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J.D. or LL.B. as the Basic Law Degree?

*Marcus Schoenfeld**

LEGAL EDUCATION IN THE United States is still evolving. In the past few decades the law schools have all but eliminated other means than law school study as preparation for the practice of law. But, problems remain, especially in the area of content of the already crowded three-year day or four-year evening curricula, and in the area of graduate study. Compared to these major issues, the question of whether the first degree in law should be called an "LL.B." or a "J.D." seems trifling. Yet this is a very current question; the Special Committee on Graduate Study of the Association of American Law Schools is expected to report on this during the 1963 Annual Meeting. It is also ancient history, since "J.D. vs. LL.B." was first discussed seriously about sixty years ago, lay dormant for about thirty years, flared up again in the 1930's, and then was followed by another thirty years' quiescence.

Although this paper will endeavor to show that the J.D. should replace the LL.B. as the initial law degree, more basically it is an attempt to delineate the method by which such choice should be made.

Today the academic degree is essentially a shorthand way of signifying that the holder has completed a specific course of study at an educational institution. As in medieval days, the degrees may be subdivided into Bachelors', Masters' and Doctors'. However, the present meaning of these terms is quite different from their original meanings.

The medieval student entered a specific faculty—Law, Medicine, Theology or Philosophy (Arts)—and after some period of study he received the apprentice status of Bachelor of his specialty. This Baccalaureate degree conferred no right to teach or practice; it was merely a stepping stone to the Master's or Doctor's degree in that specialty. Evolution subordinated the Master's to the Doctorate, so that the usual progression became Bachelor's, Master's, Doctor's, but each still within the single specialty. Thus a Bachelor of Laws and a Bachelor of Arts

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were collateral levels—each signifying the same apprentice grade, but of a different specialty. In essence, this method still prevails in the British universities (although Cambridge and Oxford have different names for the law degree);¹ while a recent article suggests a return to this pattern for the United States.²

While present degrees in the United States retain the Bachelor-Master-Doctor names of the classic degrees, it is apparent that the old names cover new concepts.³ The Bachelor of Arts today very rarely is a symbol of completion of the first stage of a classical education in the arts. Rather it signifies completion of four years of college training of any sort. Thus the Bachelor of Arts and its virtual equivalents (*e.g.*, Bachelor of Science) still denote completion of an apprenticeship; they no longer necessarily connote future continuity in the same “specialization” of Arts, Science, or whatever. The same Bachelor’s degree will, in general, qualify one for post-collegiate studies in medicine, law, engineering, theology, and many other specialties, as well as in the Arts and Sciences.⁴ Similarly, the Master’s and Doctor’s no longer necessarily denote a further progression along the “specialty” begun as a Bachelor, and they do not necessarily imply a qualification to teach.

Quite simply, the general pattern of post-secondary school education in the United States may best be described as four years of college (with an award of a Bachelor of Arts or Science degree), followed by one to four years of post-collegiate study.⁵ These post-college studies are of two general types: professional or vocational, and non-professional or research.⁶ The professional degrees may include both an initial degree and a possible second degree, the latter indicating specialization of

¹ See Griswold, *English and American Education*, 10 *J. Legal Ed.* 429 (1958); Edlund, *Contemporary English Legal Education*, 10 *J. Legal Ed.* 11 (1957).

² Crabb, *On Integrating Law with the Academic World*, 14 *J. Legal Ed.* 329 (1962).

³ See, *A Confusion of Degrees*, *Saturday Review of Literature* (June 15, 1963), p. 59.

⁴ Of course, each may have a different set of prerequisite courses, but the degree is the same.

⁵ While some enter graduate schools with only three years of college, especially under a cross-filing or professional option program within a single university, it should be recognized that these programs in essence forego the final year of college. They do not affect the generality of the following discussion with respect to the graduate studies.

⁶ In a sense, the twelfth century dichotomy between practitioner and teacher is again current—except that now “doctor” has replaced “master” as the degree for either purpose.

a continuing vocational nature rather than qualification for research in the professional area. The nature of basic professional degrees is that they carry no implication of original research qualification, nor of creation of a substantial addition to existing knowledge. The research degrees, on the other hand, are those which require advanced study of a particular area of knowledge, usually evidenced by a dissertation that makes a substantial contribution to existing knowledge. The most common of course is the Ph.D. But these research degrees may also be granted in a professional area. These latter are not vocational, rather they are, in a sense, hybrids, which involve research in areas of the profession, and are designed primarily for teachers of that profession.⁷

Once this system, or hierarchy, of degrees is understood, many seeming conflicts are resolved. One realizes that certain seeming-issues in fact simply do not exist except in semantics: they are the result of applying the language forms of the prior hierarchy to the present scheme. Often confusion results simply from asking the wrong questions. Given this present pattern of academic progression, we may phrase the question that this paper attempts to answer thus: "What is the appropriate title for the first professional degree (in law)?" Reasonable men could differ in their answers, but at least they would be discussing the same question.

The most common erroneous question posed is "Is the LL.B. equivalent to the Ph.D.?" or, put another way, "How can you call this a doctorate when there is no research requirement?"⁸ The fallacy is that one cannot compare a non-professional researcher degree with a professional degree, any more than one can compare apples with oranges. The LL.B./J.D. is not a Ph.D. But on the other hand, a Ph.D. is not an LL.B./J.D. Neither is better or worse than the other; they are simply different. To debase the LL.B./J.D. because there is no dissertation requirement, is essentially equivalent to saying that the Ph.D. is inferior to the LL.B./J.D. because it does not develop a mind trained in legal method. The nature of the Ph.D. is that it demands original research. The nature of the LL.B./J.D. is that

⁷ Much of this pattern of degrees may be seen in Eells and Haswell, *Academic Degrees*, U. S. Office of Education, Bulletin (1960) No. 28.

⁸ See, for example, Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 Ill. L. Rev. 301 (1916); 35 *Proceedings of AALS* 292, 296-99 (1937).

it develops the analytic legal mind. The issue should be in terms of whether or not the nature and quality of the work for the law degree is such as to warrant conferral of a doctorate, and not whether or not such doctorate must conform to the Ph.D. So long as one ignores the fact that there are two kinds of doctorates—professional and research—and so long as the standard to which a first professional degree must be compared is the Ph.D., no first professional degree can be a doctorate. However, this does not correspond with reality, as the M.D. and D.D.S. would be excluded. Thus, if we ask this question, the answer must be that the J.D. cannot be the first law degree. Only when we free our minds from the erroneous notion that all doctorates must be the same can we proceed to choose between the LL.B. and the J.D. on a proper basis.

The second question shown to be illogical by this analysis is "How can we give a doctorate as a first degree and then give a further degree for research?"⁹ Underlying this question is the assumption that a doctorate is the ultimate step—that one cannot go beyond a doctorate. Although it is arguable that a degree superior to a doctorate should exist,¹⁰ this is probably undesirable, and as a practical matter it is not likely to occur,¹¹ so this argument will be ignored. However, since a professional doctorate and a research doctorate are different degrees serving different functions, it is not anomalous that a research doctorate (e.g., J.S.D.) should follow a professional doctorate (e.g., J.D.)—they are different species of doctorates. For example, an M.D. might do research in bio-chemistry and be awarded a Ph.D.; or he may earn an Med.Sc.D. It is similarly erroneous to speak of "cheapening the doctorate" by granting a doctorate for a non-research curriculum. If this is predicated on the assumption that a doctorate means research doctorate, this error is discussed above. If this "cheapening" argument really meant to apply Gresham's Law, whereby the "cheap" J.D. will drive out the dear J.S.D., this can be seen to be false by remembering who will want a J.S.D. In general, the scholarly attainments represented by the J.S.D. will be sought by law teachers. Since the J.S.D. has meaning mainly in the academic world, and since those in teaching can reasonably be expected to know the difference

⁹ See, for example, 35 Proceedings of AALS 292, 321 (1937).

¹⁰ Bartholomew, *Epithetology* (1948).

¹¹ See, *Transactions, Association of American Universities* (1924), at 27.

between the degrees, it cannot be logically argued that the J.D. will deter further research leading to an original contribution to knowledge.

A third recurrent fallacious question may be phrased, "Since the recipient of a first legal degree, even if he has a prior degree in arts or science, is a tyro in law, how can he expect to receive anything but a bachelor's degree?"¹² Since the recipient of any first professional degree is a tyro in that field, it is arguable that he should receive a bachelor's degree. This does not accord with the reality of the M.D. and the D.D.S. degrees. However, once the analysis of the present degree structure of the United States is accepted, and it is recognized that there is such a thing as a basic professional degree, and that by usage such first professional degree may be a doctorate, this argument is seen to be incorrect. It assumes that all first degrees in a field must be a bachelor's—ignoring the fact that in no field but law does a B.A. earn merely a second bachelor's degree.

A minor but recurrent question which is also seen to be based on a semantic error is, "Is the first professional degree a 'graduate' or an 'undergraduate' degree?"¹³ Since, by hypothesis, all candidates for professional degrees are possessors of a college degree, they are all students who have been "graduated," and hence they should be "graduate students."¹⁴ Classifying them as "undergraduates" can be explained only by equating "graduate student" with "candidate for a research degree," a position which has been shown to be incorrect.¹⁵ This ignores the fact that, for the law school, convenience of speech might dub the candidate for the first degree an undergraduate solely in order to differentiate him from the advanced degree candidate. So long as this use is not based on the equating of graduate student with research student, no error is committed. However, it should be realized that such loose usage might carry unwarranted implications outside the law school.

By now it should be obvious that it is senseless to attempt to pour new wine into the old bottles of the semantics of a by-gone era. To pose the question of the proper title today for the

¹² See, for example, 35 Proceedings of AALS 292, 316-320 (1937).

¹³ See, for example, Stein, *The Juris Doctor*, 15 J. Legal Ed. 315, 317 (1963).

¹⁴ Griswold, *Graduate Study in Law*, 2 J. Legal Ed. 272, 273 (1950).

¹⁵ *Ibid.*

first legal degree in a meaningful way, we simply must say, "Given this pattern, what is the proper name for this degree?"

To isolate the relevant factors of this question, it will be assumed that all entering law students have a B.A.,¹⁶ and that they attend an equivalent of three full-time years of law study. It will also be assumed that the recipient of this degree may elect to continue his studies, and that the subsequent research (i.e., Ph.D.-like) degree is the J.S.D.¹⁷ Because of historical development, it is further assumed that the progression of Bachelor—Master—Doctor is the generally accepted manner of describing an elementary, an intermediate, and an advanced degree, respectively.

Granting all of this, logically the first law degree should be a Master's. That is, the law graduate already has a Bachelor's, and he can progress to a Doctor's; since he is at an intermediate level, he should receive an intermediate degree.¹⁸ Since the holder of this degree would be a practitioner, with the doctorate reserved for the teacher, we would in a sense be resurrecting the twelfth century pattern of first apprenticeship, and then Artsmanship or scholarship. Similarly, all first professional degrees should be Masters', with the Doctorate reserved for research in the field. In a best-of-all-possible worlds this might well be the best of all possible solutions.¹⁹

The problem with this solution is that in fact it is not the uniform pattern. Some professional degrees are Masters' (e.g. Business Administration), but some are Doctors' (e.g., Medicine). Some research degrees are Doctor's (e.g., Ph.D.), but some are Master's (some M.A.'s). Overriding all of this is the vestigial quality of many Masters'.²⁰ Empirically, the difference between research or a profession is not the primary distinction between a Master's and a Doctor's; rather the critical factor seems to be the time devoted to study for the degree.

¹⁶ This ignores the problem mentioned in note 5, *supra*. As a matter of fact the trend seems to be away from graduate admission without a college degree.

¹⁷ Although there is some lack of uniformity with respect to the title of the research doctorate in law, this will be used.

¹⁸ Cf., Crabb, note 2, *supra*.

¹⁹ The professional second degrees, e.g., LL.M. in Taxation, could possibly be replaced by certificates, but discussion of this is beyond the scope of this paper.

²⁰ See, Bartholomew, *supra*, note 10, at 20-21.

That is, assume that a student has the first collegiate degree (i.e., B. A. or equivalent); the next degree he earns will be either a Master's or a Doctor's, regardless of whether he embarks on a research program or on a professional program (unless, of course, he goes to law school).²¹ The sole distinction which determines the title of the degree seems to be the time spent in order to earn the degree. The Master's is almost always a one year course, and in no case exceeds two years. The Doctorate usually requires three or four years of study beyond the B.A. Although the actual conferral of the research degree may well take longer due to the thesis requirement, it is still basically three or four classroom years.

Viewed in this light, the first degree in law should be a Doctorate simply because the very high level of achievement over three years is not sufficiently rewarded by a Mastership.²²

In sum, the Bachelor of Laws degree is anomalous. It is a carryover from a former academic pattern wherein it was in fact usually a first degree of any kind. Much of the conceptual difficulties involved in attempts to change the LL.B. derive from semantic illusions created by the use of obsolescent language forms derived from the prior pattern, and employed to discuss present-day issues. Analysis of the present structure shows that professional degrees, even if they imply no research or contribution to knowledge, may properly be called Doctorates. The standard of such a professional doctorate is not the Ph.D.; rather it is a high level of post-B.A. attainment, sustained for a period of three or four years. On this basis, the first degree in law *must* be a J.D. today.

The current discussion of whether or not the J.D. should replace the LL.B. as the first degree in law is only the latest phase of an old argument. Since the problem is essentially one of semantics, the discussion of the merits will be more fruitful if certain past errors in semantics are avoided. This paper attempted to show certain of these problems in order to aid in avoiding repetition of former errors.

²¹ This situation reminds one of the ancient joke about the doting mother who saw her soldier son marching for the first time and exclaimed, "Look, they're all out of step except John."

²² See, A Confusion of Degrees, note 3, *supra*.