Case Western Reserve Law Review

Volume 9 | Issue 4

1958

Reflections on Legal Education and the Practice of Law

Frank D. Emerson

Franklin C. Latcham

Reflections on Legal Education and The Practice of Law

By Frank D. Emerson and Franklin C. Latcham

THIS ARTICLE is an effort to record some ideas on the teaching of law gained from the writers' combined experience of about 12 years of teaching and 20 years of practice. We are not unaware of the dangers involved in venturing into a controversial area in which the practitioner often feels that the schoolman is lost in the airy heights of pure theory and in which the schoolman frequently believes that his practicing brother is lost in a tangled jungle of meaningless verbalisms.[1] Perhaps the fact that we each have combined experience in both fields will help in bridging whatever gap may exist. At least, that is our hope.

FRANK D. EMERSON (A.B., 1938, University of Akron; LL.B., 1940, Western Reserve University; LL.M., 1957, New York University) is a professor of law at the University of Cincinnati. From 1944-1954 he served as an attorney for the Securities and Exchange Comm'n and from 1951-54 as a Lecturer in Law at Western Reserve University.

FRANKLIN C. LATCHAM (B.S.L., 1943, LL.B., 1944, Univ. of Washington; J.S.D., 1950, Yale Univ.) is a practicing attorney in San Francisco, California. From 1948-1951 he was an assistant professor of law and from 1951-1954 an associate professor of law at Western Reserve University.

In a society in which the rule of law, and not the dictates of one man or a small group of men, is supreme, it is inevitable that lawyers should have a commanding position. Furthermore, in a society which places such great faith in education, it could be expected that the schooling of lawyers should be of the highest order. It is abundantly clear that this expectation has been realized by the leading law schools of the country. The growth of legal education in the United States has matched the tremendous expansion of our society. Those responsible for the development of legal education have not only probed deeply into the profound and obscure corners of an all-encompassing field, but they have done so with a lively imagination and an open-minded spirit. It is in this spirit of open-minded investigation that the writers offer the following thoughts on some of the problems in the field.

---

[1] For a good review of the present problems of legal education see Harno, LEGAL EDUCATION IN THE UNITED STATES (1953) which also collects most of the writing on the subject, and Vanderbilt, *The Future of Legal Education*, 43, A.B.A.J. 207 (1957).

THE CASE SYSTEM

The initial effectiveness of the case system as a teaching tool has been amply demonstrated. In the hands of a teacher who is an effective exponent, it affords an educational medium for requiring a close analysis of a case as well as forcing the student to assume the role of an advocate to defend his arguments "on his feet." But the case technique can also prove a slow method for covering course material. In the first year some slowness in covering ground can be justified in favor of the opportunity provided for introducing the beginning law student to the techniques of effective reading of a case and logical argumentation. In some second and many third year courses, however, the traditional case method may well be modified, if not entirely eliminated, in favor of a basic textbook or treatise augmented by law review materials and other supplementary reading. By a textbook or treatise we do not mean merely a work setting forth the legal doctrines of the particular field, but a text which is a stimulating teaching tool and which contains a critical analysis of those doctrines and some statement of their historical setting and their relationship to other disciplines involved, for instance economics, political science, sociology, etc. Furthermore, the text should contain examples and analysis of the principal legal documents involved in the field, and if fact-finding is of major importance in that area of the law the text should contain a section on the problems of gathering, analyzing and presenting facts to a court or other governmental body. Many authors are enlarging their casebooks to contain such material.[2] We believe they are moving in the right direction.

Not only is the conventional case system a slow method for covering course material, but it can prove to be stultifying to the student in his second and third years. The student tends to limit his horizon to the confines of the case studied rather than entering the broader sources in the particular field. A great many fields of law today are not limited to cases but depend for authority upon statutes, legislative material, regulations and administrative rulings. The student must become adept at an analysis, synthesis and evaluation of these other sources of the law to be an effective practitioner. Unfortunately a rigid case approach tends to overemphasize the work of the courts and to de-emphasize, if not ignore, these other sources of authority giving the student a one-sided ap-

---

[2] Examples are BALLANTINE, LATTIN AND JENNINGS, CASES AND MATERIALS ON CORPORATIONS (1953); GELLHORN AND BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS (1954); FRANK, CASES AND MATERIALS ON CONSTITUTIONAL LAW (1952); MCDOUGAL AND HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT; SELECTED CASES AND OTHER MATERIALS ON THE LAW OF REAL PROPERTY (1948).

proach to the law. The case system, if strictly followed, also omits vital non-legal material which the instructor should use.

The case system as initially conceived fails to cover yet another important area of a practitioner's work, that of drafting legal documents. In many fields of law today, particularly in corporation law, commercial law and estates, the lawyer spends a large percentage of his time in drafting instruments or considering the instruments drafted by other lawyers. In the corporation and commercial law fields, for example, comparatively few cases of significance are being considered by the appellate courts to day due in part to the careful drafting being done by lawyers. The casebooks too often rely on the older decisions for discussions of the applicable law, thereby concentrating upon problems currently being avoided by careful draftsmanship and ignoring other present problems which draftsmen must face.

We are not advocating, of course, that the substance of a particular field of law should be ignored in favor of a concentration on problems of drafting. Indeed, a knowledge of substantive law is a requisite to drafting. But at the very minimum the student should be introduced to the major documents used in the field together with some attention to the problems of draftsmanship involved in those documents. Furthermore, the student should have the responsibiltiy for drafting at least one or two documents in the field, together with a memorandum explaining how the document meets and resolves the legal problems which it must cover. He will not, of course, emerge as a polished draftsman, but he will have an understanding of the need for approaching drafting, as well as other legal work, on the basis of a careful investigation of the facts, an analysis of the law, and a synthesis of a client's objectives with legal theory.

In order to consider drafting and other suggested materials, there may have to be a reduction in the amount of course time spent studying cases, statutes and other precedents. To some extent this problem can be alleviated by eliminating reliance on the case approach in favor of either casebooks carrying text notes or resort where appropriate to textbooks as described above. In any event, the problem can further be minimized by limiting the amount of class consideration given to doctrines which, although presenting fascinating problems for consideration, are not of primary concern in today's practice.

Still another way of obtaining the time needed for consideration of drafting problems and other components of a modern curriculum lies in revising the curriculum. Some courses need to be eliminated or combined with other courses. The time devoted to other courses needs to be reduced. Law faculties in recent years have given attention to this problem and we shall only touch upon it here. A change in the curriculum

always requires difficult choices. However, a greater reliance on the use of text material would mean that fundamental principles of basic courses could be presented in a shorter time and still provide for the student's introduction to the problems involved.

Whether drafting techniques can best be presented as a part of each course, or by a separate course, is an issue that must be faced. Even if a decision is made to teach drafting in a separate course, the students should at least be introduced to the principal documents connected with the field in the course which considers that field. The separate course in drafting could then provide a more concentrated consideration of selected drafting problems.[8] A smaller or medium sized school may have to choose between a first year writing program and third year drafting courses in view of the additional personnel required to provide the individual student attention needed in drafting or writing courses. Apart from the importance of drafting, the circumstance that third year classes are ordinarily smaller than first year classes points up the greater feasibility of presenting courses requiring a large amount of individual attention in the senior rather than the freshman year.

SEMINARS AND RESEARCH PROBLEMS

A discussion of the inclusion in each course of the broadest possible sources of the law, leads to an evaluation of seminars and research problems. It would be ideal if every student in law school could be given a problem requiring a gathering together and an analysis of facts as well as the research and application of the law to the facts. It is extremely difficult, however, to present the student with an imaginary problem requiring the gathering of facts. The facts usually must be supplied. But this does not mean that every student should not be given as much experience as possible in the analysis of a fact problem, an awareness of fact sources, and the resolution of the legal problems involved therein. In regard to the legal problems, the student must achieve proficiency in using the basic source of materials of the law, and develop ability to use those materials to resolve a difficult legal problem. These skills can only be attained by taking a problem to the law library and rooting systematically through the materials available. They cannot be gained through the casebook approach alone. Of course, a research problem of this type is useful to the student only after he has had enough background in law to appreciate the legal problems involved, and do some effective work with those problems. Perhaps such background comes only after the first year or year and a half. The type of experience with which we are con-

[8] See Cook, LEGAL DRAFTING (1951) for an excellent selection of materials.

cerned is presently afforded to the students who write for the law reviews, but our plea is that this experience should not be restricted to the top students who gain a position on the reviews. Actually, the others need it equally, if indeed not more than the few elite.

A research program of this type can be carried out as a part of regularly offered seminar courses, or it can be established as a separate honors-type course in which faculty members work on an individual basis with a few students, supplying them with the fact problem and providing them with the essential constructive criticism. The faculty member, however, must be afforded sufficient time to devote to the research problems. In determining his course load, the seminar or research problem course should have equal weight with the other courses in the curriculum.

"PRACTICE" COURSES

There has been much "hue and cry," especially in recent years, on the alleged failure of the law schools to afford law students with the skills needed in the actual practice of law. The charge is made that new graduates may have a fine background in the niceties of the rule against perpetuities, but they know next to nothing about the practicalities of drafting a pleading, proceedings in court, or negotiating a settlement. The law school graduate with his lack of practical know-how is compared unfavorably with the medical school graduate who, at least after his period of internship, is presumed to be a reasonably qualified general practitioner.

The comparison of the medical school graduate with the law school graduate is somewhat unfair in that the subject matter of their training is significantly different. In medicine the student is being trained in a scientific discipline in which teaching through demonstration and by actual student participation is effective and can be provided with relative simplicity. In law the student is not being trained in a scientific discipline but in an analysis of the rules formulating the structure of our society. Furthermore, in law school, teaching by demonstration and actual student participation in conferences between an attorney and his client, or in the actual trial of a lawsuit is difficult, if not impossible, to achieve.[4]

Even though it may be granted that it is much more difficult for law

[4] FRANK, COURTS ON TRIAL p. 235 (1949). The late Judge Frank suggests that faculty members undertake the representation of governmental bodies and that their students participate with them in such representation. Of course, Judge Frank's stimulating plan for "lawyer-schools" envisages much more than just this suggestion. Judge Frank does not, however, go into details on his suggestion and to our knowledge the practicalities of the plan have never been investigated by others. We would agree with Judge Frank that student participation in the work of legal aid clinics would not appear to be fruitful because the work is not sufficiently broad.

schools to provide practical training than for medical schools, nevertheless the law schools should consider every method available for giving the student the background necessary for the practice. Special consideration to drafting problems and to independent research are techniques for affording such training. These courses can deal with live, legal problems and require serious thought from the student. Somewhat less can be said in this connection for the usual moot court program, especially trial moot courts. Trial moot court proceedings suffer seriously because the facts are "manufactured" and not real. There is a tendency to "shape" the facts to gain a point. Thus the proceeding descends further into unreality affording the student participants little opportunity for experience in the difficult process of gathering and presenting hard facts to a court. Perhaps students would gain more by observing the conduct of actual trials — both before courts and before administrative tribunals. A supervised and carefully planned program of student observation of actual litigation in which the students were afforded some background to the case and were able to follow the trial as does a jury, could be beneficial.[5] How many law school students graduate without ever having attended a trial? A very large percentage!

A great deal more can be said in favor of appellate moot court programs. However, care must be exercised so that the ultimate emphasis is not placed upon the oral argument rather than upon the written results of research. American students ordinarily have a good deal of training, or at least opportunity, for oral expression in their pre-law training, but apparently few have had an opportunity for undertaking research problems and writing a careful analysis of the results of their research efforts.

There is a further method by which law schools can provide more practical training, not to the undergraduate, but to the graduate lawyer. Those responsible for medical education are fortunate in that practical experience can be given the new doctor through hospital internship supervised by the medical schools. Such an internship system is not readily available to legal education. The young lawyer does have available to him, however, training similar in character to that afforded to the young doctor through association with a private law firm, a governmental legal department, or a legal department maintained by a private business organization. The law schools can supplement this training through programs designed especially for the graduate lawyer. We are not speaking here about post graduate programs leading to doctoral degrees, but of programs designed to provide participants with more extensive training in fields of law pertinent to their practice. Some law schools, principally

[5] In this connection, motion pictures of actual trials could be a rewarding teaching technique.

those in or close to large metropolitan areas, are presently sponsoring programs in this field. Participants have not been limited to young lawyers, although not surprisingly, they appear to be the principal ones who have taken advantage of the programs. In other instances, short institute programs of this type are being sponsored by state or local bar associations. The subjects offered have not been limited to the so-called practical courses. But since the lecturers are often practitioners of broad background in the particular subject, they are able to introduce an abundance of actual experience in their course material.

Inasmuch as the field of post-law school training is assuming increasing importance in legal education, the law schools in metropolitan areas should give this aspect of the training of the lawyer added attention. The problems include questions as to when to present the material through institutes of a few days or weeks duration, or through semester-long courses; if the latter are used what materials should be used and how should participants be examined and graded; further, what should be the scope of the course offerings. It is a tribute to Dean Andrews that during his deanship Western Reserve Law School has been a pioneer in incorporating a continuing legal education program in its curriculum. The experience of Western Reserve should provide a wealth of helpful data for other law schools interested in the field.

One final thought in regard to the problem of providing more practical training for law students is that law schools in their undergraduate program cannot afford to sacrifice truly important and basic theoretical training. It is axiomatic that training in the application of theoretical knowledge to practical problems is useless without a thorough background in theory.

"NON-LEGAL" MATERIALS

Law school curricula have also been subject to attack, particularly from those within the schools themselves, for failing to provide their students with materials from other disciplines: economics, sociology, psychology, etcetera.[6] The debate has been raging for some time and will no doubt continue as long as there are teachers of law. Law is intimately bound up with our political thinking, our economic theories, our social relationships. As Holmes pointed out some years ago, "The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories; intentions of public policy avowed or unconscious, even the prejudices which judges share

[6] For a leading essay on this subject see, Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203 (1943.)

with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[7] The study of law cannot ignore the society out of which it has grown and which it is designed to preserve.

Furthermore, lawyers do not practice their profession unaware of the impact of law upon the lives and fortunes of their clients and of society at large. More and more the legal adviser to businesses must be thoroughly cognizant of the economic problems of the business to afford it effective legal advice. The field of estates and trusts also presents the lawyer with problems in economics. And in these fields as well as in many others (e.g., criminal law, domestic relations, labor law, torts, evidence) the lawyer is confronted with problems involving the human personality and its adjustment to society. It is clear that law students should be made aware of the thinking in many non-legal fields insofar as it is pertinent to legal problems.

The principal difficulty here is one of the time available to the law schools. It would not seem possible to add any substantial number of courses in other disciplines as such to an already burgeoning curriculum. Therefore, the burden of introducing the relationship of these other disciplines to the law must in most law schools be borne largely by the law faculty. This difficult burden will certainly require the help of colleagues from the other departments of the university.

In speaking of the non-legal aspects of the curriculum, we should like to note that law school faculties must give greater consideration to the effective use of the English language by law students. It is common knowledge in the law schools today that the average law student is not well-grounded in the use of English which forms the fundamental tool he must use in his life's work. Furthermore, law schools should give thought to at least some training in the understanding of language and the meaning of words.[8] Of course, a law student must know and understand the old accepted legal verbalisms, but this does not mean that he should be denied a critical analysis of such legal verbalisms. This can be done with particular effectiveness in connection with a study of court decisions, legislation, rulings and briefs and legal documents written by lawyers. The student's training should go at least one step farther, for his own use of language should also be subjected to critical analysis. After all, the lawyer will spend his life analysing and criticising the writings of courts, legislatures and other lawyers, as well as having his own legal writings subjected to minute analysis. Our experience has been

[7] HOLMES, THE COMMON LAW 1 (1881).

[8] For a stimulating recent article see Probert, *Law, Logic and Communication*, 9 WEST. RES. L. REV. 129 (1958).

that young law graduates are not sufficiently aware of the requirements of rigorous analysis of either the work of others or of their own work. This type of analysis should be included in the student's work in the research and drafting courses we have previously discussed.

Although it is perhaps trite to say it, it is still true that law schools must not be ivory towers of academic legal excellence entirely divorced from the world around them. Students should be subjected to the stimulation of meeting, talking with and listening to not only outstanding members of the bench and bar but also to the leaders in politics and academic fields, and any distinguished person with a stimulating mind. Law school faculties should make it their business to see that the work of students is periodically augmented through lectures from distinguished persons in their fields and through small groups meeting and getting together with such men.

CONCLUSION

In closing a word should be said about the commanding position of the university law schools not only in legal education but in the whole domain of the law. In the last half-century law schools have pre-empted legal education, and at the forefront have been the law schools associated with the great universities. The law schools have done a magnificent job. Teaching standards have been of the highest order. Outstanding scholarship has been required and obtained from the student body.

The very fact of their excellence and domination of the field of legal education, however, has placed great responsibilities upon the law schools. Whether or not the expectation is a fair one, the vast majority of the profession expect the law schools to provide the young lawyer with the background necessary to commence the practice of law. Many legal educators have pointed to the unfairness of expecting the law schools to shoulder the whole task. The complaint of the educators undoubtedly has merit. However, it points to the necessity of a closer liaison between the schools and the profession. The schools would benefit through being kept abreast of the latest developments in the practice. The profession would benefit from having a better understanding of the work of the schools; their continuing efforts to improve legal education, and their needs, particularly those of a monetary nature, to achieve their goals.

There appears a reluctance on the part of some schoolmen to implement such a liaison principally because of a fear that practitioners would attempt to limit legal education to the narrow confines of the established precedents. To some extent this fear is justified. Practitioners with such a limited outlook need reorientation.[9] The views of these practi-

[9] See Vanderbilt, *The Future of Legal Education*, 43 A.B.A.J. 207 (1957).

tioners do not represent those of a vast majority of the profession however, especially when they take the time to consider the requirements of modern legal education. Closer cooperation with the profession would give the schoolmen an opportunity to present those requirements to their practicing brothers and thereby win their support.

Finally, the dominance of the law schools in the field of legal education places upon them the burden of training not only the future leaders of our profession but a large percentage of the future leaders of our government, our society, indeed, leaders of our western world. The pre-eminent part that lawyers have played in the history of our country is obvious. Of necessity, they dominate the court system and the administration of justice. Traditionally they have formed a significant portion of the members of Congress and the state legislatures. In their position as counselors, they have had a strong position in the executive departments of our national, state and local governments. As counselors, lawyers have also had an important position in our business life, and as the complexities of business organization and government regulation grow, the role of the lawyers is increasing in importance. We are proud to say that ours is a government of law and not of men. Truly the burden of maintaining our free society in these perilous times rests heavily upon lawyers, and upon the law schools.

Thus the work of the law schools requires the devoted consideration of the whole profession and of all thoughtful men. We have no doubt that the law schools will continue to develop in the outstanding fashion that they have to date, but self-examination and exchange of ideas are taking on cumulative importance both in the practice of law and in legal education.

FRANK D. EMERSON
&
FRANKLIN C. LATCHAM