

Training the Trial Lawyer: A Neglected Area of Legal Education

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That a Justice of the United States Supreme Court should help Stanford Law School dedicate its new home is only to observe that comity which one educational institution owes to another. There is more similarity between the two than you may have thought. Throughout the academic year, a student body consisting of the legal profession looks to our Monday lectures by which they are instructed as to what the law is—when they are not mystified. Our curriculum is haphazard but balanced, for our lectures elucidate both, and sometimes several, sides of each subject. It is complained that we neglect existing casebooks; but no one denies that we are diligent in writing new ones. We have no conflicts with alumni; but we do sometimes have faculty difficulties.

While an occasion so memorable, an assembly so distinguished, and a time so troubled tempt a speaker to venture upon exalted themes of universal import, it may be more fitting to confine myself to some narrow, but comprehensible, problems of the legal profession and the law school, upon which those present may exert some appreciable influence.

The future of any American law school is bound up with that of the American legal profession. The profession here has been more fortunate than in a large part of the world where the independence of both lawyer and judge has been destroyed and they have been reduced to the status of civil servants doing the will of the government. While that prospect does not confront us, there is no certainty that a slow drift is not in the same direction. An increasing proportion of the bar is in service of the Government. The judges more and more are called on to affirm and enforce executive or administrative orders without inquiry as to their factual foundation or justice and are increasingly refused access to sources of evidence. The prestige, independence, and competence of the legal profession collectively is of concern to each teaching lawyer, as well as to each practicing lawyer and judge.

The lawyer performs the ultimate function of serving the wel-

* Associate Justice, Supreme Court of the United States. See also President's Page, page 2, *supra*.

fare of society through assuming a variety of immediate duties, often in conflicting roles. He counsels and represents individual interests against the power of the state, as well as in controversies between individuals. Also, the lawyer is the chief instrument by which society applies its laws and sanctions to the individual. Our system also throws upon the legal profession a certain guardianship of our traditional liberties and our legal institutions. Explosive political and social issues must often be adjudged by applying constitutional or statutory provisions through the cumbersome mechanism of the lawsuit. Unfortunately, both the public and legislators too often understand that to relieve them from responsibility.

The difficulty of the legal profession in performing these social functions to the satisfaction of society is substantially increased because the educational world has put our specialty so much outside of cultural life that law is no necessary part of an American liberal education. It is rarely studied except as the working tool of one practical profession. Perhaps we will get the measure of this educational lapse if we are reminded that Blackstone's *Commentaries* were written, not for professional education, but for general education of young Oxford gentlemen for citizenship, because, as the author said, "A competent knowledge of the laws of that society in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of a liberal and polite education."

We are keenly aware that the rules which govern the layman's life have become increasingly numerous, detailed, and complex. The lawyer must apply them through the adversary system of litigation, the ethics of which presupposes in the advocate a partisanship which people do not understand. They censure the lawyer for living up to his code on behalf of an unpopular client almost as severely as for departure from high standards of honesty and fidelity. Moreover, even the educated layman does not have enough knowledge of legal method to understand how lawyers can honestly find so many uncertainties and conflicts in the law. I am convinced that most laymen without some instruction in the nature and method of the law tend to think of it as a complete and closed body of writing in which the judge or lawyer should find precise and final answers to his problem, if only he knew enough to open the right book at the right page. This leads to a suspicion that unnecessary controversies are promoted by lawyers often to serve the

interests of private clients and that judges disagree about them only because one side or the other lacks competence or learning. It is too much to expect that the public or the individual client will understand with so much legislation and litigation why, with all that has been settled, so much still is in doubt.

What is this law, to the teaching of which we dedicate this building? I suppose a score of plausible answers could be made. Whatever more it may be, is it not, as between pedagogue and student, chiefly a mode of thought, to be practiced under criticism of the tutor until it is acquired as a habit? Whatever help the student may find in recorded experiences and reflections of earlier judges, he will also find that the answer to the lawyer's concrete problem has rarely been written out; it must be thought out. And, if not before, the young lawyer will realize the sharp disparity between legal thinking and lay thinking, when he begins to interview clients. He will have to sift out from what the layman thinks it worthwhile to recite much that, in the lawyer's discipline, is immaterial or irrelevant or not reliable because it is hearsay or secondary evidence. He will have to probe and search for information that, in his thinking, bears more importantly upon the questions involved but which to the lay mind seemed of no consequence. And throughout his professional life, or for that matter his public life, if he really is first of all a lawyer, he will find that his habit or way of thinking differs from that of laymen by demanding higher standards of certitude and stricter tests of relevancy. Impatient reformers will think him obstructive and technical. But if every legislature in the land should abolish what are stigmatized as "technical rules of evidence," the lawyer will stubbornly recognize the inherent superiority of direct evidence over hearsay, of "best evidence" over secondary evidence, of expert conclusions over nonexpert opinion, of the relevant over the irrelevant. These relative values can never be repealed or abolished. The lawyer's thinking should, and if he is a genuine lawyer it will be, characterized by closer adherence to the issue and higher standards of accuracy than any calling except, perhaps, the exact sciences.

Considerations of an autobiographical nature would make it immodest for me to suggest what a law school should teach and how best to teach it. I am a vestigial remnant of the system which permitted one to come to the bar by way of apprenticeship in a law office. Except for one term at law school, I availed myself of that

method of preparation which already was causing uneasiness—to which feeling I must have added, for the system was almost immediately abolished. You may be comforted to realize that I am the last relic of that method likely to find a niche on the Supreme Court.

But perhaps I can qualify to express the opinion that the greatest need and opportunity for improvement in legal preparation will be found where the practicing legal profession is most vulnerable on the score of performance. This, I believe, is in the work of the trial courtroom. It seems to me that, while the scholarship of the bar has been improving, the art of advocacy has been declining.

I think the bar itself has underrated the importance of trial work. It has been avoided as less remunerative, more exacting, and less suitable for senior dignitaries than the work of the office. It is sometimes forgotten that the ultimate test of the work a lawyer does in his office is whether it will stand up on its day in court. The rights of clients, like the liberties of our people, are only those which some lawyer can make good in a courtroom. Character of the lawyer in the public mind is likely to be fixed by what it sees of the profession in trials. So I concern myself today with the lawyer as an advocate, an officer of the court, a judge, perhaps, but always a public character, for better or for worse, constituting that class from whom, as Woodrow Wilson said, we used to draw our statesmen.

Every thoughtful observer must be depressed by the tendency of many of our criminal trials to degenerate into partisan wrangling and competitions in prejudicial, obstructive, and contemptuous tactics. It will not do to put all the blame for this on either defense lawyers or prosecutors or judges, or even on the legal profession collectively. It behooves us to consider the causes of the mob atmosphere which sometimes surrounds and discredits a criminal trial.

The trial judge has largely lost the control of the influences that can be brought to bear upon the jury. Our procedural law regarded such control as necessary to fair trial. Its techniques were designed to keep unreliable testimony such as hearsay and irrelevant or prejudicial matters from influencing jury deliberations, by having the judge exclude them from evidence. In that way it was sought to confine the attention of the courtroom to the issues and to evidence meeting judicial tests of admissibility and subject to contradiction and cross-examination in open court. The newspaper made this insulation of the jury from outside influences more difficult, but

still possible. Today, however, the radio, television, newsreels, and many editions of papers, penetrate nearly every juror's home and bring many influential communications before them, including matter which the judge rules to be inadmissible and keeps the lawyers from presenting in court. For example, long and bitter experience convinced courts that lay jurors tend to attach an importance to the mere fact of confession, regardless of its circumstances, which those familiar with such events know it does not merit. But what is gained for fair trial, when the trial judge rules a confession out of the courtroom as obtained by coercion, if the jurors hear repeatedly on the radio that the defendant has confessed and perhaps read the excluded statement in their newspaper? If made in court, even wrongly, such statements could at least be answered; when put before the jury out of court, that defense is impossible. If given in court erroneously, a conviction would be set aside on appeal. But appellate courts cannot protect a defendant against false or prejudicial evidence introduced by publicity. Whether "planted" by prosecutors or police or just published as journalistic enterprise, such publicity for prohibited matter is a serious menace to the right of an accused to a fair trial. Examples could be multiplied indefinitely, and it is not always the defendant who is the victim. Innuendo or worse about witnesses or parties, on whichever side, have the same effect of denying a fair trial and taking control of the proceedings out of the hands of the judge.

Then there are litigants who feel that newspapers and radio commentators marshal the weight of public opinion against them. In behalf of such, there has been a tendency of late to organize picket lines, to make visual demonstrations of sympathy and to inform the juror leaving or entering the court by placards how the crowd feels about the prosecution or particular witnesses, or rulings of the judge. That such efforts to influence, if not to intimidate, present a menace to the fairness of the trial process and to its repute, needs no demonstration. In all fairness, however, the picket line, by its very crudeness and self-evident impropriety, is likely to offend the juror, and may therefore constitute less actual danger to the administration of justice than subtler and more respectable forms of communication which convey influences to the mind of the juror without offending him.

All of these methods of by-passing the judge with communication to the jurors are defended upon the same ground—that they

are exercises of freedom of speech and of press. Supreme Court decisions are cited in support of each. It is true that the Court has broadly assimilated picketing to free speech.¹ It has also sharply limited the power of trial judges to punish newspaper efforts to pressure court decisions, upon the grounds that such efforts are immunized as part of our constitutional freedoms.²

Without discussing the merits of the arguments for or against such holdings, it seems obvious that if before or during a trial the right to publicize inadmissible evidence is inseparable from our freedoms, then the trend of trials to turn on evidence and influences beyond control of the judge may be expected to continue. The custom of prejudging guilt or innocence and of injecting evidence and opinions upon the trial by publicity can easily proceed to such a point that verdicts in highly publicized American cases will no more really represent the jurors' dispassionate personal judgment on the legal evidence than do those of "People's Courts" we so criticize abroad. The plain fact is that courts and the legal profession cannot make good the constitutional assurance of fair trial except with the co-operation of the agencies that make and convey public opinion. If they do not respect the judicial process sufficiently to forego scooping it, pressuring it, or circumventing it, fair trial in this country is headed in the direction we so deplore when we see examples of farcical trials abroad.

But we must not allow these external influences to be invoked to exonerate our own profession for the threatened disintegration of the criminal trial process. There is often ground to suspect that the forces that pressure the courtroom from the outside have had aid and comfort from the inside. And disorderly, obstructive, contemptuous, or defiant demonstration within the courtroom can only be charged to lawyers. The problem would be less difficult if it were due only to a purpose to discredit courts and judicial proceedings. But the more subtle danger is from the growing attitude that judicial control of the proceeding is a sort of tyranny, that a courtroom ought to be a cockpit without rules, the trial a free-for-all, into which the participants are free to throw anything they please. Many people seem to have been influenced by the philosophy (which they often quote) expressed in a recent dissent in the Supreme Court: "Freedom of speech in the courtroom deserves the

1. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

2. *Craig v. Harney*, 331 U.S. 367 (1947).

same protection" as freedom of press and speech outside of court.³

The analogy is so inconsistent with any kind of orderly legal procedure that it could hardly have been intended by the authors to be taken literally. If a trial, civil or criminal, is to have any semblance of order and its result is to be accepted as a sound judgment on evidence, it must be a controlled and disciplined proceeding from beginning to end. Neither lawyers, parties, nor witnesses can have freedom to speak irrelevantly, intemperately, or out of their proper turn. None have freedom to speak of things which are excluded because prejudicial or immaterial.

The adversary system which we employ in litigation in America is peculiarly susceptible to abuse. It relies on self-interest to bring out both sides of the case. This presupposes and stimulates partisanship in the lawyers. Even the best trial lawyers, if unrestrained by an alert and able judge, sometimes yield to the temptation to overstep.

This combat theory of litigation, particularly in criminal cases, has been carried in this country to lengths practiced in no other. Continental Europe does not employ the adversary so much as the inquisitorial system; the judge largely conducts the trial as an active inquirer for truth on behalf of society, not merely a receptive and passive moderator between adversaries. In England, and some other common-law countries where the courtroom lawyer constitutes a separate profession, the barrister accepts employment only from the solicitor, who briefs him on the facts, and his methods must commend him to those who judge by professional standards. But in the United States, neither the structure of his profession nor the system he employs provide restraining influences upon the lawyer's partisanship or his tactics. The responsibility for fair and orderly trial must be carried by the trial judge or hope of attaining it be abandoned.

I am convinced that the position in our profession which requires the most versatility of mind and firmness of character is the worthily occupied trial bench. I do not belittle the very necessary and important role of the appellate court, but I think it has been exalted at the expense of the role of the trial judge.

The trial judge sits alone and does most of his work with the public looking on. He cannot lean on advice of associates or help

3. *Fisher v. Pace*, 336 U.S. 155, 163 (1949).

from a law clerk. He works in an atmosphere of strife, with counsel, litigants, and often witnesses and spectators bitter, biased, and partisan; and, if the presiding judge fails of his part, they become demonstrative and disorderly.

This lone trial judge must make a multitude of quick and important decisions as the case progresses. He must rule immediately and firmly on questions upon which appellate judges may deliberate for months and then divide. He is frequently attended by poorly prepared counsel, and even diligent counsel may be unprepared on questions that are not anticipated. In training lawyers the law schools are also training these future judges, for we do not think it compatible with democracy that the judiciary, as in some Continental countries, be a separate profession specially trained for the task of judging. Either to preside over a courtroom or helpfully and successfully to conduct cases at its bar is, perhaps, less a science than an art. Some of the best trial judges I have known were not distinguished for learning so much as for wisdom and common sense and a personality that enabled them unostentatiously to dominate the courtroom and be master of its proceedings. I do not know that it would be possible to teach that kind of art, but it seems to me that the unsolved problem of legal education is how to equip the law student for work at the bar of the court and for assumption, the politicians willing, of the work of the trial bench. The two are similar in many requirements.

It may be that the law school emphasizes preparation for appellate work at the expense of preparation for the trial court. I sometimes sit in moot court, through which our schools are trying to teach advocacy. I find young men carefully trained, their research exhaustive, their arguments penetrating. But they usually argue some great issue for which they are not likely to be employed during the first twenty years of practice. Then, too, they are adapting themselves to an appellate court, which no case of theirs is likely to reach for some years. But more unrealistically, they have been given the complete facts of a hypothetical case. The difficulty with this is that they are started at the wrong end of the process. Most lawsuits are ended as soon as there is a final settlement of the facts. The success or failure of young lawyers will be determined by the way they investigate and prepare and present cases to the triers of fact. A surprising number of cases every term are thrown out of our Court because counsel in the trial courts have not made ade-

quate records, have not preserved crucial questions, or have not asked appropriate instructions or findings. The place to win an appeal, as well as a verdict, is in the trial court.

When I observe these moot courts, I cannot help contrasting the law school's preoccupation with appeals with the emphasis which the old apprentice method of legal preparation placed on trial work. Of course, I do not advocate a return to the apprentice system, for conditions in our large offices have made that impossible and always it left much to be desired. It was casual and uneven. Too much depended upon the choice of the office, and that usually was determined by some accident of relationship or acquaintance. If one were fortunate, he would serve his clerkship under a good lawyer who took a personal interest in him as something of a protégé.

Even at its best, apprenticeship left almost everything to the initiative of the individual and could rarely produce the well-rounded acquaintance with the general body of the law that is the aim of the modern law curriculum. If one acquired much of the general philosophy of the law, it was the result of voluntary and self-guided inquisitiveness, or what Einstein has called "a passion for comprehension."

However, the apprentice system offered some of the advantages associated with preparation at the British Inns of Court. A young lawyer of promise was soon admitted to the fellowship of lawyers. He worked with them, negotiated with them, went to court with them, ate with them, and—nostalgic admission—drank with them. Waiting about the courthouse for a case to be reached or a jury to report, he listened to their tall tales about cases they had won, laughed with them at slips in cross-examination that had cost lawyers their verdicts or oversights in proof that led to nonsuits. He came to know and respect qualities that made leaders at the bar and to recognize and imitate their skills. Moreover, he learned how eager leaders of the profession always were to know and to help a young man who they thought would carry on the traditions of the profession in which their own lives were absorbed.

The apprentice system was at its best in the smaller communities where one could appear in justice court without being admitted to the bar, and where every law office was a sort of private legal aid society. Each lawyer had poor relatives, poor friends, poor political followers, who sought his advice in their small troubles. The com-

mon sense and aptitude of the law student were tried out after a time as a counselor for such nonpaying clients. He began to learn how to deal with clients, witnesses, and adversaries, and how to investigate facts and law. If he showed promise, ultimately he was allowed to try the losing side of a justice court lawsuit. It was probably over a small bill for goods sold and delivered, or deceit in the sale of a horse, the latter a prolific and entertaining source of promotor age litigation. If he had a flair for trial work, he was enlisted to assist in preparing his tutor's cases for higher trial courts, to sit in at the trial, and perhaps to help on an appeal—provided the client was still indignant, and solvent. Thus he accumulated experience in the matters on which he would first be put to test in his profession. He discovered that advice may be erudite without being wise. He learned to size up a case, to know how many stories which sound credible *ex parte* go to pieces under cross-examination. He learned the feel of a lawsuit and a wholesome skepticism about his own client's statements. He learned to prove the signature on a promissory note, to prove books of account, to interrogate a witness without leading—too much, to ask a hypothetical question, to cross-examine and, most of all, when to let a hostile witness alone. He learned how to organize and present materials, not to satisfy professors, but to convince farmers and carpenters and laborers and miscellaneous humanity in the jury box. He learned to speak, not merely so he could be understood by persons of education, but so he could not be misunderstood by those without it. Such matters lie at the very root of successful litigation. They are experiences which our young men leave the law school without knowing and which of course are very difficult to teach except in actual practice.

If the weakness of the apprentice system was to produce advocates without scholarship, the weakness of the law school system is to turn out scholars with no skill at advocacy. The problem, therefore, is whether a way may not be found to teach the art of trying an issue of fact, making a trial record, and generally how to handle a lawsuit in trial court.

I pointed out that the old system of apprenticeship taught one to practice law by assigning the student to actual work in what I characterize as the private legal aid business of the office. Perhaps the law schools, too, could combine this important public service with practical experience for senior students. In any thickly populated area a large number of people need and are qualified to

receive free legal aid. In most such places, legal aid societies are struggling for support, and one of their burdens is to obtain services of lawyers. I see no reason why, in co-operation with bar associations, local courts, and legal aid societies, each law school should not maintain a legal clinic, as each medical school now tries to maintain a medical clinic. Law students must learn to deal with live problems instead of hypothetical cases, just as young doctors find that experience on cadavers does not teach skill with living flesh and blood. The student, of course, may not engage in law practice before admission. But he might conduct interviews with the indigent client and his witnesses, and possibly his adversaries, and prepare a brief of the facts and of the law. While he was performing a useful service, he would be learning something about the sources of evidence, how to get and weigh it, how fallible it all is, and how partial clients are in relating their own troubles. The case at that stage would be taken up by an instructor, perhaps, or a volunteer lawyer qualified to practice law. Within the faculty, the best counsel would be available in any specialty involved. If the case went to court, it could interest the services of lawyers too busy to take on the whole preparation of legal aid cases. The student could observe and perhaps assist the actual trial of an actual case, in preparation of which he had had a part. Of course, such plans require close supervision and support of the bar and judges, and depend on the good sense of administering personnel and to some extent on local conditions.

But it seems to me that in such a way the law schools might recapture some of the values lost with abandonment of the apprentice system. It might prove a forward step, both in legal aid and in legal instruction. The difficulty with leaving trial experience to be acquired during clerkship after admission is that law offices which employ clerks are now rarely set up to render the systematic, supervised study of trial methods which law schools could offer.

We dedicate this new building to use in training the younger generation for what Lord Radcliffe recently described as "that strange calling which is neither so masterful as a craft, nor so precise as a science, nor so imaginative as an art, and yet which mixes the elements of all three and which we are disposed to rank among the great professions." That profession can be worthily maintained only by placing standards of quality above those of quantity, and a balanced, exact, and exhaustive scholarship above the impressionism of popular opinion. Such standards have values;

they also have a price. While works of quality win respect within the profession, they may not earn wide recognition, for the law is a calling too occult to be appraised and appreciated by the uninitiated, and general popularity is apt to be the badge of low professional standards.

The Stanford Law School, like the Supreme Court, is now housed in new and elegant quarters. The silent eloquence of the edifice, however, pays tribute to the profession of architecture rather than to the law. But it fixes a high standard for the intellectual and spiritual life with which we must animate them.

As we gather in the imposing presence of this new home, it indicates no lack of appreciation to remind ourselves that, to a law school as to a court, men matter more than buildings. May the buildings we dedicate be peopled with consecrated men—men to whom the law is the first and last interest in life, to which they are single-minded in devotion, and to which they bring intellectual boldness, integrity, and courage. This will make a living institution which will be both cradle and monument to our profession.