

11-1-1977

The Tension Between Practical and Theoretical Legal Education: A Judge's View of the Gap

Sherman G. Finesilver

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Legal Education Commons](#)

Recommended Citation

Sherman G. Finesilver, *The Tension Between Practical and Theoretical Legal Education: A Judge's View of the Gap*, 1977 BYU L. Rev. 1061 (1977).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1977/iss4/4>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Tension Between Practical and Theoretical Legal Education: A Judge's View of the Gap

*The Honorable Sherman G. Finesilver**

The Gee-Jackson study, a critical examination of American legal education, may be as significant for the legal profession as the Flexner report¹ was for the medical profession. In order to prepare their study, the authors visited ten American law schools, distributed lengthy questionnaires to selected law professors and students, and interviewed English legal educators. They utilized a consequential or "functional" method of analysis which considers all proposed changes in view of their probable results. The authors have drawn principally upon their own multidisciplinary experience as legal and political science educators, as well as upon the critical studies of others, in order to produce a work having potential impact throughout the legal profession.

Collaborative projects on legal education are not new to the authors. They have jointly prepared two prior studies that examined law school curricula. In the instant collaboration, they have endeavored to present and evaluate the latest thinking and trends in legal education in a historical and comparative context. This Commentary is a critical presentation of the principal themes and conclusions of the study, together with my own proposed resolutions to some of the problems raised by the authors.

I. THE PRACTICAL-THEORETICAL DICHOTOMY IN LEGAL EDUCATION

The central theme of the Gee-Jackson study is raised at the very beginning: that there is a recurring tension between the "practical" and "theoretical" aspects of legal education.² The law school method of teaching future lawyers, which has remained essentially intact over the past century, is primarily

* United States District Judge, District of Colorado. The research assistance of Peter R. Osinoff, Esq., is gratefully acknowledged.

1. A. FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (Carnegie Foundation for the Advancement of Teaching Bull. No. 4, 1910). Abraham Flexner, an educator, prepared a report on medical schools in 1910 for the Carnegie Foundation for the Advancement of Teaching. He urged that the clinical and classroom approaches be merged and that medical schools be associated both with the university and with a hospital.

2. In this regard the instant report is reminiscent of the Flexner report on medical education. *Id.*

“theoretical.” The consequence of this “theoretical” training has been the growth of a dichotomy between an attorney’s activities as a law student and as a member of the practicing bar. It is widely recognized that a student’s legal training is not “complete,” in any sense of that term, until the student has actually practiced law for a few years. The authors go one step further and claim that unless the student becomes affiliated—at the public’s ultimate expense—with a large law firm or government agency where his activities receive careful supervision, the student will probably not be trained as a fully “competent” lawyer. The problem with this solution, as the authors note, is that most students never have an opportunity to fill such elite positions. Law schools, therefore, must bear more of the responsibility for training their students.

The practical-theoretical dichotomy has generated a perception among many law students and attorneys that the law school experience is both unrealistic and irrelevant. Faced with the problem of how legal education can produce competent practicing attorneys, the authors examine the more important solutions that have been recently proposed and implemented.

According to the authors—and one can hardly disagree—the most important, widespread change in American legal education during the past decade has been the development of clinical law school courses. This teaching method gives the student an opportunity to study law from the perspective of a practitioner. The student will inevitably become more involved in a well-run clinical course, because what he does in such a course is, after all, the *raison d’être* for law school. The student is playing the role of a functioning attorney. Because it is still a part of law school, a clinical course also compels the student to perform an evaluative examination of the legal system. A practicing lawyer, on the other hand, would have to readjust his time commitments in order to perform such a critical analysis voluntarily. Finally, and quite significantly, clinical courses provide the best vehicle for the exposure and examination of problems in legal ethics, a subject that has skyrocketed in attention in the shadow of Watergate.

The lessons of Watergate, as opposed to the canons of the Code of Professional Responsibility, cannot best be taught in traditional classroom courses on legal ethics. Nor do special bar examinations on ethics “weed out” the type of person who would use a position of authority in ways that are “above the law,” underhanded, or uncivil. A person’s character, good and bad habits, and tendencies are largely formed and developed long before

he enters law school. Thus, there is a tremendous responsibility placed on law school admissions committees in the admissions process.

However, there are particular ethical problems that emerge out of one's status as an attorney—such as problems of whom a lawyer may represent in particular circumstances—that should be taught in law schools. While some of these ethical problems may be encountered in traditional “casebook” courses, the unique difficulties emerging from the attorney's role in an adversary system and in society may be most clearly examined in clinical courses where a law student actually experiences this role. Optimistically, the confrontation and exploration of these problems in a clinical course taught by a member of the practicing bar will make the student a better, more confident, and more civil member of the legal profession. At the same time, members of the practicing bar will become more involved in law school activities. Ultimately, the sagging public image of the legal profession would improve as a result of the admission to practice of those who have deeply considered their roles in the adversary system and society. No casebook courses in the Code of Professional Responsibility can possibly have such an ameliorative effect.

II. THE CHALLENGE AND PROMISE OF CLINICAL LEGAL EDUCATION

Clinical legal education today, however, is beset with problems. Students in clinical courses must be closely supervised, and teachers must make themselves readily available. Because of the limited number of dedicated and experienced clinical instructors, few students can be exposed to this type of education. In addition, clinical courses have created scheduling difficulties for students who take traditional courses at the same time. Not only are there generally few clinical courses to choose from, but the time requirements for a clinical course often conflict with those of a student's other courses. Moreover, clinical teaching materials, such as videotapes, are more expensive than those of the traditional casebook courses. As a result, a fruitful clinical course may be as inaccessible to the average law student as a large law firm.

It has been difficult to interest outstanding members of the local bar in becoming clinical instructors at law schools and even more difficult to retain them for a substantial period of time. Clinical instructors seek to return to practice or to move into traditional academia, either because of workload pressures or because of the low level of faculty prestige that is accorded to clinicians. The authors emphasize that while there is pressure

from students and from some members of the active bar and judiciary for law schools to develop clinical programs, theoretical legal education and "bar exam" type courses are still the most highly regarded. Law school faculty members look upon an image of their law school as a "trade school" with a marked degree of disdain. Tenure is generally awarded to those professors who have made substantial academic contributions, not to "mere clinicians" who have little time for thorough academic research.

Despite these problems, clinical legal education is an extremely positive development. The legitimacy and utility of these courses are no longer open to debate. The clinical phase of legal education has grown enormously within the past ten years, both in number of subjects covered and in number of overall programs. With certain attitudinal changes toward legal education, the problems enumerated above can be virtually eliminated. With the increasing awareness that clinical education is a permanent innovation, there will undoubtedly be greater demand for clinician-professors. A greater clinical orientation at law schools will lead to tenure for clinical instructors and the institution of clinical professorships. These incentives, together with the recognition that clinical courses are necessary to produce competent attorneys, will attract and maintain the interest of outstanding and dedicated clinical faculty members.³

The cost of clinical education programs is one objection to their implementation. It should be noted, however, that while the cost of clinical courses is greater than that of traditional courses, the cost of providing a legal education is significantly less than that of providing a scientific or medical education. The authors point out that while law school tuition is high, university presidents use law schools as a means of raising money for other, less self-sustaining academic programs. Another economic factor to consider is that once standard course materials are developed for clinical programs, their subsequent reuse from year to year will reduce both the cost of clinical courses and faculty preparation time.

More importantly, clinical courses may ultimately provide a means of obtaining significantly more financial support from the

3. Difficulties with scheduling clinical courses can be resolved both by increasing the number of clinical offerings and, as the authors note, by introducing the concept of clinical semesters. In this connection, the authors discuss three law schools—Northeastern University School of Law, Southwestern University School of Law, and Antioch School of Law—that have radically restructured their curricula in order to accommodate extensive clinical programs.

practicing bar. The authors deplore the lack of support for law schools by their graduates. As long as law schools leave the practical aspects of legal education to the practicing bar, lawyers may not feel that requests for extensive financial support of law schools are compelling. Clinical courses, however, represent the recognition by law schools that they must bear some of the burden of training future lawyers in practical aspects of the profession. With the introduction of clinical programs, law schools may be able to forge a closer bond between themselves and the remainder of the legal world. In time, the practicing bar may take a more active interest in the support, financial and otherwise, of law schools.

Unlike the authors, I do not view the introduction of "legal clinics" at law schools with trepidation. If high quality clinical instructors can be attracted by an increase in the prestige of clinical teaching methods, students will receive the necessary individualized attention. The advent of legal clinics at law schools is likely to result in greater student supervision than many forms of clinical externships at public law offices outside law schools—or at law offices after law school—where the practitioners are often too burdened to give students much guidance. In addition, law school legal clinics may provide a valuable link between law schools and surrounding communities.

In summary, once clinical courses are recognized as being as important for legal education as traditional "bar" subjects, many of the initial problems of innovation will be overcome. The development of clinical programs at law schools is not, I think, a passing fancy, but offers an opportunity to work out a resolution to the practical-theoretical dichotomy that has plagued university legal education. At the same time, however, it is neither necessary nor wise to abandon the basic classroom courses which help develop the student's analytic skills as well as provide a working knowledge of substantive law.

III. EDUCATIONAL INNOVATIONS ON THE HORIZON

While the development of clinical courses has been the most fundamental change in university-based legal education, there have been other innovations whose full potential has not yet been realized. One area of innovation has been in the interdisciplinary programs that have burgeoned in recent years. While such programs shorten the time required for obtaining degrees in both fields, the authors have found that interdisciplinary curricula are not as popular among students as are clinical courses. Many stu-

dents have discovered that it is extremely difficult to unify two subjects of study, particularly where each department maintains its own course requirements. Other students have complained that an interdisciplinary program dilutes one's legal education. Perhaps because of pressure from state bar associations, law schools have been jealous of the number of law credits they are willing to relinquish to another department. In my view, however, a humanistic orientation to the law, or a perspective on the role of law from other fields of study, is more important for an attorney than total immersion in the technicalities of the legal process.

An interdisciplinary approach could also be beneficial from another standpoint. If many law school courses, particularly those with relevance to other academic fields, were opened to other interested students on the campus, law schools might help remedy the deplorable lack of understanding of legal thinking, the legal profession, and the legal system prevalent even among the most educated nonlawyers in our society.

The age of technology has not left the law untouched. Among the more significant technological developments in legal education are videotape, computer-assisted research, and computer teaching. In my view, videotape may be the most important of these developments, at least for purposes of legal instruction. Videotape usage is particularly useful in clinical courses, both to bring the courtroom presentation of a case into a classroom for purposes of detailed analysis and to call the student's attention to his own mistakes in a more apparent and meaningful way. The computer is probably a more valuable tool for legal research than for legal education. Because there may be several correct answers to legal problems, or problems of case interpretation, computer teaching programs may be difficult to construct. In addition, oral exercise would be lacking.

The authors discuss another alternative to the "case method" that has been implemented in a special program (SCALE)⁴ at Southwestern University Law School in Los Angeles. The first year in the program is devoted to classroom work organized around concepts such as negligence, estoppel, and causation rather than around areas of law such as torts and contracts. The second and final year (there is almost no summer break) is spent in classroom "transactions" wherein particular problems are analyzed. The professor plays the role of a senior partner, and each student becomes the professor's associate.

4. SCALE stands for "Southwestern's Conceptual Approach to Legal Education."

There is also a fourteen week externship during the second year. Only time and adequate study will reveal the benefits and drawbacks of such a program.

The example of Southwestern illustrates that we should not feel that we are monogamously wedded to the case method as the only means of classroom instruction. On the other hand, I do not believe that the case method should be abandoned. Its almost universal utilization throughout American legal education underscores the fact that it is based on the essential role of judicial interpretation in our legal system.

IV. STRUCTURAL REFORM OF LEGAL EDUCATION

A myriad of "structural reforms" have been advanced, most of which are intended to inject a dosage of the practical aspects of lawyering into law school at the expense of traditional classroom education. Some of the most significant of these proposals will now be considered.

The Carrington committee report⁵ and Dean Michael Sovern of Columbia Law School⁶ have suggested that the final year of law school be devoted to specialization in an area of interest to the student. The Carrington plan simply calls for a two-year basic curriculum with an optional third year for those who wish to specialize. Dean Sovern suggests a third year of law practice—an externship—followed by a mandatory return to academia for a fourth year of study in an area of interest to the student. A specific problem with the Carrington plan is that it is difficult for most students to decide upon an area of specialization without substantial prior exposure to actual practice. I also suspect that few students would opt to take a third year of specialized courses if they had the opportunity to practice law after two years of study.

Bayless Manning, former Dean of Stanford Law School, has suggested that law school consist of two years of classroom work and one year of apprenticeship.⁷ In effect, he eliminates Dean Sovern's requirement that students return for a fourth year of specialized training.

5. CURRICULUM STUDY PROJECT COMMITTEE, ASSOCIATION OF AMERICAN LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, at 1 (P. Carrington ed. 1971) (AALS 1971 Annual Meeting Proceedings, Part One, Section II).

6. Sovern, *Training Tomorrow's Lawyers: A Response to the Chief Justice's Challenge*, 11 COLUM. J. LAW & SOC. PROB. 72 (1974).

7. Manning, *Law Schools and Lawyer Schools—Two-Tiered Legal Education*, 26 J. LEGAL EDUC. 379 (1974).

Professor Thomas Bergin of the University of Virginia Law School has suggested that law schools have two "tracks."⁸ The J.D. track would be oriented toward the practical aspects of legal practice, while a more specialized Ph.D. track would adhere to a traditional academic format. Currently, many of the foremost law schools offer an advanced doctorate in law. Such programs, however, generally extend two or more years beyond the regular law school curriculum and are not very popular among American law students. Moreover, such J.S.D. programs do not consist of taking courses, but are based upon individual research. Professor Ehrlich and the late Professor Packer of Stanford have suggested that law schools offer various options for different types of students.⁹ Rather than reconciling the theoretical and practical aspects of legal education in a single format, these plans permit the student to choose his own approach.

Justin Stanley, former President of the American Bar Association (ABA), has suggested a two-year law school program, followed by continuing legal education (CLE) under the direction of the bar for the improvement of the practical skills of advocacy.¹⁰

I believe that one's legal education (although not necessarily one's classroom legal education) prior to becoming a full-time practicing attorney should be at least three years in length. Legal education is quite different from one's prior academic experience. Law school must not only administer heavy doses of analytical problems, but also must "bridge the gap" between a broadly based humanistic education (or a specialized education in a foreign field) and one's professional life as a competent lawyer. In my view, a two-year law school program would be inadequate without the development of a highly structured CLE program. Of the several alternative means of monitoring and improving professional fitness,¹¹ the two plans most likely to be adopted, mandatory CLE and certification of specialists, are discussed at length below.

V. CERTIFICATION AND CONTINUING LEGAL EDUCATION

Mandatory CLE has undergone great study, and five states

8. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

9. H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972).

10. Stanley, *Two Years +*, *LEARNING AND THE LAW*, Winter 1977, at 18.

11. These means include voluntary CLE, mandatory CLE, peer review, voluntary self-assessment testing, mandatory periodic examinations, selective monitoring by a bar commission, and certification of specialists.

have adopted mandatory CLE plans. Gee and Jackson raise doubts about the value of mandatory CLE. Optimism about mandatory CLE programs may be unfounded because these programs consist only of an hourly requirement rather than a course requirement. A mandatory hourly requirement could degenerate into spending particular amounts of time at conventions or conferences, thereby serving primarily as a means of obtaining vacation time and a tax deduction. In my view, if CLE programs were operated as an integral part of law schools, with an emphasis on course requirements, effective legal education could occur and the affiliation between law schools and the active bar and bench would grow.

While certification of specialists is more efficient than mandatory CLE, the authors caution that it may be used as an instrument for charging higher legal fees. Specialists in particular fields of law are undoubtedly necessary for "big business" or government agency work. However, I particularly support the concept of specialists in advocacy. In a section stimulated by Chief Justice Burger's fine anglophiliac article, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*,¹² the authors compare the English and American systems of legal education. They conclude that advocacy specialization, not English legal education, accounts for the acknowledged superiority of English advocates. Specialization, unlike legal education at the Inns of Court, which the authors consider inferior to the average American law school,¹³ had its origin early in the development of the English legal system. According to the authors, the following factors contribute to the superiority of English advocates over their American counterparts: first, no English student is compelled to become a courtroom advocate; second, those secondary students with outstanding oral skills are more easily noticed in a smaller country and thus are channeled into becoming barristers; third, the screening process continues during a student's term at the Inns and during pupillage; and, fourth, barristers are hired by solicitors. An advocacy specialization in America would entail a significant revision of the nature of our profession, but I believe that the results would be well worth the effort.

12. 42 FORDHAM L. REV. 227 (1973).

13. Indeed, the Ormrod Committee, formed in 1967 to study legal education in England, has recommended that the training of English lawyers be transferred to the university as in America. REPORT OF THE COMMITTEE ON LEGAL EDUCATION, CMND. No. 4595, at 43-49 (1971).

VI. PROSPECTS FOR CHANGE IN THE ROLE OF LEGAL EDUCATION

The authors conclude that although contemporary legal education is at the height of a reformist mood, major change is not likely. Implementation of a durable educational innovation is unlikely because such reformation requires a widely perceived need for change and an innovating educational institution with great prestige—such as Harvard Law School in the late 1800's. According to surveys conducted by the authors, while student demand has generated clinical courses, the casebook method and traditional classroom techniques continue to fulfill faculty needs and desires. The need for innovation, in short, has not been widely perceived.

According to the authors, law schools generate their own prestige-of-subject ranking, with subjects of greater abstract intellectual difficulty at the top. At the same time, however, the authors found that many students would like more emphasis on the teaching of practical aspects of law, including greater emphasis upon substantive law (although fewer students at top law schools desire more emphasis upon substantive law). The coexistence of these prestige rankings and the apparently dissimilar desire of students for more substantive law courses is illustrative of the "schizophrenia" in legal education, the tension between academia and the practicing bar, between the theoretical and the practical. The authors feel that this tension is due, in part, to the mixed self-perception of the legal profession: are lawyers simply legal technicians or are they social engineers? Does a lawyer best perform his social function simply by serving the needs of his client within the advocacy system or by acting for particular social goals?

In my view, however, the theoretical courses in law school do not transform students into social architects. Rather, I believe that the nature of the attorney, apart from his law school experience, largely controls his social viewpoint and the value that the lawyer places on pro bono publico, government, or private work. I agree with the authors that society needs lawyers with a knowledge of other disciplines, a sense of history, and a profound awareness of ethical questions. I do not foresee, however, that such understanding will be obtained in law school courses, albeit issues of history and ethics should be raised in them.

It is the duty of every lawyer to approach each legal problem not only with his technical tools but also with his knowledge of our society and its legal system. A lawyer must always be conscious of the morality and the social consequences of his action.

To be a lawyer places one in the position of making value judgments. There is a social aspect to each case. An attorney is obligated to act in the best interests of his client, but the question is whether this obligation should include action that would protect socially questionable activities of his client. In my view, the real sin of Watergate is in having a total obliviousness to everything but the immediate needs of one's client. Clinical or traditional courses infused with practical considerations may be utilized to train lawyers to consider both the immediate analytic aspects as well as the larger social context of each case. While law schools cannot train lawyers to be ethical or teach lawyers what values to place on particular cases, practically oriented courses may compel students to confront and consider what type of lawyer's role they may fulfill.

Although law school cannot instill a code of ethics in the student's mind, it can help to make students truly *civil* practitioners. Law schools must teach their students proper preparation that will minimize the cost of litigation and prevent a waste of court time. The propriety and ultimate usefulness of harrassing litigation tactics should be discussed in law school courses. In my view, an advocate gains more for all his clients by endeavoring not to raise irritants in each case. An adversary system operates best when its advocates are most civil. American lawyers are regarded throughout the world as being the most knowledgeable specialists in many substantive fields of law. If American legal educators were to train students in the skills of advocacy as another specialty, and were to compel a thorough consideration of the difficult role of an advocate in the adversary system, we would improve both the competency and public image of the bar.

VII. CONCLUSION

The Gee-Jackson study is excellent. It is full of useful information and can serve as a blueprint for action by legal academicians, bench, and bar. Its message is clear—legal education and the legal profession are at a crossroads, and formalized legal education must be tested in the crucible of today's adversary system. The study's reading and analysis are mandatory if our legal structure is to continue to have the resiliency to withstand the pressures of America's legalistic society.