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Practical Skills in the Law School Curriculum

Richard L. Braun
University of Dayton

PRACTICAL SKILLS IN THE LAW SCHOOL CURRICULUM

*Richard L. Braun**

I. INTRODUCTION

It is beyond dispute that the past decade has witnessed a great deal of ferment in the field of legal education. The size of law schools, their standards, their curricula, relations between dean and faculty, student power and the importance of training in practical skills compared with theoretical knowledge of the law are a few of the subjects that have involved legal academe, as well as bench and bar, in controversy. Among these issues, that of practical versus theoretical training is one of the most important, and one that merits extensive discussion and experimentation.

As a new law school established in 1974, the University of Dayton has sought to develop a traditional curriculum supplemented by an emphasis on programs designed to prepare its graduates to function as practicing attorneys. Toward this goal, in addition to the normal structure of theoretical courses, the school has developed a moot court program, several elective clinical education courses, and two elective courses on trial practice (civil and criminal). In the future, it is anticipated that a course or program in client counseling will be developed. In addition, there are plans for a studio in which depositions can be taken by means of videotape for use in actual trials.

The Law School has also inaugurated its own courtroom in which actual trials and other judicial proceedings are held. In addition, the courtroom is used for moot court and trial practice exercises. The scheduling of actual trials is an experiment which has been duplicated at only one other law school.[1] The purpose of the courtroom is to give students the opportunity to observe judicial proceedings on a regular basis, to have closer contact with practicing attorneys, and to relate their courtroom observations to the development of their own practical skills in both clinical and trial practice courses.[2]

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* Dean and Professor of Law, University of Dayton School of Law. B.A., Stanford University, 1941; J.D., Georgetown University, 1951; LL.M., Georgetown University, 1953.

1. That school is the McGeorge School of Law of the University of the Pacific in Sacramento, California.

2. Although not identical in scope, this "teaching courtroom" can be likened to the "teaching hospitals" which during the last half-century have become associated with medical schools.

The programs mentioned above are designed to provide a balance to the traditional law school emphasis on teaching the theory of the law through the study of appellate cases. The casebook method was originated by Dean Langdell of Harvard and has been the basic system of legal education followed almost universally by American law schools since the turn of the century.[3] Departures from the pure case-study method have been initiated by an increasing number of law schools in recent years, particularly in the areas of clinical studies and trial practice courses. Although the Langdell theory of legal education has been secure in its position as the basis for teaching students to *think* as lawyers for the last half century, it is somewhat detached from the realities of everyday practice. For this reason it has been subjected to increasing challenge from those who claim that students must also learn how to *function* as lawyers.

Although the most widely noted criticism has come from Mr. Chief Justice Burger of the United States Supreme Court[4] and Chief Judge Kaufman of the United States Court of Appeals for the Second Circuit,[5] one of the most telling indictments of traditional law school education has been voiced by U.C.L.A. Law School Dean William Warren: "I got all the way through law school without learning what a lawyer does."[6] He was also reported as stating that: "A good law school may do a superb job of preparing students to become clerks for the Supreme Court, but it is grossly inadequate when it comes to teaching the practice of law. . . ."[7] Ralph Nader has said that the Langdell education process "is a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage."[8]

Although many have criticized the American system of legal education, no one has done more to change its emphasis from theory to practice than William Pincus, President of the Council on Legal

3. *See* Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL ED. 162, 163-73 (1974) (hereinafter cited as Grossman) for discussions of the history of Langdell's case method of study and some of the criticism it has received, and Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 ORE. L. REV. 57 (1970).

4. Burger, *The Special Skills of Advocacy*, 42 FORDH. L. REV. 227 (1973)(hereinafter cited as Burger).

5. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974) and Kaufman, *Advocacy as Craft—There is More to Law School than a Paper Chase*, 28 SW. L.J. 495 (1974)(hereinafter cited as Kaufman, *Advocacy As Craft*). *See* FINAL REPORT OF THE ADVISORY COMMITTEE ON PROPOSED RULES FOR ADMISSION TO PRACTICE, 67 F.R.D. 159 (1976) (also known as the Clare Committee Report). The Committee was appointed by Chief Judge Kaufman in January, 1974, to consider how trial advocacy could be improved.

6. Los Angeles Times, June 28, 1976, Part II, at 1, col. 5.

7. *Id.*

8. Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493, 494 (1969).

Education for Professional Responsibility.[9] Funded by the Ford Foundation, that organization has contributed nearly six million dollars to the development of clinical education programs in law schools during the last eight years.

The new trend toward greater emphasis on the practical aspects of legal training has not gone unchallenged. The address by Dean (now Assistant United States Attorney-General) Rex Lee, stresses the need for maintaining the traditional dominance of theoretical courses in law school training.[10] In his view practical courses should be supportive of the law school's principal responsibilities to provide strong theoretical grounding. He would leave to members of the practicing bar the bulk of responsibility for training young attorneys in practical skills during their post-law school years. Others, including Mr. Justice Powell, have expressed similar views.[11] These critics of practical legal education offer several arguments to support their position: the law school's basic function as teacher of the law and the art of legal analysis,[12] the lack of faculty interest or competence in teaching practical courses,[13] and the greater cost of practicum courses.[14]

The remainder of this article will address the need for and value of practical training in law schools and will respond to the views of those such as Dean Lee who claim that it should be returned to its former second-class status in legal education or perhaps be assigned to some other segment of the legal community.

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9. See Pincus, *Clinical Training for the Law School: A Challenge and a Primer for the Bar and Bar Admission Authorities*, 50 ST. JOHNS L. REV. 479 (1976) (hereinafter cited as Pincus). *See* Spring, *Realism Revisited: Clinical Education and Conflict of Goals in Legal Education*, 13 WASHBURN L.J. 421, 425-26 (1974), for a further account of Pincus' efforts and achievements.

10. Address by Dean Rex E. Lee, University of Dayton Courtroom Dedication, Mar. 12, 1976, p. 3 *supra* (hereinafter cited as Address).

11. Powell, *Clinical Education in Law School*, 26 S.C. L. REV. 389 (1974) (hereinafter cited as Powell, *Clinical Education*); Powell, *In Defense of the Langdell Tradition*, 1975 B.Y.U.L. REV. 587 (hereinafter cited as Powell, *Langdell Tradition*. See also Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 271-72 (1974) (hereinafter cited as Boyer & Cramton); Dente, *A Century of Case Method: An Apologia*, 50 WASH. L. REV. 93 (1974); Pedrick & Frank, *Questioning the Clare Cure*, TRIAL, Mar., 1976, at 47 (hereinafter cited as Pedrick & Frank).

12. Powell, *Clinical Education*, *supra* note 11, at 393; Powell, *Langdell Tradition*, *supra* note 11, at 589; Pedrick & Frank, *supra* note 11, at 54; Address, *supra* note 11, at 4-5.

13. Gorman, *Clinical Legal Education: A Prospectus*, 44 S. CAL. L. REV. 537, 555-57 (1971)(hereinafter cited as Gorman); Grossman, *supra* note 3, at 182-83.

14. Boyer & Cramton, *supra* note 11, at 289-90; Gorman, *supra* note 13, at 558; Grossman, *supra* note 3, at 182.

II. Practical Training in Law School

A. *Why it is Necessary*

Practical training should be as much a part of the law school curriculum as theoretical or knowledge courses. Both are necessary for the new attorney, and both must be provided in law school because that is the only place students receive their legal training before they enter the practice of law. Under the system as presently constituted, the law student, upon graduation, normally takes a bar review course on the substantive subjects which the examination tests. The bar examination itself is largely a duplicate of law school examinations. Upon passing the bar exam the student is subjected to a character evaluation, and if nothing untoward is found in his background, he is certified as qualified to practice law with no restrictions on the type or size of the case or client he may represent. In five states[15] the graduate need not even pass the bar if he has graduated from the state law school; a character certificate and a law school diploma qualify him for a license to practice law.

Through study by the casebook method, such new attorneys may have developed the most discerning and sophisticated knowledge of legal principles and yet remain deficient in practical skills such as knowledge of where and how best to plead a case; how to interview clients and develop facts; how to handle settlement negotiations; and how to try the case in court.

As Chief Justice Burger has pointed out:

> The shortcoming of today's law graduate lies not in a deficient knowledge of the law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions—simple, single questions, one at a time. . . . And a lawyer who cannot do that cannot perform properly—in or out of court.[16]

Chief Judge Kaufman adds:

> It strikes me as particularly foolish to assume that following a three-year sojourn through the annals of appellate court opinions, the law student will emerge capable of performing the arduous duties of a courtroom lawyer. . . . The newly-admitted member of the bar is formally deemed to be as qualified to engage in courtroom performance as is a lawyer who has spent a career toiling in that vineyard.

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15. Those states are Mississippi, Montana, South Dakota, West Virginia, and Wisconsin, 45 The Bar Examiner 98, 98-99 (1975).

16. Burger, *The Future of Legal Education*, in Selected Readings in Clinincal Legal Education 50, 53 (1973).

> Yet, we know from our frustrating experiences, that reality does not conform to the myth.[17]

The above are only a few of the problems that could be posited regarding the young attorney's ability to handle legal problems. Theoretical training in the principles of law via the casebook method clearly does not prepare the new graduate for any of the foregoing situations. Nevertheless, except in the State of New Jersey, a law school graduate can be licensed with little, if any, knowledge as to how he should face real-life problems in the practice of law. A decade ago clinical education was seldom available, trial practice and professional responsibility courses were given little attention, and law students therefore experienced difficulty in attempting to prepare themselves for the practice of law. Today, due to the acceptance in legal education of clinical courses, the initiation of trial practice and professional responsibility training, the development of client counseling courses, and competition, and other programs of this sort, practical training is at least *available* to law students, although generally not required, in a substantial number of law school curricula. In striking contrast are the practical training programs available to students of teaching, dentistry and medicine, which provide actual experience as a prerequisite to the licensed practice of the profession.

The value of practice-oriented courses in the law school curriculum is not limited to helping new lawyers find their respective ways to the courthouse. They lend meaning to, and synthesize, the principles and analytical thought processes learned by students during their theoretical classroom training.[18] They also provide relief from the tedium of the last year of law school.[19] In short, *practical* courses can assist in providing effective *theoretical* training.

B. *The Practical Curriculum Will Not Detract From the Theoretical Curriculum.*

Dean Lee also argues that the introduction of practical courses into the curriculum will drain students' interest and energy away from what he considers the more valuable and rigorous theoretical

17. Kaufman, *Advocacy as Craft*, *supra* note 5, at 497.

18. See Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA LAW. 246 (1974); Boyer & Cramton, *supra* note 11, at 281.

19. Justice Tom Clark has termed the last year of law school a "squeezed orange." Address by Justice Tom Clark, University of Dayton Courtroom Dedication, Mar. 12, 1976. *See also* Boyer & Cramton, *supra* note 11, at 277.

courses.[20] In answer to this claim it may be asserted that while practical courses are more interesting and enjoyable, they need not be less rigorous or valuable than theoretical ones. Students usually find that both clinical and trial practice courses require greater attention and more preparation time than theoretical classroom study. They also frequently conclude that they have learned more in the practicum courses.

It may also be noted that Dean Lee agrees with the proposal, which has received increasing support recently, to limit law school to two years,[21] leaving to others in the legal profession the responsibility for practical training of new graduates. Adoption of this proposal, however, would in fact further restrict the amount of time devoted to the theoretical courses which he now believes are being threatened by the increased emphasis on the practical courses.[22] Even assuming that a student were to take as much as twenty credit hours of trial practice, clinic and client-counseling courses in a three year curriculum, this would not reduce the amount of theoretical training as much as slashing a full year from law school.

C. *Practice Training Cannot Realistically Be Obtained Outside the Law School.*

The advocates of eliminating or reducing practical training in academe do not reveal how or where effective practical training is to be obtained. Dean Lee suggests it should be provided by the entire legal profession.[23] I submit that this would be unnecessarily expensive and a pedagogical failure.

In the first place, we are faced with the problem that American law school graduates now are licensed upon passing the bar. Should we postpone such licensing until they have, as in the Canadian system, completed their practical training?[24] If such a change were

20. Address, *supra* note 10, at 6.

21. Address, *supra* note 10, at 7. Others who have adopted this proposal include Burger, *supra* note 4, at 232; Address by ABA President-elect Justice Stanley, A.B.A. COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR, Aug. 10, 1976; and Address by Justice Tom Clark, University of Dayton Courtroom Dedication, Mar. 12, 1976.

22. In view of the vast increase in the volume of the law and the growing complexity of litigation and other types of dispute-settling mechanisms, it would be hard to justify a reduction in the total span to be devoted to educating a student for the practice of law.

23. Address, *supra* note 10, at 6, 7.

24. For a discussion of the Canadian system, *see* Parker, *Legal Education in Ontario*, 27 J. LEGAL ED. 576 (1975); Thompson, *Canadian Experience in Practice Training*, 16 J. LEGAL ED. 43 (1963).

made on a state-by-state basis, the coordination between law schools and state legal systems would pose monumental problems, especially in view of the fact that nearly all law schools draw their students from many parts of the country. If the law schools drop practical courses before most states adopt a post-graduate training system, thousands of new graduates would enter their careers unprepared for their responsibilities as attorneys. Perhaps states could require post-graduate training in the skills of lawyering as New Jersey and Canada have done, regardless of the type of courses the student has taken in law school. Assuming, *arguendo,* that the New Jersey system is a viable method of training young attorneys, its adoption in other states would involve substantial expense and would be unduly repetitious in cases where the new graduates had previously received in law school the same type of training required by the state after graduation.

Except in New Jersey there now exists no system of post-law school practical training. In addition, there appears no readily available method of initiating such a program. Past experience has demonstrated the failure of individual "clerking" with practicing attorneys as a system of training large numbers of would-be lawyers, and an attempt to reinstitute such a system surely would produce confusion and expense if it were to be supervised in any meaningful way.

A series of structured practical training courses for members of the bar would simply duplicate the practice oriented programs that law schools have been developing in a reasonably coordinated fashion. Such programs could be undertaken by the continuing legal education staffs of the organized bar, by private organizations such as the Practicing Law Institute, or by some type of government agency; however, in addition to the expense involved,[25] no appreciable improvement in the quality of education over that provided by law school practical training programs would likely be realized. It may be anticipated that the quality and content of such programs would vary widely from state to state. Some might be lengthy, others brief; some might involve carefully simulated practice courses while others merely provided routine orientations to courts, clerks offices, and records offices; some might employ permanent staffs and facilities, others hastily improvised volunteer services in rented halls. Whereas all approved law schools must now meet rigorous standards developed by the American Bar Association, which enforces them with periodic inspections, such post-graduate programs

25. See text *infra* p. 17.

would be subject only to whatever standards each state might develop.

Even if adequate standards and funding were uniformly developed throughout the country, it would be necessary for each state to hire substantial new staffs and facilities which are not now available. At the present time, thanks in part to the generosity of the Council on Legal Education for Professional Responsibility, most law schools have or are developing effective clinical education programs and trial practice courses. It would take years for the individual states to equal the practical training now available in law schools and the effort could only be achieved at greater expense and with less uniform quality.

Another and even less desirable alternative would be to leave training in lawyer skills to law firms. Although this can work reasonably well in large firms where the young attorney serves a true apprenticeship of from one to three years, most new graduates do not join large firms.[26] Reliance cannot therefore be placed upon training by law firms for the legal profession generally. In addition, *self*-training results in the unfortunate consequences which have produced so much criticism of the legal profession and of legal education. In this regard Chief Justice Burger's remarks are relevant: "[w]e are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians. . . . No other . . . profession is as casual or heedless of reality as ours."[27]

D. *Law School Faculties Are Trained to Teach Practical Skills.*

Another argument sometimes made against skills training in law schools is the fact that faculties are not trained to conduct such instruction.[28] That may have been true ten, or even five years ago. Today, however, more than 90 percent of American Bar Association-approved law schools provide credit-granting clinical instruction[29]

26. Most attorneys practice alone or in firms too small to be able to provide any but the most limited training. According to 1972 census figures, out of the roughly 350,000 lawyers in this country, 95,820 are sole practitioners. Of 72,724 law offices surveyed, 67,326 (more than 92 percent) had annual gross incomes of less than $300,000; 52,015 (more than 72 percent) had gross receipts of less than $100,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF SELECTED SERVICE INDUSTRIAL-LEGAL SERVICES (1972).

27. Burger, *supra* note 4, at 230-31.

28. *See* note 13 *supra*.

29. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., 1975-1976 SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION (May 1, 1976).

and most have experienced faculty members who serve as clinical instructors. Progress is also being made in trial advocacy courses. A review of one-hundred randomly selected law school bulletins shows that ninety offer such courses, and eleven require them. While this is an area in which practicing attorneys can and do play a major role as adjunct professors, many outstanding law school faculty members, aided by training in the National Institute for Trial Advocacy (NITA), have also become highly proficient in the field. In fact, NITA relies heavily on law school professors for its training faculty and its staff. Client counseling is also becoming an important and successful part of law school curricula.[30]

E. *Law School Training Is Less Expensive Than Post-Graduate Training.*

Finally, cost has been cited as a reason that law schools should not become heavily involved in skills training.[31] It is true that clinical and trial practice courses are more expensive than theory courses taught in large classes by the casebook method. But law school education has been generally underfinanced in comparison with other types of graduate study, and more funds are needed to enhance all phases of legal education. The cost of proper skills training will have to be met wherever such training is given, and because of such cost factors as those set out below, it can be accomplished in law schools at less expense than in some new type of post-graduate training.

The Director of the Ohio Legal Center Institute has estimated that only fifteen hours of continuing legal education training per year for the state's 20,000 attorneys would cost more than $2,600,000 annually, in addition to the salaries for instructors and the costs of facilities and other capital items. About 1,300 persons are admitted to the Ohio Bar each year. It is reasonable to assume that each would need the equivalent of at least one law school semester for skills training. Based on the foregoing estimated expenses, this new training in the State of Ohio alone would cost at least three million dollars per year, plus faculty salaries and capital costs. Although there would be savings in law school costs if the third year were eliminated, it would surely be necessary in such event to increase the amount of skills training and thereby the costs of that phase of the student's education.

30. *See* Gallinson, *Interviewing, Negotiating and Counseling*, 27 J. LEGAL ED. 352 (1975) for a discussion of developments in this area.

31. *See* note 14 *supra*.

III. Views of the Legal Profession

It is relevant to consider the views of the legal profession concerning these issues. Surveys taken over the last several years demonstrate that most practicing attorneys think that law schools should provide more practical training.[32] One study of graduates' views of their law school education reported:

> The statement, "I wasn't prepared" is made over and over again. Behind this plaintive cry one senses the disorientation and embarrassment experienced by men who were formally qualified to practice law, yet forced to reveal inadequacies, ignorance, and confusion before clients, employers and friends. . . . [Lawyers] complain in large numbers that they lack the skills—technical and social—needed to play even the beginner's role.[33]

Another concludes that:

> [I]ndividuals practicing at the bar of the court generally feel that they would be better prepared to serve their clients or employers if, while in law school, they had more practical experience with actual legal problems and the courts. Lawyers . . . generally feel they do not need any additional theoretical law work in law school.[34]

At a meeting of leading members of the Ohio Bar, the participants voted overwhelmingly to recommend that there should be an expansion of practical education in legal training prior to admission to the bar.[35] One panel of the group considered, but unanimously opposed, the suggestion that law school be reduced in length from three years to two.

Such views cannot be refuted by the response of some educators that the purpose of law schools is not to train lawyers but to "educate men for *becoming* lawyers."[36] As William Pincus points out, it is the authority to practice law which gives membership in the bar its status and which, in the main, attracts students to law school.[37]

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32. Boyer & Cramton, *supra* note 11, at 386-87; Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 551, 592, 595 (1973).

33. Lortie, *Laymen to Lawmen: Law School, Careers, and Professional Socialization*, 29 Harv. Ed. Rev. 352, 366 (1959).

34. Dunn, *Legal Education and the Attitudes of Practicing Attorneys*, 22 J. Legal Ed. 220, 225 (1969).

35. Ohio Bar Proctor Conference, Initial Report (1976).

36. Address by Dean Phil Neal, 15 U. Chi. L. School Record 1, 6 (Winter 1967).

37. Pincus, *supra* note 9, at 488.

IV. CONCLUSION

In summary, few would argue with the proposition that attorneys must be trained in legal theory and knowledge. They must also learn to think analytically and with detachment so that they understand the issues upon which their cases depend. For both of these purposes the Langdell system of structured classroom schooling is effective. But, in addition, an attorney must be able to carry out the *functions* that are necessary to practice law, and for this purpose traditional law school training is sadly inadequate. It is apparent that, for at least the foreseeable future, law schools will be the only source of training for those who pass the state bar examinations and become licensed to practice law.

Dean Lee proposes that, since the education of good attorneys spans their entire career, the practical aspects of such education can be postponed until after law school and the bar exam.[38] This proposal completely overlooks the fact that, except in large firms and law offices, the young attorney must have the ability to handle the real cases with which he deals as soon as he starts practice. He will develop such skills throughout his legal career, but he needs at least a basic knowledge when he starts. As pointed out by Judge Kaufman, the young lawyer cannot expect to be eminently qualified in any field, but he also is not likely to be performing in the "center ring" during his first year out of law school.[39] On the other hand, the fact that new attorneys cannot be expected to be the equal of seasoned attorneys does not mean that their incompetence should be excused.

It is hard to imagine a young electrician explaining to his customer that he understands the theory of a wiring problem but has never handled pliers or wirecutters, and few patients would be willing to subject themselves to an operation by a new surgeon who had never before wielded a scalpel.[40] Yet this, in effect, is what some theorists expect clients to accept in young attorneys.

The law schools have made significant progress during the last decade in providing effective practical training, largely by implementing elective courses. These courses do not stress local rules so they have value for young attorneys wherever they may practice.

Every law school should have well developed courses in clinical

38. Address, *supra* note 10, at 6-7.

39. Kaufman, *supra* note 5, at 503.

40. This point is made convincingly by Dean J. McLaughlin, *In Defense of the Clare Cure*, TRIAL, June, 1976, at 62.

education, trial advocacy, trial practice and client counseling. Only by offering such courses will law schools satisfy their responsibility to produce graduates who are prepared to practice law.