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- (d) Professional development opportunities for legal academics;
- (e) Professional legal education and practices programs.

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**THE AMERICAN CASE METHOD AND ITS INFLUENCE ON  
MODERN LEGAL EDUCATION**

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This paper is concerned with the development of the case method system of teaching which has remained at the core of American legal education until the present time.

Whilst Christopher Columbus Langdell has been credited with originating the case method form of teaching law, there is evidence that it had been adopted as a form of instruction prior to Langdell's appointment to the Harvard Law School in 1870. Martin Lloyd Levine states that 'the case method had been developed by Clerke, who ran his own law school, and by Pomeroy at New York University and at Hastings'.<sup>1</sup>

Nevertheless Charles W. Eliot, the President of Harvard, had appointed Langdell with the expectation that he would revolutionise the Harvard Law School's approach to the teaching of the law. He was not to be disappointed as Arthur E. Sutherland explains in his 'The Law at Harvard'<sup>2</sup> where he quotes Eliot as summing up this philosophy of Langdell's as '[o]ut of these two fundamental propositions – that law is a science, and that science is to be studied in its sources, - there gradually grew, first, a new method of teaching law; and secondly a reconstruction of the curriculum of the school'.<sup>3</sup>

In Langdell's view law, being a science, consisted of various principles or doctrines which were to be found in the decisions of the courts. This formed the sources of the Common Law. The case method system of instruction depended on the selection of a number of cases which could be used to illustrate the essential doctrines of the law.

Albert J. Harno has described both the advantages and disadvantages of Langdell's system 'Langdell introduced, and his early disciples perfected, a system of instruction which in the hands of an able and skilful teacher is unexcelled as an instrument of education'.<sup>4</sup>

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<sup>1</sup> Martin Levine, *Legal Education* (1<sup>st</sup> ed, 1993) D XIV.

<sup>2</sup> Arthur Sutherland, *The Law at Harvard* (1<sup>st</sup> ed, 1967) 176.

<sup>3</sup> Charles Eliot, *Record of the Commemoration Number Fifth to Eight 1886, on the Two Hundred and Fifteenth Anniversary of the Faculty of Harvard College* (1<sup>st</sup> ed, 1887) 159.

<sup>4</sup> Albert Harno, *Legal Education in the United States; a Report prepared for the Survey of the Legal Profession* (1953).

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He has also drawn attention to an important drawback of the system, reiterated by other critics over the past 136 years as '[b]ut Langdell also is responsible more than any other man for confining legal education in a strait mold which was for years to dissociate it from the living context of the world about it'.<sup>5</sup>

Despite this comment of Harno, by 1907 the majority of law schools in the United States had adopted the case method form of teaching, and Robert Stevens has explained that '[t]he lasting influence of the case method was to transfer the basis of American legal education from substance to procedure and to make the focus of American legal scholarship – or at least legal history – increasingly one of process rather than doctrine'.<sup>6</sup>

In 'The Centennial History of the Harvard Law School 1817 – 1917' there is a description of the dramatic effect of the first trial case method in the Fall of 1870 when the first year law class

opened their strange new pamphlets, reports bereft of their only useful part, the headnotes! The lecturer opened his:

Mr Fox, will you state the facts in the case of *Payne v. Cave*?

Mr Fox did his best with the facts of the case.

Mr Rawle, will you give the plaintiff's argument?

Mr Rawle gave what he could of the plaintiff's argument.

Mr Adams, do you agree with that?

And the case system of teaching law had begun.....<sup>7</sup>

It was one of the pupils in that first class, James Barr Ames, subsequently to become a Professor at Harvard, who perfected the Langdell system. Ames was an outstanding teacher as compared to Langdell, so he was able to perfect the Socratic method of teaching; 'like Socrates himself, he desired to open the eyes of his students and let

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<sup>5</sup> Ibid 59.

<sup>6</sup> Robert Stevens, *Law School – Legal Education in America from the 1850s to the 1890s* (1<sup>st</sup> ed, 1983) 10

<sup>7</sup> The Harvard Law School Association, *The Centennial History of the Harvard Law School 1817 – 1917* (1918) 34-5.

them discover the truth for themselves. He would rather state a problem than a solution. His favourite device in teaching was to put one good student against another, that the class might learn the law from their arguments'.<sup>8</sup>

It could be argued that Ames was the first in a long line of American Academics to adapt the case method system to the changing needs of American legal education.

As the account of the History of the Harvard Law School goes on to state, '[a]lmost without exception, Ames's pupils enthusiastically admired his method. It was a stimulus to the slow pupils and a delight to the more acute'.<sup>9</sup>

However, whilst the Law Schools had embraced the case method form of teaching, it was still opposed by the American Bar Association (ABA), who were concerned that it was a system 'which encouraged law graduates to become litigators whilst the trend for the legal profession was away from 'courtroom lawyers' to the office lawyers who sought to avoid litigation'.<sup>10</sup>

In 1891 this attack on the case method was led by the ABA Committee on Legal Education, which in its 'Report of Committee on Legal Education' argued that the case method was, in contrary to Langdell's view, 'unscientific'. In 1892 it went further by stating '[a] limitation of the case method, and probably an unavoidable one, is its confinement to the doubtful part of the law and disregard of the great but settled principles upon which so much of the lawyer's reasoning depends...'<sup>11</sup>

Whilst the ABA had pronounced its opposition to the case method, this was not reflected in the approach towards the system adopted in general by the American Law Schools. Stevens explains that at the end of the nineteenth century 'the fashionability of the Langdell system grew with remarkable rapidity', and although 'for a short time

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<sup>8</sup> Ibid 37.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 57.

<sup>11</sup> Ibid 59.

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it was a phenomenon largely confined to certain elite schools, but once such schools as Columbia had fallen to the trend, others followed in quick succession'.<sup>12</sup>

In the account in the chapter 'Harvard sets the Style' Stevens explains that for many less prestigious law schools this Harvardization of law teaching was seen 'as a way of gaining academic recognition'.<sup>13</sup>

Its introduction within most law schools has to be seen also within the context of other innovations introduced by Langdell at Harvard in association with the case method, such as the three year law degree, the raising of admission standards, & in the long term the recognition of law as a graduate study.<sup>14</sup>

Whilst space limits a detailed examination of the alternative modes to the case method system of teaching which have been advocated since 1870, there have been some major attempts during the period since which should not be ignored.

Martin Lyon Levine in a reproduction of his article 'Legal Education & Curriculum Innovation: Law & Ageing as a New Field of Study' draws attention to the early attempts by Roscoe Pound calling for the abandonment of the method of deduction from predetermined conceptions' and 'for the adoption instead of a sociological jurisprudence emphasising the human factor and the social structure within which the law operates'.<sup>15</sup>

The implication of Pound's argument was that '[t]he rising and still formative school to which we may look chiefly henceforth for advance in juristic thought may be styled the Sociological School'.<sup>16</sup>

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<sup>12</sup> Ibid 60.

<sup>13</sup> Stevens, above n 6, 61.

<sup>14</sup> Ibid 37.

<sup>15</sup> Levine, above n 1, 267.

<sup>16</sup> Roscoe Pound, 'Scope and Purpose of Sociological Jurisprudence' (1911) XXIV *Harvard Law Review* 594.

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In my view, of equal relevance in a copy of the *Harvard Law Review* XXV 1911, in which these views were espoused, is an article by Albert M. Kales entitled 'Should the Law Teacher practice Law?' where the author raises the problems of those law teachers who had 'because of the excellent case books have been made for them and the second editions are out' poses the question '[w]hat shall these young men who are going into law teaching on the basis of not practicing at all, do to develop their powers?'.<sup>17</sup>

The article in fact becomes a dialogue between Kales and a note appended by Ezra Ripley Thayer who engages in debate with the former espousing the virtues of the law teacher becoming a law teacher advocate, and Thayer responding that the case method system should not prevent the lecturer from developing an expertise in his subject expanding on his knowledge enabling him to pursue a scientific and painstaking investigation of his subject.<sup>18</sup>

The relevance of reviewing these various legal fields is that they arise 'from different visions of legal education that reflect differing assumptions about purposes & methods' and can be classified 'as stages of the development of American legal education'.<sup>19</sup>

In that respect they are relevant to a consideration of the case method form of teaching and Stevens has stated that 'the major contribution of the Realist movement was to kill the Langdellian notions of law as an exact science, based on the objectivity of black letter law'.<sup>20</sup> This reflects the attack by American legal realists on the formalist approach originally adopted by Langdell and his successors.

Concurrently with regard to this exchange of views between Pound and Karl Llewellyn in the *Harvard Law Review*, there had been criticisms of the case method

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<sup>17</sup> Albert Kales, 'Should the Law Teacher Practice Law?' (1911) XXV *Harvard Law Review* 254.

<sup>18</sup> *Ibid* 256.

<sup>19</sup> *Ibid*.

<sup>20</sup> Stevens, above n 6, 156.

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articulated in Reports by Joseph Redlich in 1914,<sup>21</sup> and Alfred Reed in 1921<sup>22</sup> and 1928.<sup>23</sup>

Karl Llewellyn, in response to Roscoe Pound's 'The Call for a Realist Jurisprudence' conceptualised the New Realism whilst denying that there was a Realistic School.<sup>24</sup> He nevertheless endeavoured to define '[r]ealism' as 'the systematic effort to carry one problem through, to carry a succession of problems through, to consistently, not occasionally, choose the best available technique, to consistently keep description on the descriptive level, to consistently distinguish the fact basis which will feed evaluation from the evaluation which it will later feed, to consistently seek all the relevant data one can find to add to the haphazard single life experience, to add to general common sense'.<sup>25</sup>

Llewellyn also emphasised that 'is it not obvious that – if this be realism – realism is a mass of trends in legal work and thinking?'.<sup>26</sup> Although there was a gap of thirteen years, Llewellyn was able to continue his campaign against the case method system when he was the principal author of the 1944 Association of American Law Schools Curriculum Committee's Report. Stevens states that this 'was apparently the first organised attempt to isolate legal skills and so to articulate the rationales underlying legal education'.<sup>27</sup>

The main thrust of the report was that 'with the increasing complexity of the law the regular case course was no longer, except for the best students, an adequate vehicle for indirect conveyance of the basic legal skills'.<sup>28</sup>

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<sup>21</sup> Joseph Redlich, *The Common Law and the Case Method in American University Law Schools* (1<sup>st</sup> ed, 1914).

<sup>22</sup> Alfred Reed, *Training for the Public Profession of the Law* (1<sup>st</sup> ed, 1921).

<sup>23</sup> Alfred Reed, 'Present Day Law Schools in the United States and Canada' (1928) 21 *Carnegie Foundation Bulletin* 289.

<sup>24</sup> Karl Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1930) XLIV *Harvard Law Review* 1250.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Stevens, above n 6, 214.

<sup>28</sup> *Ibid.*

The outcome of this Report was an attempt to introduce the problem method as an alternative to the traditional case method. This was aimed at resolving one of the criticisms of the case method; that it was a study of the solutions of problems, not how to solve them.<sup>29</sup>

However it failed, one of the reasons being advanced for the failure being the lack of well prepared problems or the existence of problem books.<sup>30</sup> This may be regarded as a poor excuse for not responding to the challenge of the case method system.

The survival of the case method form of teaching has to be seen in the context of changes in American legal education and the future demands on the Law School curriculum, whether this is curricular reform or the introduction of new courses, new methodologies or new programs. As we have seen, although it might be thought that the case method system was the only accepted system of law teaching, in fact it suffered a number of severe attacks over the years. An example of such criticisms' were the concerns and reforms recommended by the Report of the ABA Task Force on Law Schools convened in 1989 which in its Report (The MacCrate Report) endeavoured to develop 'a conceptual statement of the skills & values that it was considered all lawyers should seek to acquire and that would promote the competent and responsible practice of law'.<sup>31</sup>

It did this by providing both a conceptual analysis of ten fundamental lawyering skills which were linked to four professional values.<sup>32</sup>

This constituted a further challenge in the conflict between the ongoing formalising of legal education as contrasted to the challenge of hands on training in essential lawyering skills.

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<sup>29</sup> Ibid 215.

<sup>30</sup> Ibid.

<sup>31</sup> MacCrate Report, *Legal Education and Professional Development – An Educational Continuum. Report of the Task Force on Law Schools and the Legal Profession – Narrowing the Gap* (1992).

<sup>32</sup> Donald King, *Legal Education and Conduct; Selected Observation in Fred Rothman (ed) Legal Education for the 21<sup>st</sup> Century* (1999) 134.

Because of its ongoing presence it is difficult to undertake a rational critical analysis of the case method form of teaching. Starkis, Dickenson and Martin have stated that 'Langdell has become the scapegoat of choice for much of what ails legal education'.<sup>33</sup> Whilst Andrew Popper added to this with the comment, 'witness a warning against perpetuating some bizarre Langdellian psychodrama'.<sup>34</sup>

However, the controversial nature of the case method system has led to ongoing critical analysis regarding this mode of legal teaching. In this respect I intend to focus on two articles analysing the case method, both published in Volume 4 of the 'Journal of Legal Education', the former in the Autumn 1951 No 1 Edition 'The Case Method in American Legal Education: Its Origins and Objectives' by Edwin W. Patterson,<sup>35</sup> and the latter in the Summer Edition 1952 No 4 Edition 'The Case Method' by Edmund M. Morgan.<sup>36</sup>

The latter article by Edmund Morgan is comparatively short, totaling eleven pages, but within this brief space he manages to encapsulate the various aspects of 'what the study of law by the case method will do for the student [as] better stated by.....Ames & Keener'.<sup>37</sup>

In doing this he summarises their arguments emphasising that the student, by the study of the cases 'becomes acquainted with the characteristic problems that arise in the different fields of the law and with the fundamental principles upon which the courts rely or purport to rely in solving them, as well as with the methods which judges and lawyers use (a) in analysing a factual situation, separating the legally material elements from the legally immaterial (b) in eliminating as far as possible the emotional and superficially relevant elements, and (c) in reaching such a decision as

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<sup>33</sup> Andrej Thomas Starkis, Paula Dickenson and Thomas H. Martin, 'Meeting the MacCrate Objectives (Affordably)' (1998) 48 *Massachusetts School of Law, Journal of Legal Education* 229-30.

<sup>34</sup> Andrew Popper, 'The Uneasy Integration of Adjunct Teachers into American Legal Education' (1997) 4 *Journal of Legal Education* 83-4.

<sup>35</sup> Edwin Patterson, 'The Case Method in American Legal Education: Its Origins and Objectives' (1951) 4 *Journal of Legal Education*.

<sup>36</sup> Edmund Morgan, 'The Case Method' (1952) 4 *Journal of Legal Education*.

<sup>37</sup> *Ibid* 380.

in their opinion should be reached in any case in the foreseeable future presenting the same problem, regardless of the persons involved or the magnitude of the amount in controversy or the passing prejudices of the community'.<sup>38</sup>

This, in the view of Edmund Morgan encapsulates 'the theory upon which Langdell, and particularly his disciples at Harvard and Columbia, conceived the case method to be built'.<sup>39</sup> He does however stress that this, like any other mode of teaching, depends on the ability of (in this context) the instructor 'to arouse in the student an enthusiasm for the subject'.<sup>40</sup>

He recognises that much will depend on the ability of the law teacher and introduces shades of value in respect of the variety of the teaching by the case method, but argues where the teaching is of the highest quality the law student will receive 'training in the analysis of states in fact and in distinguishing the legally material from the immaterial', and among other advantages will require him to do some independent thinking and to form his own judgments upon legal questions.<sup>41</sup>

He goes on to state that for 'this kind of instruction by the case method in the first year of law school there is, in my opinion, absolutely no substitute'.<sup>42</sup> He does add a cautionary note; '[n]o method of instruction has been or ever will be discovered that will enable any law school in three or four short years to equip him (or her) with these qualities and capacities. But experience has shown that the best available method of giving him (or her) a sure foundation for their acquisition is the case method'.<sup>43</sup> Morgan's view is supported by Patterson.

Patterson observes in his article 'The case method of teaching in American Law Schools has now passed its seventy fifth birthday' (a reminder that the date of this publication is 1951), and is of the view that '[t]he controversies about its merits and

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<sup>38</sup> Ibid 381.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid 384.

<sup>42</sup> Ibid 387.

<sup>43</sup> Ibid 391.

demerits which agitated law teachers and the legal profession for more than forty years after its inception have long subsided. All, or nearly all, American law schools have adopted the case method in its general outlines'.<sup>44</sup>

He queries whether the changing legal theories such as '[a]merican legal realism, theories of natural law and of policy science' have altered the 'basic features of objectives of the case method' or has 'merely exemplified in a new way its valuable content'.<sup>45</sup>

For the remainder of the article he develops an appraisal 'of the advantages and disadvantages which long experience has shown the case method to possess'.<sup>46</sup> During this exposition he examines the presuppositions of the case method under the subclassification of:

1. Scientific
2. Pedagogical
3. Pragmatic (by which he quotes Holmes emphasising 'reasoning by analogy without an explicit major premise'.<sup>47</sup>
4. Historical (whereby the student by 'study of the cases can best grasp the historical development of the law')<sup>48</sup> and quotes J.C. Gray who stated that the casebook 'accustoms the student to consider the law.....as a living thing, with a continuous history'.<sup>49</sup>

Whilst Patterson acknowledges that different teachers and law schools cause a variety in the instruction of the case method, he states that the following three devices are 'generally... deemed essential:

1. The casebook
2. The participation of students in class discussion

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<sup>44</sup> Patterson, above n 35, 1.

<sup>45</sup> Ibid 1.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid 8.

<sup>48</sup> Ibid.

<sup>49</sup> J.C. Gray, 'Methods of Legal Education' (1892) 1 *Yale Legal Journal* 159.

3. The problem type of examination'.<sup>50</sup>

These three devices listed by Patterson seem particularly relevant to the whole thrust of any consideration of the value of the case method as the success of this form of teaching would certainly very much depend on the first two devices of choice and the makeup of the casebook would determine to a large extent the manner in which the class discussion was conducted.

With regard to the casebook itself, the article poses the rhetorical question as to 'what cases shall be included in the casebook, what excisions shall be made from the original report, how shall they be arranged, and what other material shall be included with them?'.<sup>51</sup>

Within this consideration is incorporated a discussion as to the efficiency of a 'national' casebook over a 'local' casebook, the latter having been advocated by Professor Albert Kales of Northwestern University. The justification for a 'national' casebook is contained in the statement that it has 'tended in some measure to counteract the isolated provincialism of forty nine separate jurisdictions and thus bring about the uniformity which the casebook presupposed'.<sup>52</sup>

Among this discussion is survey of the variety of the '[c]lassifications and arrangements of the materials in casebooks';<sup>53</sup> the choice of the main headings of a casebook outline as conceptual devices for the classification of cases';<sup>54</sup> the selection of cases that will acquaint the student with the contemporary culture in which he lives and in which legal devices are operative;<sup>55</sup> and 'the editing of reported cases by excision or condensation'.<sup>56</sup>

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<sup>50</sup> Patterson, above n 35, 10.

<sup>51</sup> Ibid 11.

<sup>52</sup> Ibid 12.

<sup>53</sup> Ibid 13.

<sup>54</sup> Ibid 15.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 16.

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This is an invaluable part of the discussion as it illustrates the trend away from the starkness of Langdell's first casebook to the current practice of 'the inclusion of more and more supplemental material in the form of textual discussions by the editor, excerpts from law reviews or treatises, statutes, committee reports, forms of contracts and other instruments'.<sup>57</sup> These are the type of contemporary law and materials casebooks used by students in most Common Law schools.

The other main topic in relation to the case method discussed by Patterson is entitled 'The class discussion' with the '[s]ocratic dialogue' being stated as 'the early ideal of the class discussion'.<sup>58</sup>

In Patterson's view 'the teacher, like Socrates, should ask more questions than either he or the student can answer' which is considered to produce 'a process (which) can be intellectually stimulating to the entire class and can give the students clues to what they should investigate further'.<sup>59</sup>

However it is recognised that law teachers had moved away from one of the original concepts of the case method form of teaching that the teacher 'ought never to lecture, or to summarise the conclusions to be derived from the cases and the class discussion'.<sup>60</sup>

In his conclusion Patterson states that '[i]n practice the case method has never stood still; it was not the same with Ames as with Langdell, and today, with all due admiration for these men, it need not be the same as either'.<sup>61</sup>

In tracing the saga of the case method from its origins in 1870 until the present time, it is instructive to note that no American law school wishes to abandon it completely as a form of teaching.

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid 17.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 18.

<sup>61</sup> Ibid 23.

Even the New York University School of Law, currently recognised as one of the most innovative of the American law schools, stated through its then Dean (now President of NYU) and 1997 AALS President, John Sexton that '[d]espite profound changes in the legal profession, the dominant mode of teaching continues to be the traditional casebook method, developed in the late 1880s by Christopher Columbus Langdell'.<sup>62</sup>

He went on to add '[w]e did not propose that the traditional casebook and Socratic methods be abandoned. To the contrary, we affirmed that what traditional legal study aimed to do, did it excellently. The active reflection upon and synthesis of appellate judicial decisions has been a model of rigor and active discourse that many disciplines have envied and work to emulate'.<sup>63</sup>

Then having voiced concerns as to the need for the modernisation of the NYU law programs, he stated that '[w]e proposed therefore that the casebook method be supplemented with major new initiatives in clinical education and interdisciplinary study'.<sup>64</sup>

Yet again the case method system would survive and be reshaped to meet the needs of modern American legal education.

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<sup>62</sup> John Sexton, 'Charting the Course for Law Schools: Process, Goals and Globalisation' in Donald King (ed) *Legal Education for the 21<sup>st</sup> Century* (1999) 43.

<sup>63</sup> Ibid 43.

<sup>64</sup> Ibid.