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The Rise and Fall of Part-Time Legal Education in Wisconsin

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THE RISE AND FALL OF PART-TIME LEGAL EDUCATION IN WISCONSIN: 1892-1924

I. INTRODUCTION

In the fall of 1923, Max Schoetz boarded a train for Chicago bearing a bombshell. The dean of the Marquette University Law School was on his way to a meeting of the executive committee of the Association of American Law Schools (AALS), and he carried a surprising announcement with him as the train rolled out of Milwaukee. His school, a recent victor in the bitter war over part-time legal education and the sole provider of such services in the state, had decided to close its night law school.[1]

At the meeting, Dean Schoetz vowed to open the night program again, and soon. As it turned out, however, he never did, and neither did any of the next five men who succeeded him as dean of the Marquette Law School. In fact, it would take over seventy years for night legal education to return to Wisconsin.[2]

The closing of the Marquette night school was not accidental. Nor was it due to a want of student interest or to a lack of commitment from Marquette administrators. Instead, several local and national forces—economic, philosophical, and political—combined to end part-time legal education in the state.

This paper examines those forces, and attempts to describe and explain the rise and fall of part-time legal education in Wisconsin. Beginning in 1892 with the Milwaukee Law Class and ending in 1924 at Marquette, the story of night legal education in Wisconsin illustrates the tremendous impact that societal influences had on legal institutions during the last decades of the nineteenth century and the first decades of the twentieth. This story also reveals the often turbulent relationship between the two main providers of legal education in Wisconsin, and the effects this internecine warfare had on the people of the state.

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1. *See* V.W. Dittmann, *History of the Marquette Law School*, 8 MARQ. L. REV. 299, 302 (1924); 1923 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 33-35 (1924).

2. In the fall of 1997, Marquette re-opened its part-time legal education program.

II. THE RISE OF THE NIGHT LAW SCHOOL IN WISCONSIN: 1892-1915

In 1892, night legal education in Wisconsin began with a handful of young men preparing for the bar examination in rooms rented from an office building in downtown Milwaukee.[3] By 1912, just twenty years later, it consisted of more than sixty students in a four-year degree program at Marquette University, one of the most rapidly growing private universities in the country at that time and a member of the AALS.[4] The rapid rise of night legal education in Wisconsin resulted from both economic and political influences, as well as a wave of recent immigration and the triumph of a particular vision of the law and legal education. This convergence of forces, however, had not always existed in the state, nor would it last. The birth and development of the law school at the University of Wisconsin in Madison illustrates how these forces began to work together to fashion Wisconsin's first law school and how they laid the foundation for the part-time schools that followed.

A. The Birth of Wisconsin's First Law School (1868)

Law schools in the mid-nineteenth century were not intended to certify the professional competency of lawyers or regulate access to the bar. Instead, a brief stint in law school, usually lasting no more than a year, was meant to augment, not replace, the traditional means of legal training: an apprenticeship with a practicing attorney.[5] Thus, the law program launched by the University of Wisconsin in 1868, though modest by contemporary standards, differed little from the other law schools then in existence.[6]

The first classes of the "Law Department" of the University of Wisconsin were held about a mile off campus, in a room inside the State Capitol Building. The University saved money on books by having its students rely on the state law library instead of creating its own, and saved money on salaries by hiring only two local attorneys as the school's entire faculty. Twenty-nine-year-old William F. Vilas lectured part-time on evidence and pleadings, and forty-six-year-old Jairus H. Carpenter served full-time as dean and lecturer for all the other courses. To build up the reputation of the nascent school, three Wisconsin Su-

3. Dittmann, *supra* note 1, at 298.

4. MARQUETTE UNIVERSITY COLLEGE OF LAW 1912-13 BULLETIN 25 (1912). *See also* FR. RAPHAEL HAMILTON, S.J., THE STORY OF MARQUETTE UNIVERSITY 121 (1953).

5. WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 42 (1978).

6. *Id.* at 44.

preme Court justices were listed as part-time lecturers, although it seems clear the justices never actually lectured. The University Board of Regents provided two thousand dollars for Dean Carpenter's salary to get the school off the ground, but expressed their hope that the school would become self-supporting. The first class consisted of fifteen full-time day students; twelve of whom went on to graduate the next year with a Bachelor of Laws degree.[7] These humble origins, however, belie the program's growing influence.

Beginning in the 1870s, formal legal education was becoming more important across the nation and the state. One reason for this change was the economic impact of the law schools on the supply and demand of the legal market. Law schools encouraged more university students to pursue law as a career. As part of their legal education, which their university education was only supposed to supplement anyway, more students sought a limited number of apprenticeships as clerks in law offices. In university towns like Madison, where the university population grew quicker than the town's economy, this created significant problems. With students unable to learn the law in law offices, there was mounting pressure to have them stay in school and learn it there.[8]

Another reason for the expanding importance of law schools was the changing nature of the legal profession itself. As American society became more complex in the wake of the industrial revolution, lawyers were required to have more specialized knowledge in specific areas of law. This change simultaneously increased the value of systematic study of legal principles in a formal law school setting and lessened the value of an apprenticeship. Apprentices to specialist lawyers, for example, seldom received work assignments in an order best suited to their stage in the pedagogical process, and might never gain access to other areas of law which lay outside the ken of their particular firm.[9]

Specialization also demanded a different set of skills from lawyers in the last decades of the nineteenth century. With the rise of the corporation after the Civil War, lawyers were being asked to counsel in business offices more than advocate in open court. Suddenly, a law school

7. *Id.* at 46-48. In support of the proposition that the Wisconsin Supreme Court justices did not actually lecture at the UW law school, Johnson cites the account of Burr Jones, a UW law student in 1870 who eventually joined the faculty. In a contemporary account, Jones noted, "The influence of [the justices'] names was all that was ever expected." *Id.* at 47 (quoting Burr W. Jones, *Colonel Vilas and the Law School, in* MEMORIAL SERVICE IN HONOR OF WILLIAM FREEMAN VILAS AT THE UNIVERSITY OF WISCONSIN 18 (1908).

8. *See* Johnson, *supra* note 5, at 60-61.

9. *See id.* at 52.

graduate's ability to wade through a complex and constantly changing area of law became much more valuable than superb rhetorical or trial skills, which an accomplished attorney had to develop over time.[10]

This tension between the generalist and specialist approaches to the law led to two competing theories of legal education. Edwin E. Bryant, dean of the College of Law at Wisconsin from 1889-1903, dedicated his career to making the law school an "ideal law office." According to this school of thought, the law school should impart practical legal knowledge to students in the same way and with the same purpose as did the old apprenticeships.[11] Under this approach, practitioners, not theoreticians, made the best teachers. The other theory of legal education, first developed at Harvard in 1870, later became known as the "case method." This school of thought saw law as a science, the tools of which needed to be imparted to law students in a systematic and theoretical manner by critically examining appellate decisions. Under this approach, professional academicians, not practicing attorneys and judges, were preferred as instructors. For reasons that will be discussed below, the case method had an enormous impact on the development of law schools across the country. The case method soon eclipsed the theory of an "ideal law office," which was to become increasingly unworkable as law school enrollments continued to climb and the individualized attention apprentice-type programs required became impossible.[12]

A third reason for the growing importance of law schools was the political activity of members of the bar and the law school lobby. Leaders of the bar nationwide, concerned about an alleged surplus of lawyers and an increasing number of reports of unethical conduct, lobbied hard to restrict access to the bar during the last third of the nineteenth century. As a result of their efforts, by 1890 a majority of jurisdictions required bar applicants to complete a formal period of legal study or apprenticeship, and to sit for a written bar examination. Law schools were eager to assume the added responsibilities these initiatives placed on them, particularly when they also enjoyed the diploma privilege.[13]

In 1870, the Wisconsin legislature granted graduates of the University of Wisconsin's Law Department the privilege of automatically being

10. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 301-03 (1950).

11. Johnson, *supra* note 5, at 88-89.

12. *Id.* at 101-02.

13. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 25-26 (1983).

admitted to the bar upon presentation of their diploma and the payment of a fee. The bill was motivated in part by the University Regents' concern about low attendance at the law school, and presaged the University's role as gatekeeper of the entrances to the legal profession. Graduation was not difficult; students merely had to attend lectures for one academic year of three terms, or even just the final term if they had "pursued a course of study elsewhere equivalent to that required here." The bar was nonplussed about these relatively lax requirements; at the time law school was still viewed as merely a supplement to apprenticeship training. As a result, applications to the UW law program surged in the wake of the bill's passage.[14]

As economic, philosophical, and political forces combined to increase the stature of law schools in Wisconsin and throughout the rest of the country, they brought other changes in their wake. One noticeable change was a dramatic proliferation of law schools around the turn of the century. In 1890, there were sixty-one law schools in the United States. By 1910, that number had more than doubled, to one hundred and twenty-four.[15]

But the changes also brought about a different kind of law school. The same forces that enabled law schools to flourish also helped create a vibrant offshoot known as the night law school. Over one-half of the law schools that were established during the growth spurt between 1890 and 1910 were either partially or exclusively part-time schools.[16] The same economic, philosophical, and political forces that thrust the UW law school onto center stage also created its first competitor in the Wisconsin legal education market: the Milwaukee Law School.

B. Night Legal Education Comes to Milwaukee (1892)

Night law schools in the United States were born in Washington, D.C. immediately following the Civil War. Columbian College (George Washington University) began its program in 1865, hoping to attract government employees after they left work at three o'clock in the afternoon. Georgetown University and National University followed suit five years later. The first significant night schools outside the nation's capital were established in 1888, when the Metropolis Law School (later absorbed by New York University), Chicago College of Law (a forebear

14. Johnson, *supra* note 5, at 55-57.

15. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 442 (1921).

16. *Id.* at 449.

of the Chicago-Kent College of Law), and the University of Minnesota evening law department opened their doors.[17]

Night legal education in Wisconsin began shortly after the 1885 Wisconsin legislature passed a law requiring prospective lawyers to pass a written bar examination. In 1892, a cadre of candidates studying for the bar exam in Milwaukee sought the assistance of a young attorney, William H. Churchill, and installed him as the first professor of the Milwaukee Law Class, as the group came to be known. Churchill, who had graduated from the University of Michigan the previous year, was apparently chosen because of his formal legal education and experience with having passed the Michigan bar exam, which was at least one more bar exam than his students had taken.[18]

Four years later, the group changed its name to the Milwaukee Law School and added more faculty. One of these lecturers was United States Circuit Judge James Graham Jenkins, who would also become the first dean of the Jesuit-sponsored Marquette Law School in 1908. Other attorneys who came to lecture included Franklin Spies, Edward W. Spencer, and a former member of the UW faculty, Lynn Spencer Pease.[19] Classes were held in rented rooms in the Miller office block on the northeast corner of Wisconsin and Broadway in downtown Milwaukee.[20]

Unlike many other proprietary schools that were popping up all over the nation during this same time, the Milwaukee Law School was not run as a profit-making venture. The school spent most of its sixteen year existence as a voluntary, unincorporated association of its students and faculty.[21] The first students literally passed a hat to come up with stipends for the teachers. The school generated a total of 147 lawyers over its sixteen year history, an average of less than ten a year.[22] Assuming a high rate of attrition among students who were attending the classes only as a supplement to their legal training in law offices and in preparation for the bar exam, it is likely that classes were no larger than thirty or forty in number. Assuming further some extremely optimistic rates of tuition and payment, as well as the school's low $6,000 price tag

17. *Id.* at 396-97.

18. *See* Johnson, *supra* note 5, at 72; Dittmann, *supra* note 1, at 299.

19. Johnson, *supra* note 5, at 113. *See also* In Memoriam: James Graham Jenkins, 175 Wis. lii, liii (1921).

20. Dittmann, *supra* note 1, at 299.

21. Hamilton, *supra* note 4, at 80-81.

22. *See* Robert F. Boden, An Early History of Marquette University Law School 6 (1974) (unpublished manuscript, on file with the Marquette University Archives).

in 1908 when it was sold to Marquette, it seems reasonable to assume the school grossed at most somewhere between three and five thousand dollars per year.[23]

The admissions standards at the Milwaukee Law School were indicative of the low standards for the legal profession as a whole. Before the turn of the century, applicants to the Wisconsin bar needed to show only that they were residents, twenty-one years old, of "good moral character," and that they had passed the bar examination, which generally consisted of answering questions posed by a judge in open court.[24] Only in 1903 did the Wisconsin legislature mandate that bar applicants also be required to have graduated from high school and to have studied law in some way for at least three years.[25]

Although requiring a high school diploma of bar members seems minimal by contemporary standards, it was not *de minimis* in the early twentieth century. Wisconsin law during this period mandated compulsory attendance through only the first eight grades. In Milwaukee at the time, only a small percentage of eligible young people graduated from high school. As late as 1915-16, less than twelve percent of 18-year olds in the city of Milwaukee were graduating from high school.[26] The high school diploma requirement presented a problem for the Milwaukee Law School, as it threatened to put a law school education out of the reach of most Milwaukeeans. Thus, the school continued to admit students who had not yet graduated from high school, allowing them to continue their high school work while studying law. This policy made the school vulnerable to charges that it was admitting unworthy students, an accusation that would haunt part-time legal education for years to come.[27]

But the lights of night legal education were not just burning in Milwaukee. Between 1890 and 1910, the number of night law schools in the U.S. nearly quadrupled.[28] Three factors contributed to the sudden explosion in part-time programs of legal education during this twenty-year period, the first of which was economic. Traditional law schools were

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23. *Id.* at 5 n.21.

24. Johnson, *supra* note 5, at 39.

25. Boden, *supra* note 22, at 6.

26. 57TH ANNUAL REPORT OF THE BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE 64 (1916), *quoted in* Boden, *supra* note 22, at 32 n.91.

27. *See, e.g.*, Harlan F. Stone, Book Review, 1922 COLUM. L. REV. 284, 291 (1922) (reviewing ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921)).

28. REED, *supra* note 15, at 398.

failing to meet the burgeoning demand for legal education. As the value of a law degree rose in a competitive job market, people who were not law clerks began to gravitate towards law schools. The problem was even more evident in the Midwest, where states had tended to place their land-grant universities in small rural towns rather than large cities. In 1890, for example, Milwaukee had a population of 204,468. Madison, on the other hand, numbered only 13,426.[29] Thus, residents of major metropolitan areas who could not afford to quit their jobs in the city to attend law school full-time in the country readily enrolled in classes they could attend after work.[30]

Proximity to the school was not only a concern of students, however. Professors in part-time programs were almost exclusively practicing attorneys and judges, most of whom could only teach after their work day was over. The use of practitioners as teachers, of course, was intentional. Night law schools, both by necessity and design, adopted the "ideal law office" model of legal education. They tended to emphasize the practical aspects of legal training more than the more theoretical day schools, which tended to rely on the Harvard case-method.[31] Night law schools offered a fundamentally different product than their day school counterparts, and it was clear that many people, in Wisconsin and elsewhere, wanted it to continue.[32]

Alfred Reed, in his 1921 Carnegie-sponsored study of legal education, reported that 403 students attended night law school in 1889-90. By 1915-16, that number had risen almost fourteen times to 5,570. During the same time, enrollment at schools offering both day and night programs experienced a similar jump, from 134 students in 1889-90 to 5,164 students in 1915-16. Meanwhile, figures at "pure" day schools rose more slowly, from 3,949 students in 1889-90 to 11,469 in 1915-16.[33] Reed concluded these numbers showed that effective part-time law schools emphasizing a "practical" legal education should be maintained.[34]

A third factor in the rapid increase in night law school enrollment, both across the country and within Wisconsin, was due to changing

29. 1890 U.S. Census, *quoted in* Boden, *supra* note 22, at 1.

30. JOSEPH T. TINNELLY, C.M., PART-TIME LEGAL EDUCATION: A STUDY OF THE PROBLEMS OF EVENING LAW SCHOOLS 11-12, 28 (1957).

31. REED, *supra* note 15, at 394-95.

32. *See* STEVENS, *supra* note 13, at 57; JOHNSON, *supra* note 5, at 133.

33. REED, *supra* note 15, at 398.

34. *Id.* at 416-18.

demographics as well as political concerns. Waves of immigrants had reached the shores of the United States around the turn of the century, and many of them saw the legal profession as their gateway to opportunity. Too poor to afford full-time law school, they relied on part-time legal education for their access to the bar. To meet this need, the evangelical Young Men's Christian Association (YMCA) began nearly a dozen law schools across the country. Many other for-profit law schools sprang up as well. Gleason Archer, dean of one of the more successful of these proprietary schools, the Suffolk Law School in Boston, saw the founding of law schools that were accessible to the immigrant poor as combating the twin dangers posed by the "reds" (Communists) and "crimsons" (Harvard).[35] Alfred Reed, writing in 1921, advanced the proposition that this development was healthy for a democracy:

> Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. The organization of educational machinery especially designed to abolish economic handicaps—intended to place the poor boy, so far as possible, on an equal footing with the rich—constitutes one of America's fundamental ideals. It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens.[36]

Reed's enthusiasm, however, was not shared by all. Concerns with night law schools ranged from anxiety over an oversupply of lawyers in a limited market to inadequate training and poor ethical formation at fly-by-night part-time law schools. Franklin M. Danaher of the New York State Board of Law Examiners warned in 1913 that "morality at the bar is in direct proportion to its prosperity."[37] William R. Vance, dean of the University of Minnesota Law School, estimated in 1914 that forty percent of the "hordes of men in New York city who hold themselves out to practice law are without sufficient legitimate business to afford a living income. [Some] starve, others steal, and only a few go to Sing Sing [prison]."[38]

How accurate were the allegations that part-time schools were de-

35. STEVENS, *supra* note 13, at 80.

36. REED, *supra* note 15, at 398.

37. Danaher's comments appear in the minutes of a meeting of the American Bar Association Section of Legal Education, *reprinted in* 3 AM. L. SCH. REV. 35 (1911), *quoted in* TINNELLY, *supra* note 30, at 6.

38. William R. Vance, *The Function of the State-Supported Law School*, 3 AM. L. SCH. REV. 409, 410 (1914), *quoted in* TINNELLY, *supra* note 30, at 6 n.22.

grading the profession? It was difficult to prove in 1910, and remains so today. Many states, including Wisconsin, have no record of disciplinary proceedings from that period. A study of disbarments in Massachusetts, on the other hand, seemed to indicate that graduates of part-time schools were punished *less often* than other graduates. Of the 109 lawyers disbarred in Massachusetts from 1900 to 1930, only six were graduates of night law schools. Yet during at least two years during that period, 1922 and 1925, the three part-time law schools in Massachusetts—Northeastern, Suffolk, and Portia—were educating roughly two-thirds of all law students in the state.[39]

The Milwaukee Law School continued to operate until 1908, when it was purchased by Marquette University. During its sixteen-year history, the Milwaukee Law School, it may be argued, raised the standard of at least the Milwaukee bar by offering a supplement to apprenticeship legal training. It also produced 147 members of the Wisconsin bar, some of whom went on to serve long careers on the bench. Michael Sheridan became a county judge; Gustave G. Gehrz, Walter Schinz, and John J. Gregory became Milwaukee County circuit judges; and Oscar M. Fritz became Chief Justice of the Wisconsin Supreme Court.[40] Thus, the Milwaukee Law School was Wisconsin's rather successful contribution to the brood of night law schools that were born nationwide between 1890 and 1910.

C. The Night School Moves to Marquette (1908)

In 1907, Marquette College joined with the Milwaukee Medical College and the Wisconsin College of Physicians and Surgeons to become Marquette University. Recognizing an opportunity to expand even further, the Jesuit fathers negotiated with the administration of the Milwaukee Law School (MLS) and purchased it for $6,000 in 1908. The previous year, Professors Churchill, Pease, and Spencer had incorporated MLS so that it could be transferred to Marquette. Under the terms of the deal, a $3,000 downpayment was made to the three stockholders, with the balance due as soon as enrollment reached fifty students. The three stockholder-teachers also agreed not to teach in a competitive law school for five years, an indication of either the teachers' sound reputation in the Milwaukee legal community, a perceived low demand for legal education in Milwaukee, or both.[41]

39. TINNELLY, *supra* note 30, at 12-13.

40. Boden, *supra* note 22, at 7 n.29.

41. HAMILTON, *supra* note 4, at 84. *See also* Boden, *supra* note 22, at 9.

The purchase contract also provided that Marquette would provide a Bachelor of Laws degree to all graduates of the Milwaukee Law School who had already passed the bar. On June 23, 1908, Marquette conferred 84 LL.B. degrees upon those students of the Milwaukee Law School who had already passed the bar.[42] The move provided Marquette with an instant body of alumni and the former students of MLS with a university degree. There was precedent for such an arrangement, regardless of its dubious academic integrity. In 1870, the University of Wisconsin granted several LL.B. degrees to students who had completed just one term of legal study, and permitted them to be directly admitted to the bar because of the newly-enacted diploma privilege. Nevertheless, the degree-granting incident of 1908 came back to haunt Marquette years later, when it was accused by a UW law professor that it had once sold law degrees for five dollars.[43]

Immediately after its purchase of the Milwaukee Law School, Marquette began a day law program.[44] The *modus operandi* of the pre-existing night school provided a pattern for the new day school. The official publication of the law school advertised the school's "distinctly practical atmosphere, which is apt to be lacking in a strictly theoretical school whose teachers have either never been practitioners, or have retired from the practice, and are therefore apt to become too academic. . . ."[45] Marquette shunned an exclusive reliance on Harvard's case method of teaching law, saying the method led to "mental confusion and discouragement on the part of the student."[46] Instead, Marquette relied on a "mixed system" of lectures, textbooks, and case study.[47] Experienced practitioners, rather than career academicians, were employed as professors, because they were "in a better position to correct the theory and mere science of law by experience and practice."[48] Enrollment rose dramatically; the day school averaged 70 students annually in the school's first decade, while attendance at the night

42. MARQUETTE UNIVERSITY COLLEGE OF LAW 1908-09 BULLETIN 19 (1908).

43. *See* JOHNSON, *supra* note 5, at 136; Howard L. Smith, *Reform in the Requirements for Admission to the Bar in Wisconsin: A Rejoinder*, 3 AM. L. SCH. REV. 516, 519 (1914).

44. The first bulletin shows tuition was $100 per year for the "day course" and $50 per year for the "night course." The cost of textbooks was estimated at $15.00 to $20.00 per year. MARQUETTE UNIVERSITY COLLEGE OF LAW 1908-09 BULLETIN 11 (1908).

45. *Id.* at 7.

46. MARQUETTE UNIVERSITY COLLEGE OF LAW 1910 BULLETIN 8 (1910).

47. MARQUETTE UNIVERSITY COLLEGE OF LAW 1909 BULLETIN 19 (1909).

48. *Id.* at 8.

school averaged 75 during the same period.[49]

In Madison, meanwhile, the new dean of the University of Wisconsin College of Law had brought the "mere science of law" to his law school. Soon after Harry Sanger Richards replaced Edwin E. Bryant as dean in 1903, the thirty-four year old Harvard law graduate embarked on an ambitious five-year plan to "Harvardize" UW.[50] He instituted stricter admissions requirements, restructured the entire curriculum, lengthened the course of study to a full three years, built up the law library, increased instructor salaries, and, most important of all, implemented the case method, that mode of instruction that Dean Christopher Columbus Langdell and Professor James Barr Ames had made famous at Harvard in the 1870s.[51]

Many law schools had adopted the principal Harvard-type reform, the case method teaching approach, because of its financial benefits. Professors using the case method conducted an ongoing Socratic dialogue with their students, calling on students to answer questions about the facts and rules of law presented in a variety of appellate cases. This teaching style allowed for larger class sizes than did the older lecture method, which required the use of quizzes and student recitations to keep students engaged. University administrators welcomed more tuition income from increasing numbers of students who could be taught in this manner.[52]

To be sure, true devotees of the Harvard reforms saw more to the case method than its effect on college revenues. Advocates such as Richards saw the case method as part of an overall theory of legal education, one which would equip graduates with the tools to grapple successfully with the increasingly complex body of common law in any jurisdiction. To this end, the Langdellian curriculum paid little regard to classes in areas such as jurisprudence or drafting, and offered courses in statute-driven areas of law, if at all, only as electives in the second and

49. JOHNSON, *supra* note 5, at 136-37. The first class at Marquette's law school included one female student from the Milwaukee Law School, Katherine R. Williams. MARQUETTE UNIVERSITY COLLEGE OF LAW 1908-09 BULLETIN 11 (1908). She was later awarded a degree by Marquette. MARQUETTE UNIVERSITY COLLEGE OF LAW 1912-13 BULLETIN 23 (1912). The first woman to enter Marquette's night school program after the merger in 1908, Marie Desrosiers, entered in 1909 and graduated in 1914, after having transferred to the day program. MARQUETTE UNIVERSITY COLLEGE OF LAW 1910 BULLETIN 23 (1910); MARQUETTE UNIVERSITY COLLEGE OF LAW 1916-17 BULLETIN 22 (1916).

50. STEVENS, *supra* note 13, at 79.

51. *See* JOHNSON, *supra* note 5, at 124-30.

52. STEVENS, *supra* note 13, at 63.

third years.[53]

While UW remodeled its curriculum to fit the Harvard model, Marquette, on the other hand, regularly taught classes such as "legal ethics" and "natural law," required courses in statute-driven areas such as administrative law and taxation, and taught its students how to draft legal documents.[54] Marquette also instituted a mandatory moot court program in 1913, affecting both day and night students,[55] while Madison, like many other schools following the Langdellian model, allowed its voluntary student practice programs to die out.[56]

Richards' reforms received a mixed reception, at least in the early years. Class sizes and graduation rates in the first years of Richard's tenure dropped precipitously. The average class size shrank roughly thirty percent, from a range of well over two hundred during the last years of Dean Bryant's leadership to an average of only 165 during Dean Richards' first decade. The number of graduates was cut in half, from an average of 60 per year during the years 1898-1903 to an average of only 38 during 1903-13. Meanwhile, the law school at Marquette flourished, averaging around 150 students total in its day and night programs.[57]

The quick pace and radical scope of Richards' reforms worried some University Regents, one of whom wondered aloud whether "a school run along the lines of Marquette was much more desirable."[58] Dean Richards did not allow these concerns to steer him off his course. This was not simply obstinacy on his part. Richard's persistence reveals his deep philosophical commitment to the changes he had begun to implement at UW, and his faith in their ultimate triumph.

Richards viewed schools such as Marquette, and any part-time program in particular, as a step backwards into nineteenth century legal education.[59] Richards' insistence on high entrance standards (one year

53. JOHNSON, *supra* note 5, at 122-26. One commentator held that a jurisprudential course "stinks in the nostrils... of the professional law teacher." 1919 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 121 (1920). Harvard did not teach tax until the 1920s, and administrative law was not offered until 1941. Robert Stevens, *Two Cheers for 1870: The American Law School, in* LAW IN AMERICAN HISTORY 405, 486 (Donald Fleming & Bernard Bailyn eds., 1971).

54. Boden, *supra* note 22, at 18-19, 27.

55. *Id.* at 25.

56. JOHNSON, *supra* note 5, at 138. Harvard's moot court program was a voluntary, extra-curricular activity known as the "Pow Wow Club." STEVENS, *supra* note 13, at 127, n.32.

57. JOHNSON, *supra* note 5, at 131-32, 136-37.

58. *Id.* at 140.

59. *Id.* at 138.

of college before acceptance) put law school out of the reach of most citizens of the state, only a small percentage of which were even graduating from high school in the early 1900s.[60] His emphasis on full-time study of law likewise made it impossible for the working poor to study law. Nevertheless, Richards saw these requirements as a way not only to improve the quality of the entering law student, but as a means to preserve the integrity of the profession. Richards remained inspired by the reforms in medical education that doctors had accomplished in the wake of a highly influential report on medical schools that had appeared in 1910. The Flexner Report, funded by the Carnegie Foundation, recommended restrictions on the number of medical schools and medical students, and that part-time medical schools be abolished. Over the next ten years, the number of medical schools was nearly cut in half and the number of medical students fell by one-third, reforms that made it much more difficult for the poor and minorities to become doctors. Richards, like many in the AALS, hoped to accomplish similar goals in the legal profession.[61] In an address to the Association of American Law Schools in 1915, he elaborated on some of his concerns:

> If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants, remembering the respectable standing of the advocate in their old home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.[62]

Marquette, on the other hand, was doing everything in its power to accept poor but worthy candidates. It was, after all, located in Milwaukee, a city not only many times the size of Madison, but one in which one-third of its residents were foreign born and 85% of its population of foreign parentage.[63] A scan of an early Marquette law class roster showed less than 38% of the student population had Anglo-Saxon sur-

60. *See* Boden, *supra* note 22, at 32.

61. *See* 1915 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 62-63 (1916); JEROLD S. AUERBACH, UNEQUAL JUSTICE 110-11 (1976); STEVENS, *supra* note 13, at 102-03.

62. 1915 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 63 (1916).

63. 1910 U.S. Census, *quoted in* Boden, *supra* note 22, at 48.

names, and that continental European ethnic groups constituted nearly two-thirds of the night school population.[64]

Marquette expanded its night school in 1912, which only added to Dean Richards' worries about avaricious immigrants gaining access to the bar. The MU part-time program was lengthened to four years, with its classes now counting as credit towards a full law degree.[65] The differences between part-time legal education in the ethnically-diverse city of Milwaukee and the university community of Madison were becoming more distinct, and the lines between the two institutions were being drawn.

III. THE FALL OF PART-TIME LEGAL EDUCATION IN WISCONSIN: 1916-1924

Relations between the two Wisconsin law schools were often tense during the first two decades of the twentieth century. Their first skirmishes occurred in 1911 and 1912 over Marquette's admission into the Association of American Law Schools. In 1913, the two schools disputed over the diploma privilege. In 1914, the quarrel turned ugly as it spilled onto the pages of the *American Law School Review* and resulted in UW's subsequent attempt to have Marquette expelled from the AALS in 1916. Only a world war put a temporary halt to their battles, which flared up again at the 1919 AALS convention in Chicago. The history of this conflict between the two schools is instructive, as it shows more than pure legal theory was behind the debate over part-time legal education in Wisconsin.

A. The UW-MU Battles (1911-1919)

In 1911, Marquette applied for membership in the Association of American Law Schools, a voluntary organization which had spun off from the American Bar Association in 1900. Before the ABA began accrediting law schools in 1923, the AALS served as a de facto accrediting agency by holding its members to certain standards, almost all of which mirrored the Langdellian model. In 1912, 45 of the 150 law schools in United States belonged to the AALS. Creighton University was the

64. Boden, *supra* note 22, at 48 n.17. Relying on the 1916-17 Marquette University College of Law Bulletin, Dean Robert Boden, in a 1976 study, found 34 Anglo-Saxon and 46 "other" surnames in the day school, and 29 Anglo-Saxon and 57 "others" in the night school. He classified the "others" into the following groups: 41 German, 38 Irish, 13 Jewish, 5 Scandinavian, 4 Polish, and 2 French. *Id.*

65. MARQUETTE UNIVERSITY COLLEGE OF LAW 1912-13 BULLETIN 6-8 (1912).

only other member school that was Catholic; Georgetown had dropped out in 1907 because its night law school program was not of sufficient length.[66]

Because the University of Wisconsin was a charter member of the AALS and growing in national prominence, Marquette probably viewed membership in the organization as an economic advantage, if not an outright necessity, in the small Wisconsin market for legal education.[67] Not surprisingly, UW steadfastly opposed MU membership. Dean Richards wrote to the AALS Secretary-Treasurer in 1911 that "it would be an unfortunate thing for the [AALS] to admit a school like Marquette."[68] He continued:

> I have had some opportunity to know through persons who have actually observed the school, the sort of work they are doing there, and it is of such an order that I should think the school ought not to be entitled for admission. I don't believe they observe their paper standards in conferring degrees. Indeed, the inducements they have offered to some of our lame students to come there and take a degree would indicate that they are not very particular. No doubt we have some schools in the Association that are no better than Marquette, but I don't see that this is any reason for adding another lame duck to the collection.[69]

At their annual meeting in Boston of 1911, the AALS executive committee passed over Marquette's application. At the next year's meeting in Milwaukee, however, Marquette and four other schools were admitted, despite UW's efforts to keep Marquette out. Despite Marquette's acceptance, the AALS sounded a warning for other part-time programs at that 1912 meeting, by agreeing not to admit any more schools with evening divisions.[70]

The tension between UW and Marquette continued to build. Max Schoetz, dean of the Marquette University College of Law, complained four years after the 1912 meeting:

> [The] University of Wisconsin made a determined effort when the matter was up before the Association, to keep the Marquette University College of Law out of the Association. At the time this matter was pending, Dean Richards, of the University of

66. Boden, *supra* note 22, at 50.

67. *Id.* at 51, 120.

68. Richards to Professor George P. Costigan, March 9, 1911, *Law School General Correspondence*, *quoted in* JOHNSON, *supra* note 5, at 142.

69. JOHNSON, *supra* note 5, at 142.

70. 1912 REPORTS OF THE AMERICAN BAR ASSOCIATION 965 (1912).

> Wisconsin, acting through other persons, was doing his very best to throw obstacles in the way of our admission to the Association.[71]

Relations between the schools worsened the next year, when a debate erupted in the Wisconsin legislature over the diploma privilege. UW grads had enjoyed the privilege of being accepted into the state bar upon presentation of their diploma to the Wisconsin Supreme Court since 1870. The faculty of the Marquette College of Law, encouraged by their new AALS membership, helped introduce a bill in the Wisconsin Assembly on March 5, 1913 seeking the same privilege for their graduates. The bill died, however, when the Chief Justice of the Wisconsin Supreme Court, John B. Winslow, who had been listed as a member of the Marquette faculty from 1908-1910, and again as a lecturer for the 1911-12 and 1913-14 school years,[72] declined to accept the supervisory duty suggested by the bill.[73] During the same legislative session, another bill regarding the diploma privilege was introduced. This second bill, echoing a decades-old position of the American Bar Association, suggested that the diploma privilege be abolished completely, and that all law school graduates be required to sit for a bar examination. The backing of this bill by Marquette advocates, so soon after the other bill had been defeated, would later lead some to conclude that MU was bitter about its defeat and was simply retaliating against UW.[74]

As it turned out, however, MU was the big loser in this war of words in the legislature. The University of Wisconsin not only got to keep its privilege, but did so at Marquette's expense. One observer noted that in the halls of the legislature, Marquette was labeled a "sectarian institution" and a "so-called university," with "no library worth mentioning" and "no faculty in the proper sense of the term." The degree-grant of 1908 to 84 Milwaukee Law School graduates who had passed the bar but not spent a day inside Marquette classrooms was mentioned as an example of Marquette's questionable academics, as the degrees "were sold for five dollars." The night school, in particular, was ridiculed as a place where practitioners could "tak[e] their ease" after work instead of truly

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71. Letter of Max Schoetz, *quoted in* Boden, *supra* note 22, at 51.

72. MARQUETTE UNIVERSITY COLLEGE OF LAW 1908-09 BULLETIN 6 (1908); MARQUETTE UNIVERSITY COLLEGE OF LAW 1909 BULLETIN 7 (1909); MARQUETTE UNIVERSITY COLLEGE OF LAW 1911-12 BULLETIN 4 (1911); MARQUETTE UNIVERSITY COLLEGE OF LAW 1913-14 BULLETIN 5 (1913).

73. Boden, *supra* note 22, at 55-56.

74. JOHNSON, *supra* note 5, at 146-48.

teaching.[75]

The next salvo in the increasingly acrimonious conflict between the schools came early in 1914. Writing in the Winter 1914 issue of a national periodical, the *American Law School Review*, Marquette Professor Arthur Richter decried UW's sabotage of the legislative effort to phase out the diploma privilege. Notably absent from Richter's account, however, is any mention of Marquette's own effort to secure the privilege for itself earlier in the same legislative session. Richter portrayed his school as a selfless guardian of the quality of legal education, and UW as a ruffian, aided by the "blind allegiance of its alumni," jealous of its "vicious privilege," and wielder of "tremendous influence."[76]

The University of Wisconsin responded quickly. In the Spring 1914 issue of the same journal, UW Law Professor Howard L. Smith gave a more complete view of Marquette's motives in the 1913 legislature. In what could be described as political overkill, Smith went on to unleash an attack on Marquette that must have appeared peculiar in the scholarly *American Law School Review*. Smith charged, inter alia, that Marquette was

> one of those institutions that seem inevitably to spring up in our large cities, which owe the possibility of continued existence to the indifferent and good-natured complaisance of a bench and bar who permit themselves to be used as the unwitting and entirely unintentional instruments for the degradation of legal instruction. Any young lawyer can start a "law school" in any of our big cities, and in two weeks' time announce to the world a "faculty" that shall absolutely blaze with legal luminaries from judges of the highest courts down. Their connection with the school may be so tenuous as to be little more than nominal, but that does not prevent them from figuring as corner stones of the temple in the advertising literature scattered by the promoters.[77]

Smith claimed that Marquette's "faculty" was composed of "judges and practitioners, nineteen in number, . . . for whom the school furnishes a grateful relaxation from the labors of the day, especially in the night school, which meets on three evenings a week. . . ." He added sardonically that Marquette had "a flavor of intellectuality, for the school possesses a library supplied with the English Common Law Reports, the Federal Reports, and the reports of all but forty-three states, to say

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75. SMITH, *supra* note 43, at 518.

76. Arthur Richter, *Reform in the Requirements for Admission to the Bar in Wisconsin*, 3 AM. L. SCH. REV. 432 (1914).

77. Smith, *supra* note 43, at 519.

nothing of the Northwestern Reporter and some 'miscellaneous' books donated by an ornamental 'dean.'" Smith concluded by saying, among other things, that he looked forward to the "abolition of 'night schools.'"[78]

Although Marquette threatened to sue for libel over Smith's article, the dispute over the diploma privilege gradually wound down. Another dispute, however, soon took its place. At its annual meeting in 1914 in Chicago, UW College of Law Dean Harry S. Richards was elected president of the American Association of Law Schools. At the next year's meeting, one more faculty member and another former member of the UW faculty were promoted to the five-member Executive Committee.[79] Marquette grew suspicious when only months later, in May of 1916, a law professor from the University of Illinois, William G. Hale, paid an unannounced visit to MU on behalf of the AALS.

The surprise inspection was unusual. The AALS membership dues in 1914 were ten dollars per school, giving the organization a total budget of less than $500, hardly a pool out of which a phalanx of investigators could be paid to make sure member schools were meeting AALS standards. In fact, the first formal attempt in AALS history to ensure all of its members were complying with group standards had occurred only the year before, when the AALS sent out questionnaires to its members.[80]

When Professor Hale arrived, Max Schoetz, the new dean of the Marquette University College of Law, had only been on the job for three months. Schoetz had attended night school in Chicago, and had graduated as a member of the Order of the Coif from the University of Wisconsin College of Law in 1908. Schoetz was satisfied with Hale's visit, commenting later that the only suggestion Hale had made was to add a treatise, *Modern American Law*, to the Marquette law library. Schoetz did wonder, however, why Hale left for Madison, not Champaign, immediately after his visit to Marquette.[81]

Six months later, Schoetz was shocked to receive a letter from the AALS Secretary-Treasurer that Marquette had been found in noncompliance with AALS standards. Hale's "Report," which no one at Marquette had ever seen or ever would see, alleged that students were still being admitted to both the day and night schools without a high

78. *Id.* at 518-19, 521.
79. Boden, *supra* note 22, at 64-65.
80. *Id.* at 65-66.
81. *Id.* at 68.

school diploma and that Marquette was giving the same academic credit to night classes as they were day classes.[82] Although Marquette officials would eventually defuse the allegations contained in the Hale Report at the 1916 AALS convention, this incident added to the acrimony between the two schools, evidence of which would appear during the debates over part-time legal education that took place on the convention floor.

Back in 1912, in order to bring their night program into conformity with AALS standards, Marquette had added a fourth year to its night program. It also began to offer a degree through its evening program, so long as applicants had a high school diploma or its equivalent. This was a standard that went beyond what Wisconsin law required.[83] Four years later, Marquette added another requirement for entry into its night law school program: one year of college study. Only three other schools in the country had at that time such strict entrance requirements for a night school program.[84] If certain students did not meet these qualifications, they were permitted to enter the school, but only as "special" or non-degree seeking students.[85]

These additional requirements evidently did not impress the five-member AALS Executive Committee, three of whom had substantial connections to the University of Wisconsin. Dean Harry S. Richards and Professor Eugene A. Gilmore were both faculty members, and Association President Walter W. Cook from the University of Chicago was a former UW faculty member.[86] These men went to the 1916 AALS convention in Chicago prepared to rid their organization of part-time legal education completely, or at least in Wisconsin. And the Marquette delegation—composed of Dean Schoetz, Justice Franz Eschweiler, and Professor Albert Houghton—went down to Chicago to defend both the Marquette night school and its reputation.[87]

B. The AALS Conventions of 1916 and 1919

Although the decisive battle over part-time legal education would be fought in Chicago at the AALS convention in 1919, evidence that a se-

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82. *Id.* at 69 n.35.

83. MARQUETTE UNIVERSITY COLLEGE OF LAW 1912-13 BULLETIN 6 (1912).

84. MARQUETTE UNIVERSITY COLLEGE OF LAW 1916-17 BULLETIN 4 (1916); REED, *supra* note 15, at 435-441.

85. MARQUETTE UNIVERSITY COLLEGE OF LAW 1916-17 BULLETIN 4 (1916).

86. 1916 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 5 (1917).

87. *Id.* at 34.

rious storm was brewing could be clearly seen at the 1916 AALS meeting. The AALS Executive Committee made two proposals that took aim at two of the foundations of part-time legal education.

The first proposal of the Executive Committee attacked the use of part-time teachers, or practitioner professors, at AALS schools. The Committee recommended that each member school be *immediately* required to employ at least three full-time professors on staff. The radical nature of this proposal is evident when one considers that at the time it was made, about one-fourth of the AALS member schools, including Marquette, would not have been able to meet the standard. Furthermore, the suggestion came right during the middle of the school year and on the eve of American involvement in World War I, making spare teachers a rare commodity and imposing a tremendous financial burden on the schools.[88] Nevertheless, the resolution passed in modified form, with an effective date of September 1, 1919. Syracuse joined Marquette in casting "no" votes.[89]

The Executive Committee's second proposal was also leveled at one of the developing strengths in part-time programs. Under the Committee's plan, part-time students would be forbidden from earning a degree through night law schools. This proposal affected only 4 of the 47 AALS members: Marquette, Creighton, Cincinnati, and Southern California. The Marquette administrators vigorously opposed this directive because it undermined the improvements they had been trying to make in the night program ever since they assumed control over the Milwaukee Law School in 1908. Prohibiting degree credit at night meant that the night classes would inevitably return to the level of bar exam preparation sessions.[90]

This second proposal also struck the Marquette contingent in Chicago as odd for another reason, relating back to Professor Hale's surprise inspection. One of the violations Hale reported to the AALS was that Marquette was awarding degree credit to students in its night law classes. The proposal at the 1916 AALS meeting showed very clearly that the AALS had not yet enacted any such rule. This meant that the Hale Report was condemning Marquette for violating a rule that did not yet exist, and in fact was only being proposed at the 1916 meeting.[91]

88. Boden, *supra* note 22, at 70.

89. 1916 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 80 (1917).

90. Boden, *supra* note 22, at 70.

91. *Id.* at 73.

President Cook of Chicago, Association President and an ex officio member of the Executive Committee, sarcastically reassured members that the proposal did not seek to eliminate night law schools altogether. "This [proposal] does not, of course, prohibit members from teaching law at night and so of providing for the budding Abraham Lincolns of whom we all hear so much whenever this matter is discussed."[92] University of Wisconsin Professor Gilmore, Secretary-Treasurer of the AALS and a co-author of the proposal, continued in this vein when explaining the policy behind the proposal:

> I do not sympathize—and the Committee did not, I think, for a moment—with the feeling that in this country, even in the Far West, we need to subsidize men to enter the bar. I think most of us will agree that we have plenty of lawyers, and we are not to sit up nights devising ways for poor and worthy individuals to get to the bar.[93]

Shortly after Gilmore's speech, the motion was tabled. But it would appear again in 1919, and on that occasion it would carry the day.

World War I prevented the AALS from meeting in 1917 and 1918, but as the December 1919 convention approached, it was evident that the feud over part-time legal education had not diminished. The AALS Executive Committee circulated another proposal earlier that year proscribing night legal education by directing that academic credit earned at night could only count as 75% of credit earned during the day, and that no more than twenty such credits could count towards a law degree. Although it was phrased in general terms, Dean Harry S. Richards told the Wisconsin news media that it would only affect two schools: Southern California and Marquette.[94]

By 1919, formal legal education had replaced apprenticeship as the preferred means of gaining access to the bar, both nationwide and across Wisconsin. The number of degree-seeking students at the Marquette night law school was growing. But Marquette officials knew that the impact of the proposal would be drastic: students could spend no more than one year studying law at night, and they would have to make up 25% of any credit they did earn in the evening division, or else abandon all hope of earning a law degree.[95]

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92. 1916 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 108 (1917).

93. *Id.* at 66.

94. Boden, *supra* note 22, at 87.

95. *Id.* at 87-88.

The gathering storm clouds attracted media attention. On November 6, 1919, *The Wisconsin News* carried the following headline: "Marquette in Fight for Law School: Move to Stop Night Classes Said to be Outgrowth of Jealousy of U. of W.". The article continued:

> Ill feeling that has existed for years between the Marquette university and the University of Wisconsin law schools is expected to break into an open feud Dec. 30 when a proposition, which is defined by the local institution as a move to put Marquette law school out of business, will be laid before the Association of American Law Schools at its Chicago convention.... Marquette university law school now has more than 100 night school students. In all it has an enrollment of 300, while the University of Wisconsin law school has only 150. It was said on good authority that jealousy has arisen over the success of Marquette.[96]

The Milwaukee-based daily also cited UW Professor Gilmore's statement at the 1916 AALS convention criticizing efforts to help the "poor and worthy" gain access to the bar. The article gave Marquette's Dean Schoetz's view:

> We consider the move to have night law students deprived of degrees a direct slam at Marquette.... Such a rule would not only work untold harm to Marquette, but it would deprive persons of limited means from studying law and becoming members of the bar. It would mean that only students with ample means could study law. We consider our night school a valuable asset to young men and women with aspirations to better their circumstances.[97]

Two weeks later, *The Wisconsin News* carried the University of Wisconsin's response to Dean Schoetz's charges. Dean Richards, who refused to address the dean of the Marquette law school as Dean, stated:

> Since the proposed rule has been announced the papers of Milwaukee have contained statements and interviews with the administrative officer of Marquette university college of law located in Milwaukee, charging in effect that an attack is being made on the Marquette school by the University of Wisconsin law school through the proposed regulation with a view to its destruction or serious injury. It is also asserted that the University of Wisconsin is actuated by most unworthy motives.... It is true that two members of the Wisconsin law school faculty are mem-

96. *Marquette in Fight for Law School*, THE WISCONSIN NEWS, Nov. 6, 1919, in Law School Administration Records (Series 1, Box 1, Schoetz scrapbook folder, Marquette University Archives).

97. *Id.*

bers of the association's executive committee, but they have not proposed the rule, and do not constitute a majority of the committee.[98]

Richard's protestations did not convince the members of The Milwaukee Bar Association (MBA), who voted unanimously to adopt a resolution in favor of Marquette's position. In light of the AALS Executive Committee proposal to curtail night legal education, the MBA asserted that "by such recommendation a stigma is placed upon those students whose earnestness in pursuit of a legal education prompts them, despite adverse circumstances, to combine study with bread-and-butter activities." The MBA members also complained that the proposal would "force an eight-hour or a six-hour study day upon the country," and the comments of Professor Gilmore from three years before about "sit[ting] up nights devising ways for poor and worthy individuals to get to the bar." Concluding that "the poor and worthy student should have an opportunity to better his condition if he has the ability to do so," the MBA sent a copy of its resolution to the AALS.[99]

The floor debates took place on December 31, 1919. Arguing for Marquette was Justice Franz C. Eshweiler, a Wisconsin Supreme Court justice since 1916 and a lecturer at Marquette. Eshweiler was more than sympathetic to the night law student, having studied law on his own while working as a mail clerk. The last supreme court justice in Wisconsin without a law degree, Eshweiler taught bar examination courses inside the Supreme Court chambers on the ten Sundays before the exam was given.[100]

Eshweiler attacked the proposal on several fronts. He asked schools without a personal interest in night schools to leave well enough alone. He reminded those present of the unseemly origins of the proposal, making reference to Gilmore's remark about the poor and worthy student. He questioned the propriety of tax-supported law schools quenching the flickering flame of the only alternative working people had to their full-time law schools. He ended by asserting that students could receive just as much from their instructors after six o'clock in the evening as they could before that time.[101]

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98. *Denies Attack on Marquette*, THE WISCONSIN NEWS, Nov. 19, 1919, in Law School Administration Records (Series 1, Box 1, Schoetz scrapbook folder, Marquette University Archives).

99. 1909-43 MINUTES OF EXECUTIVE COMMITTEE AND ANNUAL MEETINGS OF THE MILWAUKEE BAR ASSOCIATION 38-39 (1943), *quoted in* Boden, *supra* note 22, at 92.

100. Boden, *supra* note 22, at 94.

101. 1919 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND

Executive Committee member Walter W. Cook, former UW faculty member and a co-author of the proposal, responded to Eshweiler's charge that the purpose of the proposal was to "kill the night school."

> As I see it the resolution is not aimed to kill the night schools. If anybody imagines that this Association can kill the night schools it is about time he woke up to the actual situation. The Association of American Law Schools is an organization of law schools who are supposed to have similar ideals of what constitutes a sound legal education for members of the Bar. It seems to me it is not possible for us to do our work efficiently unless we think enough alike. I think most of us... [agree that] there is a substantial difference between work done in the day schools and the work done in the night schools, and that a really adequate legal education cannot be obtained incidentally after a day's work has been done.[102]

Marquette Professor Walter Corrigan then took the floor. An experienced trial attorney, the 43-year old Corrigan had joined Marquette's faculty only the year before.[103] He stressed the value of an initiative that provided the same standards, curriculum, and professors in both day and evening programs. He maintained that institutions like Marquette were performing a public service by advancing a superior alternative to both self-study and apprenticeship, and offered the unanimous resolution of the Milwaukee Bar Association as proof to the assembled delegates:

> You talk about raising the standards of legal education. None of you can go too far to suit me, but I want to ask you—what will become of these poor fellows in the localities where night schools are necessary?... What will become of them if we don't furnish them a school to go to? They will be studying in the offices, at nights in their homes. The result would be that the standards of legal education would be lowered instead of raised. It means that these men will get to the Bar in Wisconsin by reason of study outside the law schools for men who will work.[104]

A motion to table the proposal failed 35-5 with 7 abstentions, and a motion to send the proposal back to the Executive Committee failed on a voice vote.[105] The next night school advocate was a University of Wis-

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PROCEEDINGS 74 (1920).

102. *Id.* at 77-78.

103. Boden, *supra* note 22, at 95.

104. 1919 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 79-80 (1920).

105. *Id.* at 83-84. Marquette, Boston University, the University of Southern California,

consin alumnus, Frank L. Porter, now a professor at the Southern California School of Law. He implied it would be a different matter altogether if the proposal had been "aimed at the usual commercial school."[106] But it clearly was not, and that was the problem:

> Our teachers would tell you, without exception, that the night students, after the first year, do as good work in the night as the day students do in the day. Why discriminate, if they do the same work and as good work? . . . If, then, with you the student appears and can recite in the forenoon and can work in the afternoon and night he gets credit. If he unfortunately has to work in the forenoon and recite at night you say, "You are unworthy of a degree," regardless of whether he can pass or not. . . . I don't see why studying at night should be a stigma upon a man. . . . Make your standards high. Make the night man meet the same standards as the day man, and let each man stand on his own merit.[107]

Without further debate, a roll call vote was taken. The final tally was 35 in favor of the proposal, 4 against (Marquette, Pittsburgh, Syracuse, and Southern California), and 8 abstentions (4 absent schools, Creighton, Idaho, South Dakota, and Vanderbilt).[108]

Although supporters of night law schools had suffered a defeat, the setback would prove to be merely temporary. Just a few years later, the same arguments Marquette professors Eshweiler and Corrigan had used at the Chicago convention in 1919 would be adopted by the American Bar Association and contribute to the legitimization of part-time legal education. Whether the Marquette program would survive, however, was another question.

C. The Closing of the Marquette Night Law School (1924)

Just days after his rebuff at the 1919 AALS meeting in Chicago, Marquette University College of Law Dean Max Schoetz told the press his school might bolt from the AALS. "Sixty-eight percent of law students [in the U.S.] are now attending schools which are not members of the association and withdrawal would in no way affect the prestige of our institution. . . ."[109] On the other hand, he noted, hinting that AALS

Syracuse, and Washington of St. Louis cast the five "aye" votes. Four absent schools were counted as abstentions, as were the votes of three schools: Creighton, South Dakota, and Vanderbilt. *Id.*

106. *Id.* at 85.

107. *Id.* at 85-86.

108. *Id.* at 86-87.

109. THE MILWAUKEE LEADER, Jan. 5, 1920, in Law School Administration Records

affiliation did in fact affect Marquette's prestige, "we do not want the public to get the impression that the night course at Marquette is unduly important, or to overlook the fact that we have a very efficient day school, which is now larger than the school at Madison."[110]

As the 1920 school year approached, Marquette elected to stay the course. They would remain in the AALS and cease offering a degree through its night school. The evening division thus returned to the status it enjoyed at the Milwaukee Law School and at Marquette before 1912, as a program of legal education designed to supplement apprenticeship study and to help people prepare for the bar examination. In the fall of 1920, the 38 degree-seeking students in the night school had to decide whether they would stay in the night program as "special" students or transfer to the day school and lose one-fourth of the credits they had earned. Six students made the switch.[111]

The night school still faced difficulties. Pursuant to AALS policy, Marquette had lengthened the night program to four years back in 1912, the year it also began offering a degree through the night school. Yet now the incentive of a degree was absent. At the same time, Wisconsin law permitted applicants to sit for the bar after three years of legal study. Thus, the fourth year of the evening program became essentially meaningless.[112]

The lack of a degree caused an even more serious problem, in that applicants to the night school no longer needed to have completed one year of college before they could be accepted. Marquette had adopted their one-year college requirement in 1916, making it one of the four most exclusive night law schools in the country.[113] With the requirement gone, the number of high school graduates began to significantly exceed the number of students who had done some college work. This shift, combined with forces outside the law school, would eventually lead to the collapse of the evening program.

What the Marquette administrators did not realize was that the winds of change were blowing. The American Bar Association (ABA), at its annual meeting in August 1920 in St. Louis, created a commission, chaired by the famous Elihu Root, to study the ways in which the ABA

(Series 1, Box 1, Schoetz scrapbook folder, Marquette University Archives).

110. *Marquette May Quit Law Association*, THE MILWAUKEE JOURNAL, Jan. 4, 1920, in Law School Administration Records (Series 1, Box 1, Schoetz scrapbook folder, Marquette University Archives).

111. Boden, *supra* note 22, at 104.

112. *Id.* at 104-05.

113. *See supra* note 82.

could help "strengthen the character and improve the efficiency of those admitted to the practice of law."[114] One year later, the Root Commission presented its findings at the ABA meeting in Cincinnati, greatly aided by the work of Alfred Reed and his eight-year study of American legal education sponsored by the Carnegie Foundation. Reed's *Training for the Public Profession of the Law*, published earlier that year, strongly recommended that part-time programs be continued, and that the "night school movement" provided

> a necessary corrective to the monopolistic tendencies that are likely to appear in every professional class—tendencies that in some professions may be ignored, but that in a profession connected with politics constitute a genuine element of danger. A decidedly intolerant attitude toward any sort of night law school training is sometimes displayed by those who have received their education in other ways. When this attitude does not reflect merely a failure to grasp the necessary implications of a democratic form of government, it is itself an indication of how badly these schools are needed.[115]

The report of the Root Commission was equally forceful:

> [T]o confine the right to practice law to one economic group would be to deny to other economic groups their just participation in the making and declaring of law. Such a restriction would properly be resented by the public. It follows that opportunities must be given to those who are obliged to support themselves during their legal studies. If a man has completed two years, or, better still, four years, of a college course, he will do best if he attends a law school which commands substantially all of his working time. But if he has come to the point where he finds it necessary to support himself, and perhaps his family, he should not be denied admission to the public profession of the law. For such a man the afternoon or evening school is the only recourse.[116]

The ABA members assembled in Cincinnati that summer of 1921 adopted the Root Commission findings and set standards for admission to the bar. The ABA plan required all law students to have completed two years of prelaw college work before being accepted into law school; night law schools would be recognized, but were required to be four years long. The ABA also agreed to the membership requirements of

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114. REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 657 (1921).

115. REED, *supra* note 15, at 398-99.

116. 1921 ABA REPORT, *supra* note 114, at 685.

the AALS, but rejected the AALS ban on membership of schools with part-time or multiple divisions, as well as its proscription on degree credit at night.[117]

In his 1976 book *Unequal Justice*, Professor Jerold S. Auerbach argues that these recommendations were adopted not because of democratic ideals, but out of xenophobia, prejudice, and bigotry.[118] Because of the converging desires of the practitioners of the ABA and the professors of the AALS to stem the tide of "the poorly educated, the ill-prepared, and the morally weak candidates," they united their efforts under the guise of improving and democratizing the bar.[119] The allegations are not without evidence. One New York ABA delegate frankly admitted his rationale for the two-year college requirement: it was "absolutely necessary" to have lawyers "able to read, write and talk the English language—not Bohemian, not Gaelic, not Yiddish, but English."[120] Some academicians were more blunt. The 1922 Yale Board of Admissions expressed grave concerns about "the Jewish problem," and a Yale professor recommended a year later that prospective law students with foreign-born parents should be obliged to stay in college longer than students whose parents were born in the United States.[121]

It is important to note that part-time schools remained closed to the ranks of "poor and worthy" students who could not afford the two years of prelaw college work, still a staggering obstacle to many Americans in the early twentieth century. Auerbach notes that

> [b]arely 5 percent of American children born between 1895 and 1904 were finishing high school and college. Between 1915 and 1925, those high-schoolers whose fathers had less than eight years of schooling had 8 chances in 100 of entering college; those with fathers who had entered college had 47 chances in 100. Unless one assumes, first that 95 percent of American youngsters lacked "energy and perseverance," or, second, that the correlation suggested by these figures for college attendance was accidental, the only tenable explanation is that factors other than pluck accounted for a student's presence in or absence from college.[122]

Whatever their origin, the ABA standards struck the Achilles' heel

117. *Id.* at 687-88.

118. *See generally* AUERBACH, *supra* note 61, at 94-129.

119. *Id.* at 107.

120. STEVENS, *supra* note 13, at 101.

121. *Id.*

122. AUERBACH, *supra* note 61, at 117.

of the Marquette night law school. Bending over backwards to comply with the shifting AALS standards over the years had put Marquette administrators in a particularly vulnerable position, one from which they could not easily adjust to the new ABA standards. Marquette's night school was now flooded with working students who had a high school diploma at best, and little hope of earning college credit, as there was no night college program available in the state at the time.[123] An immediate implementation of the ABA requirement of two years of college work prior to law school meant the immediate end to the night school. An ABA Conference in Washington in 1922 recognized this, and recommended that

> [w]henever any state does not at present afford such (college prelaw) educational opportunities to young men of small means as to warrant the immediate adoption of the standards we urge the bar associations of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible.[124]

Later that year, at their annual December meeting, the AALS adopted the ABA position on night schools. Non-AALS member schools received applause for making essentially the same arguments Marquette delegates had made two years before, who must have been struck by the irony. They may also have had second thoughts about their decision to stay with the AALS, especially in light of subsequent events. Several fellow Jesuit universities—Georgetown, St. Louis, Detroit, Fordham, and Loyola in New Orleans among them—had been offering law degrees through their non-AALS night schools for years, and would continue to do so long after Marquette's night school closed.[125]

In any case, by more than a 2-1 margin, the AALS delegates at the 1922 convention reversed their 1912 ban on accepting new members with evening or multiple divisions, and overturned their 1919 prohibition on awarding degree credit at night. The University of Wisconsin delegation, for its part, voted "no" on both proposals.[126] At the same meeting the delegates passed a resolution mandating that no more than ten percent of the population of a member law school be non-degree "special" students. Marquette, however, was specifically allowed time

123. 1923 PROCEEDINGS OF THE WISCONSIN STATE BAR ASSOCIATION 57 (1923).

124. 1922 PROCEEDINGS OF THE STATE BAR ASSOCIATION OF WISCONSIN 12 (1922).

125. Boden, *supra* note 22, at 88 n.146, 125.

126. 1922 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 96 (1923).

to adjust to this new requirement.[127]

The future of the night law school looked even more promising after the annual meeting of the Wisconsin State Bar Association in June 1923, when all indications pointed to a gradual adoption of ABA standards in the state. By the time the judiciary and legislature got around to implementing the two-year college requirement, it seemed that the night school would have had time to adjust. That fall, Marquette University was planning on offering night college courses, an option never before available to Wisconsin citizens. The new program, it was hoped, could offer prospective law students with the requisite level of college experience and provide the night law school with a pool of students that would allow it to continue.[128]

But then came the ABA Convention of 1923. In August of that year, the ABA began accrediting law schools. The Marquette University College of Law was not on the list. Though it met every other requirement and had announced a three-year timetable for the implementation of the two-year prelaw college work requirement in its day school, high school grads were still pouring into the night school. The ABA made it clear that they would refuse to accredit Marquette so long as this practice continued.[129]

The decision to close the night school, however painful for Marquette administrators, was not a difficult one to make. On one hand stood the night school, that dearly-bought institution which had endured so many battles, full of "poor and worthy" young people studying for the bar exam instead of languishing in law office apprenticeships. On the other hand stood ABA accreditation, a competitive advantage—if not an economic necessity—in light of the University of Wisconsin's ABA-approved status, and a sign of respectability across the country and within the state. Shortly after Marquette learned of the ABA policy and before Dean Schoetz traveled to Chicago for the AALS Executive Committee meeting in the fall of 1923, the Solomonic choice was made. In February of 1924, five students with college experience applied to the night school. They were accommodated in the day program, and the night school closed. A four-year phase-out period followed, and the last eleven students left in June 1927.[130]

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127. *Id.* at 64.

128. Boden, *supra* note 22, at 125.

129. *Id.* at 128.

130. *Id.* at 130. In 1923, the Marquette University College of Law changed its name to the Marquette University Law School. *Id.*

IV. CONCLUSION

Throughout this paper, forces outside the legal profession have been shown to have affected legal institutions in dramatic ways. Economic forces drove students into law schools and into the legal profession in the latter half of the nineteenth century, and helped create the phenomenon of night legal education in the early twentieth century. Philosophical changes in the legal system wrought by industrialization forced changes in the content and method of legal education, and enabled one law school in Massachusetts to have a tremendous national impact on the way law students were formed. Political concerns about the quality and quantity of lawyers around the turn of the century galvanized law schools and members of the bar to erect barricades to the bar, and concern about the democratization of the legal profession helped spur recognition of the importance of part-time legal education. These forces clearly affected the early rivalry between the University of Wisconsin College of Law and the Marquette University College of Law, and contributed to the rapid rise and equally sudden fall of the night law school in Wisconsin.

The interplay between legal institutions and socio-economic forces in the late 19th and early 20th centuries, as seen in the state battle over part-time legal education, is a vivid reminder of the important role law has played—and continues to play—in the shaping of our society.

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