Practice Work and Elective Studies in Law Schools

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One of the difficulties confronting the persons yearly honored by invitations to read papers before this Section on Legal Education of the ABA is that of choosing a subject with even a flavor of novelty. Those law-school problems which can be much enlightened by discussion are neither many nor complex, and we have talked about them all before. Experience is solving them for most of us. However, one over which disagreement is certainly reasonable is how far practice should be taught in the law school.

Discussion of the subject in recent years has often been prefaced with the statement that half of the appellate litigation in this country is over questions of practice, and has proceeded upon the assumption that law schools could give instruction which would very much diminish this proportion. The first proposition, as usually stated, is extravagantly misleading, and the second may well be doubted. Granting, however, that mistakes are too numerous to be creditable, how far might law school instruction reduce them?

In answering this we must discriminate. Many rules of practice depend upon no principle, but are arbitrary rules of convenience. No lawyer not largely engaged in perfecting appeals ever tries to charge his memory with these minutiae, or fails to refresh it by a reference to his books. Most mistakes here occur through carelessness, and would not be sensibly lessened by any reasonable amount of law school instruction.

On the other hand, while the details of practice in our various states differ, its general principles and theories are similar. The chief benefit which a student will gain from a course in practice will be less an abiding knowledge of the exact steps to be taken in a given proceeding than an idea of what kind of steps he must expect to look up the details about in his local practice books. Just as it is a better use of his time to learn the arrangement of a digest than to try to memorize the cases, so it is better for him to learn what is typical of practice in general than to spend much time in familiarizing himself with local details. The important elements of common practice may be fairly well covered in the equivalent of two hours of classroom weekly for a year. If, in addition, a serious attempt is made to teach trial practice and the art of conducting cases before a jury, probably at least as much more time must be spent.

No doubt both of these courses, well conducted, would be useful to a student. The practical question, as has often been said, is one of relative values. What is the best use of a student's time? I do not think this question can be answered in the same way for all law schools. A school may be unable to provide a wide curriculum, and its students, drawn almost wholly from a single state, may for the most part go into practice for themselves immediately after leaving the school. A large majority of American law schools are of this type. The relative value of the practice courses in such schools will be high. Inasmuch as nearly all of the students are from the state...
whose practice is taught, even details are not valueless, and the student who does not have the benefit of an apprenticeship in an office before he starts for himself, needs instruction in practice more than if he has had some office experience first.

At the other extreme are those schools which offer more important courses on substantive law than can be taken in three years, whose student body represents many states, and whose graduates are commonly able to spend some time in an office before starting for themselves. Every argument for the relative value of practice courses in such schools is much weakened. Where more work is offered than can be taken in three years many students will wisely choose that which they are least likely to be able to master by themselves. Probably ordinary practice can be learned with less difficulty than most branches of substantive law.

On the other hand, there are several respects in which law-school instruction in practice is superior to what even a diligent student will gain in an ordinary office. Unless a long time is spent in an office the work done is apt to be fragmentary. Some things he will do frequently. Some not uncommon proceedings may never chance to be turned over to him. These he must learn from reading, and there are a good many practical hints which he will not find in the books. Moreover there is often a choice between several methods of procedure where the most intelligent reflection, unaided by experience, would scarcely suggest the one best for a client. A good teacher of practice can give the student much of his experience in such matters, and in his early days this may be very useful to the young lawyer. Certainly there are circumstances where such knowledge is of substantial advantage and its ultimate value, as compared with another course in substantive law, the student can probably determine as well as any one. Thus my conclusion would be that law schools of all types might wisely offer at least elective instruction in practice, exclusive of those features which are supposed to be taught only by mock jury trials.

Regarding the value of the latter, in view of the time they take, I am skeptical. The ability to try jury cases even fairly well is far more an art than a science, and is to be acquired only by an amount of experience and observation far greater than any law school can afford. The school at best can give students but a slight start in this direction—how slight appears when we consider the artificial conditions under which mock trials must be held.

It is hard to believe that many students can obtain such benefit from taking part in a few mock jury trials that the third or fourth case they try in actual practice will be affected by it. I do not suppose it would be claimed that students can get from this exercise much practice in the art of handling questions of fact before a jury. Its value must consist rather in giving them some knowledge of the processes of this branch of litigation: how to empanel a jury and open a case, how to present various kinds of evidence, in what form questions should be put, how objections should be made and exceptions taken, and so forth. Now these matters are very easily learned. Some of them may be treated in the course on evidence, and any bright boy who has had a year or two in a law school can get a fair knowledge of the others in a few days by attending some actual trials and reading a small treatise on trial practice. He can do this in vacation, and devote his time in the law school to study of the books in which he is interested.

A Timeline History of the Law School

1891-92 Founding of the University. The Law School is explicitly part of President Harper's original conception.

1898-99 Ernst Freund is appointed Assistant Professor of Jurisprudence and Roman Law in the Dept. of Political Science.

1901-02 President Harper presents the final Law School proposal to Board of Trustees. Ernst Freund, James Parker Hall, Julien W. Mack, Clarke Butler Whittier are appointed to the faculty.

1902-03 Law School opens for classes (with 78 students) in University Press Building (present-day Bookstore). Tuition is $150 per year. The library has 18,000 books. The Law School is the first in the nation to offer the J.D. degree.

Three fraternities are established: Phi Delta Phi, Delta Chi, Phi Alpha Delta.

The first "Law School Smoker" (dinner and faculty spoofs) takes place.

Law School is admitted to the Association of American Law Schools.

1903-04 Floyd R. Mechem joins the faculty.

1904-05 James Parker Hall is appointed Dean; Harry A. Bigelow joins the faculty.

The new Law School building is completed.

Sophonisba Breckenridge '04, the Law School's first woman student
1905-06 The law library exceeds 25,000 volumes.

1906-07 Wig and Robe society is founded. Laws beat medics in football, 12-0. Professor Ernst Freund plays as a “ringer” on the Law team.

1907-08 Harry J. Lurie ’05 is elected first president of the Law School Alumni Association. First annual Alumni Association Dinner is held.

1908-09 Student enrollment exceeds 300 for the first time.

1909-10 Professor Floyd Mechem publishes A Treatise on the Law of Sale of Personal Property.

1910-11 Mining and Irrigation is added to the curriculum.

1911-12 Professor Ernst Freund publishes Cases on Administrative Law. The Order of the Coif is established at the Law School.

1912-13 Title to Real Estate changes from 1st-year required course to 2nd/3rd year elective.

There is more matter of substantial general importance in our law to-day than can be thoroughly taught in three years. It is unnecessary to argue that it is better for a student to cover three-fourths of the field of the law thoroughly than to cover it all superficially. The most valuable possession a student can carry away from a law school is that ability to analyze complicated facts, to perceive sound analogies, to reduce instances to principles, and to temper logic with social experience, which we call the power of legal reasoning. Superficial study is fatal to the acquisition of this power which alone makes truly effective any amount of legal information. A large number of law schools have not at present the resources to attempt teaching all branches of law, nor even all of substantial importance. They do far more wisely to choose enough work to employ a student for three years and to require it all than they would do to use the same amount of money in giving more courses less thoroughly. There are also a number of schools which offer, in addition to the required work, a few extra elective courses which are frankly given in a more cursory way than the regular work. No advocate of elective studies would wish to see these schools permit their students to substitute such electives for the regular work thoroughly given. So far we should all agree.

A real difference of opinion regarding the elective system only arises in the case of those schools, relatively few in number, which offer considerably more work of substantial general importance, thoroughly well taught, than can be taken by the average student in three years. Here the method of choice becomes important. A free elective system in the last two years of the law school does not assume that the end of general legal discipline is the only thing to be considered. It does assume, however, that there are such differences in teachers, in students, in methods of treating subjects, in the case with which subjects may be mastered outside of a law school, and in the special needs of students, that the greatest net good from discipline and information combined may be obtained for any particular student by a wise election of courses.

It may be pertinently asked what assures a wise election? I should answer: the maturity of the student, and his natural desire, if he be earnest, to get the best possible preparation for his profession. But, it will be said, many students are not mature and many are not ear-
Students in class with Professor Ernst Puttkammer, early 1950s

nest. So far as concerns students under twenty years old, beginning professional study directly from the high school, this is obviously true, and law schools which do not require at least two or three years of college work for admission may be wise to restrict election more narrowly. Certainly college experience shows that the older men elect work far more intelligently than do the under-class men. What I have to say, therefore, is meant to be particularly applicable to those schools with admission requirements high enough to secure a considerable degree of maturity and judgment in their students. Indeed, such schools are almost the only ones which permit notable freedom of election.

Of the six schools with a wide elective system, it is significant that four, Harvard, Columbia, Stanford, and the University of Chicago, constitute at present the entire group of American law schools which require a college education for admission. This insures a degree of maturity and training which should enable their students to profit from an elective system, if that system, wisely used, has any decided advantages.

What, then, are the advantages of an elective system, assuming that those students who are worth saving will honestly try to obtain them?

In the first place, after the mastery of four or five fundamental courses which are required in all schools, it is not easy to say ex cathedra which courses in a particular school are the best for any particular student, or even for that abstract individual, the average student. In most instances the value of a course to a student in giving him that combination of stimulus to independent thinking, training in legal reasoning, and information about the subject, which is the aim of good teaching, depends far more upon the teacher's method of treatment than upon the subject-matter. A subject of very modest intrinsic importance may be so illumined by a teacher who lays all other branches of law under contribution to furnish analogues or to illustrate principles that its worth to the student is far greater than its title would indicate. Among these may be mentioned trusts, conflict of laws, suretyship, constitutional law, quasi contracts, and partnership.

It should also be remembered that there are individual differences in personality and method between teachers of equal excellence which have a marked effect upon students. One teacher will especially stimulate and interest one type of mind, and another another type. I thoroughly believe in the wisdom of mature students choosing even law courses quite as much for the teacher as for the subject. With such students noth-
1920-21  Ernst W. Puttkammer '17 joins the faculty.

1921-22  James Parker Hall publishes Constitutional Law.

1922-23  Tuition increases to $210 annually.

1923-24  Trade Regulation is added to the curriculum.

1924-25  The library exceeds 50,000 volumes.

1925-26  George G. Bogert joins the faculty.

1926-27  Student enrollment exceeds 500 for the first time. Kenneth Craddock Sears '15 joins the faculty.

1927-28  Taxation and Criminal Procedure are added to the curriculum.

...tends more to make the class-room work an inspiration and a pleasure to both teacher and taught than an elective system, and this is worth a great deal more to a school than is the certainty that every student shall study all the subjects thought by its particular faculty to be most important. The student may take full advantage of the work of those teachers from whom he gets the most benefit, and the teacher is encouraged to his best efforts in the preparation of every course by the knowledge that, if he makes it really valuable, students are as free to take it as any other course.

Not a few students know, before leaving the law school, into what kind of practice they are going, and a man who knows that he must deal immediately with the legal affairs of a city, a railroad, an insurance company, an indemnity company, or a wholesale house may wisely elect municipal corporations, public officers, carriers, insurance, suretyship, or bankruptcy, even at the expense of wills, advanced property, or bills and notes. Such cases constantly occur in some numbers, and I think a mature student is better able to decide what is best for him than is any law-school officer. Of course, the elective system does not preclude men from advising with the faculty about their work, and from my own experience I think they seldom fail to take all of the more important subjects without consultation with some member of the teaching body.

Finally, it is really not a very serious matter that some students should leave the law school without having had systematic instruction in one or two of the more important second or third year subjects. Failure to take such courses in class never means that the student remains totally ignorant of them. The principal doctrines of agency may be picked up from many of the other courses as readily as may persons and damage. Suretyship, partnership, and trusts will incidentally give some knowledge of bills and notes, a subject which to-day arises far less frequently in practice than does insurance, constitutional law, or bankruptcy, for example.

Under normal conditions it will be found that the principal law courses are generally elected by all but a small per-