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PRACTICAL TRAINING IN ADVOCACY:

A PROPOSAL

Ralph C. Thomas*

For a number of years, but particularly since the end of the Second World War, the law schools have been under a drumfire of criticism for not giving their students practical training. A relatively common strain is that not enough training for the courtroom is provided.

It is to this criticism that this study is directed. Whether it be of central or peripheral importance in the preparation of a student for the legal profession, understanding and competence in court is of some moment.

A comparison is often drawn between training in law and training in medicine. This comparison is, for the most part, unprofitable. In reality there is little correspondence between the two disciplines and even less in the manner of teaching appropriate to each. The apprehension of basic materials is essentially the same. It is in their application that popular criticism gives the palm to the medical profession.

The reason for the difference is that the "sick in law" are not so varied and complaisant as the "sick in medicine." Medical know-how is transmitted, in large measure, by students watching and aiding their instructors in the treatment of the instructor's patients, who are often indigent. These patients lend their cooperation in return for free or at least cheaper help. They have almost every conceivable common disease. There are few "rich men's" diseases, and therefore indigence does not inhibit variety of practice material. Even where indigence is not a factor, patients cooperate in order to secure expert medical help.

When attention is turned to law it is apparent that even considering the potentialities of such agencies as Legal Aid Clinics for instruction purposes, the spectrum of legal difficulties is constricted. There are no shareholder's derivative actions, no anti-trust litigation, nor patent infringement suits. It consists in large measure of domestic difficulties and small debts with a sprinkling of landlord-tenant problems. These are live problems but they do not train the student across a broad spectrum.

If this is a true picture the question arises whether the law schools are being asked to answer to a well-founded indictment. If expertness comes only from experience it is obvious that the law schools cannot furnish it. Nor, it is submitted, can any other agency. Again, the dissimilarity between legal education and medicine provides a useful lesson.

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In one day in the hospital ward the medical student can diagnose and suggest treatment for a host of differing ills. The next day he can witness several operations and thus gain familiarity with several operative techniques. But a glance at law shows that the student cannot witness a complete anti-trust trial, for instance, without attendance upon the courts for days and possibly months. When time is considered there is no counterpart in law for the hospital ward or the operating room.

Expertness in the courtroom is usually a matter of learning from the successful or unsuccessful use of hypotheses. Each time a stimulus such as perjury is encountered the advocate responds by trying a particular forensic technique.

The range of possible stimuli is vast. As no handbook exists which can demonstrate with certitude what response will be effective in a given situation, although a choice of responses may be proffered, expertness comes only with mature judgment. Judgment is not learned from a book, nor acquired in one concrete instance. Expertness in trial advocacy is based on near-intuitive factors. It comes as an amalgam of past experience with the same adversary, with similar ones, with other juries and other witnesses and with the same or similar clients and causes of action.

It is apparent that criticism which reasons from particular inadequacy to general incompetence is ill-founded. It betrays a distorted view of what makes for well-rounded competence in the law. Law schools cannot fit out the accomplished advocate. They can, however, and some of them do, train the student for effective work in court. They can provide a foundation from which expertness can be acquired.

What then can legal education do? The answer, in the field of trial practice, seems to be that it can prepare the student to put on evidence in an intelligible and admissible form. It can help him choose emotive, unambiguous, clear and simple words. It can help him in the technique of argumentation. Here also there are broad guidelines, but little else. Skill comes with practice, not lectures. The law schools can furnish some familiarity with the basic task.

Although this study will attempt to sketch the outlines of the instructional picture, no attempt will be made to determine how much, if any, of the activity described owes its genesis to a desire to placate the critics.¹ Although legal education is, to a certain extent, responsive to criticism from the Bar, it should also be accorded credit for its continuing self-reappraisal. Not all innovations are dictated from without.

A basic cleavage in approach is seen in the emphasis or lack of it placed on realism. Realism in this area is equated largely with spontaneity of testimony. Its exponents contend that the best training is found in presentation of proof of an actual event that the witness experienced. A typical approach is that of the University of Washington where lawsuits deal with minor incidents of insufficient magnitude to be worthy of legal action.² The parties, as a condition of participation, are made to agree that there will be no action later in a real court.

¹Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?* 38 A.B.A.J. 907, 908 (1952).

²M. Green, *Realism in Practice Court*, 1 J. LEGAL ED. 421 (1949).

The virtue of such raw material for trials is that there is no "script."³ The witness may disappoint the student lawyer because he is evasive or stupid, but not because he "forgot his lines." A further positive benefit is that these cases, like real ones, are just what the ingenuity of counsel can discover. They do not, as do some imaginary cases, take on the configuration of what he can invent.

What seems to be the diametric opposite of the realism method is that used by the University of California at Los Angeles.⁴ Following instruction in pleading and practice, student firms are formed and are assigned a cause of action. Their task is then to prepare a statement of facts which embraces the elements of the cause of action; discloses jurisdiction, venue and the proper parties; contains one out-of-the-ordinary problem of evidence in addition to routine ones; and discloses one possible, but not certain, affirmative defense in addition to a possible defense on the general issue.

The statement is reviewed by another firm and its merits and demerits discussed. The case is then assigned. The plaintiff's side does not go as a matter of course to the firm that prepared the fact statement. By memoranda for preparation of complaint, answer, and demurrer and by an exhaustive trial brief the case is prepared for trial. After the trial, presided over by a real judge, the teams are required to prepare a critique of the trial and of each side's presentation. The possibilities of appeal are explored.

The merits and demerits of such a plan are obvious. There is much to be said for the deliberate preparation of a case to include a thorny problem of evidence. This device insures good trial materials, a certainty not present in the "real case" approach. And, in like fashion, the requirement that there be a less than decisive affirmative defense insures that both sides have worthwhile evidence to offer.

The defect in this plan, which is characteristic of all "made up cases" is that so long as anything other than the bare truth of an actual occurrence is used there exists the risk that the witness will go outside the "script." This is a built-in hazard of the U.C.L.A. plan which specifically permits the witnesses to deviate from the "statement of facts" to assert as true any relevant or material matter not in conflict with either the facts as disclosed in the hypothetical statement or the inferences arising therefrom. This introduces a fertile field for argument about relevancy and conflict. As it leads nothing to the science of proof it should be avoided. Facility in objecting to departures from the script are not part of legal education.

Apart from this defect, the course should yield substantial benefits as it provides the student with a solid core of evidentiary matter upon which to sharpen the claws of his trial technique. The requirement of the memoranda for complaint, demurrer, answer and trial briefs would be a wholesome addition to a course which emphasized the actual oc-

³ FRANK, COURTS ON TRIAL, 234 (1950). Judge Frank says that "sham law school trials" are not the equivalent of "serious law work."

⁴ Mathes, *The Practice Court, Practical Training in Law School*, 42 A.B.A.J. 333 (1956). The author is United States District Judge for the Southern District of California who also helps teach the program.

currence rather than, as here, the hypothetical base. A borrowing of techniques seems indicated.

Another worthwhile approach is that of the University of Michigan,⁵ which, while using hypothetical occurrences and thus securing richness of material, evades the "script" problem. The technique is a worthwhile refinement on the old device of the enactment of a scene before a group followed by description of it, designed to show the fallibility of human observation. At Michigan an occurrence, such as an automobile accident is staged while moving picture cameras photograph it from various angles.

The witnesses see only the pictures taken from their position showing what they did and what they probably would have seen. The defendant sees only the picture taken from inside the automobile showing his actions and showing what he saw or might have seen. The student lawyers do not see the films. After they are designated as attorneys for plaintiff or defendant they talk to their clients and afterwards interview witnesses and police officers.

This is a wholesome approach. There is no imaginary testimony, nor need there be. The witness is testifying to what he saw. The only unreal element is that there is, in fact, no accident and thus no economic tension of the antagonists and no emotional involvement either. It is the absence of the psychological factors of involvement, justification and recrimination which is the most telling criticism of a hypothetical trial.

Practicalities of litigation in addition to those inherent in the offering of evidence are underscored in such plans as the one at Yale⁶ where the raw material is usually authentic transcripts and exhibits which are studied by the parties and the witnesses. Cases are to be settled if they are proper subjects for settlement and the students are graded according to their evaluation of their case.

Even if settled, the cases proceed to arbitration presided over by professional arbitrators. After the instructional content is extracted from the arbitration the case is tried to a jury. The students have a chance to see the difference between evidentiary requirements and techniques in the two modes of disposition of controversy. Before the trial there are workshop sessions where instruction is given in such complicated trial techniques as introduction into evidence of hospital records. Realism dictates the use of the directed verdict where proof is insufficient.

One of the most telling criticisms of law schools, in a superficial sense at least, is that law students do not attend court and therefore do not avail themselves of the training available there.⁷ It is considered important for students to attend court if for no other reason than to acquire familiarity with the atmosphere and some smattering of the geography of the courthouse. This view is mirrored by the schools which describe their nearness to courts in their bulletins.⁸

The critics are correct in their observations. Students commonly do

⁵ Joiner, *Motion Pictures and Practice Litigation: Michigan Law School Introduces New Technique*, 35 A.B.A.J. 185 (1949).

⁶ Mueller and James, *Case Presentation*, 1 J. LEGAL ED. 129 (1949).

⁷ FRANK, *op. cit. supra* note 3 at 228, 229.

⁸ E.g. The current Rutgers School of Law Bulletin noting the school is ten minutes from the courthouse.

not attend those courts which are available. The reasons are obscure but probably have something to do with the time spent in travel, difficulty of getting a seat in an interesting case, and imperfect seeing and hearing opportunities once in the courtroom.

Michigan has anticipated all of these excuses. Closed circuit television brings the trial into the classroom building. Without going to court students can watch trials being held in the Circuit Court of Washtenaw County. This is the electronic equivalent of dropping by the courthouse.

If these television facilities were used only for unsupervised viewing they would be worthwhile, but in addition they may be used for instruction.⁹ Commentary may be made upon parts of the trial without fear of upsetting the decorum of the courtroom. The instructor can identify the strategy of each participant and evaluate it and offer suggestions about practice realities evoked by the trial.

The television industry has given birth to another technique which can be put to an even better use. This is the use of video tape. The virtue of the tape is that it could be stopped at any juncture for comment from the instructor.

Video tape can be edited to delete all the boring and uninformative detail. It can be played back to allow missed points to be grasped. In the hands of a careful instructor it can be an excellent source of questions designed to impart strategy lessons. As the instructor may view the tape in advance he can know the location of problem situations. As the tape approaches these vital points he could stop it and inquire of the class what their response would be to the predicament in the courtroom. After exhausting the instructional possibilities the tape could be restarted and the class could see what response was actually made.

Perhaps most important for practical training purposes is the potential instruction by the lawyers involved in the case. Even if students attend court they can not be made privy to the thoughts of the lawyers. Here again is a vital difference between the practical training of doctors and lawyers. The surgeon can explain to the students in the operating amphitheater what he is doing. The unconscious patient does not hear, and even if he did hear the fact remains that the surgeon's discourse does not interfere with his busy hands and brain. Assuming the cooperation of the lawyers, by the use of video tape they could give a candid discussion of their strategic aims and an analysis of the success or failure of their aims with their appraisal of the reasons for success or failure. Much of the spirit of the operating room instruction could be captured. It is submitted that this is something to which Judge Frank would have given approval.

There have been many proposals to institute some sort of apprenticeship

⁹ Ex relatione Stanley K. Laughlin, recent instructor at Michigan. Curiously the television facility is not described in the 1963-64 Michigan Law School Bulletin, nor so far as can be located, in any other periodical.

training or internship.¹⁰ This idea, drawn from the traditions of England and our early history is attractive. It requires the active cooperation of the Bar. To be effective this must be more than mere tolerance. It must be affirmative instruction. Mere tagging along at the heels of the lawyers too busy to pause for explanation and discussion is of little value. Of even less value is association with the lawyer who regards his apprentice as an errand boy and uses him accordingly.

One of the often-voiced objections, the exact dimensions of which are unexplored, is that lawyers are too busy to take time from their practice to instruct the young. The argument is that time taken from their practice is expensive time, and indeed it is. Viewed solely from the standpoint of how much such time can be sold for, it costs \$20 per hour for a lawyer whose net income before taxes is \$18,080.¹¹ The cost is proportionately higher as income expands.

This is not the only difficulty. It might be difficult to find enough offices and difficult to find lawyers with enough varied practice to justify placing the student with them. In addition, of course, any extension of law study time by apprenticeship would defer the moment when the student could become self-supporting and would thus produce further financial strain.¹²

An internship of no less than six months nor more than two years has been proposed.¹³ Pay would be comparable to that of hospital interns. The legal intern would work with a Legal Aid Clinic or, because of the more diverse problems, preferably with Lawyer's Referral. He would at first help the director, then work under him, and later be independent with help available if needed. Such a scheme would protect the public, in the proponent's view, from the current attitude which he terms, "Caveat Client."¹⁴

Certainly the ideal of practical training by way of internship seems to have been realized at Georgetown.¹⁵ The interns, recipients of E. Barrett Prettyman Fellowships, spend eleven months in residence.

After a period of intensive training and orientation, the interns begin to accept assignments from the Court of General Sessions of the District of Columbia. They represent indigent misdemeanants and felons, the latter for the purpose of preliminary hearing only. They are under the close supervision of the director who is ready with instruction and advice.

¹⁰ See Llewellyn, *On What is Wrong With So-called Legal Education*, 35 COLUM. L. REV. 651, 675-76 (1935). Included within his polemic was a proposal for "interstitial apprenticeships." By this he meant summer training between academic years. He also suggested a post-graduate apprenticeship which would be a prerequisite to the degree. See also Harum, *Internships Re-examined: A "Do" Program in Law School*, 46 A.B.A.J. 713 (1960).

¹¹ Malone, *The Life and Times of Percy C. Personable: A Study of Time and Motion in Law Offices*, 48 A.B.A.J. 826 (1962).

¹² For an appreciation of the problems involved see Calhoun, *Law Schools and Practical Training*, 55 W. VA. L. REV. 83 (1953). The author is a West Virginia District Judge.

¹³ Clad, *The Gap in Legal Education: A Proposed Bridge*, 41 A.B.A.J. 45 (1955).

¹⁴ *Id.* at 93.

¹⁵ Pye, *Legal Internships: Georgetown's Experiment in Legal Education*, 49 A.B.A.J. 554 (1963).

Critiques are held following each appearance.

Later the interns receive assignments in the United States District Court for the District of Columbia in felony cases. The director also is assigned to each case as counsel. Also they begin to take cases in the juvenile court. During the eight and one-half months of courtroom work each intern represents about forty indigents, trying several jury and non-jury cases, disposing of the rest by pleas and *nolle prosequi*.

The pity is that there are only six of the fellowships available each year. Undergraduate students benefit from the program somewhat by helping the interns, but the fact remains that practical experience in courtroom advocacy is parsimoniously restricted. It is noteworthy that recognition is accorded the economic factor. A stipend of full tuition and \$4,000 per year is paid.

It is submitted that the training of the Prettyman Fellowship is the ideal. This is not to say that the other methods discussed here are worthless. But, important as they are, measured against the acid tension of a real trial with liberty or property in the balance, they are a pale imitation.

The reference to economics discloses the essential problem of such an approach. It may explain the uniqueness of the Georgetown experiment. As Georgetown can only accommodate six fellows it is likely that other schools could provide for none. Economic considerations do not dissolve upon being ignored. Any advance must be paid for in money as well as forethought and labor.

It is the proposition of this study that Georgetown's practice should be adopted as the best means of practical training in advocacy. Economic and practical considerations probably would dictate a shortening of the time to five months or less offered in the senior year.

The raw material lies ready at hand in most law school locations. In the complex of state and local courts there are many indigent misdemeanants whose cases should, in the interest of justice, be heard. In addition there is a vaster substratum of civil causes of action which are not pressed because they are economically unfeasible. Cases growing out of the cheating of the television repairman, the dry cleaner's derelictions and the breaches of warranty on small appliances all form a pool of festering lay discontent with law and lawyers. A hearing cannot be gotten without a disproportionate cost in view of the value involved. The unrepresented indigent and the unrepresented petty indignant are both a flaw on the face of justice. An active lawyer, no matter how well disposed toward public service, could not *give* his time to more than a very few.

By student help a service could be performed which would work profound social benefit. This would not encroach on the prerogatives of the bar. It should alleviate burdens ungracefully borne. It is submitted that it would do no harm to let students practice *on* these litigants by practicing *for* them. It is difficult to see how their predicament, now largely untouched, could be worsened by enlightened if inexperienced help.

A major problem is the burden which would be placed on the criminal courts by the upsurge in representation and consequent trials in minor criminal cases. Although all of the student representation would provide but a fraction of that needed in these cases, this added fraction

would impose a burden which should not be blinked at. Neither should it be determinative. Justice, it has been said to satiety, should have no price tag. The abstract ideal of justice posits a forum for the expeditious disposal of each person's case. If the ideal is missed provision for realization should be made.

Sight should not be lost of the fact that the problem has a double aspect. It is not all-important that students be given a chance to represent these defendants. What is important is their need for representation. If *Gideon v. Wainwright*¹⁶ points the way at all, representation will ultimately be theirs. It is but one step more to require counsel in misdemeanor cases where liberty is at stake.

Can justice be done for the indigent defendant by student representation? The unverifiable assumption of this paper is that it can. Although, as was noted in the *Gideon* case, all accused who can afford them procure counsel, it is certain that all do not acquire counsel of top skill. Everyone cannot have an expert trial lawyer. The supply is too short. That being true, skill in representation is necessarily relative. All trial lawyers must start sometime. And the adept and famous started, in many instances, because their clients could not employ a better lawyer. Use of law students for indigent representation is substantially the same phenomenon.

A factor worthy of consideration is the fresh approach and the enthusiasm the neophyte brings to his task. What he lacks in experience he makes up in zeal.¹⁷ It is submitted that the criminal defendant is better served in his hands than in the hands of some tired has-been who has demonstrated no competence in any field. And, he is better off with an eager tyro than with an unwilling and perfunctory non-court lawyer who has been appointed by the judge.

Can this work be done in the senior year? It is submitted that it is feasible. There is nothing inherently difficult about evidence and procedure courses, which are necessarily prerequisite to trial practice, that require them to be deferred until a broad competence in substantive law has been acquired.

The virtue of the usual practice course described in this study and duplicated in some degree in most schools is that, being hypothetical in the sense that they are not real lawsuits set on a judicial calendar and subject to its demands, the time of presentation of the cases can be flexible. This is not so with the Georgetown plan, nor would it be possible with cases under this proposal. If used at all the schedule of the law school would have to give way to the schedule of the courts. Although there is room for indulgence by the court, it is plain that the demands of the court calendar rather than the law school schedule must be served.

If attendance on law school courses is to be subject to the pressures of court appearances something must give. Either the student is given

¹⁶ 372 U.S. 335 (1962), which holds that the assistance of counsel is essential to a fair trial and that states must provide counsel for indigents.

¹⁷ Although it is recognized that one incident does not establish anything of empirical value an example of youthful zeal is *Williams v. Oklahoma*, 358 U.S. 576 (1959). Here a \$250.00 per month public defender fresh from law school took, at his own expense, a case to the Supreme Court of the United States. His double jeopardy assertion gained a dissent from Mr. Justice Douglas.

relative carte blanche to miss class or else the traditional class meeting must be changed or eliminated. It is submitted that this elimination might be another means for dispelling what has been called "the third year ennui."¹⁸

One attack on the third year structure could be made by treating the remaining courses as "problem method" courses with the instructor suggesting problems and counseling with the students as they work on them. Also, it has been suggested that purely "reading" courses be offered.¹⁹ The emphasis on close supervision should give way to emphasis on student initiative. The former requires frequent and perfect class attendance, the latter does not. It is submitted that by such a mutation room would be made for the trial practice course and at the same time a worthwhile innovation in legal education would be introduced.

Administration of the program should be under a faculty member who has had some experience in the courts. Criminal cases should be suggested by the judge rather than assigned by him as they are assigned in the Georgetown experiment. The advisor and the student should consult with the accused, with appropriate safeguards of privacy and privilege, to determine if it is a case worthy of trying. Within the compass of the few months available it would be possible for the student to be entirely occupied with unlitigable cases without this preliminary evaluation. The need for the preliminary evaluation with its disclosures demonstrates why it is not suggested that the judge assign the case.

Practical questions abound. Where would the money for travel, investigation, transcripts and the like come from? To pose them is sufficient for this study. Although they need solution, they are not peculiar to a proposal for student training. They beset the law at every turn whether the criminal defendant is unrepresented, has a public defender, or a paid attorney.

Sight should not be lost of the practice potential of civil cases. Properly encouraged the petty contenders would bring their cases to the law school which could provide representation. The local justice court, or small claims court would be the proper forum. Reflection indicates that this might, in itself, bring about a closer approximation of justice in these courts. As no selfish interest of the judge would appear to be served the judge might try the case on its merits. Whether that would constitute realism is open to debate.

A final question is whether it is possible or advisable to have law students actually trying cases. In discussions about realism in practice court, and in pre-graduation internships, it is sometimes said as a matter of course that students must not actually represent people.²⁰ Why? Examined logically such statements seem to imply that the passage of at most a few months, the gaining of a few more college credits, or the successful passage of a bar examination spell the difference. It is difficult

¹⁸ Cavers, *A Proposal: Legal Education in Two Calendar Years*, 49 A.B.A.J. 475 (1963).

¹⁹ Hervey, *There's Still Room For Improvement*, 9 J. LEGAL ED. 149, 159 (1956).

²⁰ Calhoun, *supra* note 12, who says it cannot be done although he nostalgically recalls the days when clerks could try cases in justice court.

to see why the successful bar candidate is better qualified to try a case than he was a few weeks or months before. It is submitted that this is an artificial distinction and should not be determinative.

A practical approach is that taken in Colorado which authorizes its undergraduate law students by statute to appear in court in connection with Legal Aid.²¹ The same result could be accomplished by court rule in many states. However accomplished it would be a worthwhile change.

Turning for the last time to the analogy between law study and medical study, it is to be noted that a not yet graduated student is allowed to deliver babies in the course of his training.²² This is as much the essence of practicing medicine as trying cases is the essence of practicing law. Here, the analogy fits.

The plain fact is that competence is gained by repetition. The more trials the more adept the advocate. To the extent that the law schools are discharging graduates into the bar who have not tried anything but the flimsiest of "make believe" suits they must plead guilty to the indictment of the critics. If their dereliction is in not turning out polished advocates the indictment is ill considered and unworthy of answer. The important consideration is not that schools are guilty or not guilty but rather whether they are doing their utmost to fit out a complete lawyer who can perform lawyerlike skills, not with expertness because that comes from repetition, but with competence which really comes from familiarity.

²¹ COLORADO REVISED STATUTES, 12-1-19. (1954).

²² Bulletin, School of Medicine of New York University for 1962-1963 p. 61. A third year student will deliver 6 to 8 multiparous patients.