



## WHAT CAN MEXICAN LAW SCHOOLS LEARN FROM THE AMERICAN LEGAL REALISTS?

Luis Alfonso NAVARRETE ALDACO\*

**ABSTRACT.** *This article offers (a) a basic exposition of what some members of a certain generation of legal scholars said with regards to legal education; and (b) an effort to link those ideas with a specific issue of legal education in general, and Mexican legal education in particular. With regards to these points, the idea is to go beyond the traditional approach to theory and practice, i.e., that theory is independent or even irrelevant in some cases with regards to matters of practical knowledge. Contrary to this approach, it is assumed that there is a strong relationship between theory and practice, and that they both complement each other. The purpose is to show: (a) that the ideas of the legal realists regarding training for practice during legal education is useful for general legal education; (b) that the implementation of some of these ideas in Mexican legal education would invariably help to graduate more conscious and prepared legal professionals; and (c) that the implementation of these ideas does not require much effort, only the willingness of universities and faculty to go beyond traditional, localist approaches to legal education, towards a more realistic view.*

**KEY WORDS:** *Legal education, social sciences, legal realism, professionalism.*

**RESUMEN.** *Esto no es más que: a) una exposición básica de lo que algunos miembros de cierta generación de juristas dijeron con respecto a la educación legal, y b) un esfuerzo por vincular las ideas con un tema específico como la educación jurídica en general, y la educación legal mexicana, en particular. Con respecto a estos puntos, la idea es ir más allá del enfoque tradicional de la teoría y la práctica, es decir, que la teoría es independiente o incluso irrelevante en algunos casos con respecto a asuntos de conocimiento práctico. Contrariamente a este enfoque, se supone que hay una fuerte relación entre la teoría y la práctica, y que ambos se complementan entre sí. El propósito es demostrar: a) que las ideas de los realistas legales en materia de formación para la práctica durante la formación jurídica es útil para la enseñanza del derecho en general; b) que la aplicación de algunas de estas ideas en la educación jurídica mexicana invariablemente pueden ayudar a graduar profesionales del derecho más conscientes y*

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\* J.D., University of Sonora; LL.M., University of Minnesota. I wish to thank two friendly, anonymous reviewers for their valuable contributions and suggestions. Any mistakes are sole responsibility of the author.

*preparados, y c) que la aplicación de estas ideas no requiere mucho esfuerzo, sólo la voluntad de las universidades y de la facultad de ir más allá de los enfoques tradicionales, localistas a la educación legal, hacia una visión más realista.*

PALABRAS CLAVE: *Enseñanza del derecho, ciencias sociales, realismo jurídico, profesionalismo.*

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#### I. MEXICO: LEGAL CULTURE, AND LEGAL EDUCATION REFORM

A 2006 survey, carried out by the Center for Economic Research and Teaching (CIDE) in three states of Mexico, shows that 80% of those accused never actually faced or spoke before a judge. In addition, 82% of the accused were “prosecuted for offenses against property and for amounts under 5,000 pesos (about USD 4009).”<sup>1</sup> Mexican legal culture is characterized by being excessively formalistic. Criminal proceedings (and the trials themselves) can take years to get finally solved. And, while cases get solved, most accused remain in pre-trial detention, as in Mexico one is guilty until proven otherwise. “The accused is considered an object under investigation rather than a subject with rights.”<sup>2</sup>

Public defense is a right. Unfortunately, public attorney’s salaries are very low, and they are not part of civil service career. An accused that cannot afford a private, independent lawyer would receive, more likely than not, insufficient legal advice by public attorneys. As most accused do not defend themselves properly, public prosecutors generally do not professionalize in

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<sup>1</sup> MARCELO BERGMAN, ELENA AZAOLA & ANA L. MAGALONI, DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. RESULTADOS DE LA SEGUNDA ENCUESTA A POBLACIÓN EN RECLUSIÓN EN EL DISTRITO FEDERAL Y EN EL ESTADO DE MÉXICO (CIDE, 2006).

<sup>2</sup> CRIMINAL JUSTICE CONSTITUTIONAL REFORM, CHAMBER OF SENATORS AND CHAMBER OF DEPUTIES, MEXICAN CONGRESS, 2008.

their respective fields of crime investigation (and neither are they asked for it by public institutions). This causes, at the same time, that most innocent, low income accused usually pay the price of staying in prison, while most guilty, high income accused are free.

Along with this circumstance is the fact that Mexico is facing a complex situation, given the high rise of crime rates and the presence of organized crime in several states of the country. The most notorious event lately<sup>3</sup> is still present in Michoacán, Mexico, where citizens perform law enforcement actions against organized crime, without governmental authorization.

To fight against these and other long-term, institutionalized irregularities, in 2008, the Mexican Congress passed a constitutional reform that turned the old, inquisitorial system into an accusatory, procedural criminal system that is supposed to gradually end with the number of irregularities that Mexican institutions have faced throughout decades, if not centuries. The deadline for each state of the country is 2016, that is, a period of eight years for each to gather enough economic resources, adapt their respective local criminal codes to what the constitution demands, build proper establishments for trials and administrative offices, equipped with video-recording systems, and train justices, judges, clerks, and legal officials in general. Professionalization of the police forces, both at a local and federal level, is also a pillar of the reform (fight against criminal corruption is the target).

As for the structure of the reform itself, it establishes an “accusatory court procedural system, regulated by the principles of public access, confrontation and cross-examination, concentration, continuity, immediacy and impartiality.”<sup>4</sup> The principles just mentioned, according to the official description of the reform, published by Congress, are only possible under a set of procedural rules that establish that any judicial proceeding takes place in public proceedings, carried out orally by everyone present in court: judges, clerks, lawyers, prosecutors, witnesses, etc., all of them. No party is able to speak before the judge without its counter-party being present (today, any party can speak with the judge without the presence of others involved).

Another important feature of the decision making process established by the constitutional reform is the principle of free assessment of evidence, which requires that judges ground and explain in a professional manner their rulings, as article 16 of the Constitution establishes.

The rights of the victims and the accused are expanded in a positive way; alternative dispute resolution mechanisms are offered to avoid high prison rates (overpopulation is the case in most national prisons); and “a quality public defense service will be guaranteed for the general public, and public defenders will be ensured of the conditions to pursue a professional career

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<sup>3</sup> I am writing in March, 2014.

<sup>4</sup> David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 (2) MEXICAN L. REV. 189 (2011).

service, establishing that public defenders' salaries may not be lower than those of the Public Prosecutors."<sup>5</sup>

Regarding organized crime and the fight against it, the reform establishes the grounds for more powerful law enforcement institutions, and severe measures against growth of organized crime.

It is obvious that what comes in 2016 is somehow uncertain. True is that, as is shown below, efforts are being made by institutions to implement the system in a proper way in most states, and also at a federal level. However, the process for each state of gathering enough resources for future changes is of a significant complexity. Just imagine what it takes (and how much it takes) to redraft criminal codes, set up buildings of considerable size, infrastructure, and technology, and train hundreds, if not thousands, of legal officials.

Shirk argues<sup>6</sup> that there are both positive and negative aspects of the process of implementation that can be taken into account. On the positive side, many institutions, national and international, are working in the implementation.

First of all, there is the National Fund for the Strengthening and Modernization of Justice Promotion (Fondo Nacional para el Fortalecimiento y Modernización de la Impartición de la Justicia), which sponsors training programs for judges and officials, as well as the drafting of a model procedural code for the entire country (which is about to be enacted by Congress). Financial assistance and training has also been granted by the Rule of Law Initiative of the American Bar Association (ABA).

As for economic assistance, 266 million pesos were distributed federally in 2010 by the government, in 19 recipient states of the 32, for the implementation of the new process. The National Commission of Higher Courts of Justice (CONATRI) continually offers courses to train judges and clerks at the state level.<sup>7</sup>

Regarding the negative aspects, it is true that educational materials are distributed for legal officials, especially judges, public defenders and prosecutors. However, there are around 40,000 lawyers and 400,000 law enforcement officers in the country, whom will also need some training.

With regards to law enforcement officers, Shirk says that "[i]f they are to develop into a professional, democratic and community-oriented police force, they will need to be properly vetted, held to higher standards of accountability, given the training and equipment they need to do their jobs, and treated like the professionals they are expected to be."<sup>8</sup> But how is that possible in a

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<sup>5</sup> PREAMBLE AND FULL TEXT OF THE 2008 CRIMINAL JUSTICE CONSTITUTIONAL REFORM, CHAMBER OF SENATORS AND CHAMBER OF DEPUTIES, MEXICAN CONGRESS, 2008.

<sup>6</sup> See Shirk, *supra* note 4.

<sup>7</sup> PREAMBLE AND FULL TEXT OF THE 2008 CRIMINAL JUSTICE CONSTITUTIONAL REFORM, CHAMBER OF SENATORS AND CHAMBER OF DEPUTIES, MEXICAN CONGRESS, 2008.

<sup>8</sup> See Shirk, *supra* note 4, at 226.

legal system in which the requisites to become a police officer are reduced to having studied only up to the secondary level of instruction?

Similarly, those who currently practice law as an independent, professional career, *i.e.*, lawyers, and also students that would become lawyers in a few more years (or eventually), will be part of the process. And being part of it at such an early stage will more likely than not bring about many unpredicted situations, and patience is required to get through and solve those issues. Some creativity is also welcomed.

It is true that the new legal system could be shaped by the most professional and uncorrupt lawyers and judges. But the opposite could also be true. The compromises of national higher education institutions are obviously more inclined not only to structure, but to promote that professionalism and the ethical considerations of each profession continue to be taught to students efficiently.

Nevertheless, why as of today just a few law schools have adapted their programs to the new legal system to be in place in 2016? Is that a sign of looking for professionalism? Currently, most programs were designed years, if not decades, ago, and the skills and methods needed back then, and those needed today, have changed in a fast-paced and characteristic way.

Is it impossible to modestly anticipate the issues to come for the new legal system? Moreover, would it be impossible to (again, modestly) avoid some of those potential, unpredicted situations mentioned above? “Enabling Mexico’s legal profession to meet these higher standards will require a significant revision of educational requirements, greater emphasis on vetting and continuing education to practice law, better mechanisms to sanction dishonest and unscrupulous lawyers, and much stronger and more active professional bar associations.”<sup>9</sup>

With regards to legal education in Mexico, it appears to be an unexplored subject in Mexican legal academia.<sup>10</sup> Since the 1950s, only a handful of books and articles regarding national legal education have been published. The most influential of those being the studies of Héctor Fix-Zamudio and Jorge Witker (for the period from the 1960s to 1970s), and more recently Fix-Fierro & López-Ayllón.<sup>11</sup> Up-to-date field work and research is scarce, with the recent exception of the writings and up-to-date research of Luis Fernando Pérez Hurtado.

What follows is a description of the structure of Mexican legal education, taking into account issues that go from standards of authorization for law

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<sup>9</sup> *Id.*

<sup>10</sup> Luis Fernando Pérez Hurtado, *An Overview of Mexico’s System of Legal Education*, 1(2) MEXICAN L. REV. 53 (2009).

<sup>11</sup> HÉCTOR FIX-ZAMUDIO, *METODOLOGÍA, DOCENCIA E INVESTIGACIÓN JURÍDICAS* (12th ed. 2004); ANTOLOGÍA DE ESTUDIOS SOBRE ENSEÑANZA DEL DERECHO (Jorge Witker ed., 1976); DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES. ESTUDIOS SOCIOJURÍDICOS SOBRE EDUCACIÓN Y PROFESIÓN JURÍDICAS EN EL MÉXICO CONTEMPORÁNEO (Héctor Fix-Fierro ed., 2006).

schools, admissions standards for students, structure of curricula, academic process, graduation standards, to concerns regarding faculty, limited resources, etc. As mentioned above, the above subjects are described as they appear in the Legal Education Reform Index (LERI) for Mexico of the American Bar Association Rule of Law Initiative in Mexico of June, 2011.<sup>12</sup> Positive elements and weaknesses of the legal education system are identified, and proposals for change are offered. But first, some statistical information is necessary to take into account:

According to the latest LERI for Mexico, by 1998, 170,210 students were enrolled in 364 institutions, which in total offered 367 law degrees (Bachelor of Laws). In 2007, around 240,000 students were enrolled in 930 institutions, which in total offered 1,130 law degrees. That is, the increase in enrollment from 1998 to 2007 is of 41%, while there is a 156% increase in institutions of higher education that offer a law degree, and a 208% increase in law degrees. “In other words, in the past ten years, approximately every week a new law school begins to offer one or two new (Bachelor of Laws degrees) to 134 new law students.”<sup>13</sup>

As for the job market for lawyers, the National Association of Universities and Higher Education Institutions (ANUIES) performed a study in the 1990s in which it found that law was one of thirteen programs that had a “high enrollment surplus”, “critical” for the job market. The surplus was of 47% for law graduates. “The ANUIES study concludes that law graduates, like those in other critical programs, ‘may be unemployed, and at best, they may find a low quality occupation that is not a professional career. This implies a considerable amount of sub-employment for professionals.’”<sup>14</sup>

It could be argued that there is a relationship between the quality of legal education, the quality of the services offered by lawyers, and the efficiency of the legal system. The better legal education is, the better services will be offered by lawyers and legal institutions in general. Unfortunately, the rules to follow for Mexican legal education institutions when establishing their respective law schools are flexible, and there are different ways to start up a law school.

What does it take to start up a law school in Mexico? A very straightforward answer would be as follows: “opening [law school]... does not require a large investment. All you need is a classroom and one or several part-time professors. There is no real need to invest in a library (maybe a basic one), nor [is there any need] for an ambitious research program and publications.”<sup>15</sup>

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<sup>12</sup> Elaborated under the supervision of Luis Fernando Pérez Hurtado (director of Centro de Estudios sobre la Enseñanza y el Aprendizaje del Derecho, Mexico).

<sup>13</sup> See Pérez Hurtado, *supra* note 10, at 74.

<sup>14</sup> *Id.*

<sup>15</sup> Héctor Fix-Fierro & Sergio López-Ayllón, *¿Muchos abogados pero poca profesión? Derecho y profesión jurídica en el México contemporáneo*, in DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES 1, 16 (Héctor Fix-Fierro ed., 2006).

Legal research is not conditional for a law school to function accordingly to the rules of national education. The reason why the system allows institutions to offer law as a degree in a flexible manner is because the rules that govern general education allow institutions to obtain the respective Official Recognition through a simple procedure, because it is the government's goal to offer more opportunities so people can get through higher education.

Even for law schools, which are supposed to achieve the highest standards, the requirements have diminished. "The way in which each [Institution of Higher Education] enters the system determines the degree of academic and administrative freedom the institution has and, consequently, the flexibility to define the requirements that its students must meet in order to obtain the law degree and the license to practice law."<sup>16</sup> The process for a higher education institution to become authorized for diploma awarding requires official recognition, granted by the National Education System after a review of the curriculum.

There are, however, alternate sources for an institution to obtain recognition of studies: by presidential decree (which is usually granted to high ranked institutions), through the Ministry of Education (National Education System), or through state agencies of the National Education System, established in each state of the country.

An institution can also obtain recognition through a different path: incorporation. Incorporation implies that either the federal government or each state government grants permission to a public higher education institutions to create decentralized institutions. In both cases, established private institutions of higher education can obtain recognition, strictly speaking, or recognition through incorporation. Most recognitions are granted by state authorities, 576 in 2006-07, or by federal authorities, 301 in the same year. 70 recognitions were awarded by presidential decree.

## II. SPECIFIC PROBLEMS REGARDING MEXICAN LEGAL EDUCATION

Generally speaking legal education is imparted almost exclusively through lectures. The "professor is the sole source of relevant information and the classroom exists to impart theoretical knowledge."<sup>17</sup> Unfortunately, training in alternative teaching methodologies for faculty is not the general rule.<sup>18</sup> There is a lack, also, of practice-oriented and up-to-date materials in most law libraries, which is part of the reason why faculty is still using the more traditional lecture method of education.

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<sup>16</sup> See Pérez Hurtado, *supra* note 10, at 84.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

How is the legal curriculum structured? Mexican authorities have determined that programs under the label of Law and Legal Sciences are professional programs. Professional programs are “those whose graduates will, in general, have a professional practice and whose study plans do not require a high proportion of basic courses in sciences or humanities or courses exacting a large amount of time for student attention,” according to Agreement 279, article 10.<sup>19</sup> Full-time faculty is simply not a requisite for institutions that offer law as a degree.

Law schools, through their respective higher education institutions, can structure and define in their own way (following their particular identity, ideology, etc.) the legal curriculum. Nevertheless, the curricula throughout the country is usually of the same nature: a 40 to 70 mandatory courses program that may or may not offer an area of specialization, which is determined by the institution if that is the case. Programs differ as to their “structure and development,” “flexibility, division, duration and class shift.”<sup>20</sup>

Law degrees in Mexico are generally oriented to offer a set of theoretical knowledge for legal practice, as opposed to practical knowledge (the know-what vs. the know-how). Professional skills, along with the ethical values that pertain to the legal profession, are subjects less explored by most law schools in the country.

The latter situation causes that students get their correspondent professional skills after working for some period of time at the side of a practicing lawyer or at a legal office. As of today, it must be recognized, only “some schools have started incorporating courses aimed at developing the skills needed for practicing law in the new adversarial criminal procedure system.”<sup>21</sup>

What does it take to practice as a lawyer in Mexico? It usually takes three steps: First, studying and graduating from a Bachelor of Laws is required. Second, meeting the institution’s requirements for graduation and, if so, a degree diploma to the student is granted. Finally, such diploma is registered at the General Office for Professional Practice for a license to be granted by the same organism. Such license is valid in any national court.

What to do? Which are the options at hand? Obviously, if there is a modification in the way the legal system works, then legal education would necessarily be in a position to change and adapt to it. According to two of the most

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<sup>19</sup> “Agreement 279 establishes a minimum percentage of courses that must be assigned to full-time faculty depending on the program. Law and Legal Sciences programs are classified as professional programs, which are defined in Article 10 as “those whose graduates will, in general, have a professional practice and whose study plans do not require a high proportion of basic courses in sciences or humanities or courses exacting a large amount of time for student attention.” As a result, a full-time faculty is not required for bachelor, specialization, or master’s law programs. However, for doctoral programs —regardless of the field— at least 50% of the courses must be taught by a full-time professor. Article 10 of Agreement 279.” *Id.*

<sup>20</sup> *Id.*

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

important reports on legal education in the United States, there are ex-ante issues that should be taken into consideration when planning and organizing both a legal curriculum and the way a law school functions. As it is shown below, past experiences in the U.S. could throw some light as to the potential issues that may present during the process of implementing a new type of legal education in Mexico

Some authors suggest an ex-ante commitment on the part of higher education institutions to improve themselves and their population by 1) preparing students for practice, 2) clarifying and expanding educational objectives, 3) improving methods of instruction, and 4) evaluating themselves and their respective curricula. Objectives, it should be noticed, are identified in terms of desired outcomes, which is “is becoming the norm throughout higher education.” Institutions of higher education in some areas must not only structure those desired outcomes for their students, but they also need to prove that their students attain such outcomes. In the U.K., for example, most law schools follow an outcome focused type of curriculum. In the U.S., only a few.<sup>22</sup>

Other authors emphasize the fact that most American law schools have not started preparing their students through (a) a more practical-oriented teaching methodology, and (b) a focus in ethical and social skills. The same phenomenon occurs in many universities throughout the American Continent. Paradoxically, law being a professional degree entails that preparing law students in professional practice is necessary and conditional to perform properly as a lawyer (and not as, say, a legal technician). “The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”<sup>23</sup>

On the other hand, Ethics, Legal Ethics, and similar subjects, are being taught in most law schools. Nevertheless, there is little attention

...to the social and cultural contexts of legal institutions and the varied forms of legal practice. To engage the moral imagination of students as they move toward professional practice, seminaries and medical, business and engineering schools employ well-elaborated case studies of professional work. Law schools, which pioneered the use of case teaching, only occasionally do so.<sup>24</sup>

Law school provides the beginning, not the full development, of students' professional competence and identity. At present, what most students get as a beginning is insufficient. Students need a dynamic curriculum that moves them back and forth between understanding and enactment, experience and analysis. Law schools face an increasingly urgent need to bridge the gap between

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<sup>22</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>23</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS. PREPARATION FOR THE PROFESSION OF LAW (2000).

<sup>24</sup> *Id.*

analytical and practical knowledge, and a demand for more robust professional integrity. At the same time, they open to legal education a historic opportunity to advance both legal knowledge—theoretical and practical—and the capacities of the profession. Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice.<sup>25</sup>

However, how to define the correct balance between theoretical and practical knowledge? If Mexican legal education is to change for good, then such balance must be established beforehand. The next section deals with the experience of North America with regards to legal education. The purpose of describing a fraction of the evolution of such a system is to highlight the options at hand for Mexican universities and law schools to improve in their respective fields of knowledge and training.

### III. WHAT CAN MEXICAN LAW SCHOOLS LEARN FROM THE HISTORY OF NORTH-AMERICAN LEGAL EDUCATION

According to Christopher Columbus Langdell

...the method of teaching by cases... consists, first, in using a collection of cases on a given subject as a text-book, instead of using a treatise on the same subject. For each exercise the members of the class are expected to prepare themselves by studying thoroughly some ten or twelve pages of the cases. During the exercise each student has his volume of cases before him with facilities for taking notes. The instructor begins by calling upon some members of the class to state the first case in the lesson, *i.e.*, to state the facts, the questions which arose upon them, how they were decided by the court, and the reasons for the decision. Then the instructor proceeds to question him upon the case. If his answer to a question is not satisfactory (and sometime when it is), the question is put round the class; and if the question is important or doubtful, or if a difference of opinion is manifested, as many views as possible are elicited. The students also question the instructor and state their own views and opinions without being called upon.<sup>26</sup>

Before Christopher Columbus Langdell,<sup>27</sup> legal training in the U.S. was accomplished through basic apprenticeship in a legal office, under instruc-

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<sup>25</sup> *Id.*

<sup>26</sup> BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-190*, 143 (2009).

<sup>27</sup> The name of Christopher Columbus Langdell will be long remembered as the scholar that developed and implemented the case and Socratic methods of legal education that are currently in use in American law schools. In other words, he will be remembered as the founding father of legal education as a professional, postgraduate degree. But who was Christopher Columbus Langdell? For many of his school friends he was a “prodigy of learning and master

tion of a lawyer. Students learned the law from experience and practice, in a system of legal training that is usually referred to as the “apprentice system.”

The first American law school, properly called, was founded by Judge Tapping Reeve in 1784, and it functioned in the same way as the apprentice system, but instead of one apprentice there were groups of apprentices experiencing, seeing the way in which courts functioned. After that, proper law schools were continuously introduced to colleges and universities, but it was only about lectures and calling students to “recite” what they learned (usually memorized) in legal textbooks and treatises, written by prominent legal scholars. The system’s criteria for admission required no more than English literacy, and students could start law school at any time, and in any course.<sup>28</sup>

For all intents and purposes, however, Reeve’s original concept eventually faded from the minds of legal scholars. The apprenticeship system was replaced by the “case method,” introduced by Christopher Columbus Langdell at Harvard, in the beginnings of the nineteenth century. Given its characteristics, the case method improved the old system in the sense that it made of learning the law an active enterprise through participation, dialogue, and final examinations.<sup>29</sup> It is possible to find traces of the general idea of the case method in Locke’s conception of general education, because it relied on the need to train students with advanced texts, for they to be able to think from particulars to universals, and to encourage their autonomy; as for the professorship’s duties, the idea was to teach a method of learning, and to prompt students to go to the original sources of knowledge.<sup>30</sup>

“Justice and legitimacy of the legal system depend on the quality and legitimacy of the legal profession, which require, in turn, that lawyers acquire strong legal knowledge through demanding legal education.”<sup>31</sup> In Langdell’s idea, the latter would only be acquired by means of a method of education that consisted in the development of the student’s expertise and self-confidence to understand the legal doctrines of the court’s judgments by themselves, which required at the same time the study of the courts’ rulings in particular, rather than hypothetical cases in textbooks. This is why many mainstream textbooks were banned in Harvard Law School. By means of the Socratic method —another name for the case method— the student would

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of research,” a presiding genius among his colleagues.<sup>9</sup> His intellectual interests as a young student ranged from English, American, and French poetry, plays, and novels, Greek and Latin history, biography, and grammar, to natural history, theology, and philosophy. Favorite writers included Emerson, Watts, Bacon, and he had a special interest in the ideas of John Locke regarding general education. *Id.* at 35.

<sup>28</sup> *Id.* at 39.

<sup>29</sup> Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VANDERBILT LAW REVIEW 342 (2007).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> *Id.* at 129.

learn how to analyze particular and concrete controversies, not hypothetical propositions stated in books.

In class, Langdell usually exposed himself to questions and objections on the part of students, which sometimes conduced to a revision and correction of his own views on legal topics during discussions in lecture. The aim was to involve his students in an exercise of dialectic argumentation.<sup>32</sup> Langdell borrowed from Harvard Divinity School the requirements to study law, and further applied them to Harvard Law School. By 1895, Harvard Law School system, same as Harvard Divinity School, was a three-year, sequential, post-graduate (it required a college Bachelor of Arts as a precondition for admission), and professional school curriculum, with first-year and second-year required courses and examinations, consisting in real problems for solution, for every course. (As a result, high flunk-out rates, and selection of the most successful students to study law, were the case.)<sup>33</sup> Lastly, it replaced part-time teachers (judges, lawyers, former practitioners, etc.) with full-time professors, thus, legal practice and experience were no more a requirement for teaching law.<sup>34</sup>

“What qualifies a person, therefore, to teach law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes —not experience, in short, in using law, but experience in learning law...”<sup>35</sup> Langdell’s opinion that legal practice was detrimental for professorship was due to a belief, acquired during years of working as a practicing lawyer, that legal practice was accompanied with corruption. Therefore, in order to exclude corruption from the teaching of the law to students, an “experienced” faculty was no longer necessary in Harvard Law School.

A particular characteristic of the introduction of the case method is that it followed the “scientific” status quo of the end of the nineteenth century. During that period of time, Darwin’s *Origin of Species* (1859) and *The Descent of Man* (1871), along with the birth of analytical positivism of late nineteenth-century Europe, were in vogue inside intellectual circles of scientists, logicians, philosophers, and, of course, lawyers. Moreover, the emergence of concepts and their strict definitions engendered by the case method supported the worldview of that time: students, for example, regularly searched for concepts and principles “hidden” behind court decisions, and assumed that an “eternal” *stare decisis* doctrine guided every decision. As for social change and the ways in which society develops and functions, it was not part of legal education, and such idea was explicitly acknowledged by Langdell and Harvard.<sup>36</sup> With the case method, law was established and confirmed itself as an

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<sup>32</sup> *Id.* at 144.

<sup>33</sup> *Id.* at 341. See KIMBALL, *supra* note 26, at 39.

<sup>34</sup> See Gordon, *supra* note 29, at 341.

<sup>35</sup> See KIMBALL, *supra* note 26, at 169.

<sup>36</sup> LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, 13 (1986).

(apparently) autonomous discipline, detached from others, due, in part, to the focus on professional specialization of the era. The study of the law as a discipline that is structured over social, political, economical, and historical sources was thus avoided.<sup>37</sup> Public law was no longer important for the legal curriculum, and private law became the predominant focus of the Harvard legal curriculum (except for the mandatory Criminal Law course in the first year, and the third year elective Constitutional Law course).<sup>38</sup>

Other factors that contributed to the Harvard Law School method's success were that (a) it was inexpensive for the university administration (it required one teacher for every seventy five students), (b) it was available mostly to upper-class students (given the Bachelor of Arts requirement), which preserved hegemony between them and "banned undesirables" from the profession,<sup>39</sup> and (c) that the law faculty believed in the case method as a successful tool for teaching and learning law.<sup>40</sup>

Nevertheless, despite its success, the well-established Harvard Law School and its case method system had its detractors and alternative proposals, but, at the end, American law schools rejected all of them. As casebooks and the case method were being spread among American law schools, the the further rejection of public, interdisciplinary and theoretical approaches to law by almost every university was the case. "These alternative curricula all resembled one another, in that their aims were to educate publicly minded lawyers as well as private practitioners-lawyer-statesmen and public civil servants capable of large-minded reasoning about issues of constitutional structure and legal policy, viewed in comparative and historical perspective."<sup>41</sup> This generation of alternative legal curricula comprised three movements that shared the same characteristics, namely: the education of the law as a discipline that cannot be fully understood without reference to other disciplines, types of knowledge, and methodologies; the education of the law, so to speak, as a complex social system. Three particular proposals, sketched by detractors of the case method, are worth mentioning: (a) Law as Statesmanship, (b) Law as Policy Science, and (c) Social Law and Progressive Economics. It is somehow surprising how and why the rest of the law schools in America systematically rejected all these alternative and more efficient (at least at first sight) models of legal education, as the case method spread to almost every university in the country. The first system combined the knowledge of political economy, American and comparative constitutional law, the law of nature, the law of nations, comparative law, Roman and legal history, the common law system, equity, and pleading. It is interesting how this system was divided into two

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<sup>37</sup> *Id.* at 348.

<sup>38</sup> See Gordon, *supra* note 29, at 341.

<sup>39</sup> This point is carefully exposed by Duncan Kennedy, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2nd edition, 1995).

<sup>40</sup> See KALMAN, *supra* note 36, at 13.

<sup>41</sup> Gordon, *supra* note 29, at 342.

models of legal education, which were attractive to students because the legal profession was construed over the assumption that the lawyer was a statesman. The first model was designed to educate lawyers as policy makers in a liberal commercial society, and was conceived by Adam Smith and David Hume in the eighteenth century Scottish School of Jurisprudence, Moral Philosophy and Political Economy. They called this model the Science of the Legislator. Similarly, the second model was designed to educate students over the liberal-humanist ideal of the orator-statesman, and Cicero was an exemplary figure in this kind of teaching. The second system of legal education never materialized. Woodrow Wilson (who later became President of the United States) conceived it in New Jersey by 1890, after he was asked to design a new law school curriculum for Princeton University. His idea was a Public Law curriculum, and “not a duplicate of those [law schools] already in full blast all over the country, but an institutional law school, so to speak, in which law shall be taught in its historical and philosophical aspects, critically rather than technically, and as if it had a literature besides a court record, close institutional connections as well as litigious niceties —as it is taught in the better European universities.” The subjects of his proposal ranged from constitutional, administrative, and international law, to public corporations, conflicts of laws, and even legal history and general jurisprudence and its history. Alas, Wilson’s system never materialized, as noted above. Finally, the last system of education of that time found its sources in the historical and comparative study of legal institutions. It could be said that it resembles quite a lot to the current, predominant Law & Economics movement in American legal education and scholarship, as it studied legal concepts and institutions from an economical perspective, *i.e.*, finding their economic functions and purposes in society, their costs and benefits, and their utility to economic agents.<sup>42</sup>

By the second decade of the twentieth century, policy and social studies in law schools were almost completely driven out by a case method curriculum, with a strong focus on private law, designed by Langdell.<sup>43</sup> As a consequence, these alternative curricula were moved, in the best of the cases, to other university departments.<sup>44</sup>

What types of legal knowledge were lost as the Harvard Law School model spread through America? Apparently, almost everything that was not private case law, namely: subjects related to public law, legal theory, jurisprudence, Roman and comparative law, legal history, the sociology of law and institutions, etcetera.<sup>45</sup> In a few words, with the case method, legal interpretation was substituted by case law.<sup>46</sup>

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<sup>42</sup> *Id.* at 343-345.

<sup>43</sup> *Id.* at 347.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Surprisingly, professors of the founding generation of the Harvard Law School method

### 1. *Legal Realism and Legal Education*

What were the Legal Realists trying to change? Harvard Law School professors were not the only scholars that tried to modify, or reject, the case method system and its implications in training law students. As a product, or as a reaction, to this type of legal education, a further generation of scholars was born into the legal profession at the end of the second decade of the twentieth century, namely: the American Legal Realists,<sup>47</sup> scholars that did “some empirical legal research and... turn their policy preference into law in such areas as civil procedure, commercial law, and securities law.”<sup>48</sup> Also, they were lawyers and scholars that tried to understand the law through a multi-disciplinary perspective, through its social, economic, and cultural sources.<sup>49</sup>

Why a sudden change in the orthodox, conventional understanding of the law in legal scholarship? To answer these questions, one must look to what was happening in the rest of the academic fields of the social sciences and humanities.

At the beginning of the twentieth century, a new worldview was present in diverse disciplines, such as sociology, psychology, anthropology, economics, history, religion, linguistics, and law as well. As Cohen said, “The problem of eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities is not a problem peculiar to law.”<sup>50</sup>

Functionalism theory, a non-autonomous, empirical, and relativistic worldview that purported that every aspect of society was a necessary function for its own existence and evolution, was gradually adopted by most social-sci-

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were international, interdisciplinary, and cosmopolitan American scholars. Their casebooks were drafted as they exchanged their ideas with analytical legal scholars from England and the rest of Europe. Nonetheless, as their objective with the Harvard system was to teach their students “how to think like a lawyer,” they remained with the case method but improved on it in the sense that, instead of “finding” the principles hidden behind courts’ decisions, they treated those cases as a way to train the students’ minds in legal reasoning, and to exercise their “mental muscles.” Although, in Robert Gordon’s opinion, “Harvard’s missionaries and epigones pushed for their constricted curriculum simply because they had become fanatically committed to the case method of teaching law students as a uniquely rigorous and effective method, one they were convinced took a full three years to master successfully.” See Gordon, *supra* note 29, at 342, 348, 349.

<sup>47</sup> What was the American Legal Realism movement, and who were the American Legal Realists? American legal realism was, on the one hand, a movement in legal scholarship that intended to introduce empirical social science, along with other disciplines of the humanities, to the study of law; on the other hand, American legal realism was a movement that contributed to the general jurisprudence of the era. See JOHN H. SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

<sup>48</sup> *Id.* at 8.

<sup>49</sup> See KALMAN, *supra* note 36, at 1.

<sup>50</sup> *Id.* at 42.

tific departments and scholars, not only legal scholars. With functionalism in law, judicial decisions were no longer seen as the product of a judge's formal reasoning about legal rules and conceptualism, but as a psychological activity which carried with the judge's idiosyncrasy and psychological conditions.<sup>51</sup> Therefore, formalism and conceptualism, as the only sources of legal decisions, were driven out by the new worldview of the American legal realists<sup>52</sup> (whom certainly "were not blind idealists under the spell of the social sciences; they were hardboiled lawyers who were concerned because the uncertainty of law made it difficult to forecast their client's chance of winning a case. They felt that the uncertainty of judge-made law meant that judges could hide the true reasons for their beliefs").<sup>53</sup>

The interdependence between the social system and the law was the focus of the realists, which lead them to believe that, in order to choose the best social policy, lawyers and judges must look directly to the vast knowledge of the social sciences. As a result, there was a point in which legal realists acknowledged that law was a discipline that pertained to the social scientific collection of disciplines, and that this view was the best way to propose social policy and change. (It may seem as if the legal realists' general jurisprudence was constructive.)

Through the study of the recent discoveries in the theory of language, the legal realists exposed the ambiguity of legal rules and of judicial language, as those categories arise in the context of diverse phenomena. Thus, in their conception of legal rules, these were ultimately incomplete,<sup>54</sup> which

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<sup>51</sup> *Id.* at 6.

<sup>52</sup> See SCHLEGEL, *supra* note 47, at 20; see KALMAN, *supra* note 36, at 29.

<sup>53</sup> KALMAN, *supra* note 36, at 23-24. "The list of Realists who served, sometimes only for summers that somehow stretched into fall, sometimes for years, in the administration's emergency and permanent bureaucracy includes Thurman Arnold, who came to Yale early in Clark's deanship; Douglas; Abe Fortas, who barely had a chance to teach at his law school before heading off; Frank; Walton H. Hamilton, an economist hired by Hutchins; Oliphant; and Wesley Sturges." See SCHLEGEL, *supra* note 47, at 19. It is interesting to notice that when the whole business of Langdellian legal education resided in the "scientific" nature of law, legal realists' conception was, at the same time, to make the law more "scientific" and "objective," even when the realists were explicitly against Langdellian conceptualism and formalism. Consequently, it could be possible that what really changed between the end of the nineteenth and the beginning of the twentieth century was not just a bunch of disciplines, but specifically the concept of "science" itself. Let us not forget that Euclidean geometry stopped being used by mathematicians that found other types of geometry, and that Albert Einstein formulated his theory of general relativity in 1905. Likewise, many legal realists were conducting empirical and statistical studies of the way in which courts functioned, whereas (naïve) case-method professors were "finding" the principles behind justice decisions. The only difference here is that the realists did have the goal of reforming the law taking as a basis the products of such new insights, and this was not the case with Langdellian professors and scholars. See KALMAN, *supra* note 36, at 35-36.

<sup>54</sup> KALMAN, *supra* note 36, at 21, 30.

only means: rule-skepticism. In the Realists' view, it was necessary to focus in the interrelationship between law and society to determine what actually determined judicial decisions, besides rules and precedent.<sup>55</sup>

The latter could be said to be the more apparent objectives of the legal realists, although there was not an agreement on this and other matters between them.<sup>56</sup> But, if the legal realists' goals are viewed through an intellectual microscope, it is possible to think that they were trying to change not only law, but legal institutions and the legal profession as well.<sup>57</sup> How? As they believed in a government of people, not of rules, their aim was to improve the education of social agents to manage the system's rules through a legal education that viewed the law as a complex system, developed with the knowledge of social disciplines such as political science, history, psychology, economics, sociology, ethics, logics, and philosophy.

However, how would a realist train students when the very basic activities of writing and reading were not enough for students? Not only that, but how would an enterprise like this would be accomplished if basic disciplines such as logics, grammar, and argumentation, among others, were disappearing from the curricula in that period of time? As a product of this scenario, it is not hard to picture how complicated was for law students to completely understand the language of the high courts' legal decisions, which was a product of logical reasoning and years of experience. So, in Hutchins words, "we had the spectacle of students and professors wrestling in the law schools with logical problems of the greatest difficulty and doing it without any equipment except that with which they had been gifted by nature."<sup>58</sup>

During the early-twentieth century legal education, there was an assumption from the part of the law schools that a law student possessed a strong background in the social sciences and the humanities. Again, the legal education system relied on the assumption that students possessed such knowledge, but fact is that, according to Frank, law students finished their legal education with the "vaguest recollections" of what they learned before law school in college.<sup>59</sup> How would future lawyers be grounded "in the social, economic and political material in which their technique must be exercised"?<sup>60</sup> How to teach a particular type of "knowledge which is the common possession

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<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 23. "But if one looks carefully there is more than a modest antagonism, sometimes in print and sometimes in private, between the individuals featured in the longer story and the individuals who would need to be added to make the enlarged group of Realists." See also SCHLEGEL, *supra* note 47, at 21.

<sup>57</sup> *Id.* at 45.

<sup>58</sup> Robert M. Hutchins, *Legal Education*, 4 THE UNIVERSITY OF CHICAGO LAW REVIEW 358 (1937).

<sup>59</sup> Jerome Frank, *Why Not a Clinical Lawyer School?*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER 922 (1933).

<sup>60</sup> Max Radin, *The Education of a Lawyer*, 25 CALIFORNIA LAW REVIEW 687 (1937).

of an educated minority and which has almost always a distinct literary and aesthetic coloring"?<sup>61</sup> How to reach such goals if legal education lacked the most basic preconditions for acquiring such type of specialized knowledge?

## 2. *The Social Sciences and the Legal Curriculum*

In an era in which conceptualism was so intertwined in legal education even for the most radical legal scholars, the first argument against Langdellian legal education was made by Oliver Wendell Holmes Jr., in his book *The Common Law*. Holmes believed that judges were fallible human beings, and that they reasoned according to their own political, economical, and moral biases.<sup>62</sup>

To accomplish the task [of learning law], other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.<sup>63</sup>

Almost three decades after Holmes' criticisms, Hutcheson would publish "The Judgment Intuitive" in 1929, which provided a direct critique against the law school curriculum and its methods and purposes of teaching. For Hutcheson, it was this faculty of the mind, the "hunch,"<sup>64</sup> which made the

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

<sup>62</sup> One year before, Holmes' all-famous sentence "The life of the law has not been logic: it has been experience" first appeared in a review of Langdell's *Selection of Cases on the Law of Contracts*, in which he described the author as the greatest living theologian, a Hegelian in disguise, whose "ideal in law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as system." See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE. THE ORIGIN OF MODERN LEGAL EDUCATION* 89-91, 110, 119, 121 (1933).

<sup>63</sup> OLIVER W. HOLMES, *THE COMMON LAW* 1, 2 (1881).

<sup>64</sup> "A strong, intuitive impression that something is about to happen."

most prepared legal agents and “the great scientists of the world.”<sup>65</sup> From that point on, the ideas of the legal realists covered different areas. Regarding legal education, reform was necessary given the existence of judges and lawyers dealing with “uncertainties, contingencies, imponderables, unpredictable”<sup>66</sup> on a daily basis. Teaching statutes and decisions to law students, therefore, was not enough to deal with these types of phenomena. If there were some requisites for admission (earning a previous B.A., for example), they were there not only for the student to count with huge amounts of ideas before enrolling in law school (as it was the case), but to develop a “power to reason, power to think consecutively, power to weigh and appraise material, with habits of getting to the bottom of things, of going to the sources, and of clear thought and expression.”<sup>67</sup> Contrary to this, Roscoe Pound lamented the students’ lack of general, cultural knowledge, social scientific frameworks, and “power to reason”. (Leaving behind, of course, the fact that Pound never attempted to follow his own remarks on legal education. He continually subscribed to the Langdellian case-method for twenty years as dean of the Harvard Law School...)<sup>68</sup>

Pound was one of the first scholars that published proposals on legal education of national and local character, which meant training future lawyers in the realms of the legal, political, and economical conditions of the country; that is, as trial lawyers, as advocates before appellate courts, and as office lawyers; as legislators, as judges, as law professors, and as legal scholars.

Legal education was about training these characters and social agents with “solid all round cultural training” on the appraisal and interpretation of cul-

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<sup>65</sup> Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the ‘Hunch,’* in JUDICIAL DECISION, CORNELL LAW QUARTERLY 14 (1929). In the last paragraph of the article, it is clearer: something ought to be changed in law schools, both in its methods of studying and of teaching law. The imaginative and intuitional mental faculties were essential, and the mere study of logical legal relations was not enough. Something more should be provided to the law student, that is, the sharpening of the mental processes by which such decisions are achieved, the proper channels of legal reasoning. “If these views are even partly sound, and if to great advocacy and great judging the imaginative, the intuitional faculty is essential, should there not be some change in the methods of the study and of the teaching of the law in our great law schools? Should there not go along with the plain and severely logical study of jural relations study and reflection upon, and an endeavor to discover and develop, those processes of the mind by which such decisions are reached, those processes and faculties which, lifting the mind above the mass of constricting matter whether of confused fact or precedent that stands in the way of just decision, enable it by a kind of apocalyptic vision to ‘trace the hidden equities of divine reward, and to catch sight through the darkness, of the fateful threads of woven fire which connect error with its retribution?’” *Id.* at 903.

<sup>66</sup> Jerome Frank, *Are Judges Human? Part Two: As through a Glass Darkly*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER 259 (1931).

<sup>67</sup> Roscoe Pound, *What is a Good Legal Education?*, 19 AMERICAN BAR ASSOCIATION JOURNAL 630 (1933).

<sup>68</sup> See KALMAN, *supra* note 36, at 46.

tural phenomena in the day-by-day experience; agents able to understand the techniques and ends of the social sciences, with knowledge on the history of the common law and its system, the ends of the legal system, the judicial and administrative processes, and the history, organization, and standards of the legal profession. Pound's proposal aimed to push the student to grasp the techniques of developing and applying the legal materials, which, it must be said, is different than knowing or memorizing each statute or decision.<sup>69</sup>

Other proposals were more inclined to the fields of uncertainty, such as Frank's. How would a law student know —he asked— if a question of fact will be posed by their counterpart in trial?, how would they manage with conflicting testimonies, and, more important, how will the judge and the jury react to that? How is a law student supposed to learn the law if the object of study is an upper court decisions?<sup>70</sup> To solve such issues, the following were measures to take: obligatory requirement of previous experience in legal practice to become part of the faculty, use of casebooks for just six months,<sup>71</sup> and the allowance of law students in “legal surgery” at legal clinics (which did not exist in any law school during that period of time, and maybe neither today in the way in which Frank describes it, *i.e.*, as, literally, legal firms). Along with these ideas, there was a conviction that law was a discipline of the social sciences, and that law students would learn it only by practicing it and by submerging themselves in the social sciences.<sup>72</sup>

The concept of legal education was also seen as something similar to the general idea of medical education. Frank thought of legal education as if it were the medical education of the “doctors of society,” of the lawyer as a gatekeeper of liberty and property, and who also helps in the development of the legal systems' rules and institutions. A return to Judge Reeve's idea of

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<sup>69</sup> See Pound, *supra* note 67, at 631.

<sup>70</sup> See Frank, *supra* note 66, at 253.

<sup>71</sup> Frank believed that the so-called case system failed in spending too much time with casebooks, three years to be exact (a law student's whole law school...).

<sup>72</sup> When Frank is talking about the “social sciences” he is referring not only to economics, sociology, history, politics, psychology, sociology, anthropology, and philosophy, but also to logics. He made clear that first-rate courses in logics should be taught to law students, in order to provide them with a frame of reference to really start “thinking like a lawyer.” With logics, potential lawyers would learn to identify fallacies and dogmas, but more importantly, “the provisional, experimental and tentative nature of most conclusions —particularly those relating to the conduct of human beings.” Along with such courses, a place should be given to factual studies on litigation. Attention should also be paid to the “art of the judge” (in case some student wanted to pursue such a career). Professional ethics would be impressed in the student's minds while they experience first-hand encounters with ethical problems that arise through the practice as a lawyer. And they would also experience the customs and social conventions of the bar. Finally, Frank proposed courses related to pedagogy: “For the sake of those students who may become teachers, there should be some courses in the art of teaching law.” Jerome Frank, *Why Not a Clinical Lawyer School?*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER 922-923 (1933).

teaching law students through the apprentice system in group,<sup>73</sup> but on a more sophisticated level, was imperative: Not law schools, but “lawyer-schools,”<sup>74</sup> where the arts of the judge, of the lawyer, of the critic of the work of lawyers (and judges), and of the teacher of these three arts, are always present (the theorist points out how long ago judges actually instructed, taught, law students who were present in courts during trials...)<sup>75</sup>

As Pound, Frank pointed out the deficiencies of college education in terms of the training of students in the realms of the social sciences. For that matter, “men who need not have first-hand experience in practicing law, but who are skilled economists, historians, political scientists, anthropologists or psychologists might well be made full-time or part-time members of the law faculty” (and he actually mentions the name of Max Radin as an exemplary, interdisciplinary legal scholar of such characteristics).<sup>76</sup>

Another, relevant program for the reform of legal education was posed by Hutchins in 1937. The scholar was sure that, in that period of time, at that moment in history, such program would have been disliked by most legal practitioners given their conservative standpoints, and because their limited notion of the concept of the lawyer and of education. (Is this still the case today?)

Legal education, as a method, is both speculative and practical. On the speculative side, history of the law as is seen taking into account its intellectual, political, and economic developments. The philosophy of law is the main aspect of the speculative side of legal education. The “philosophy of law, therefore, attempts through psychology to understand the law in terms of the analysis of man as a rational animal engaged in making and administering laws.”<sup>77</sup> On the practical side, training law students to perform operations of legal thinking through legal analysis is the case. (Legal analysis means dealing with problems of moral and political philosophy in the formulation of legislation and the interpretation of legal language.) Regarding the actual contents of legal education, there are: study of cases, along with the legal history of each of them, is also taken into account; Sociology and Economics, which serve to interpret how lawmaking functions; Moral and Political philosophies,

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<sup>73</sup> The first American law school, properly called, was founded by Judge Tapping Reeve in 1784, and it functioned in the same way as the apprentice system, but instead of one apprentice there were groups of apprentices experiencing, seeing the way in which courts functioned.

<sup>74</sup> Jerome Frank, *What Courts do in Fact*, 26 ILLINOIS LAW REVIEW 781 (1931-1932).

<sup>75</sup> It is in this sense in which some argue about law’s necessary educative function. See Brian Burge Hendrix, *On Law’s Necessary Educative Function, Alternative Methods in the Education of Philosophy of Law and the Importance of Legal Philosophy* in THE LEGAL EDUCATION. PROCEEDINGS OF THE 23<sup>RD</sup> WORLD CONGRESS ON THE INTERNATIONAL ASSOCIATION FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (Imer Flores & Gülriz Uygur eds., 2010).

<sup>76</sup> See Frank, *supra* note 72, at 922.

<sup>77</sup> Robert M. Hutchins, *Legal Education*, 4 THE UNIVERSITY OF CHICAGO LAW REVIEW 358-367 (1937).

along with psychology, logic, and grammar, in order to interpret legal rules and the cases themselves. Jurisprudence, *i.e.*, general philosophy of law, is the discipline that covers all of them. “The members of a learned profession must be learned and they must practice their profession for the welfare of the community.”<sup>78</sup>

Few law schools today follow the ideas of the legal realists regarding the legal curriculum. Independently, of course, of the ideas’ theoretical success, which seems to be plausible. The very notion of uncertainty, which appears to be impossible in Harvard’s rigid system, placed the legal realists one step above Langdell’s. Nevertheless, the case and Socratic methods are still in use in almost any American law school. (Not to mention most Latin American countries’ programs of legal education, which are about the same level.)

#### IV. TOWARDS A MORE COMPREHENSIVE LEGAL EDUCATION FOR MEXICO

It is true that, as general legal education and curriculum design methodologies are divergent in both their means, ends, and geographical location, it is somewhat difficult to sketch a rigid classification of the alternatives at hand for a further development of a step-by-step program to reform legal education accordingly. To this it must be added that external factors could and would jeopardize the whole enterprise if not considered properly.

As of today, regarding the legal curriculum design and teaching techniques, it is more than obvious that the social, economical, ecological, and political context of local and federal institutions are important factors to consider, especially today when the global market grows fast enough for governments to regularly fail to detect *ex-ante* possible future failures in the legal system.

More generally, a curriculum design that does not adapt its contents to the current, global scenario, will, more likely than not, fail. Solving a problem of this nature requires to “go further in time” and “foresee” what type of problems would lawyers be dealing with in a near future, for future lawyers to actually professionalize or become more professional during legal education. (Not after. It seems preferable to make mistakes during legal education, not after.)

Law schools are meant to provide the necessary means for the students to achieve the highest levels of understanding and reasoning, let alone basic fact-finding and research abilities. And our capacities to understand and reason will not improve or get better (of necessity) by following what already is not the best option. If the world has changed, then legal education must change too, or at least adapt.

A first obstacle to emphasize in current legal education is the student’s (and sometimes the professors’) lack of awareness of the sequencing of the learn-

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<sup>78</sup> *Id.* at 368.

ing process. In a recent article, attention is placed in an ex-ante pedagogical tool which aims to guide and take the student up to the confines or limits of her own cognitive processes, a sort of metacognition. By means of such techniques, students tend to become more efficient learners. If in the old days students used to recite from memory paragraphs and paragraphs containing legal facts, today, a law student that can only declaim what is contained in codes and statutes is as useful as the books that contain such codes and statutes themselves: a certain, particular form of reasoning is needed to perform as a lawyer in the Twentieth-First Century. But, how to identify which form of reasoning is needed, if we do not yet know how to teach it and learn it?<sup>79</sup>

A second obstacle is the underestimation of disciplines such as Jurisprudence, Ethics and Moral Philosophy, the Arts and Humanities, Logics and Mathematics, etc. Such underuse of alternative techniques to develop sharper forms of reasoning in the student tend to produce mold-lawyers. For example, Del Mar argues that overuse of textual resources undermine the student's capacity to recognize human states of mind such as suffering and vulnerability. In the author's opinion, appreciation of visual and movement arts, along with moral philosophy, are plausible ways to balance students attitudes towards their fellow citizens.<sup>80</sup> Other authors have argued that the use of humor, strange questions, impossible scenarios, and brainteasers would be useful too.<sup>81</sup> Same goes for the inclusion of pedagogical (or, should I say 'epistemological?') techniques as mind-mapping and mental imagery, let alone the stimuli for creativity.

If closely observed, our legal education institutions seem to alienate students from the valuable results that can be achieved through the use of these techniques, as these are not means to keep legal education stable, but on shaky grounds.<sup>82</sup> In the same line of reasoning, studies have been performed to identify cultural experiences, biases, and perspectives of law students to better understand how the learning process should be undertaken, especially when activities such as mediation, counseling, and negotiation are fundamental for today's lawyers.<sup>83</sup>

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<sup>79</sup> Edwin S. Fruehwald, *Teaching Law Students How to Become Metacognitive Thinkers*, available at <http://ssrn.com/abstract=2243128> or <http://dx.doi.org/10.2139/ssrn.2243128>.

<sup>80</sup> Maksymilian T. del Mar, *Beyond Text in Legal Education: Art, Ethics and the Carnegie Report*, 56 *LOYOLA LAW REVIEW* 101-144 (2010), available at <http://ssrn.com/abstract=1087790>.

<sup>81</sup> Hershey H. Friedman, *Talmudic Humor and the Establishment of Legal Principles: Strange Questions, Impossible Scenarios, and Legalistic Brainteasers*, 21 *THALIA: STUDIES IN LITERARY HUMOR* 14-28 (2004), available at <http://ssrn.com/abstract=2236456>.

<sup>82</sup> Our current forms of life seem to be an impediment to develop the intellect, as activity, doing, is what appears to count. On the other hand, not-doing, e.g., thinking, contemplation, remains as the cheapest way to strengthen the mental muscles. Contemplation, in this case, would be the key to creativity.

<sup>83</sup> Andrea Anne Curcio et al., *Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process*, 16 *U. W. SYDNEY L. REV.* 98-126 (2012).

A third obstacle is the legal curricula lack of adequacy to what the current economical and political changes worldwide demand from lawyers. Van Bemmelen summarizes this point very well:

In the past, between the years 1800 and 1950, legal education was a local, generalist, apprentice-based, non-corporate, and highly academic self-explanatory affair. Most of the legal professionals regarded themselves as involved in ex-post private law and criminal litigation/trials. Legal theory and the curriculum, correspondingly, could focus mainly on local private and criminal law contained in approximately 10.000 pages. At the start of the 21st century a number of things have changed. Around 100 specialized areas of legal theory and practice have emerged, along with millions of pages of new material. The sources of these new rules are increasingly international and regional, especially in Europe. The legal profession has also industrialized. The sole practitioner is outnumbered by legal professionals that are mass producing legal services and legislative instruments, as well as adjudicative products. Client demand has changed the emphasis to be more focused on ex ante: preventing disputes. Employers are expecting more than ever that graduates are well on their way through this increased volume of material, plus well versed in critical thinking, advocacy and research techniques. Moreover, in the countries where legal education is subsidized, universities are expected to educate more pupils for less money, plus accepting lower entry qualifications favoring historically less privileged groups. This process includes attempts, again especially in Europe, to harmonize the higher education degree structure across states. Law school traditions have not responded to these developments yet. The curriculum and teaching techniques have remained largely the same as in the 1800 to 1950 era.<sup>84</sup>

Where are we left? If the legal curriculum does not comprise emphatically the development of the capacity to learn how to learn, if subjects and topics in the curriculum are such that law students cannot become Statesman, but at most successful technicians, and if such subjects are not adequate enough to what society and clients demand from their lawyers, then maybe what follows is a profound, subsequent reform to legal education programs. Or maybe starting from scratch.

Is Law & Economics the way out? There are more than two features of today's proposals regarding legal education that relate to, and improve some of, the Realists ideas. I argue that most of the ideas that the Legal Realists pointed out regarding legal education are more than plausible today, and would apply to the current status of the legal profession.

Parisi, commenting on Ulen, recently argued that a multidisciplinary approach to legal education will serve to improve lawyering skills, especially when such approach takes into account disciplines that adhere to the Law

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<sup>84</sup> Ernst Van Bemmelen van Gent, *Legal Education: A New Paradigm*, BYNKERSHOEK LAW REVIEW 2-18 (2012).

and the Social Sciences approach. In addition of such approach, Parisi explains how the Law and Economics approach rigorously improves the student's analytical skills (which were left behind long ago). The farther legal education is from multidisciplinary coursework, the farther the law student is from understanding the law as it functions in the world. In addition to that, we "may be shortchanging our students if we continue using these outdated methods,"<sup>85</sup> that is, the Socratic and case-based methods. Instead of these, the legal curricula could take the same direction as the one taken by the home of two Law and Economics scholars, recognized with Nobel Prizes: James Buchanan (1986) and Vernon Smith (2002) of George Mason University.<sup>86</sup>

At George Mason Law School, analytical methods for law is a required first-year course, and Economic Foundations is one the courses with the highest number of units, which means that most law students are familiar with topics and disciplines such as decision theory, constitutional political economy, and public choice theory. The reason for the inclusion of these particular subjects in the curriculum is that, as it is known, Professor Henry Manne's Law and Economics Center was incorporated to George Mason Law School, and in 1971 the Center offered to the law faculty courses in microeconomic theory, taught by recognized economics scholars. Legal issues there were not the issue at hand: most of it was pure microeconomic theory. As of today, more than 600 law professors are graduates of this course, some of whom are recognized Law & Economics scholars and federal judges; also, since the institution constantly relies on economic analysis of law, six joint-degree programs — between the Law School and the Department of Economics — have been opened since.<sup>87</sup>

Law and Economics is not, and should not become, the one and only methodology of legal education in general. Although its method in particular has given insight as to which are the ways to make legal rules and contracts more efficient, and the creation of incentives for compliance, that does not mean that other methodologies are not desirable in the legal curriculum. Other, particular approaches to law are and would be necessary for a proper understanding of law and of the means to solve legal disputes in a peaceful and civilized way.

There are examples of North-American universities that incorporate alternative methodologies to the legal curricula besides Law and Economics, as in the case of the University of Minnesota School of Law, and its team-taught course "Perspectives in Law," which is offered both in first and upper years, and each of the three course's requires the student to tackle a practical situation using a particular methodology outside the law. The courses are taught by professors with training in alternate methodologies to law.

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<sup>85</sup> Francesco Parisi, *Multidisciplinary Perspectives in Legal Education*, 6 UNIVERSITY OF ST. THOMAS LAW JOURNAL 1-11 (2009).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

Many, many universities could be doing the same. However, the legal curricula remain as decades ago, with the same techniques. Today, as the world changes in the way it does, many Law Schools seem to be focused in adding to the legal curriculum courses such as “Human Rights”, “Alternative Dispute Resolution”, “International Legal Research,” etc. Such efforts are valuable. However, they seem to solve only a small fraction of the issue at hand. Measures like the ones chosen and applied by George Mason University are good efforts that go beyond the mere addition of subjects to the curricula.

Judges and policymakers lack the knowledge to determine when a legal rule is efficient, independently of the vast amounts of knowledge on mathematics and economic analysis. A market failure will not get solved with the type of political measures that governmental offices apply. Something else is needed.

Future lawyers, judges, and policymakers could thus undertake the kind of functional analysis that is imparted throughout law school at George Mason University. Such an analysis starts with an inquire into the incentives underlying the legal or social structure that produced a legal rule, rather than “weighting” the costs and benefits of individual rules. Based on this premise, the best choice of law depends on the needs of individuals: Allow parties to contract away from existing law; allow for a market for rules; foster competitive market for rules; allow multiple suppliers of law.

The functional approach to law and economics is informed by an explicit recognition that whatever social reality we seek to explain at the aggregate level, ought to be understood as the result of the choices and actions of individual human beings who pursue their goals with an independently formed understanding of the reality that surrounds them.<sup>88</sup>

Now, imagine a legal education that paid attention to the ex-ante identification of political failures in the formation of law, stressing the importance of market-like mechanisms in the creation and selection of legal rules... Or a legal education in which public choice theory were present at all times... This may be the education that lawyers would sooner or later ask for, as well as Realists could if they were still present today.

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<sup>88</sup> *Id.*