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A Second Chance: Learning What Law School Never Taught Me

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A Second Chance: Learning What Law School Never Taught Me

Harry Lee Anstead

Harry Anstead has been a judge on the Fourth District Court of Appeal for the State of Florida since 1977, during which time he has served as chief judge and has been nominated for a vacancy on the Florida Supreme Court. He has devoted considerable time and energy to studying and proposing reforms for the Florida judiciary and, as an experienced trial lawyer, has served on the Board of Editors for various Florida Bar publications.

If the New York Times is to be believed, this country's law schools have been under constant criticism for many years for the "narrowness of their focus and the tedium of their teaching methods."¹ Law school enrollment has dropped for the third year in a row. In schools such as Harvard and Stanford, class attendance, participation and interest are reputed to be at a low ebb. Indeed, the prestigious law schools have been described as merely conduits for students to lucrative positions with large law firms rather than institutions for learning where the important issues of law and justice are debated. Mark Kelman, a faculty member at Stanford, is quoted as saying:

For most students, nothing that goes on in law school matters — it's simply a credential. The most common student here is getting none of the real new clinical training, none of the new, financially sophisticated courses, no law and economics, no nothing. What this place offers is a ritzy degree, and there's a legal requirement that you spend three years here to get it.²

Critics have questioned the case law and Socratic methods of teaching, and suggested that the program be cut from three years to two, or that the European system of university education combined with a lengthy internship be substituted (see David Applebaum's arti-

1. David Margolick, *The Trouble With America's Law Schools*, NEW YORK TIMES MAGAZINE, May 22, 1983, at 21.

2. *Id.*

cle, p. 297). Yet the criticism has resulted in little change. To be certain, there has been an increase in clinical programs, an injection of economic theory into the law school curriculum, and some controversial challenges to the traditional foundations of the law and legal education as a means of maintaining the status quo, but the traditional law school program has pretty much remained intact for the last fifty years. In the face of such widespread criticism and radical proposals for reform, it is tempting to get out one's own meat axe. But lack of knowledge of the system precludes me from venturing so far.³ Instead, I offer some personal observations and concerns about the system that have come to trouble me over the years, along with a modest proposal for reevaluation.

When I interview prospective law clerks, I find that the required curriculum at the vast majority of law schools is largely unchanged from my own day, and not varied to any great degree from one law school to the next. The present system of legal education consists of three years of study, including one year of required courses and two years of electives. Required courses are scheduled the first year and usually include real property, contracts, torts, criminal law, civil procedure and legal research and writing. On the other hand, students are free to choose courses during their second and third years among a wide selection of electives. Courses on topics expected to be encountered on the bar examinations are usually favored. Contrary to the claims of many members of the practicing bar that the law schools do not produce graduates with any practical lawyering skills, a good argument could be made that the standard curriculum was especially designed to produce (in one year's time) a general practitioner who could draft a contract, close a property sale, prosecute a personal injury case, and defend a person accused of a crime. It appears that the standard curriculum was developed about the same time that society viewed the typical doctor and lawyer as a general practitioner who could handle the most common problems of the community. As someone who grew to adulthood in the late fifties, I can easily visualize a Norman Rockwell-type image of these characters, the "family" doctor or lawyer.

3. Today, our justice system is also under constant attack. If the quality of medical care in this country were challenged, it would seem appropriate to look to the medical schools for some of the answers. Similarly, should we not start looking at the law schools as a part of both the problem and the solution to many of the issues facing our legal system?

It is difficult to catalog the tremendous changes that have taken place in our society over the last two decades: the size and impact of the government; the size and mobility of our population; the increase in authority and in reliance upon the courts; the decreasing reliance on churches, school, family and community; the rise in crime and the institutionalization of the criminal defense bar; the impact of technology; and on and on and on. All of these changes have brought about a different demand for legal services. And, of course, the shape of the legal community has changed drastically in response to changing demands. Large law firms and specialization are the hallmarks of the day. With all these changes, the role of the general practitioner has declined dramatically.

Of course, law schools have reacted to these changes. Significantly, over the last 10 years or so, there has been a dramatic rise in the number of clinical programs offered at law schools. Many of these programs have resulted from demands by the practicing bar or judges, such as Chief Justice Warren Burger, for more law school training in practical lawyering skills. Law school faculties have gradually, and in some instances, grudgingly, given in to demands initially perceived, perhaps, as anti-intellectual intrusions on faculty control over curriculum. In any case, the scope and variety of elective law school courses have mushroomed. Students have courses available in economics, medical malpractice, products liability, condominium law, multi-national corporations, and dozens of other subjects reflecting current problems or experiences in society. Unfortunately, however, as Professor Kelman notes, it is doubtful whether the average law student is exposed to the updated materials which are offered almost exclusively in elective courses during the second and third years. Most students have little idea of what specific shape their legal careers will take. Yet they are left to choose among the dozens of elective courses offered by most law schools during their second and third years, and the mandatory curriculum remains unchanged. The danger is that students can load up on courses narrowly tailored to particular subjects and come away from law school minimally equipped even to be a "50's-style" general practitioner.

My primary concern is whether the mandatory curriculum, which has remained unchanged for so long, is fundamentally sound. I would submit that it is not and that the required curriculum needs to be reshaped and expanded. In addition, more guidance should be available in the selection of elective courses, with the elective program primarily reserved to serve the special emphasis of a particular school or special

interest of a particular student. By limiting the required curriculum to the first year, the schools have, in effect, established a basic educational standard for a lawyer entering the profession. With students free to choose their courses the last two years, minimum requirements have been transformed into maximum standards for the average student. My suggestion for reform is two-fold: first, there should be a reevaluation of the required curriculum and the development of a modern consensus as to what basic legal knowledge every member of the legal profession should possess; secondly, courses that are designed to transmit that knowledge should be developed and made mandatory during the first two years. The values that our society treasures about its legal system need to be identified more precisely, and, along with the duties and responsibilities of the various roles to be played in the legal community, emphasized in a structured, mandatory law school program.

In constructing the mandatory curriculum, we are not only setting standards, but also controlling a person's initial impression of our legal system. The first impression is critical. In my view, students of the law should be provided with a thorough and comprehensive overview and history of our legal system and its foundations before receiving instruction in more narrow legal subjects such as property or contracts. For example, our legal system is unique and inextricably bound up in our widely respected constitutional system of government. First-year law



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students should be required to study the Constitution, the magical document that serves as the fountainhead for our legal system and the focus of the work of the highest court of the land. Other such fundamental subjects should be identified and required. Many are already in place. When I was a law student, courses in jurisprudence, legal history and philosophy, comparative law and such were regarded as "soft" subjects that would be of little "hard" practical value in the practice of law. Now, after struggling for years with my responsibilities as a lawyer and judge, I have a totally different view of the importance of those topics. These subjects deal with the basic foundation of our legal system. Knowledge and understanding of these subjects is essential to understanding our legal system. It is ironic that the law school, which so jealously guards its obligation to educate rather than "train," would fail to require such fundamental courses.

We do have a definable legal system in this country. Moreover, we have an adversary system of justice that is not only unique and complex, but that relies almost entirely on the assumption that the advocates for both sides in a legal dispute fully understand their responsibilities and carry them out in an equally superior manner. Is it too apparent to be seen that persons who are to be deemed qualified to play important roles in our legal system ought to be required to learn about their responsibilities in that system? In addition to teaching the fundamentals of our system, this should be the foremost obligation of the law schools. Law students should be directly taught the duties and responsibilities of the judges, prosecutors, lawyers and others who operate the system. The present teaching method of touching on the lawyer's various roles incidental to every legal topic taught is simply not doing the job. If anything, this method covers too much territory too thinly, and suffers for lack of focus on role-responsibility. Nowhere else in the world are lawyers and judges vested with such great authority and responsibility and called upon to play such important problem-solving roles. Yet in Europe, for example, much greater emphasis is placed on role-responsibility through the requirement of an extensive two and one-half year externship during which students, in successive six-month periods, work and study under a judge, prosecutor, defense lawyer, or office lawyer before becoming eligible for admission to the bar. There is no reason why many of the fundamental courses, such as criminal law, cannot be reshaped to provide greater emphasis on the prosecutor's and defense lawyer's responsibilities, or why other courses, such as one in the judicial process, cannot be made mandatory, to better prepare lawyers for their responsibilities in the legal community.

I would compare the scope of the problem of developing a mandatory curriculum to that of writing an introductory treatise on the law. For instance, in the preface to his work "The Law," Rene Wormser writes:

This book was born of a suggestion once made by Wendell Wilkie. He felt the need for a book — written by lawyers — which would give some idea of how the law which governs us today came into being: how it had its beginning in ancient civilizations, how it developed, what great personalities helped give it shape and substance; and some of its major past and present problems.

I soon found that the greatest difficulty in organizing such a project was the selection of material. The law spreads out into all sorts of fields (philosophy, history, anthropology, religion, ethics, and many others), and the volume of written material is staggering. So I have selected as I thought best, and I undoubtedly should tender apologies to many jurists, statesmen, and writers who have been excluded because some others seemed more vital to the story.⁴

Indeed, many law schools define their missions in similar terms but fail to deliver in their curriculums:

The primary goal of . . . [law school] is to produce graduates who are skilled and knowledgeable masters of legal doctrines and procedures. In addition, they must have the capacity to perform as counselor and advocate, social engineer, educator, leader, humanist, protector, and creator of basic human rights. Thus, the . . . [law school] attempts to impart not only an appreciation of what the law is and its function in society, but also a sense of what is good law. We believe that the ideal lawyer should possess a keen sensitivity to ethical concerns and an appreciation of the basic values of the western world's traditions and those of the legal profession. He should know where the law has been, where it is going, and how that movement is influenced. She must possess an exceptional sense of relevance, analytical skills, and facilities for written and oral expression. His perspective must be future oriented, but soundly supported by an appreciation of the past, so that in solving problems he can devise prophylactic solutions that will direct society's efforts and resources in constructive channels.⁵

4. R.A. WORMSER, *preface* to THE LAW at vii (1949).

5. Nova University Center for the Study of Law, 1984-85 Bulletin.

I admire this highly aspirational statement but I question whether it is a realistic assessment of today's standard law school curriculum. Most of us view this sort of statement as "puffing." Shouldn't the law schools be held accountable for not coming closer to hitting the mark?

The need for reshaping the mandatory curriculum is critical. Repeatedly I see lawyers and judges who have little understanding of their duties and responsibilities as prosecutors, civil trial lawyers, family lawyers, criminal defense lawyers, appellate lawyers, or trial judges. The prevalence of a mentality of "win at any cost" reflects a basic problem that needs to be addressed at the earliest opportunity in the lawyer's training. I have observed too many lawyers whose respect for their work and their clients was much less than their respect for the dollar or prestige. I have attended conventions of prosecutors where speakers have appeared as if cheerleaders in an adversarial forum, and have been certain that I have heard ghostly cries from the audience of "kill, kill, kill." The "defendant" is the enemy, and anyone who gets in the way of destroying that enemy, including judges and defense lawyers, becomes the enemy. There is a similar problem at the opposite table. I have heard criminal defense groups struggle with the question of how best to serve clients who have conceded some misconduct, or the issue of what to do when a client tells them he is going to take the stand and lie (see Paul Savoy's article, p. 801). Virtually every criminal case tried is now subject to a second trial on the issue of competency of counsel. On my own side of the bar, I have heard some judges say that under the adversarial system they have no responsibility to see that "justice" was done other than to enforce the various rules of procedure. Other, so-called activist judges see themselves as having a greater role and responsibility. Finally, I have known few who would claim that they could adequately define "justice" under our adversarial system.⁶ In my view, the prevalence and nature of these problems reflects a serious defect in our legal education system rather than individual problems with a particular person's character or educational experience. The law schools may not have all the solutions to these concerns, but they should darn sure be posing such basic questions to themselves and their students.

The title to this piece refers to a unique opportunity I had to return to law school after I had become a judge to participate in a master's degree program in the judicial process. Surprisingly, perhaps,

6. Stevens, *Legal Questions in Perspective*, 13 FLA. ST. U.L. REV., 1 (1985).

the program focused on many of the areas that I now find lacking in the required curriculum of the law schools: legal history and philosophy, the relationships between law and economics and the other social sciences, comparative legal studies, federalism, administrative law, and law and medicine. I am indebted to the program and the University of Virginia for a second chance at my formal legal education, and I would encourage others to return to law school and take another crack at some of the subjects that hindsight has made more attractive. I do not feel that I received the maximum benefit of my initial law school experience. Of course, my own ignorance and lack of judgment were partially to blame. But those that went before me, and subsequently laid down a course to follow, also must share the responsibility, just as we must share the responsibility for those who follow us. Most do not get a second chance, and, indeed, with appropriate course of study, most should not need it.