

Which Way Is The Courthouse?

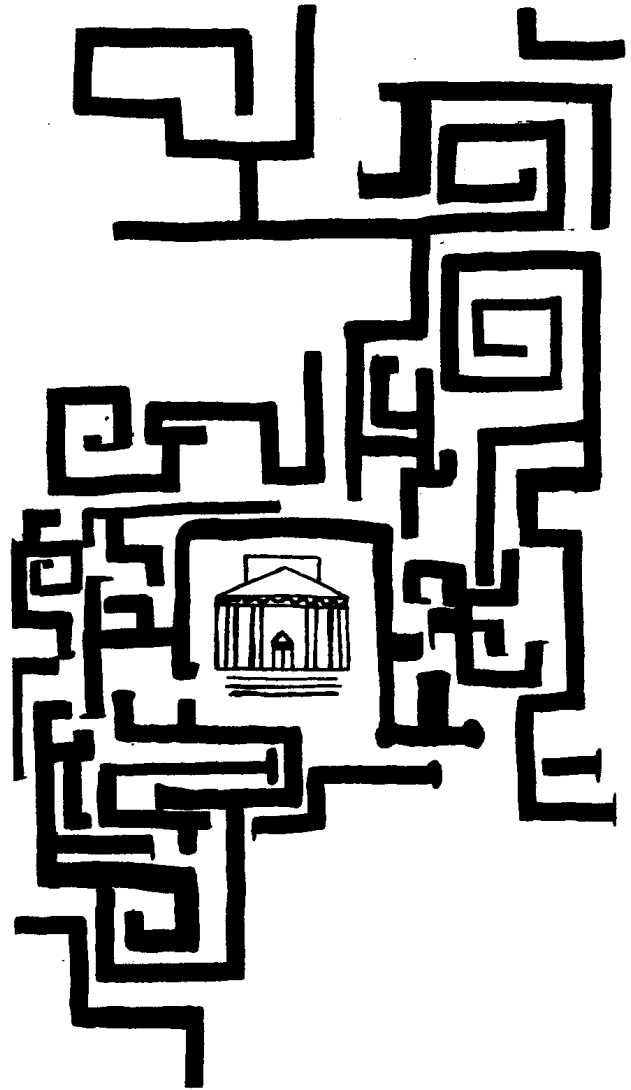
Some thoughts on the desirability of clinical legal education.

by

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Prior to the mid-1950s, any legal educator who dared to suggest that the law school curriculum could be modified to include courses and programs of practical application ran a very serious risk of being burned at the stake. The prevailing view was that law school should be an extended voyage into the theoretical, with emphasis on mental gymnastics and bad Latin. It was felt that law school should be devoted entirely to the absorption of theory and the development of the ability to "think like a lawyer." Those who were ever troubled with the question of the actual, demonstrable value of this approach were usually successful in repressing the doubts, usually on the basis that the student could "find out where the courthouse is" after graduation. Three years were thought, after all, to be scarcely enough time to train the student to be a legal scholar, much less to be a lawyer. Consequently, law students of the last century and a half have been emerging from their three long, dull, expensive years in the halls of ivy to find that they are still virtually useless as practicing attorneys. Every law school graduate who enters the actual practice of law discovers that, however impressive his grasp of Roman Law may be, he is still completely in the dark when required to defend a traffic charge or select a jury.

In the last few years, this ivory-tower approach to legal education has come under increasing attack, although probably for the wrong reasons. The awakening social conscience of the American nation has manifested itself in the law school community in an increased interest on the part of law students in participating in legal aid projects and third-year practice programs, and those who actively press for such programs usually do so upon the assumption that this should be done because it is socially and ideologically the desirable thing. The motivation is To Serve Our Fellow Man, Noblesse Oblige (note the compulsive use of Latin), the White Man's Burden, etc.



The cold, uncharitable fact is, however, that unless and until a law school—*any* law school—offers some reasonable proportion of practical, nuts-and-bolts experience to the student, that law school is not performing what is, after all, its primary purpose—to train future lawyers. That is the *real* reason why the law school curriculum needs re-examination, and it has nothing to do with new concepts of social justice. It is, and always has been, a question of the law school's true mission.

The stereotyped reply to the foregoing assertion is that it requires three years to present the student with the necessary theoretical foundation; he can always learn to be an (ugh) **practicing** attorney later. Of course, law graduates do learn--eventually--but the sad fact is that the graduate who enters a large firm frequently finds himself relegated to the library for months, because he is not equipped to be of any other service to his employer; and the brave soul who hangs out his own shingle finds that he is completely unprepared to function in his client's interest in even the simplest courtroom situation. The result is that, after three years of law school, the graduate finds himself faced with another painful period of unofficial apprenticeship which lasts for a bare minimum of one or two years, and usually longer, until he has indeed discovered how to function as a practicing attorney.

In light of this state of affairs, it is difficult to understand the viewpoint of those who regard practice-oriented law school courses and programs as some necessary evil, permitted in the curriculum only to keep the animals quiet.

Happily, this attitude is fast disappearing, and an increasing number of schools are adding practical courses to the programs, with resultant benefits to the students, to the profession, and to society as a whole.

Unfortunately, while it is very easy to jump on the clinical bandwagon and praise the principle of practical legal education, it is very difficult to determine how the law school curriculum should be restructured to make room for the optimum number of practice-oriented courses. To neglect the traditional courses which are the foundation stones of a solid legal education in favor of forty or fifty hours of legal aid, trial practice, law-office management, and habeas corpus for fun and profit would be as bad as (if not worse than) the purely theoretical approach. A well-reasoned balance needs to be struck, and the pressure being brought to bear by those who conceive their role as law students to be solely the immediate establishment of a student-run storefront law office in every block should not induce us to act in haste or to introduce too much of a good thing.

Clearly (as we lawyers say), the first year of law school needs to be devoted to a solid grounding in the keystones of the law--torts, contracts, criminal law, property, etc. Without a sound knowledge of these fundamental areas, any subsequent attempt at legal education would be an exercise in futility. In the first year, the student has neither the time nor the background necessary to make any clinical experience meaningful, and none should be attempted.

In the second year, although there remains a substantial body of basic law to be taught (wills, trusts, evidence, business organizations, tax, etc.), the student has acquired enough of the fundamentals to make practical applications somewhat more meaningful, but the desirability of permitting or encouraging any significant amount of practical work at that level is still questionable. However, the typical second-year student, although still lacking background in some of the major areas, is becoming restive and wants some latitude for electives to relieve the weary hours. A taste of the clinical can certainly serve to make the second year more palatable, if nothing else.

It is in the third year, of course, that maximum attention can be paid to practical subjects. Assuming for the moment that a third year of law school is needed at all, the year can be made immensely more valuable to the prospective attorney by a carefully planned introduction to the practice of law through elective or even (heresy! blasphemy!) required courses in practice-oriented subjects.

There are several possible approaches, but it would appear that at a minimum each curriculum should include a classroom course in trial tactics and procedures, supplemented by a mock-trial program in which **all** students may participate. A course in the arts and sciences of in-office practice, as differentiated from trial technique, would seem desirable, and an internship program involving clerkship for credit in a local law office would be of great benefit. The participation of students in the true "legal aid" program--i.e., students assisting practicing attorneys in advising the poor--provides the student with invaluable experience in the difficult art of counseling, and should be pursued wherever such programs are available.

The third-year practice programs, in which third-year students actually represent clients in local courts on minor matters, are popular with students but present some very serious difficulties, including possible constitutional objections. Although it is very difficult to convince students that the antipathy in some jurisdictions to such programs is not merely arbitrary, reactionary discrimination against them, the fact is that the advisability as well as the feasibility of third-year practice is at least questionable. There can be little question that the program, if available, would be of immense value to the student. Whether the public would benefit equally is doubtful, but under carefully controlled conditions socially desirable results might be obtained.

Whatever the approach taken, and whatever the specific modifications or additions to the traditional curriculum, it appears certain that both

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professional and social pressures dictate some re-evaluation of the existing approach to legal education. Many law schools have successfully instituted programs of the types mentioned, and no doubt many more will do so, and in great profusion.

My personal view is that legal education needs to be more responsive to the temper of the times and the needs of the profession as it exists today, but I feel that today's law student must be careful not to fall into the trap of believing that a successful navigation of the first semester of law qualifies him to eschew further interest in the basic and traditional functions of the law school. A solid theoretical foundation is essential to success as an attorney, and it always will be. Academic flexibility is needed; academic revolution is not.

Student understanding of that fact is essential if we are to fulfill our mutual obligations to our chosen profession. ★