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American Law Schools as a Model for Japanese Legal Education?

A preliminary question from a comparative perspective¹

by

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I. Introduction: The Legal Education Discussion in Japan

Japan is about to change its system of legal education. Historically the Japanese legal and legal education systems have been influenced by their German counterparts. In April 2004 Japan will introduce law schools.³ Many in Japan are asking whether there are elements of the American legal education system that might profita-

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² Adjunct Professor of Law, Rutgers School of Law--Newark. J.D., LL.M., Dr. jur. (Munich). This is a slightly revised version of an address given March 9, 2002 at the First Symposium on Law and Jurisprudence, Kansai University Osaka—Georg-August Universität Göttingen, New Challenges for Law and Jurisprudence. I would like to thank my colleagues at Kansai University for making possible my participation and all participants for welcoming me and my American comments. The address style is maintained in these remarks, which are subject to the limitations of time and format constraints of an address. Because materials cited may not be easily obtainable, I have quoted fairly fully in the footnotes. I have not used abbreviations in citing to periodicals.

³ Akhiro Onagi, *Juristenausbildung in Japan*, *Juristische Schulung* 2002, 721, 723. See Justice System Reform Council, *Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century*, June 12, 2001.

bly be introduced here. I would like to address that question from the perspective not only of the American legal education system, but also through comparisons to the German system. In this way, the choices available to Japan are clearer. In considering both the German and the American systems of legal education as possible models, it is important to realize that there is satisfaction with neither of them and that both have been subject to considerable and continuing criticism.⁴

Law faculties in Japan are asking whether and how they should remake themselves to become law schools. One basic issue has been framed in terms of whether such programs should be professional or general.⁵ One Japanese scholar put it pointedly: “[a] major issue of the proposed reform is whether Japan should adopt an American model law school, *i.e.*, professional education at the graduate level, while essentially doing away with the traditional Japanese method of teaching law at university.”⁶ American law schools are seen as having as their fundamental goal “to provide the training and

⁴ In Germany, in particular, the last thirty years have seen many reform proposals. See generally *Bericht des Ausschusses der Justizministerkonferenz zur Koordinierung der Juristenausbildung für die Konferenz der Justizministerinnen und Justizminister vom 11. bis 13.6.2001* in Trier, Juristisches Schulung 2001, 933, also available at <http://www.justiz.nrw.de/jm/landesjustizpruefungsamt/aktuelles/pdf/bericht.pdf>; Filippo Ranieri, *Reform der Juristenausbildung ohne Ende?*, *Juristenzeitung* 1998, 831. For an extensive review of one reform that was tested, see *Juristenausbildung—erneut überdacht: Erfahrungen aus der einstufigen Juristenausbildung als Grundlage für eine weiterhin anstehende Reform* (Heinz Giehring et al., eds., 1990). For the United States, see, e.g. *Legal Education and Professional Development—An Educational Continuum*, (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992, the “McCrate” Report). I am limiting my discussion to the existing systems. For a comparison that is still current, see Jürgen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 *Vanderbilt Journal of Transnational Law* 301 (1993).

⁵ Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 *Asian-Pacific Law and Policy Journal*, text at note 54 (2000), also available at <http://www.hawaii.edu/aplpj/1/01.html>.

⁶ Koichiro Fujikura, *Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission*, 75 *Tulane Law Review* 941, 942 (2001).

education required for becoming an effective legal practitioner, *i.e.*, the institutions provide a ‘professional legal education.’”⁷

It is not my intention to tell Japanese jurists to adopt the American or the German model.⁸ Indeed, Japan could hardly adopt either. Whatever Japan does do will be distinctively Japanese. What I would like to do is to discuss the professional character of American law schools in the context of a comparison with German legal instruction. My focus is on differences in the hope that these comparisons will help clarify thinking about the choices available to Japan.⁹ That comparative perspective leads me to suggest that before one considers using the American legal education system as model of professional education, one should ask the preliminary question: What should the legal system itself look like?

II. Fundamental Differences

An American comparativist, John Henry Merryman, perceptively noted that examination of legal education in society is “a window on its legal system.” It tells us much about “what law is, what lawyers do, how the system operates or how it should operate.”¹⁰ Many—perhaps most—differences between the German and American legal education systems are explained by three fundamental differences:

- The German legal system is expected to provide an objectively correct legal answer; the American legal system is expected to provide procedures to resolve disputes about what subjective rights are.
- The German legal education system trains judges (and incidentally lawyers) to find legally correct answers; the Ameri-

⁷ Yanagida, *supra* note 5.

⁸ *Cf.* Mark Levin, Legal Education for the Next Generation: Ideas from America, 1 *Asian-Pacific Law and Policy Journal* (2000), *also available at* <http://www.hawaii.edu/aplpj/1/03.html> (taking great care to avoid preaching to Japanese colleagues).

⁹ Unfortunately, I am not in a position to make comparisons directly to the Japanese system.

¹⁰ *Legal Education There and Here: A Comparison*, 27 *Stanford Law Review* 859 (1974), *reprinted with a prefatory note in* Merryman, *The Loneliness of the Comparative Lawyer* at 53 (1999). Citations here are to the reprint.

can legal education system trains advocates (and incidentally judges) to make arguments in favor of subjective rights.

- The German legal education system was created by the State to train its judges and is funded by the State; the American legal education system was created by private legal professionals and is funded principally by the students.

These fundamental differences lead to differing legal education systems:

Education of legal professionals in Germany

In Germany, the system of legal education was established to train civil servants for the State.¹¹ All persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are trained as judges. The image of the judge colors the ideal of the legal professional. And it is the judge's mastery of the techniques of applying law to facts (*Relationstechnik*) that defines the judge.¹² The role of the German judge is to determine facts, to apply the law to those facts, and to state those conclusions in a formal judgment. "A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than being based on the personal opinions of the deciding justices."¹³ It is to deliver a legally correct answer. It

¹¹ See Reinhard Zimmermann, *An Introduction to German Legal Culture*, in *Introduction to German Law* 28 (W. Ebke & Matthew Finkin eds. 1996); Ranieri, *supra* note 4, at 832 ("Das preußische Referendariatsmodell ... prägt heute noch das deutsche Justiz- und Rechtssystem.")

¹² *Accord*, Alfred Rinke, *Einführung in das juristische Studium* 135 (1977).

¹³ Zimmermann, *supra* note 11, at 21. The importance of this difference in legal thinking for legal education was noted nearly a century ago by the Austrian jurist, Josef Redlich, in a study he was commissioned to make of American legal education: "To the German and Frenchman of our time, therefore, the law appears always in popular thought as the abstract rule, as the general principle, to which all individual relationships of the citizens are a *priori* and for its own sake subordinated. To the Englishman and the American, on the other hand, the law appears rather as the single case of law, as the single subjective suit, conducted by the regular judge, and depending only upon his 'finding of the law.'" *The Common Law and the Case Method in American University Law Schools*, A Report to the Carnegie Foundation, Bulletin No. 8, at 36 (1914).

is the judge's duty to implement—and not to make—political decisions that have been made by others.¹⁴

In Germany, law students learn the substance of the law at the university.¹⁵ Later, in the practical period of German legal education that follows university instruction, the *Referendarzeit* or internship period, they learn the *Relationstechnik* of relating facts to law and of crafting judgments. Judges as classroom teachers didactically teach classes that lay out the fundamentals of this technique, while individual judges, at least in theory, tutor the aspiring legal professionals, the *Referendare* or interns, as apprentice judges. The interns are paid by the State. The interns learn how to take the substance of the law they learned at the university, how to conduct legal proceedings to determine facts, and how to justify in legal judgments their correct determinations of how law applies to particular cases.¹⁶ In short, they learn to do what a judge has to do.¹⁷

¹⁴ See Walther Richter, In welcher Weise empfiehlt es sich, die Ausbildung der Juristen zu reformieren?, Gutachten F zum 48. Deutschen Juristentag 23 (1970). See also James R. Maxeiner, U.S. "methods awareness" (*Methodenbewußtsein*) for German jurists, in Festschrift für Wolfgang Fikentscher (Bernhard Großfeld et al., eds. 1998), at 114; James R. Maxeiner, Policy and Methods in German and American Antitrust Law: A Comparative Study (1986); James Maxeiner, Rechtspolitik und Methoden im deutschen und amerikanischen Kartellrecht: eine vergleichende Betrachtung (1986).

¹⁵ Compare Merryman, *supra* note 10, at 67 ("The truth is known by the professor and is communicated to the students.").

¹⁶ Professor Fikentscher has explained it this way: in the university students learn the "non-litigious opinion style" and in the internship period the "litigious opinion style". (*Stil des unstreitigen Gutachtens* and *Stil des streitigen Gutachtens* respectively). Interns learn to handle cases with varying sets of facts and subject to different claims, objections, replications, etc. They put the many different relevant non-litigious opinions into one litigious opinion from which they then extract a judgment: "the judge renders a decision," a judgment, and this decision is the litigious opinion turned upside down, namely, beginning with the outcome, continuing with the legal rules that support the claims, objections, rejoinders, and duplicas, and ending with the subsumption. This is presented claim by claim, objection by objection, rejoinder by rejoinder, duplica by duplica, the whole judgment being arranged by claims. By contrast, as has been said, the non-litigious opinion starts with an open question: Could the plaintiff have this claim?, continues with the subsumption, and ends with a "therefore."

¹⁷ German law requires that to become lawyers, candidates must establish their suitability to be judges (*Befähigung zum Richteramt*). The German Lawyers' Association challenges this requirement as an anachronism. See Bericht, *supra*

Education of legal professionals in the United States

In the United States, the system of university legal education began as a private substitute for an existing informal private system of apprenticeship training conducted by practicing lawyers. That apprenticeship system continued alongside the university system for the entire nineteenth century and remained at least a theoretical possibility for much of the twentieth.¹⁸ All persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are required to be trained as advocates, that is, as private lawyers.

In the United States the German view that the role of the judge is to apply law to facts is rejected.¹⁹ Americans legal professionals see the legal system instrumentally, that is, as a system for resolving concrete disputes. It is the role of the judge in the American system to preside over a clash of competing interests and to clarify what is the law that governs the dispute's resolution. The role of the advocate to find a way to the client's desired resolution through shaping of the law, the facts, and the judgment of the dispute.²⁰ In recent years, the lawyer has come to be seen as "social engineer;"

note 4, at 29-30. The significance of dispensing with this requirement should not be understated. As Professor Raiser recently observed, the German judge is seen to stand above the parties, to be neutral, to not work for money, but selflessly for truth and justice. The attorney, on the other hand, has a more complicated: to work in the client's interests and for justice. Thomas Raiser, *Reform der Juristenausbildung—Förderung von Beratungs- und Gestaltungsaufgaben als Ziel der Juristenausbildung*, *Zeitschrift für Rechtspolitik* 2001, 418, 422.

¹⁸ See generally Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983); Alfred Zantinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States*, *Carnegie Foundation Bulletin* No. 15 (1921).

¹⁹ See, e.g., Edward Levi, *Introduction to Legal Reasoning* 1 (1949) ("It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack."); Lawrence M. Friedman, *American Law: An Introduction* 85 (1984) (American legal realists "sneered at the idea that the way to decide cases was by logical deduction from preexisting cases and rules").

²⁰ See Maxeiner, U.S. "methods awareness," *supra* note 14.

that view is said to predominate among law professors.²¹ Judges revel in the role of making political decisions.²²

The American case method of legal instruction trains students to identify a precise point in controversy and to argue for resolving that controversy favorably. It teaches them first to find the legal rule relevant to the instant controversy by distilling it out of a mass of precedents, and then second, to argue for a favorable resolution of that point.²³ There is no need for the student to make a legal decision let alone to place such a decision in any kind of system outside of the context of the particular case. Legal argument is the end in itself.²⁴ A German student exposed to examinations in both sys-

²¹ Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Columbia Law Review* 723, 773 (1988) (American law school professors have a “deep-rooted belief that lawyers are social engineers”); Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 *Rutgers Law Journal* 143, 176-77 (1998) (“A century after Holmes, however, in the midst of the celebrated “crisis” in the legal profession, the position of the American lawyer as social engineer extraordinaire was taken for granted to a greater extent than ever by the legal elite—the bench and the academy.”)

²² See, e.g., Charles E. Wyzanski, *Whereas—A Judge’s Premises* 6 (1965). See generally Mary Ann Glendon, *The Ways and Tastes of Magistrates in A Nation Under Lawyers* 111-73 (1994).

²³ Nearly a century ago Redlich perceptively captured the essence of this method: “Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready made as a unified body of established rules. Under [the case method] these rules are derived, step-by-step, by the students themselves by a purely analytic process which forbids *a priori* acceptance of any doctrine or system either by the teacher or by the hearer. In the former method all law seems firmly established and is only to be grasped, understood and memorized by the pupils as it is systematically laid before them. In the latter, on the other hand, everything is regarded as in a state of flux; on principle, so to speak, everything is again to be brought into question. Redlich, *supra* note 13, at 13.

²⁴ Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 80 *Archiv für Rechts- und Sozialphilosophie* 426, 433 (1994). (“An excellent student is one who can argue either side of a case with equal facility, who is trained to be a ‘hired gun’.”) This (as well as other aspects of the litigation system) helps explain two other features of American legal life. (1) The party with the better lawyer should win. (2) Counseling clients is not so much about whether particular action is within or outside law, but about who might argue that the proposed action is improper and whether they would have a colorable claim.

tems picks up on the obvious differences: in America, students are taught to identify and make arguments (“issue spotting”); in Germany, they learn to decide cases.²⁵

American legal methods are taught principally in the first year of law school, which is the pride-and-joy of American law schools. The courses are almost always the same: contracts, torts, property, civil procedure and criminal law. Yet it is not their substance that matters: it is that students are taught to “think like lawyers.”²⁶ Nearly a century ago an Austrian observer, Josef Redlich, attributed the victory of the case law method of instruction in America over older competing apprenticeship and lecture methods to the dominance of the common law system of finding the law in the application of each particular case. Professor Redlich found the principles underlying the case method to be “practically demanded by the very nature of the common law.”²⁷

So well has the American law school done its job of teaching students to be advocates that there is no longer any requirement of professional practical experience for admission to the bar. The success of the university legal education at eliminating competing forms of training should not be taken, however, to imply success in itself

²⁵ See, e.g., Nihls Behling, “St. Louis Diary: A German Student’s Tale about Academic Life in the United States,” on the Internet on December 20, 2001 at <http://www.jura.uni-sb.de/gast/slu-diary/>, who writes: “The style of the questions in the essay section was pretty much comparable to the style of German essay exam questions, with one big difference though. While in Germany students are required to put themselves into the position of judges and consequently solve the problems of the case, here students have to put themselves in the position of attorneys. Therefore, a typical question would be: Imagine you are A’s counsel. How will you advise your client in this situation? What defenses will the other side possibly raise? Accordingly, the answer does not call for a lengthy development of the legal questions, but rather requires to precisely spot the issues of a case, and to state the applicable rule together with a short reasoning.” When I mentioned this to one student recently, he responded that he was taught not to find answers, but to argue that there are none.

²⁶ This was the predominant view already a century ago. See Redlich, *supra* note 13, at 24-25. Not all law students believe that they are being taught to think like lawyers. See Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 *Journal of Legal Education* 91 (2001). Watson inclines to agree with the skeptical students. In any case, when this is repeated in second and third year courses—as it frequently is—it is incredibly boring.

²⁷ Redlich, *supra* note 13, at 37.

providing all practical training. Although there is no such legal requirement, the reality is that many, perhaps most, young lawyers informally apprentice to law firms, courts and work under the supervision of established legal professionals before they have responsibility as legal professionals.²⁸

Professional legal education in American law schools and in Germany

In both Germany and America legal education is *professional education* in at least one sense: in both countries most students who enter law studies do so intending to become legal professionals. The course of studies offered to them anticipates that. The majority of students do eventually become legal professionals. What this means for the Japanese discussion is that it would be wrong to consider one foreign model more “professional” than another. Introducing features from one model or the other should not be regarded as “more or less” professional.

The oft-observed difference between legal education as “graduate” education in America as opposed to “undergraduate” education in Germany is off-the-mark.²⁹ It fails to take into account differences in the respective secondary and higher education systems. The German gymnasium has a mission similar to that of the American college. The average Gymnasium graduate is likely to be about as well prepared for his or her professional legal education as is the average American college graduate.³⁰ Consequently, I do not

²⁸ Another development that may have helped law school education win out was the contemporaneous demise of the complicated forms of pleading in litigation. Pleading had some similarities to German-style subsumption.

²⁹ That Americans frequently make this distinction may be because this distinction was important in the history of American legal education. High school graduates in the USA were not ready for legal studies and so law schools sought students with some college education and finally were able to insist on undergraduate degrees. In support of this view, see Ostertag, *supra* note 4, at 315-20. For an argument contrary to this view, see John Henry Merryman, “Note on Legal Education,” *supra* note 10, at 51-52.

³⁰ See Joachim Hruschka, *Gedanken zur amerikanischen Juristenausbildung*, *Juristenzeitung* 1999, 455. The best American students may be better prepared than most of their German counterparts. As with so many comparisons between Germany and the U.S., performance levels in the U.S. are less standard and vary more than in Germany. Indeed, one could legitimately argue that German law

believe characterization as graduate or undergraduate is helpful. Much more important—and where I believe the focus should be—is what are the knowledge and skills sought to be imparted and where those skills are taught.

IV. Some aspects of professional education in American law schools

I now turn to some more specific aspects of professional education in American law schools. These are aspects of American law schools that foreign observers often note or should note. I cannot well say to what extent each of these aspects is necessarily inherent in the American system of legal education.

The professional focus of American law schools

American law schools have a *professional* focus, but that does not necessarily mean that their focus is either on *practice* or on the *practical*. The similarities of these three words—both in concept and sound—make it easy even for native English-speakers to slip from one concept to the other. By *practice*, I mean the profession of the private lawyer; by *practical*, I mean the day-to-day tasks that a legal professional must do.

American law schools certainly place more emphasis on the *private practice of law* than do German university law faculties. Similarly, compared to German *university* instruction in the law, American legal education does indeed have more of a focus on the *practical*. The apparent practical focus of American legal education disappears, however, when one compares it to the practical training of the *Referendarzeit* in Germany. The practical training of the *Referendarzeit* is training in how one does a judge's job. It may also be train-

faculties, more than American law schools, take a “graduate” approach to education. In Germany *Lehr-* und *Lernfreiheit* prevail. German university students are no longer children, but adults: they are *Studenten* not *Schüler*. It is up to them to direct their education. Accomplished students have an opportunity to work closely with an academic mentor on a substantial piece of original scholarship, *i.e.*, a doctoral dissertation. In contrast, the American school treats students more as children. Attendance is taken; students want to be “spoon-fed” basic material; and, opportunities for substantial scholarship comparable to the German doctorate are rare.

ing during the second year spent outside the court system in how lawyers do their jobs. Education in American law school, in contrast, is *not* usually training in how a lawyer does a lawyer's job.³¹

The professional goals of American law schools

Professor Merryman asserts that American legal education has "much grander objectives" than do its Civil Law counterparts and that its mission is "a much richer, more demanding, and more realistic one."³² Stated in a most positive of ways, it is to train students to be problem-solving lawyers and law-making judges. While the mission may, in some respects be grander, American legal education really has much less to teach: namely, skills in law finding and in argumentation. German legal education has to educate students in the system of German law, which has to be understood in order to find the objectively correct solution it requires.³³ Lest anyone doubt this conclusion, one need only compare the requirements for admission to the bar in both countries. Germany has not one, but two state exams. Each is considerably longer and more difficult than any single American bar exam. Many foreigners with little or no American legal training sit for and pass an American bar exam.

American law students as customers

³¹ To the extent it does provide such training, it is only training to argue legal points in appellate or motion practice. One practicing lawyer recently said to me that he learned nothing useful in law school. When I asked what he meant, he said that all that he had discussed were litigated cases. These were of only limited utility in his practice as a counseling lawyer.

³² "[American legal education] is better because it has grander objectives: because it draws on the full time and energies of teacher and student; because it is concerned with human problems and their solution; because it engages students directly in the study and active solution within the legal order; because it displays a higher opinion of the student and demands more of him; and because its conception of the work of the professional lawyer—and accordingly of the mission of legal education to prepare persons for the profession—is a much richer, more demanding, and more realistic one." Merryman, *supra* note 10, at 73.

³³ Thus us poor Americans who choose to study German law have more of a challenge than do Germans seeking to learn American law. There is some analogy to learning the respective languages: English, with its absence of cases and genders, is easier to learn than German!

Just as they once had to pay for apprenticeship training, American law students pay substantial fees for their legal education. Tuition at some law schools is higher than \$25,000 a year. Students are the customers and, as is well known in marketing, the customer is always right. Students who pay substantial tuition are not interested in extending their period of study any longer than absolutely necessary. They know that there is no formal practical training after law school. If they are to become successful lawyers, such training as they get will come in law school. They thus largely seek, and legal education reformers largely propose,³⁴ that increased resources be allocated to more practical skills education (*e.g.*, clinical legal education). Increasingly one sees such instruction. The student/customers in most American law schools evaluate classroom performance of their professors. After each course, the students fill out evaluation forms about the performance of the professor. To a greater or lesser extent depending upon the law school, the pleasure of the students has significant effects on professional careers.

Professional education as privately funded education

American legal education is principally funded by private sources, generally by the students themselves. This is true even of state-sponsored institutions. In relying principally on private funds, the law schools do not differ from much of American higher education. Private funding both creates a competition among law schools and means that law schools have control over their own existences. Law schools that can offer their students the best faculty and the best facilities are the most sought after by student/customers. Since law schools need take only so many students as are necessary to raise needed funds, they can choose to limit the total number of students. According to Professor Merryman, American law schools, freed of the need to be “democratic” and of a politically imposed requirement to accept all qualified applicants, can impose a “meritocracy”, where the better law schools select only the better students. The result is, he observes, that the academic quality of student bodies tends to be stratified according to the national reputation of law

³⁴ See, *e.g.*, the most noted of more recent proposals for reform, the so-called “McCrate Report”, *supra* note 4.

schools.³⁵ He acknowledges that this meritocracy can “compound social injustice.”³⁶

Thanks to high demand for legal education and control over enrollment, the better off American law schools have established conditions for study that impress foreign visitors. Compared to legal education in foreign universities, student faculty ratios are favorable, faculty course loads are light, and facilities approach the palatial. Richer schools have more comfortable facilities, more professors, more courses and more of just about everything. Rankings of law schools—once almost never spoke of—have now become largely accepted measures of schools.³⁷ Money is, in fact, a significant component in the most widely-used ranking of law schools.³⁸ But this competition has probably benefited even less well-off schools. It has enabled them to charge higher tuition to their students to keep up with the better off schools or, if state-supported, to get additional funds from the state legislature. It has encouraged them to find special niches in which to respond to demands not otherwise met by wealthier schools.

³⁵ Merryman, *supra* note 10, at 56.

³⁶ Merryman, *supra* note 10, at 57. Professor Fujikura has discussed how importing American ideas without American money could lead to problems in the Japanese system that is more dependent on state funding. See Fujikura, *supra* note 6, at 945-46.

³⁷ The earliest substantial discussion of these rankings of which I am aware of was by a German-American law professor and appeared in Germany. See Walter O. Weyrauth, *Hierarchie der Ausbildungsstellen, Rechtsstudium und Recht in den Vereinigten Staaten* (1976) Now, such a comparison is a successful publishing venture. See U.S. News & World Report, *Best Graduate Schools 2002 Edition* (Washington: 2001). The book has spawned an internet site where one can find the up-to-date rankings. See www.usnews.com. Although American law schools officially disparage this ranking, those that do well do not refuse to participate and seek to improve their standing, sometimes illicitly. See Dale Whitman, *Doing the Right Thing*, Newsletter [of the Association of American Law Schools] 1 (April 2002) (President of law school group describes such illicit steps). See generally Mitchell Berger, *Why the U.S. News and World Report Law School Rankings are both Useful and Important*, 51 *Journal of Legal Education* 487 (2001). The concept of law school ranking has even been adopted in Germany. See Axel Westerwell, *Die besten Universitäten für Juristen: Deutschland—Österreich—Schweiz* (1997).

³⁸ Described as “faculty resources” it accounts for 15% of the U.S. News & World Report ranking. See U.S. News & World Report, *supra* note 36, at 47.

Resources certainly do matter. Based on personal experiences as a student in American law schools, in a German law faculty and in a German *Referendar* program, as well as a high school and college student, I am convinced that the single most important factor in school learning is class size. When class size exceeds thirty, a student with only a modicum of self-direction, is likely to learn as much from reading as from attending a class, regardless of the class's format. Smaller classes, preferably ten to twenty students, promote learning through interaction among students and teacher.³⁹

Professional education rather than academic education

American law schools typically focus on concerns of interest for legal practice rather than on more general concerns of law. The education they provide is said to be "professional" rather than academic education.⁴⁰ Already in 1914 Redlich identified as a weakness of the case law method of instruction that the "students never obtain a general picture of the law as a whole, not even a picture which includes only its main features."⁴¹ Alan Watson, a Scottish comparativist who has taught in America many years, much more recently, came to the same conclusion. He believes that case law teaching means that students "are not given the framework of the law."⁴² "The absence of theoretical underpinnings is a fatal flaw in the casebook approach."⁴³ According to Professor Watson, "Legal education in the United States is geared to making legal plumbers, not legal scholars, not reflective, philosophically and socially attuned practitioners."⁴⁴ Other U.S. born critics agree that law is an "art" or a "craft".⁴⁵ One

³⁹ The case law method of instruction was an attempt to bring that kind of interactive learning to large classes.

⁴⁰ Stith, *supra* note 24, at 427.

⁴¹ Redlich, *supra* note 13, at 41.

⁴² Watson, Legal Education Reform, *supra* note 26, at 93.

⁴³ Alan Watson, *The Aspiring Lawyer in the United States*, in Alan Watson, *Law Out of Context* 140, 143 (2000) 140, 143.

⁴⁴ *Id.* at 148-49. *See also* Alan Watson, Joseph Story and the Comity of Errors, *A Case Study in Conflict of Laws* 96, 118 note 29 (1992) ("To an extent unparalleled elsewhere, students are not exposed to systematic treatment of law, with clear-cut concepts, institutions, and rules, but are presented with individual cases, outside of a historical, doctrinal, legal context but against a background of social interests.")

⁴⁵ *E.g.*, Stith, *supra* note 24, at 427.

German student in America observed that American law schools provide “Training statt Bildung.”⁴⁶ Recent years have seen some movement in this area. While the focus remains largely professional, more opportunities exist than before for more academic instruction. This is usually confined to upper division elective courses. Some law schools even require students to choose at least one so-called “perspective” course from a group of courses such as jurisprudence, legal history, or comparative and international law.

The professional trainer in American law schools

The role of the American law professor is that of trainer. Cynically put, it is to train “hired guns” or “Hessians”.⁴⁷ More positively put, professors are expected to take as much or more interest in the development of their pupils as in the development of the law. Pupils are required to attend class and professors are to monitor that attendance. Professors take an interest in and to an extent responsibility for their pupils’ passing the bar exam. In Germany, law is a science. Legal science is the development of an objective legal order. It is as much the role of the German law professor to help develop the ideal legal order as it is to educate the professionals who operate it.⁴⁸ In any case, the sheer numbers of students would limit active faculty involvement with students. Where one does see close relationships between faculty and students is in the scientific study of law, *i.e.*, in faculty research and student dissertations.

⁴⁶ *Der Rechtskulturschock: Anpassungsschwierigkeiten deutscher Studenten in amerikanischen Law Schools*, Juristische Schulung 1984, 92, 93. Just how effectively they do that is itself a subject of dispute. The point is similarly debated in Germany. See, *e.g.*, the dialogue *Jurastudium heute – und morgen!* between Bernhard Großfeld and Klaus Peter Berger in *Betriebs Berater* 1998, 1756 and 2596, where Professor Großfeld challenges case-oriented education and Professor Berger supports it as practice-oriented.

⁴⁷ Stith, *supra* note 24, at 433 (“An excellent student is one who can argue either side of a case with equal facility, who is trained to be a ‘hired gun’.”)

⁴⁸ See, *e.g.*, Horst Ehmman, *Die Aufgabe der Zivilrechtslehrer*, in *Die Aufgabe der Juristenfakultäten*, Festgabe für Otto Theisen, 11, at 34 (1996) (“Die Aufgabe der Juristenfakultäten ist die Bewahrung, Verbesserung und Fortentwicklung des Rechts sowie die Ausbildung künftiger Juristen nach dem idealen Bilde unserer Zeit in der Hoffnung, daß die Schüler dieser Fakultäten in ihrem Berufsleben ein wenig von den idealen Vorstellungen verwirklichen können, von den wir nur träumen.”)

Scholarship in American law schools

In the early years of American law schools, scholarship was relatively unimportant. This resulted in part from the mission of American law schools and in part from the nature of the Common Law as a system of judge-made law. Already Redlich in 1914 warned of a “certain disadvantage which the case system possesses for the scientific activity of law”.⁴⁹ Since the judges in the Common Law world are the last word on the law, systematizing efforts comparable to the German Civil Law tradition of codes and commentaries are much more difficult. This kind of systematic development of the law through treatise writing has come to be denigrated as “doctrinal” and driven from the law schools as something inappropriate to true scholarship.⁵⁰ One noted critic observed that “[d]octrinal scholarship has been in relative decline for many years, having been abandoned by many law professors, especially young ones and especially at elite law schools.”⁵¹ In its place has arisen a new form of scholarship that calls for examining legal rules from social science perspectives; another critic calls that “amateur social science.”⁵²

Selection of faculty in American law schools

Selection of American law faculty reflects their role as trainers; it is quite different, not only from their German counterparts, but also from other faculty in American universities generally. While one might think that a professional school would prefer faculty from practice, this is not the case. Indeed, American law school faculty are often criticized for having an antipathy to practice.⁵³ American law

⁴⁹ Redlich, *supra* note 13, at 50.

⁵⁰ Stith, *supra* note 24, at 434.

⁵¹ Richard A. Posner, *Overcoming Law* 84 (1995).

⁵² Stith, *supra* note 24, at 434. For a book length treatment of competing views of legal scholarship in the United States, see Arthur Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (1998). For an explanation for foreign law students in the United States of the great variety of what counts as scholarship there, see Matthew A. Edwards, *Teaching Foreign LL.M. Students about U.S. Legal Scholarship*, 51 *Journal of Legal Education* 520 (2001).

⁵³ According to Professor Glendon, “Legal scholars, of all intellectual persuasions, have never been more disdainful than they are at present concerning legal

school faculty who teach practice-oriented, practical skills courses are often relegated to second-tier status.

American law professors are generally selected because they did well in elite law schools. They are “very smart,”⁵⁴ but are not necessarily wise. They are chosen, an American comparativist notes, for “mere brilliance.”⁵⁵ They possess, a critic observes, “not knowledge but intelligence.”⁵⁶ Their selection has a standard path: good school marks in one of a small number of elite law schools, followed by a year or two working as an assistant to a judge, the higher up in the judicial hierarchy the better (“clerkship”), followed by at most one or two years in some kind of legal practice.⁵⁷

American law professors are normally not selected because of scholarship, either of the doctrinal or the social science kind. The career path just mentioned scarcely allows for it. Clerking for a judge—the most common background these days—does not train one in the systematic study of the law, but in decision of specific points in issue. There is no counterpart to the German Dr. jur., let alone to a *Habilitationsschrift*. Although in most departments of American universities, a doctoral degree requiring closely supervised academic work with a distinguished mentor is the rule, it is not in the law schools.⁵⁸

traditions, nor more detached from the practice of law.” *Supra* note 22, at 178. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Michigan Law Review 34 (1992); Harry T. Edwards, *Another ‘Postscript’ to ‘The Growing Disjunction between Legal Education and the Legal Profession,’* 69 Washington Law Review 561 (1994).

⁵⁴ Watson, *The Aspiring Lawyer*, *supra* note 43, at 162.

⁵⁵ James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 American Journal of Comparative Law 367 (1993).

⁵⁶ Stith, *supra* note 24, at 428 (“and, often, wit.”).

⁵⁷ See Watson, *The Aspiring Lawyer*, *supra* note 42, at 161-62. Supreme Court clerks are the most sought after. Cf. Yukio Yanagida, *supra* note 5. See also Joel Seligman, *The High Citadel, The Influence of Harvard Law School* 123 (1978).

⁵⁸ See Posner, *supra* note 51, at 101: “The essence of most graduate education is not the courses and the exams, but the preparation for a career in scholarship that is afforded by the experience of writing a dissertation. Few law professors, even when they are practitioners of the new scholarship, have that experience.” See also Watson, *The Aspiring Lawyer*, *supra* note 43, at 162: “What [the new law professor] does not have is a rigorous training akin to a Ph. D. in law under a distinguished mentor. She has no publications, and she has nothing in the course of publication. She has no scholarly record. Whether she is likely to be-

Law review work should not be confused with scholarship.⁵⁹

V. Conclusion: One Preliminary Question to Ask

In contemplating changes in a legal education system, one should ask, what do we want the legal system to do? Part of that question is to ask how things would be different if we changed them? For example, what would the German legal system look like if the *Referendar* system were eliminated? Would the *Relationstechnik* disappear or be relegated to use only by judges? How would this affect how German lawyers think and act? As Japan embarks on the road of legal education reform, the one piece of advice I would offer to Japanese jurists is, ask first where you want that road to go.

come a scholar in the sense understood in the arts and sciences is not even usually under active consideration by the faculty that hires her.” The usual requirement is only a J.D., or Juris Doctor, which while styled a doctorate, is not in any conventional sense. All 175 U.S. law schools combined bestow only a handful of true doctorates in law, the S.J.D., each year—less than twenty, typically. Stith, *supra* note 24, at 428. See also Robert J. Borthwick and Jordan R. Schau, Note: *Gatekeepers Of The Profession: An Empirical Profile of the Nation's Law Professors*, 25 University of Michigan Journal of Legal Reference 191, 212 (1991) (noting the sharp decline in the last generation of new law professors with advanced degrees in law). One newly named professor, formerly a Supreme Clerk and Harvard Law Review President, was quoted in the law school's alumni magazine as saying: “Part of the frustration in a busy law practice is that there's often little time to think deeply and creatively about issues in the law. I can't wait to do that as a professor.”

⁵⁹ According to Professor Watson, “The law review is the most bizarre feature of American law schools ...” Watson, *The Aspiring Lawyer*, *supra* note 43, at 155. The acme of American legal “scholarship” is membership on the Harvard Law Review, yet selection is based not even on academic grades, but on a competition that is not determined by scholarship. See 2001-2002 Harvard Law Review Membership Selection Policies, consulted on December 20, 2001 at <http://www.harvardlawreview.org/Policies.html> (“The competition consists of two parts. The subcite portion of the competition, worth 40% of the competition score, requires students to perform a technical and substantive edit of an excerpt from an unpublished article. The case comment portion of the competition, worth 60% of the competition score, requires students to describe and analyze [within one week using provided materials] a recent U.S. Supreme Court or Court of Appeals decision.”)