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COMMENTARY

CHIEF JUSTICE BURGER AND THE ENGLISH EXPERIENCE: SUGGESTED REFORMS OF AMERICAN LEGAL EDUCATION

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Introduction

The American legal profession is currently under siege. A recently published report of the American Bar Association[1] shows that most people think lawyers are overpriced, inefficient, and unresponsive to the needs of their clients. The most recent attack on the legal profession has been launched by none other than the Chief Justice of the Supreme Court, Warren E. Burger. While testifying before the Royal Commission on Legal Services in London, England, in July, 1977, the Chief Justice commented that one-third to one-half of American trial lawyers are not properly qualified for trial advocacy.[2]

Burger's public dissatisfaction with the state of American trial advocacy dates back to a lecture delivered in 1973.[3] In the course of that lecture, Burger criticized the poor quality of advocacy in American courts stating:

> [T]he fundamental fact that how lawyers are trained—during and after law school—will determine their skills as advocates and ultimately the quality of our justice. That fundamental fact is nowhere better revealed than in the English experience.[4]

The Chief Justice thus suggests that despite the differences between the American and English legal systems, attributable largely to the barrister-solicitor division in England, the English system provides an excellent model from which the American bar could benefit greatly. Comparing barristers with American trial advocates, Burger traces the effective training of barristers to the English realization that: 1) lawyers cannot be equally competent for all tasks in an increasingly complex society and 2) legal educators should develop a system where students or new graduates can learn under the tutelage of experts and not by trial and error at clients' expense.

In contrast to the English system, Burger finds American legal education

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1 *The Legal Needs of the Public,* final report of the ABA—American Bar Foundation survey of legal needs, 1978.

2 26 A.B.A.J. 25, 26.

3 Chief Justice Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973-1974) [hereinafter cited as Burger]. With the exception of quotations, unless otherwise noted, references to the remarks of the Chief Justice are taken from this article which is a reprint of a lecture delivered by the Chief Justice at Fordham University Law School.

4 *Id.* at 227.

grossly deficient in certain respects. Primarily, the Chief Justice criticizes the American insistence that all persons admitted to the bar are fully qualified to address every kind of legal problem. Second, Burger attributes the incompetency of many American trial advocates to the failure of most law schools to provide adequate programs to teach students the elementary skills of advocacy.

Burger proposes that basic legal education be accomplished in two years, not the traditional three, with a third year of concentrated programs designed to develop specialized skills. For a third year specialization in litigation, Burger prescribes training conducted under the supervision of professional advocates and teachers. This third year is to be followed by a period in which novice advocates would actually participate in trials under the tutelage of experienced trial lawyers. In addition to such specialized training, Burger advocates the institution of a system of certification for trial advocates based on standards independent of general admission to the bar:

> [I]n spite of all the bar examinations and better law schools, we are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing electricians. We have no testing or licensing process designed to assure that those engaged to protect and vindicate important rights by trial advocacy are genuinely qualified for their crucial role in society.[5]

It is clear that Burger's suggested reforms of American legal education of trial advocates stem from a favorable analysis of the training of English barristers. Assuming such an analysis is correct, it is important to note that out of roughly 39,000 practicing lawyers in England, just under 4,000, or less than 10% of these, are barristers.[6] A subject unexplored by Burger is the overall quality of training of the remaining 35,000 lawyers in England. These lawyers are termed solicitors and their capacity to appear in court is limited by English professional regulations.

Although Burger does not discuss this "other half" of England's bifurcated bar, a solicitor can be said to be more akin to his American counterpart than a barrister. A solicitor, unlike a barrister, can perform most of the functions of an American attorney save pleading in the higher English courts.

It is impossible to understand the English system of legal education without grasping the dual nature of the English legal profession with its distinction between barristers and solicitors.[7] Also central to the system is the dual control over legal education which is shared between the universities and polytechnics, and the professional bodies. The two professional bodies are The Law Society and the Senate of the Inns of Court and the Bar. The Law Society regulates the solicitors' branch of the profession, while the Senate of the Inns of Court and the Bar regulate the barristers' branch of the profession.

5 *Id.* at 230.
6 Law Society Evidence to the Royal Commission on Legal Services, 1978.
7 For those not familiar with the English system and the divided profession, see Green, *Legal Education in England*, 28 J. LEGAL ED. 137 (1976).

The English Experience

1. The Academic Stage

In England, there is a division between the academic stage of training undertaken at a university or polytechnic leading most often to a law degree and the subsequent stage of practical training undertaken by those persons wishing to qualify as either barristers or solicitors. Whether one qualifies as a barrister or a solicitor, the process is likely to take approximately five years from the date of leaving secondary school.

A significant difference from the American system is that a law degree is a three-year undergraduate degree. As a result, many law graduates do not actually go on to qualify as lawyers. The subjects taught at undergraduate degree level generally focus on six core subjects: contracts, tort, constitutional law, criminal law, land law and trusts. If the student fails to take these subjects he will not obtain exemptions from either of the two professional bodies' Qualifying Examinations. A student will also have to take at least four other electives usually from a selection of jurisprudence, comparative law, EEC law, international law, conflict of laws, company law, commercial law, conveyancing, landlord and tenant, labor law, criminology, welfare law, human rights, family law, administrative law, tax law, legal history, and evidence.[8]

Historically, there has been a tendency on the part of the universities to emphasize the academic as opposed to the more practical side of the subjects taught. In particular the techniques of drafting, interviewing clients, procedure, advocacy and clinical legal education play little part in the undergraduate degree.

2. The Professional Stage

The rules governing the training of solicitors are governed by the Solicitors Act 1974, S.4. A prospective solicitor who is a law graduate will have to complete a period of two years articles. He will also have to take the Law Society Part Two Finals. The Part Two Exams are set and marked under the auspices of the Law Society. The subjects tested are conveyancing, accounts, revenue law, equity and sucession, commercial law, company law and partnership, and either family law, local government law or magisterial law. It is also possible for non-law graduates to qualify as solicitors. They must pass the Law Society Part One Exams, which test the core subjects and complete a period of two years articles in addition to passing the Law Society Part Two Exams.

A prospective solicitor must complete a period of articles. He must arrange for a qualified solicitor to take him on as an articled clerk.[9] The articled clerk must work in the solicitor's office and satisfy the solicitor as to his overall competence. The relationship is similar to that of an apprentice and his master.[10] The solicitor is often too busy, however, to instruct the articled clerk adequately.

8 Wilson & Marsh, *A Second Survey of Legal Education in the U.K.*, 13 J. Soc'y Pub. Teachers of Law 239 (1975).

9 Only a solicitor who has been admitted for 5 years and has a practicing certificate for this period can take on an articled clerk.

10 Newell, *The Legal Status of Articled Clerks*, 120 Sol. J. 671 (1976).

It is unfortunate, therefore, that articled clerks are often used to perform routine office tasks and are treated as cheap menial labor.

The Consolidated Regulations of the Inns of Court and the Bar govern the training requirements of barristers. The prospective barrister must have studied the core subjects in his law degree to obtain exemption from Part One of the Bar Exams. He must then take the Bar Final Part Two Exams covering common law subjects, civil and criminal procedure and three electives from a wide range of subjects. In addition the prospective barrister must complete a short study course covering procedure and advocacy. He must then enter pupilage for a year, which is a period of apprenticeship training.

The pupil barrister will receive practical experience in drafting pleadings and writing legal opinions. Initially, the pupil's in-court experience is limited to observation. For the last six months of his training he will be able to conduct some cases without supervision.

The system, however, is deficient in three respects. First, it is hard to find a barrister with enough time and experience to instruct the pupil barrister. Second, most pupil barristers will train not with specialist barristers, but with general common law barristers working on minor criminal and civil cases. Third, pupil barristers receive little formal training in the art of advocacy. Like American trial advocates, their experience is too often gained not from their pupil master but from their first experiences in court.

Proposals for Reform of the English System

Despite Burger's high praise, a critical examination of the entire structure of legal education in England reveals that the English system has come under serious criticism since 1971. In that year, the Report of the Committee on Legal Education[11] presented its recommendations to the United Kingdom Parliament. The recommendations of the Committee form the backdrop to the current English debate on legal education. The Committee recommended that legal education should be planned in three stages: the academic stage, the professional stage, and the continuing education stage. The academic stage should be spent at a university or polytechnic and the normal mode of entry into the profession should be by way of a law degree. The law degree would not be compulsory, as it would be possible for non-law graduates to qualify as either a solicitor or a barrister. It would be necessary for the non-law graduate to take a Common Professional Examination (common to both branches of the profession) having first attended a course of two years' duration.

Both the non-law graduate and the law graduate would then move on to the professional stage of training. They would attend a course of about nine months which would emphasize the practical skills of the professions, the nature of which would differ depending on whether or not the person wished to qualify as a barrister or a solicitor. The majority of the Committee considered that the universities and polytechnics should teach the course as opposed to the professional bodies. The Committee considered that the system of pupilage should be retained but improved and the system of articles abolished altogether. Upon

11 [1971] Gr. Brit. (Cmnd. 4595) (The Omrod Report).

completion of the vocational course, a prospective solicitor would automatically qualify as a solicitor although for a period of three years he would be unable to engage in certain types of work.

In response to the Report, the Bar, as from 1977/78, have introduced a Common Professional Exam along the Report's lines. A Common Professional Examination Board has been established and The Law Society has announced new proposals relating to the Solicitors' Exams. As of 1979, a non-law graduate (an American lawyer wishing to qualify in England will be treated as a non-law graduate) will have to take a course of one year's duration and pass the Common Professional Examination.

Articles will be retained and the periods of service will stay much the same. The Law Society will retain control over the syllabus for the exams and no improvements have been announced in relation to the system of articles. All students intending to become solicitors will from August 1979 have to attend a nine-month course leading to a new style Part Two Solicitors' Finals. The course's nature has yet to be finalized. It is envisioned, however, that the course will have four heads: the solicitor and his practice, the solicitor and his business client, the solicitor and his private client, and the solicitor and litigation. The aim of the course will be to get away from a system of rote learning. The course will be related to the practical training the student will receive in articles.

As a result of the Committee's report, study courses and exams have changed, although the system of articles and pupilage has been preserved. The proposals leave the structure of training for the profession substantially unaltered. It is this problem which will confront the Royal Commission on Legal Services.

The Royal Commission on Legal Services has been established by Parliament to report on the whole structure of the legal profession in England. The Commission, which is due to report in early 1979, has undertaken a detailed investigation of the education of the two branches of the profession. The central issue is whether or not the professional bodies should continue to exert such pervasive control over legal education. There may be a conflict of interests within a professional body as between its duties to its members and its duties to the consumers of legal services and its more junior members.

The solution put forward by a growing number of organizations in England is that an Independent Legal Training Board should be set up composed of representatives of the professional bodies, the universities and polytechnics, the government, and trainee lawyers. It would have some of the following functions: 1) to regulate the training requirements of the profession, 2) to ensure that trainees receive a minimum standard of education and training, 3) to study the future needs of the profession particularly in relation to manning, and 4) to ensure that academic and practical courses are continually reviewed and updated.

This scheme would mean that the training of the professions would be more receptive to social needs and that a balance is kept between the professions and academic institutions. The Board would ensure that if apprenticeship training is preserved within the English system it will be properly regulated and supervised.[12]

12 Newell, *The Legal Training Board,* Law Soc'y Gazette, Oct. 19, 1977.

Conclusion

The Royal Commission on Legal Services' concentration on English legal education and Chief Justice Burger's recent remarks on the state of American advocacy signify the growing conviction on both sides of the Atlantic that the quality of legal services provided reflects on the quality of legal training received. Burger's suggestion that an English apprenticeship system be implemented for intending trial advocates is an attractive one. A close examination of the English system, however, reveals the problems involved in a system of legal education encompassing a period of apprenticeship training.

It is hard to draw analogies between American and English legal training by merely examining a small section of the English legal profession, and yet Burger attempts to do so by focusing only on the training of barristers. Moreover, it is debatable whether the proficiency of English barristers is based on the period of apprenticeship training they receive.

The establishment of the Royal Commission on Legal Services in England suggests that there is even greater disquiet in England concerning the overall competence of the legal profession than in America. So great is the unease that the Royal Commission is considering fusing the barrister and solicitor branches of the profession, thereby moving closer towards the American system.

In examining the English system, the lack of formalized practical training received by students at university in comparison with the American system is striking. Until recently English professional exams and courses have been more akin to endurance and memory tests rather than examinations of professional competency. Practical training skills are not instilled until apprenticeship begins. The theoretical value of an apprenticeship period acknowledged by Burger has been minimized in practice as a result of the professional bodies' failure to live up to their responsibilities to administer and supervise such a period of training properly.

The problems with the control of apprenticeships by the professional bodies has led to the conclusion in England that an Independent Legal Training Board should be established to ensure that qualified lawyers who take on apprentices do in fact instruct them in rudimentary professional skills. It is also recognized that exactly what constitutes these rudimentary skills must be defined with greater precision.

It is unlikely that the concept of an Independent Legal Training Board would find favor in the American system. As Burger has remarked, "[t]he problem of regulating and disciplining the conduct of lawyers is far more complex in the U.S. where we train lawyers in more than 150 law schools, as compared with a country like England for example where there is a centralized and comprehensive training facility for all trial lawyers."[13] For these reasons, based on the practical experience of the English system, it is unlikely that a system of apprenticeship would work within an American context.

There has been discussion within England that apprenticeship training

13 Chief Justice Burger, Annual Report on the State of the Judiciary, A.B.A. Chicago 5 (1975).

should be abolished altogether. If such a reform was introduced the English system would more closely approximate the American one. It would be ironic if, as a result of Burger's remarks, the American system adopted that aspect of English legal training which has been found inadequate in England itself.