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Approaches and Stumbling Blocks to Integration of Skills Training and the Traditional Methods of Teaching Law

W. Noel Keyes

APPROACHES AND STUMBLING BLOCKS TO INTEGRATION OF SKILLS TRAINING AND THE TRADITIONAL METHODS OF TEACHING LAW

W. Noel Keyes*

I. THE CONTRADICTORY VIEWS ON ANTI-INTELLECTUALISM IN LAW SCHOOLS

A FEW YEARS AGO, the president of the Association of American Law Schools (AALS) condemned the adding of practical skills courses to the curriculums of most law schools accredited by the American Bar Association (ABA) by charging that:

> American legal education is confronted by the rise of a new anti-intellectualism, new, not in kind, but in its extent and the intensity of its expression. Within the space of hardly more than a decade, traditional legal education has been engulfed in a tide of criticism, a criticism directed both to the performance of law schools and to the principles on which the schools have proceeded.[1]

The AALS remains adamant in its position regarding practical legal education. In 1979, AALS president, John E. Cribbet, reflecting on the association's stance, stated:

> I am not opposed to *limited clinical programs*, . . . , but I do believe these programs are *an important side show*—the main action is in another tent. The key to all of these programs is supervised, *educational* (original emphasis) experience. We should not yield to internal (student) and external (bar, judicial) clamor for immediate gratification of an understandable thirst for involvement in the "real" world at the expense of what we know to be our principal mission.[2]

These statements express the traditional view that law schools are essentially meant to be for philosophical discussion rather than exposure to the lawyering process.[3] Those adopting an opposing view hold that the law school's primary function is to educate competent and

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[1] Allen, *The Prospects of University Law Training*, 63 A.B.A.J. 346, 346 (1977).

[2] J. Cribbet, *President's Message*, 79-1 AALS NEWSLETTER 1 (Feb. 1979). (emphasis added).

[3] *See* St. Antoine, *On Reasons for Decanal Disenchantment and Their Wider Implications*, 20 L. QUADRANGLE NOTES, No. 3, Spring, 1978, at 8, 9 [hereinafter cited as St. Antoine].

ethical lawyers, and that the only way to accomplish that is through clinical training. The underlying theory is that if the supervisor provides quality education to the student, the client will receive quality representation.[4]

The ABA recently distributed a thirty-four page report which addresses the critical need for developing extensive clinical education programs.[5] The report is an apparent reaction to growing criticism from the judiciary and the public regarding the practical incompetency of today's law school graduates. The Task Force makes twenty-eight recommendations, addressed to law schools, bar associations, government agencies, and lawyers generally, the majority of which emphasize providing students with wide exposure to what lawyers "really" do in day-to-day practice.[6] The ABA Task Force Report is perhaps the most revolutionary assault on the traditional approach to legal education since the adoption of the case method. From it one could easily and properly conclude that the present positions of the AALS and the ABA on the issue of practical legal education are diametrically opposed.

Having practiced for many years before becoming a law professor, the author felt compelled to look at the problem of how to integrate practical training into traditional methods for teaching law. It was soon evident that the solution could not be found if one took a pejorative attitude, dwelling on negative terminology such as "anti-intellectualism," but only if it was recognized that law study has little meaning without a concurrent study of its practice. This commentary will propose a mode for accomplishing this integration.

II. INTELLECTUALISM AND "REVERSE REALISM"

The Nineteenth Century not only saw the development of the case method, but also the unfolding of a positivist approach to the philosophy of law, which is the operative force behind the traditional law school teacher's methodology. In the Twentieth Century, however, there appeared the peculiarly American philosophical development of legal realism. The American legal realists focus on the elemental qualities of law in action. To them law is "the subject matter of (group) thinking [as] it borrows from the whole stock of practices, standards, [and] ethics that make up the social, economic and religious phases of society."[7] The realists place particular emphasis on the behaviour of officials who

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[4] Rowland, *Profiles of People and Programs*, in CLEPR FOURTH BIENNIAL REPORT 13, 85 (1975-76).

[5] ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

[6] *Id.* at 3-7. *See generally* Devitt, *Why Don't Law Schools Teach Law Students How to Try Law Suits?*, 29 CLEV. ST. L. REV. 631 (1980).

[7] K. LLEWELLYN, THE BRAMBLE BUSH 117 (1951).

make the law through their decisions.[8] This is a factual reality which constitutes a great portion of the law.

The realists often criticize abstract precepts as arbitrary and idealistic because they can be made to fit any complex of facts or avoided by precedential leeway. They feel that judges' decisions, like all humans', are the products of their past and not necessarily the result of logical inference. But, it is a misunderstanding of legal realism to accuse it of down-playing the force of legal rules. The realists understand that actual and ideal concepts of law should never be completely fused or separated.[9] To fuse them tends to emphasize the confusion between "law" and "justice" which is so common among law students today. To divorce then overemphasizes the destruction of idealism in law students and increases the students' bent toward cynicism.

As law schools continue traditional approaches to teaching and exclude skills training, they ultimately reject the American philosophy of legal realism and revert to what might be called "reverse realism." "Reverse realism," as practiced by traditional law teachers, trains the current generation of lawyers by ignoring and downgrading the importance of skills training. By divorcing skills training from other legal instruction, the practices that actually affect a judge in rendering a judgment, sentence, or a legislator in enacting a law are ignored. Nobel Laureate Paul Samuelson openly complained that "there is a conflict of interest, . . . between training people for a career and the creation of scholarly knowledge."[10]

The United States is virtually the only large country in the world not requiring a student to practice law under supervision before acting at the client's expense and peril. Practitioners argue that the lack of mandatory apprenticeships and clinical law programs, with its concomitant effect on the quality of advocacy in the United States, emphasize that concern should be afforded to imparting the how of lawyering. This raises questions such as: What should be the function of law schools? Should the law schools take cognizance of the desires of its traditionalist faculty members? If so, to what extent should this be done?

III. THE "PROPER FUNCTION" OF LAW SCHOOLS

A. *A Comparison*

After completing law studies at Columbia Law School and practicing for about a year, the author enrolled in the law school of the University of Paris. Astonishingly, I found that many of my fellow students had no intention of practicing law, and instead, were using the three-year program as a preparatory background for business careers. This benefit

[8] *Id.*

[9] Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671.

[10] *See generally*, St. Antione, *supra* note 3.

was available to students without concurrent harm to the public because all graduates of the University of Paris law school were recognized as incompetent to practice law at the moment of graduation and prior to undergoing their long mandatory practical training program and, therefore, the unsuspecting public of France was not being continually subjected to totally unskilled practitioners.[11] The attendance at law school of a significant number of students who do not intend to practice law is a recent development in the United States. Unfortunately, the stage of educational maturity necessary in order to deal with this trend has not yet been reached.

In this country structured clinical law training was forced upon many law schools in the 1960's because they were not relating to their student needs. Traditional and adequate internship programs, which to a very limited extent had attempted a half a century ago to make up for a lack of practical training, were no longer sufficiently available for the majority of graduates. Thus, law schools hastily implemented clinical programs to fill the gap in skills training.

Unfortunately, as a result of this haste many law schools have developed inadequately structured clinical courses. Some clinics have no internal structure and merely give credit to students for working outside of their law school. This practice should be condemned because the school has no "teaching function" and merely administers the assignments—an abuse the ABA and AALS have apparently overlooked. Structure requires a significant integration of inside and outside legal work.

The question is how to transform the student's case method performance into a practical learning experience. Merely attempting to practice by "doing" is never enough—structure is developed by the teacher to turn "doing" into learning. A well-structured clinical program is formulated by addressing the results of evaluations done by clinical faculty concerning student performance, and also evaluations of the program itself done by faculty and student participants. A clinical teacher must have a minimum of five to fifteen years experience in practice. Thus, the traditional law schools' practice of hiring bright young law graduates is totally out of the question with respect to clinicians because this practice creates a situation of the blind leading the blind.

Teaching a clinic is more difficult than making amendments to the casebook approach. Many, if not most, full-time traditional law professors become so far removed from legal practice that they are uncomfortable if asked to work on the structure of the interviews, pleadings, discovery, negotiation and settlement of a case, let alone the trial of one. This is understandable for philosophers, and partially forgivable for law professors in legal areas outside their particular field of competence. What is less forgivable is the absoluteness with which many law instruc-

[11] A similar situation exists in Mexico with its five-year program, the last of which is largely clinical.

tors divorce themselves from true practice or from the teaching of the practice of the law even in their own fields of expertise.

IV. SUGGESTED ALTERNATIVES FOR IMPROVING LAWYERING SKILLS

A. *A Fourth Year of Law School*

Proposals have been made to expand the law school curriculum by adding a fourth year to law school. Ideally, this approach makes more sense than other proposals, despite the fact that any law school initiating such an expansion would no doubt turn most students away. Clinical training in the last two years of law school might help to put an end to the "second and third year syndrome" by reducing the tendency of students to "slide" and by encouraging the "feet-wetting" experience of supervised practice.

By analogy to the four-year training of the medical profession, it has been recently proposed that a Coordinating Council of Lawyers' Credentials be created to set goals for the accreditation process, including, for example, "insuring that each lawyer attain at least a minimum level in all of the essential professional skills, including case management and dealing with clients."[12] While such thinking is well developed, the addition of fourth year appears to be politically impractical at this time.

B. *Diploma Privilege and the Early Bar Exam*

The excessive influence of the bar examination on the curriculum of law schools reduces to about sixteen percent the registration in all non-bar-related courses;[13] and of this percentage 6.2 percent is comprised of clinical courses and lawyer competency simulations.[14] The limited purpose of the bar examination is to provide a minimum standard of competency for the legal profession and for the quality of educational programs offered by law schools; it was never intended to have any broader purpose. Unfortunately, the bar examinations have pervasive effects throughout legal education; particularly in states such as California, where over forty non-ABA accredited law schools exist. This is a disgraceful situation because some of these schools function merely as bar examination cram schools.

However, permitting one to practice law on the basis of mere graduation from law school would be a step backward; and the "diploma privilege" has been dismissed by virtually all the states. One related suggestion is to move the bar examination back to the middle of law school education. This approach has been justified as follows: "[T]he last half of their legal education would be freed from the constraints impos-

[12] Kelso, *In the Shadow of the Bar Examiner, Can True Lawyering Be Taught?* 2 LEARNING & L. 39, 43 (1976).

[13] *Id.*

[14] *Id.* at 44.

ed by concern over having to assemble substantive analytical knowledge in certain bar exam areas."[15] The obvious problem with this solution is that the students could really "slide" since few schools would have the temerity to flunk out a student who had already passed a bar examination. It is difficult to think of a more perfect system for reduction of student incentive during the last half of their school careers.

C. *The Bifurcated Law School*

One suggestion is to disregard law school clinics, send students out to intern midway through the curriculum, and then have them return to law school for completion of the traditional casebook curriculum. However, this bifurcated program would eliminate or down-grade structured clinics, and structure is the key to the learning experience.

As Director of the Los Angeles College of Trial Advocacy, the author has received many comments from participating lawyers-students (some of whom have had 20 trials) concerning the benefits of structured clinical training. Among these benefits are: 1) the requirement of students performance; 2) observation of that performance; 3) evaluation soon after performance; and 4) opportunities to repeat the performance with further observation and evaluation.

D. *Development of Post-Graduate Clinical Education*

In response to complaints about the sad state of trial advocacy by Chief Justice Burger and others, the bar itself is seeking to serve a more viable function in education than ever before. Unfortunately, in the United States today such post-graduate education is purely voluntary and hence of quite limited significance. Further, in California all the voluminous Continuing Education of the Bar (CEB) programs are completely non-clinical in nature; that is, they involve listening to experts rather than active participation.

V. A PROPOSED SOLUTION

To solve the problem of relating law courses to clinical law programs for law students and for members of the bar requires a "true integration" of clinical law into the general and post-graduate curriculum. This would constitute a significant but not revolutionary change from traditional legal education. This integration would preserve "the pride of our system," the casebook method with socratic dialogue, while answering the mounting and valid criticism of today's traditional law schools, concerning the graduation of too many students at the height of their incompetency to practice law.

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[15] *Id.* at 45.

The method is simply to establish a law school goal and policy whereby twenty to thirty percent of each course taught after the first year would be clinical in nature. This goal would be accomplished by adding clinical components to chapters of the casebook used in each of these courses. Only if this is done could a law school establish as its motto "A school that prepares."

Two obstacles arise which can be overcome with adequate planning. First, traditionally-minded professors may argue that they can only accomplish the new approach with added time. However, the approach is actually a solution to the persistent criticism that the second and third year of traditional law schools only teach principles in new substantive fields without teaching any new skills beyond those learned in the first year. These years become a significant waste of time and talent. Hence, a reduction of time spent in second and third years on detailed review and analysis of cases, along with a concomitant substitution of practical training is essential in order to make progress in legal education. Secondly, some professors who do not have significant practical experience in the particular course they are teaching may perceive the new program as a personal threat. Most professors contend that this objection lacks merit; however, sharpening of practice skills may be desired where the substantive field being taught constitutes a significant departure from practical experience.

The advantage of such an approach include the following. First, the public will benefit by receiving a more competent lawyer who relates his legal knowledge to the solution of the problems of his clients. Second, the legal profession will benefit because it will have a better image. The public's current image of a lawyer is analogous to a doctor of medicine who had only two years of medical training instead of four—the last two of which would have been clinical training. Third, the law schools will initiate an honest goal of training lawyers, thereby gaining students' respect due to the increased relevance of the education provided. Fourth, the law school graduate will be more competent to practice law, having obtained a blend of the skills required for practice. Fifth, the law schools will have commenced a program of upgrading its faculty according to their abilities to teach practically as well as academically. It will help to re-orient the priorities of faculty members in addition to drawing them toward the practicing bar from which many have become estranged.

VI. CONCLUSION

The United States is the most self-conscious nation in the world—Americans are continually worried about their morality, their culture, and their national purpose. In the middle of this century, the term "anti-intellectualism" entered our vocabulary and was taken up as a subject unto itself. Anti-intellectuals are deeply engaged with ideas

which are often outworn or rejected. A person in a learned or quasi-learned profession must have command of the substantive concepts required in his work; as a professional, he has acquired a stock of mental skills that are for sale. Law is a social science and hence to teach law one must be fluxing between being an intellectual and instructing students how to practice their chosen trade. At the minimum, law school education must convey the practical skills of lawyering; but it should be capable of more.

The proposed solution outlined above would be a dramatic step towards integrating and balancing traditional notions of legal education with clinical methodologies. The study of the practice of law is an important and all too often overlooked aspect of legal education today, as demonstrated by the ABA Task Force Report. Law schools must begin to recognize that "intellectualism" is not necessarily totally synonymous with lawyer competence; if competence of lawyers is a primary goal of legal education, the realities of legal practice must be made an integral part of the law school curriculum.