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THEORY AND PRACTICE IN TRAINING FOR THE LAW; THINKING LIKE A LAWYER AND DOING WHAT HE DOES

*Rex E. Lee**

Providing law students the opportunity to observe trials at the law school is related to the recent development within the world of legal education recognizing that the process of preparing people to become lawyers can benefit from first-hand observation and participation in the lawyering process. This has resulted not only in the inclusion of courtroom facilities within law schools, but also in the incorporation of clinical training programs as part of the curriculum.

The movement to bring prospective lawyers into closer contact with the ongoing lawyering process has also received considerable impetus from the views of some of the leaders of our profession—notably Chief Justice Burger and Mr. Justice Clark—that our profession needs to place more attention on the development of the skills of the advocate.

I applaud this effort to incorporate into the lawyer preparation process a better understanding of how lawyering itself works.

My principal message on the occasion of the dedication of this new courtroom, however, is in the nature of a caveat. There is a popular rhetoric that sometimes accompanies the inclusion of practice-oriented features into a law school program. The thrust of that rhetoric is that law schools are finally training their students to do what lawyers actually do. The statement is simple, straightforward, and correct. From this seemingly innocuous premise, however, it is possible to make a convenient leap to either or both of two conclusions which have significant mischief-making potential for legal education.

First, law students should not assume that upon graduation from law school they will be accomplished lawyers because their law school has provided, as part of a formal three-year professional training program, the opportunity to observe the trial of live lawsuits or because it has incorporated clinical programs into the law school curriculum. I fear that this point is sometimes lost in our enthusiasm over the inclusion of practical components in law school programs. It is true that law students now have the opportunity, as

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part of their regular law school experience, to learn something about what lawyers really do. It does not follow that this limited exposure during the law school years is sufficient to qualify them as skilled and accomplished trial or appellate advocates.

In my view, there is no more attractive feature to our profession than this: the best lawyer is the one for whom the training process lasts over his entire professional career. This is true not only with respect to the acquisition of substantive knowledge concerning the rules of law; it is equally applicable to the skills of legal analysis, and the skills of the advocate, the counselor, or the negotiator.

The law school years constitute the initial part, and a very important part, of the lawyer's training, but they are only a part of an entire program. At a minimum, even to avoid gross incompetence and the risk of malpractice, the training process must last beyond the law school years, no matter how good the law school and no matter how effective its clinical or other practice-oriented component.

Therefore, though the purpose of law school is to prepare lawyers, the preparation process does not end on graduation day. *A fortiori*, a diploma from a law school that offers training in practice related aspects of the profession is not a certificate of accomplished advocacy.

The second conclusion is closely related to the first, and like the first, depends on a view of one's legal education as extending beyond the law school years. It also depends on a further refinement of the lawyer training process, considering it as consisting of two components which can be labeled the theoretical and the practical. It is interesting to contemplate the mix of these two that is important to lawyers in the variety of ways in which they serve our society. Of the two, theoretical proficiency is more universally required. I cannot think of any kind of lawyering job, whether that of trial or appellate advocate, legal scholar, corporate house counsel, government lawyer, or any other, in which real excellence can be achieved without intellectual proficiency. For a limited segment of our profession—the legal scholars—practical experience is helpful, though not essential. For the great majority—the practicing lawyers—it is difficult to say which is more important. Whether litigant or counselor, whether in the public sector or the private, the practicing lawyer who slights either his theoretical or his practical development, suffers *pro tanto* from this failure and is not truly successful.

If one considers that his legal education lasts for forty years rather than three and includes both a theoretical and a practical component, then the most fundamental principles dealing with optimizing the allocation of scarce resources dictate that the primary

emphasis of the law schools should be theoretical.

Training for the law in a formal, structured program, under the tutelage of full-time professional teachers for whom teaching is the principal professional objective, rather than an adjunct to the active practice of law, is a fairly recent feature of the American legal profession. Most of the lawyers with whom I was acquainted as I grew up in a small town in Arizona received their legal training over the period of a decade or so while they "read law" as apprentices to practicing lawyers. Today, by contrast, graduation from an accredited law school is one of the requirements for entry into the profession.

The law school has arrived, and I think it is here to stay. But the law school's comparative advantage—that is, the area of endeavor within which resources can be used to greatest advantage—lies not in the field of the practical, but rather the theoretical. The reason that it has emerged over the practitioner-apprentice system as the prevailing mode for training lawyers (indeed, today, the only acceptable mode for the initial phase of such training) is not due to its proficiency in simulating or incorporating legal practice situations and experiences. Rather, the comparative advantage of the law school is in the area of legal analysis and the development of theoretical and intellectual skills.

By contrast, the most effective clinic is the real world of the practicing lawyer. It is a world in which simulation is unnecessary, and there is no question that the cases selected for clinical purposes adequately reflect what the lawyer will meet in his actual practice because it is his actual practice.

I am not arguing against practice oriented features in the law school program. I believe that the opportunity to observe and participate in simulated or actual law practice situations as integral parts of a law school program not only has a place, but also that it provides a setting in which the development of the skills of legal analysis is more effective and more interesting. Moreover, while it is analytically helpful to separate the theoretical from the practical, these two aspects can, in fact, be highly complementary. But after all of this is conceded, it must be recognized that the theoretical and the practical, while complementary, are different in many respects and that familiarity with the practical does not guarantee intellectual excellence.

I come then to this fairly simple proposition: If we are willing to view the training period for the lawyer as lasting for several decades rather than for ninety weeks—as I submit we must—and if we consider this training process to include both a theoretical and a practical component—as I further submit that we must—then basic

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principles of economics counsel that since the school is a better laboratory than the practice of law in which to acquire the theoretical skills, the dominant emphasis of the law school program must continue to be the development of those skills.

Taken in proper perspective, a combination of the practical and the theoretical in the law school provides the optimal learning experience during the law school years. The perspective to which I refer entails that the student discipline himself to regard the practice-related features of his law school program as an adjunct to the principal objective of that program. I believe that the risks to the student in achieving this perspective should not be underestimated. For most students, the three years of law school are far less interesting than any comparable period in practice. Learning to think like a lawyer simply is not as enjoyable as doing what a lawyer does. Given some kind of an option between the practical and the theoretical during the law school years, there is no doubt as to which is the more attractive. Taken in proper combination, they can be complementary. Out of balance, I fear that the more attractive practical aspect will siphon off energy, attention, and effort from the more rigorous theoretical one.

We have been talking thus far about law schools, and the proper emphasis and priorities for their faculties and students. I believe there is also a message for the rest of the profession, which is not directly involved in the work of the law schools.

The Chief Justice, Mr. Justice Clark, and others who have spoken on this subject are absolutely right: We need more effective training in the skills of advocacy. Law schools can and should play a part, taking care that their role in this regard remains adjunct to, and supportive of, their principal responsibility to provide strong theoretical grounding.

It is important to recognize, however, that the job of advocacy training could not be completed in three years, even if the law schools completely ignored their responsibility for theoretical development. And it would be the worst kind of mistake to lengthen the law school training period to more than three years.

The best solution is for the members of the practicing bar to assume greater responsibility for the training of lawyers during the post-law school years.

Until fairly recently, the major responsibility for legal education fell on the members of the practicing bar. A return to that system would be as unwise as it is unlikely. However, since the law schools have established themselves as the most effective institutions for training through the period of qualification for initial entry into the profession; since there is a need for more effective training

not only in advocacy but also other practical skills, such as counseling, negotiation, and business planning; and since the comparative advantage of the law schools lies in the realm of the theoretical, the time has come for our profession to recognize that legal training does not end upon law school graduation, and that both the comparative advantage and the principal responsibility for developing practical skills rests with the entire profession.

There is already movement in this direction. There has been considerable discussion—and even some action—in the area of lawyer recertification. But I would hope that pride in our profession would impel us beyond the minimum requirements imposed by licensing authorities. There is so much that could be done and ought to be done. The greatest opportunity, and responsibility, rest with the employers of law graduates, the law firms, the corporations, the public interest groups, and the governments.

I think that if substantial reform is to come in the area of expanding the responsibility for training lawyers beyond the law schools, the main impetus will come from the principal beneficiaries of such reform—the younger members of the profession. If successful, even on a modest scale, one anticipated consequence would be the shortening of law school programs to two years. Such consequence is the more likely to occur because memories of the third year, coupled with a modicum of empathy for those who follow, will provide the incentive to bring it about.

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