit exhibited "virtually the same inhumanity and gratuitous cruelty that had existed before the trial."[25] The Solicitor-General's Department, in fact, proceeded to endorse and advance the cause of administrative segregation by establishing Special Handling Units at Kingston and Laval. Professor Jackson, in what is surely the most thorough account of the SHUs that has been put before the public, discredits the programme's objectives, decision-making process, conditions of confinement and term of detention. The carefully reasoned attack is buttressed by an effective use of direct testimony from SHU inmates whose comments reveal a striking eloquence and understandable sincerity. The entire discussion takes on new urgency in 1984 as the construction of three SHUs destined to replace and expand current facilities nears completion.

---

[18]*Supra*, note 14.

[19]Price, *Doing Justice to Corrections? Prisoners Parolees and the Canadian Courts* (1977) 3 Queen's L.J. 214, 279.

[20]*Supra*, note 2, 20.

[21]Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[22]*Supra*, note 2, 106.

[23]*Supra*, note 2, 47.

[24]R.S.C. 1970, App. III.

[25]*Supra*, note 2, 144.

The solution recommended for the present law and practice of segregation remains the most controversial aspect of this book. The appendix reproduces the author's proposal for a code embodying the premise that administrative segregation "is not designed for any end except limited preventive detention."[26] In effect, the Model Segregation Code seeks to specify reasonable and limiting criteria for the use of segregation, establish strict standards of procedural fairness for decisions regarding segregation, and impose minimum conditions of confinement based largely on the American Correctional Association's *Manual of Standards*, the whole to be set out in regulations rather than commissioner's directives so that "the legal profession and the courts will play a vital role in seeing that the code is enforced".[27] One important innovation would be the establishment of a maximum term for dissociation.[28] The substitution of this regime for the style of segregation now practised, it is argued, would likely render the experience considerably less repressive, and would certainly eliminate the open-ended quality of the detention.[29]

Professor Jackson's capacity to move beyond denunciation and draft a regulatory instrument worked out in all its detail bespeaks an intimate knowledge of the prison milieu and a pragmatic attitude toward a most difficult problem. The major objection his proposal invites is one he has tried to anticipate: "having documented the history and nature of the state's ultimate carceral power and having sought to demonstrate its illegitimacy, [it is suggested] I should lend the weight of this book to the prison-abolition movement. ... Yet I have resisted the attractions of the abolitionist stance because it offers little consolation or hope to those now experiencing the most extreme of the pains of imprisonment." Professor Jackson adds that this plea for immediate reform must "not be interpreted as diminishing the need for Canadian society to give the most serious reconsideration to the future of imprisonment."[30] The author, then, does not deny the wisdom of abolition so much as put it aside for his present purposes, handing the abolition movement a missed opportunity. Yet the awful litany of flagrant illegality, needless brutality and useless destruction seems to take on a life of its own, and one wonders if the momentum of the book's damning evidence has not overtaken its conclusions.

One of the central questions debated in *Prisoners of Isolation* is the effectiveness of judicial intervention within the prison walls. An examination is made of the expanding literature which evaluates the enforcement

---

[26]*Supra*, note 2, 230.
[27]*Supra*, note 2, 239.
[28]*Supra*, note 2, 224-5.
[29]*Supra*, note 2, 226.
[30]*Supra*, note 2, 205-6.

of judicial decrees in the United States, where the courts have been more active in applying the rule of law to carceral situations than in Canada.[31] One finds that the implementatin of hard-won decisions depends largely on the good faith of prison administrators: "Court decisions do not enforce themselves. . . .There are limits to the capacity of the Courts to police decision-making inside the prison".[32]

The same is true in Canada. Professor Jackson admits believing initially that the *McCann* decision would be implemented in the British Columbia Penitentiary, an opinion he was later forced to relinquish.[33] The plaintiffs, prepared by a different experience, "had no illusions as to what would really change inside the walls when the lawyers, the judge, and the press went home."[34] Conditions in the segregation unit of British Columbia's new Kent Penitentiary at the time of the June, 1981, riot served as a reminder that *McCann* still was not being applied.

Yet the role of prisoners' rights litigation in the slow process of forging and mobilizing public opinion, influencing local and national correctional administrators, and militating for legislative change must not be ignored. The *McCann* trial became a movement, inspiring community groups and artists, contributing to the creation of a Citizen Advisory Committee to the British Columbia Penitentiary (performing the function of outside inspection advocated by John Howard 200 years earlier),[35] and lending its moral and legal authority to the government's decision in 1980 to close that prison forever.[36] The 'ripple effect' of *McCann* is still felt, most recently in the writing and publication of *Prisoners of Isolation*, and the force of this remarkable book is such that one suspects the federal authorities will be answering to its readers before long.

---

[31]*Supra*, note 2, 82 *et seq.*, 297-8, fn. 22.

[32]J. Jacobs, *Stateville*[:] *The Penitentiary in Mass Society* (1977) 113-18. Referred to in Jackson, *supra*, note 2, 145.

[33]*Supra*, note 2, 226.

[34]*Supra*, note 2, 144.

[35]*Supra*, note 2, 12.

[36]*Supra*, note 2, 145-6.

Robert Stevens. *Law School*[:] *Legal Education in America from the 1850s to the 1980s:* Chapel Hill: University of North Carolina Press, 1983. Pp. xvi, 334 [$19.95]. Reviewed by Eric Tucker.*

The direction and purpose of legal education and legal scholarship, the two central activities of the modern law school, are once again being subjected to intensive scrutiny in both Canada[1] and the United States.[2] What is the proper balance between the professional and academic components of legal education? Should law schools focus on the teaching of analytic and technical skills or should they define their goals more academically and teach students to think about the social function of law and its intellectual foundations? Is there a contradiction between these objectives? Can they be pursued simultaneously in a homogeneous program? What educational techniques are appropriate for realizing the goals of legal education however defined? And what about the full-time law teacher? Is she a Hessian trainer[3] of proto-professionals or a serious scholar committed to critical research? Is it appropriate for members of the "community of scholars" to spend a preponderance of their time devoted to the preparation of teaching materials and the production of texts and law review articles that do "the housekeeping of the law, trying to keep track of decisions and to make sense of them"[4] for students and practitioners? These questions have been asked since...well,

*Of the Faculty of Law, Osgoode Hall Law School.

[1]The recent report by the Consultative Group on Research and Education in Law, *Law and Learning*[:] *Report to the Social Sciences and Humanities Research Council of Canada* (1983), is evidence of this concern and is likely to generate active discussion of structural reform to the law school in Faculties across the country. Canadian law students held a conference on legal education at Osgoode Hall Law School in March, 1983. A book of essays on legal education was recently published. See N. Gold, *Essays on Legal Education* (1982). See also Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching* (1983) 33 U.T.L.J. 279.

[2]For recent indications of renewed concern see *Symposium on Legal Scholarship: Its Nature and Purposes* (1981) 90 Yale L.J. 955; D. Margolick, *The Trouble with American Law Schools* New York Times Magazine (30 May 1983) 20; *Symposium: The Law Curriculum in the 1980's* (1982) 32 J. of Leg. Ed. 315. Also see the *Report of the Committee on Educational Planning and Development* (1982) on curriculum reform for the Harvard Law School.

[3]The phrase is from Bergin, *The Law Teacher: A Man Divided Against Himself* (1968) 54 Va L. Rev. 646.

[4]Reisman, *The Law School: Critical Scholarship vs Professional Education* (1982) 32 J. of Leg. Ed. 110, 115.

as Stevens convincingly demonstrates, at least since the inception of institutional legal education in the United States.

Stevens has traced for us in great detail the development of legal education in the United States. Unlike many institutional studies of individual law schools which celebrate the triumph of the three year, university-affiliated law school and the case method over its competitors,[5] Stevens is concerned with the economic, political and social forces which shaped the development of the legal profession and the distribution of legal services. He is interested in exploring the dynamic relationship between the role of the law profession in American society and the institutional arrangements for training its members. These concerns are developed in two major and closely interwoven themes in Stevens' book. The first theme is the rise to dominance of the university-affiliated, professionally accredited law school as the primary institutional arrangement for training lawyers. The second theme is the internal life of law schools, and in particular, the direction of legal education and its relationship to the professional identity and scholarly pursuits of the full-time law teacher.

Stevens' first theme, the rise of the university-affiliated law school, is of interest both because of the approach he adopts in explaining why one model of legal education succeeded in eliminating its competitors, and because the contours of that development are so different from those of our own history; this serves as a reminder to the historian of the importance of paying careful attention to the distinctive conditions of Canadian life when seeking to explain local developments. Thus it is useful to begin by outlining the historical development of legal education in the United States and briefly contrasting it with developments in Ontario.

In the post-Revolutionary War era almost all of the original thirteen states required some period of formal apprenticeship for admission to the bar.[6] Apprenticeship requirements were also imposed in Upper Canada in

[5]For a critique of these institutional studies see Konefsky & Schlegel, *Mirror, Mirror On the Wall: Histories of American Law Schools* (1982) 95 Harv. L. Rev. 833. Also see J. Willis, *A History of Dalhousie Law School* (1979) 12. Unfortunately, Willis shares many of the defects identified by the authors. He notes, "from the beginning the School knew what it was trying to do and has to this day continued to do so." It is a history in which external adversity is continuously overcome as the School moves inexorably towards the realization of its founder's ideals, the Weldon tradition. The self-congratulatory tone of the book is at times embarrassing. Commenting on the impact of the rapid growth of the student population and the rise of student activism in the 1960's Willis notes, "what Benny Russel said in 1914 is as true today as it ever was: 'During the whole history of the law school... there has never been a single instance of friction or misunderstanding between faculty and students' ".

[6]R. Stevens, *Law School*[:] *Legal Education in American from the 1850s to the 1980s* (1983) 3.

the late eighteenth century.[7] However, unlike Upper Canada, where the Law Society was granted a statutory monopoly and exercised direct control over all aspects of legal training until the 1950's,[8] private and college-affiliated schools soon appeared in the United States to satisfy a demand for legal education that went beyond what could be provided by office training.[9] Notwithstanding the different political conditions and institutional arrangements for training lawyers in the United States and Upper Canada, the legal profession was seen in both jurisdictions as an emerging elite destined to play an important leadership function, especially given the relatively weak competition from more traditional social and political elites.[10]

Although these initial differences in educational arrangements for training lawyers would have led, by themselves, to markedly different paths of development, it was the rise of Jacksonian democracy in the United States which assured that such would be the case. The anti-elitist thrust of the movement directly challenged the view that lawyers, or any other group for that matter, should be allowed to constitute themselves as an elite. As a result, formal requirements of any kind for admission to the bar came under attack and were abolished or reduced in many states. Bar associations were disbanded and the movement to make the judiciary subject to election achieved significant success.[11] In such an environment, institutional legal education was bound to and did suffer as law schools came — but mostly went — with great rapidity. These early conflicts set the agenda for the politics of legal education that was to dominate American developments for the next century.

In contrast, legal education in Upper Canada appears to have remained relatively free of such conflict and was characterized by the stability and

[7]See Baker, *Legal Education in Upper Canada 1785-1889: The Law Society as Educator* in D. Flaherty, ed., *Essays in the History of Canadian Law* (1983), vol. 2, 49, 68 and 79.

[8]University-affiliated law schools did not play a significant role in Ontario until the departure of C.A. Wright and most of the full-time Faculty of Osgoode Hall, then run by the Law Society, to join the Law Faculty at the University of Toronto in 1949. For a discussion see Bucknell, Baldwin & Lakin, *Pendants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957* (1968) 6 Osgoode Hall L.J. 139, 207-83.

[9]Litchfield Law School, the most prominent antebellum private institution, was founded in 1784. The first professor of law, George Wythe, was appointed at William and Mary in 1779. Stevens, *supra*, note 6, 3-4.

[10]Baker, *supra*, note 7, 55-8 argues convincingly that the Benchers of the Law Society were consciously seeking to build a local elite with an appropriate outlook. Stevens, *supra*, note 6, 3-7, argues that the status of lawyers in general was enhanced in the antebellum period and that the educational ambitions of the better law schools reflected a desire to provide a broad liberal education which would be appropriate for such an elite.

[11]Stevens, *supra*, note 6, 7-10. It must be noted that Stevens is wary of drawing any general conclusions with respect to the impact of Jacksonian Democracy on the legal profession. For example, he notes that geographic factors such as the Frontier played a role and that in important centers, such as Boston, leading lawyers retained their powerful positions and prestige.

continuity of its institutional arrangements.[12] Although there were complaints when barriers to entry to the bar were raised in the 1850's,[13] the control of the Law Society was not diminished. The politics of legal education in nineteenth-century Ontario were dominated by regional tensions, not populist ferment.[14]

Stevens links the revival of institutionalized legal education in the 1850's with a booming demand for legal services and the economic and social restructuring of the country. As American industry developed and business firms expanded, they required more specialized services which came to be provided by a new type of law firm catering to these corporate needs. Further, the members of a growing middle-class saw occupational professionalization as a means of creating a more structured environment in which to realize their aspirations of upward mobility.[15] Both of these concerns created an environment favourable to the raising of standards for entry into the practice of law, and one way to raise standards was to require that new entrants successfully complete a university course of legal studies. But this was not the only way of raising standards, and institutionalized legal education could take on many forms other than university-affiliated law schools. The fact that even by 1922 not one state required attendance at a law school for admission to the bar[16] attests to the difficulties that were encountered in the movement to entrench such institutional training requirements. Formal apprenticeship and bar examinations remained the most common instruments for tightening admission to the bar. Ironically, the raising of entry requirements did create a demand for more formal training which law schools rushed to meet, despite the absence of a law school attendance requirement for admission to the bar. Further, attendance at law school enhanced one's professional status and provided a pathway for entry into the upper echelons of an increasingly stratified profession.

Stevens traces the resurgence of *academic* law school training to the Langdellian revolution at Harvard in the last three decades of the nineteenth century. By emphasizing that the law was not a hodge-podge of procedures and *ad hoc* precedents, but rather a set of "scientific" principles which could be discovered from the study of cases, Landgell provided a conceptual framework upon which the academic study of law could be based. It was this characterization of the law as a science that supported the claim that its study was an intellectual endeavour appropriate for university education[17]

[12]Baker, *supra.*, note 7, 52-5.
[13]*Ibid.*, 57.
[14]*Ibid.*
[15]Stevens, *supra*, note 6, 20-3.
[16]*Ibid.*, 172.
[17]*Ibid.*, 36-9.

and led to the creation of a new division in the legal profession between practitioners and academics. If law was to be taught as a scientific system of principles, it would best be done by those who were engaged full-time in its study rather than by practitioners who were only expert in using the law. The paradigm of the law as scientific also lent support to the legal elite's characterization of law as an intellectual profession, which in turn provided a respectable justification for the demand that entry requirements be stiffened in order to upgrade its members.

However, at the same time that academic law schools were reviving, full and part-time proprietary law schools were also flourishing as increasing number of students from minority, immigrant and lower socio-economic backgrounds sought entry into the legal profession as an avenue for upward mobility. This was an unwelcomed development for the academic law schools and elite corporate law firms who recruited from them. The proprietary schools were viewed by the academic law schools as unwanted competition which they sought to eliminate.[18] As for the legal elite, Stevens explains their opposition to these schools as motivated by genuine concerns about the quality of professional services offered to the public, a desire to control competition by restricting entry, and last, but certainly not least, prejudice against Jews, blacks and immigrants.[19] Notwithstanding the confluence of interest between academic law schools and elite lawyers, their initial attempts to control the market for legal education by raising standards met with little success. Not only did they experience difficulty in co-ordinating their efforts, they also lacked the support of politically influential local and state bar associations which tended to be dominated by solo practitioners, who, at least prior to the Depression, were less concerned with restricting access.[20]

Although both the American Bar Association (ABA) and the Association of Americal Law Schools (AALS) continuously raised their standards for accreditation of law schools from the 1920's onwards, they were unable to eliminate the competition. The turning point came with the Depression, which generated greater concern with "overcrowding" at the local, non-elite level of the profession. The raising of educational requirements was considered an appropriate way of restricting entry, and states increasingly required law school training at ABA-approved schools. The result was predictable. Full and part-time proprietary schools declined and access to legal education and entry into the legal profession increasingly moved out of the reach of

[18]*Ibid.*, 98.
[19]*Ibid.*, 99-103.
[20]*Ibid.*, 96-8, 176-8.

minorities.[21] In the post-World War II era, the ABA-accredited schools consolidated their virtual monopoly over university affiliated legal education. An undergraduate degree followed by a three-year law degree from an accredited school became the normal educational requirement for admission to the bar.

Legal education in Ontario developed along quite different lines and in response to very different pressures. The Law Society retained a continuous monopoly until the middle of the twentieth century over all aspects of legal education, including formal institutional training which was conducted under its auspices in its own law school, Osgoode Hall.[22] Early efforts to establish university-affiliated law schools were motivated by regional forces favouring decentralization and by pressures from the fledgling universities rather than a desire to further restrict entry into the profession.[23] Although it has been argued that access to the legal profession was relatively open in Ontario prior to 1850,[24] compared to the United States during the same period, access was far more restricted; and because of the Law Society's monopoly, further restrictions could more easily be imposed directly by the Law Society by raising admissions requirements to its own programs rather than by delegating educational responsibility to universities. To the extent that there were forces opposed to elitism and restricted access, they were not able to generate enough of a critical mass to attract the politics of legal education to revolve around their concerns.

Indeed, when the Law Society ultimately relinquished its control of legal education to the universities, it was not done as an attempt to restrict access. The initial break occurred as the result of an internal dispute at the Law Society's own school between the full-time faculty and the profession over the control and direction of legal education which led to the establishment of a rival faculty of law at the University of Toronto.[25] Even more significantly, however, the decision of the Law Society to recognize university legal studies in 1957 and subsequently to negotiate the affiliation of its own law school, Osgoode Hall, with York University in 1968 were, to a great extent, motivated by the recognition that they no longer possessed the capacity to accommodate the rising number of students seeking entry into a legal profession which was rapidly growing after World War II.[26] Thus,

---

[21] *Ibid.*, 195.

[22] For a history of the establishment of Osgoode Hall Law School by the Law Society, see Baker, *supra*, note 7, 91-112; Bucknall, *supra*, note 8, 140-9.

[23] See Baker, *ibid.*, 52, 106-9.

[24] *Ibid.*, 57.

[25] See Bucknall, *supra*, note 8, 207-21.

[26] For brief accounts of this process see Bucknall, *supra*, note 8, 226-9; *Law and Learning, supra*, note 1, 12-5; and Arthurs, *The Affiliation of Osgoode Hall Law School with York University* (1967) 17 U. of T.L.J. 194, 197.

the modern American university-affiliated law school influenced the development of legal education in Canada only insofar as it provided an attractive model to law teachers who chaffed under direct professional control, and to a profession that felt overwhelmed by the influx of students.[27] However, as we shall see, this American heritage had embedded in it the seeds of the present discontent with legal education.

This brings us to the second theme of Stevens' book, the internal life of the law school and the professional identity of the full-time law teacher. Both of these concerns will be of particular interest to Canadians, in light of the recent publication of *Law and Learning*, a critical study of the present state of legal education and research in Canada.[28] Both Stevens and the authors of *Law and Learning* identify a dialectical tension in university-affiliated legal education between professional training, which emphasizes doctrine and lawyering skills, and academic study, which examines the intellectual foundations and social functions of law. Apparently, this tension was present even in the earliest attempts in the United States to teach law in college affiliated schools. Steven notes:

> The truth, however, is that the overall efforts by the colleges to develop law as a scholarly study were not a success. ... In a very real sense the dichotomy between the teaching of law as a liberal and liberating study and the teaching of law as a technical and professional study was already established.[29]

Of course, so long as legal education remained predominantly outside a university environment, as it did in the United States throughout the nineteenth century and a good deal of the twentieth, and in Ontario until the 1950's, professional training was the dominant goal. Yet for those who taught in university-affiliated law schools and for those who advocated mandatory attendance at such schools, their legitimacy, in part, depended on their ability to establish the appropriateness of legal education for university study.

---

[27]Although the number of law students has increased rapidly at Canadian law faculties from 2896 in 1962-63 to over 9000 in 1980-81 (see *Law and Learning, supra*, note 1, 25-9), the question of whether, from a socio-economic point of view, access has been broadened, remains unanswered. A study of the entering class at Osgoode Hall Law School for the 1971-72 year revealed that the mean income of the families of entering law students was $14,350 at a time when the mean for the entire population was between $5,500 and $6,500. Indeed, one out of four students came from families that earned over $25,000. See M. Levy, *Attitudes of the Most Likely To Succeed* (1972) [unpublished, on file in Osgoode Hall Law School Library]. More empirical research needs to be done before firm conclusions can be drawn, but the overall impression is that entry to legal profession is still largely a middle and upper-middle class privilege.

[28]*Law and Learning, supra*, note 1.

[29]Stevens, *supra*, note 6, 5.

One of the reasons for the success of Langdell's innovations at Harvard, both with respect to the paradigm of law as science and the case method of study, was their ability to overcome the tensions between the academic and professional approaches to the study of law, if only temporarily. Not only did the image of law as a scientific system of principles enhance the status of the profession and help justify restrictions on entry, it also enhanced the status of the law teacher, who could claim a respected place in the university "community of scholars". The intellectual task of retrieving or discovering doctrinal purity out of the swamp of all reported cases provided a valuable service to the profession as did the educational technique of socratic dialogue through which students learned substantive law as well as the skill of "thinking like a lawyer". The achievement of a harmonious reconciliation of professional and academic aspirations in university legal studies in the last decades of the nineteenth century was further facilitated by the movement of universities away from classic liberal education towards more practical training which would prepare students to pursue careers in an increasingly specialized industrial society.[30]

When the Langdellian paradigm of law began to crack in the early part of the twentieth century, the potential conflicts between the scholarly and the professional focus of legal education re-surfaced. The Realist Movement challenged the belief that the common law was formally rational and socially and politically neutral. If law was to be understood as a social institution, a broader perspective was required which would borrow insights and techniques of analysis from the social sciences, history and economics. An educational curriculum designed to achieve these scholarly objectives would look substantially different from the traditional curriculum emphasizing professional training. Indeed, the differences between the two were so great that an effort to implement such a program at the law school of Columbia University in the 1920's split the faculty and culminated in the departure of those pressing for the non-professional study of law.[31]

Despite the disillusionment at the failure of Legal Realism to achieve many of its curricular objectives, and the fact that the focus of legal education in most schools remained largely professional, the heritage of Legal Realism did leave an imprint on law teachers and the law schools. For many law teachers with scholarly aspirations there was a permanent loss of faith in the legitimacy of pure doctrinal analysis as an academic endeavour. The alternatives may have been undeveloped and uncertain in promise, but the kind of knowledge they were committed to seeking was no longer easily reconciled with the perceived requirements of professional training. For

[30] *Ibid.*, 51.
[31] *Ibid.*, 134-9.

even those committed to professional training, it was becoming increasingly unclear just what that training entailed. While there was a theoretical unity of interest among members of the bar, there were in fact a diversity of career patterns ranging from real estate conveyancing to policy advisor to the government. Law students themselves were unlikely to know at the outset which career they wished to pursue and whether they would have the opportunity to do so given the realities of the market. Should the focus be on substantive law, legal process, policy analysis, advocacy skills or "non-adversarial lawyering tasks?"[32] In the absence of a unifying model of legal knowledge either within the scholarly approach or within the professional approach, let alone between them, the law curriculum became increasingly fragmented as lectures, seminars, "Law and. . . ." courses and clinical legal education[33] were introduced first in the elite schools, and then spread to the less prestigious.

In sum, Stevens describes the heritage of university legal education as "one of the inherent conflicts between the professional and the scholarly".[34] The goal of lawyer-training is a practical one, the production of competent practictioners. Yet, the institutional arrangements for such training are as much a function of social, economic and political forces as they are of educational concerns. The imposition of a requirement that lawyers obtain a three year law degree from an accredited school forced professional training into an academic environment in which the faculty is recruited largely on the basis of their scholarly potential rather than their ability to teach professional skills, however defined. Although various compromises have been struck at different times and in different places, teachers and students remain unsatisfied, caught in the web of their own history and unable to achieve structural reform.

Despite the markedly different path of the historical development of legal education in Canada, it seems we have arrived at the same destination, not only in terms of institutional arrangements, but also in regards to structural tensions between professional and scholarly aspirations in the university law school. This is the conclusion reached by *Law and Learning*:

> The basic problem of legal education is that it espouses a broad range of goals and has opted for no specific structure to achieve any of them. As a result, professional formation — undoubtedly the primary objective of Canadian law schools — is neither effectively professional nor as broad and humane as it

---

[32]Pickard,*supra*, note 2, 280.

[33]For an interesting discussion of how the debates over curricular reform reflect more fundamental and unresolved theoretical debates, see Macdonald, *Legal Education on the Threshold of the 1980's: Whatever Happened to the great ideas of the 60's* (1979) 44 Sask. L. Rev. 39.

[34]Stevens *supra*, note 6, 266.

> aspires to be. Scholarly or intellectual legal study is diluted and marginalized by the predominance of professional concerns.[35]

The major recommendation of the Report is that instead of the eclectic curriculums now in place, a variety of distinctive alternatives should be developed, including a clearly defined scholarly program.[36] In the authors' view, only by creating a separate and distinct institutional space for non-professional scholarly activity will it be possible to escape the pervasiveness of professional demands which have continuously distorted or diverted the research agenda of faculty members with more academic inclinations.

This not the place to comment on these recommendations in any detail.[37] However, it is worth considering some of the historical lessons that might be gleaned from Stevens' analysis of Americal law schools. First, earlier attempts by the Realists to develop non-professional legal studies either in law schools or as autonomous institutes largely failed, although as noted previously, they did leave a permanent imprint on the standard curriculum. This is not to suggest that history is bound to repeat itself, but only that caution is appropriate. To what extent can that failure be attributed to the inability to develop appropriate institutional arrangements in which empirical research could be conducted? Were the social sciences that the realists were rushing to embrace too undeveloped to be of much help, and if so, how much has the situation improved?[38]

Second, since the Law Society gave up control of law school training, it has been content to give university law schools great leeway in the development of their curriculum. However, it is not certain that a defined non-professional course of studies leading to an LL.B. degree would, or for that matter, ought to be recognized as qualifying an individual to enter the Bar Admission program. Of course, it may be that the profession does not really care what actually goes on in law schools, but is now only interested in the enhanced status and barrier to entry that a three year program of graduate legal studies provides. But the case for giving the same degree to a person who has been trained as a legal historian or sociologist and to a person who has studied traditional doctrine, legal process, taken some lawyering skills course and had a little bit of history and policy analysis thrown in to spice things up, is not at all clear. If non-professional legal studies

---

[35]*Supra*, note 1, 153.

[36]*Ibid.*, 155.

[37]For two generally favourable reviews, see Slayton, (1983) 33 U.T.L.J. and Johnston, (1983) 28 McGill L.J. 1034. Also see Weisberg, *The Relation of Law and Learning to Law and Learning* (1983) 29 McGill L.J. 155 for a critique of the Report's definition, classification and assessment of legal scholarship in Canada.

[38]Some of these questions are explored by Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience* (1980) 28 Buff. L.Rev. 195.

mean just that, then perhaps the institutional severance should be made clearly.

Of course, there are strategic reasons both for keeping non-professional studies within the law school and for continuing to award an LL.B. degree to its graduates. Students who are uncertain of their career plans or possibilities would not be forced to make an early commitment and therefore might be more inclined to choose the scholarly option as the more interesting way of satisfying the three year degree requirement. However, more important than recruiting students, sheltering non-professional studies within the confines of a professional school increases the possibility that the program will receive funding. In an environment where investment in higher education must be justified in terms of its economic rate-of-return, a program that seeks to constitute itself as an island of critical thought which challenges prevailing views about law and social policy is unlikely to be given a very high priority by authorities responsible for funding. Commenting on developments in Ontario universities in the past twenty years, Axelrod has noted:

> Higher education was valued *not* for its ideals but primarly for its products-skilled professionals who would contribute to economic prosperity. So long as they seemed to be fulfilling this function, universities remained an important social priority. But once they produced surplus manpower, redundant programs, and a burdensome addition to the public debt, they no longer appeared to be such profitable investments.[39]

Thus even in designing institutional arrangements for non-professional legal studies, professional, economic and political considerations are still influential.

In sum, for those who are interested in attempting serious structural reform of legal education it is important to remember the central theme of Stevens' book: pedagogic concerns alone have not shaped the development of legal education in the past, and are unlikely to do so in the future.

---

[39]P. Axelrod, *Scholars and Dollars: Politics, Economics, and the Universities of Ontario, 1945-1980* (1980) 4.