

TRIAL COURTS AND LAW SCHOOLS

An Alliance for Progress

by Robert C. Casad



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PROBABLY everyone who reads this Journal regularly (which I trust includes everyone concerned with the advancement of understanding of our judicial system) is well acquainted with the late Judge Jerome Frank's masterful examination of "myth and reality in American justice," *Courts on Trial*.¹ In that work, Frank lays upon American legal education the principal blame for the perpetuation of the "upper-court myth" (i.e., the notion that appellate courts are the most important elements of the judicial system) and the belief in "legal rule magic." After showing that in reality the trial courts are more important than the upper courts in our system, and the fact-finding process more crucial than the rule-finding, he exposes certain fundamental inadequacies in our library-centered system of legal education insofar as preparing students for the realities of practice is concerned. Judge Frank recommended that law schools become "lawyer schools" in which the library would have an important but not an exaggerated place. Being much impressed by the med-

ical schools, he suggested that the heart of the "lawyer school" be a legal clinic or dispensary which would operate in the legal realm in a manner analogous to medical clinics.

Unfortunately, although he himself cautioned against it, Judge Frank carried the parallel to medical education too far. Unlike a medical clinic, a legal clinic that treats only indigents cannot present a representative pattern of legal problems, and no one has yet been able to suggest a method of setting up a legal clinic to do more than this over the inevitable opposition of the organized bar.

But even if the establishment of a "lawyer school" along the lines Judge Frank proposed cannot be done, some of his ideas could very well be put into practice. One

1. New York: Atheneum Publishers, 1963.

of these that seems eminently feasible is his suggestion that law students be encouraged to spend time in court. Is it not "ridiculous," he asked, "that, with litigation laboratories just around the corner, law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page?"² Litigation is to law what surgery is to medicine in this respect, according to Frank, and when he said "Law students should be given the opportunity to see legal operations,"³ he did not mean operations in the abstract: he meant the legal counterpart to surgical operations—trials.

"Their study of cases, at the veriest minimum, should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts. The cooperation of many judges could easily be enlisted."⁴

At the University of Kansas School of Law we have decided to try to achieve at least Judge Frank's "minimum." It is ridiculous to ignore the potentialities for legal education that lie in our trial courts. It is time we started letting our students see actual "legal operations," *i.e.*, trials, instead of limiting them to dissecting "cadavers," *i.e.*, appellate decisions.

Aided by a grant from the National Council on Legal Clinics we have instituted what we call the Trial Judge Clerkship program, through which twenty-five third-year law students spend seven to eight weeks full-time in a state trial court. During this period the students are assigned to serve as "clerk" to a particular Kansas or Missouri trial court judge. They are expected to assist the judge in such research and drafting jobs as the judge may see fit to assign, but this is not the important feature of the program.

The main job of the student is to observe and understand everything that goes on in

his judge's court. For this reason the co-operating judges are asked not to expect the student to do more than ten to twelve hours work per week on research and drafting projects, and most judges in fact do not ask the clerks to do even that much. The student is expected to familiarize himself with the files on all matters presented in court, or in chambers, and the judge is always willing to help the student understand any problems or procedures the student does not understand. When nothing is happening in his judge's court, the student is expected to spend his time becoming familiar with the operations of other courts and agencies in and around the courthouse. He is required to keep a notebook record of everything he observes, and to send weekly reports to the law school describing his activities and raising problems drawn from his observations that will serve as the basis for future discussion in a seminar that all clerks participate in on their return to the campus.

Seminar in Judicial Administration

This seminar is an essential feature of the program. It is called the Seminar in Judicial Administration. Its aim is to provide an academic focus to relate what the student clerks saw and did to law in general, professional responsibility, and, more specifically, to problems of court administration. It differs from most seminars mainly in that the students have all had extended personal experience with courts and can relate the abstract questions of judicial reform to concrete realities in a way that other students cannot.

Naturally a program that involves locating a large number of students away from the campus during a regular semester causes some administrative difficulties within the law school. Perhaps it is these difficulties that have deterred other law schools from trying Judge Frank's suggestion. To

2. *Ibid.* at 229.

3. *Ibid.* at 233.

4. *Ibid.*

me, however, the discovery of the great and heretofore largely untapped educational potential of our trial judges is well worth the trouble it entailed. We in the law schools have often despaired of the apparent unwillingness of the organized bar to undertake what we have felt is its fair share of the burden of teaching young lawyers competence in the arts and skills of practice and professional responsibility—crucially important subjects that are extremely difficult to handle in a classroom setting. We have been looking to the wrong group. The trial judges are actually more directly affected by inadequacies in instruction in procedural arts and skills and professional responsibility than is the bar association, and they are in a better position to do something about it. Although burdened with crowded dockets, the judges have been quite willing to cooperate in this program. Many of them expressed the belief that the program was beneficial for the judges as well as the students. We hoped, in order that their willingness to cooperate would be assured, that the judges would find the clerkship program beneficial, but we thought the benefit would lie primarily in the research assistance the clerks would render. The judges, however, found it helpful in a way we really did not anticipate. To illustrate, the Honorable David Prager of Topeka, Judge of Division Four, Third Judicial District of Kansas, wrote:

"I know you are interested in knowing what benefit a trial judge can have from the program. I think that I gained a great deal in explaining what our procedures are and why we use the procedures, and I feel that it had the effect of my re-examining some of our procedures with the idea that they could be improved."

This suggests that the program may lead to some improvements in court administration as well as its obvious educational benefits.

By and large our district judges are capable men with a strong sense of calling. The effect on our students of nearly two months of close daily contact with such men was indeed profound. The students all recorded not only a strong personal feeling for the judge they served, but also a heightened respect for the judiciary in general, a sensitivity to and concern for the lawyer's responsibility to the court, and an increased awareness of the importance of problems of judicial administration in the struggle for more effective justice. In several instances, students who had previously felt ambivalence toward the prospect of active law practice reported that their doubts about their calling to the legal profession had been resolved. The following are typical statements made by students in summarizing their experiences:

"The judges were and are much more competent, qualified, and conscientious than I had imagined."

"The judge-clerk relationship was not only a valuable learning tool, but an inspiration I shall never forget."

Experience with this program so far has been so satisfactory as to warrant the suggestion that the key to effective teaching of procedural arts and skills and professional responsibility, which are said to be the most serious deficiencies in American legal education,⁵ may be found in an alliance between trial courts and law schools. The law schools have been unable to solve the problem alone, partly because it has been regarded as an uneconomical use of professional talent to spend much time teaching skills and arts that can be picked up rapidly and probably more effectively once the student enters practice. But the learning process could be easier and shorter if the newly admitted lawyer had previous first-hand experience in courts. Of course, if the student is a mere spectator in court,

5. See Harno, "American Legal Education," 46 A.B.A.J. 845 at 850-851 (1960).

he would not learn much. That is why Judge Frank specified, in the passage quoted above, that the students should be accompanied by law teachers who could explain and raise questions for the students while the trials proceed. But rather than a regular law professor (who probably would rather not be doing it anyway) if the judge himself would do the teaching the student would learn even more effectively. And the judges seem quite willing to serve this role. In two months of such first-hand instruction by the judge himself, the student will learn more than in a much greater period of time spent in a law office. As Judge Prager said of his clerk:

"Al was with us for eight weeks and I am certain the experiences he had during that period would be equivalent to a one year internship with any particular law firm."

The judges can help legal education. The law schools and students can help the judges. The contacts developed through this kind of program can be strengthened and expanded in other mutual undertakings. As one judge wrote in commenting on his experience with the program:

"I personally feel that the program is of value in bringing a closer association between the judiciary of Kansas and the University of Kansas School of Law. I have always felt that the courts have not availed themselves of the intellectual facilities available at your school."

Another way in which programs like the Trial Judge Clerkship can be of benefit to the judiciary is in the contribution that such a program can make to the development of a career judiciary. Winters and Allard have noted:

"... the increasing conviction that once a judge comes to the bench both he and the public should regard his judicial service not as a phase in an advocate's career or a

stepping stone to other public office, but as a life-long commitment to the giving of justice according to the best practice of the judicial craft."⁶

One of the implications of the career judiciary system is that persons tend to be called to the field earlier and stay longer than under our present system. If they are to be called earlier and expected to make a career choice it is essential that those facing this choice have some close experience with judging and judges. Young aspirants to a judicial career could learn what they must face through contacts such as those experienced by our students in the trial judge clerkship program.

It should be noted that Judge Jerome Frank foresaw this feature of the trial court-centered training he recommended. In calling for instruction in the "art" of administering justice, he said:

"Instruction in such an art would include first-hand observation of all that courts, administrative agencies, and legislatures actually do. Such instruction would serve three purposes. First, it would aim to equip future lawyers to cope with courthouse realities, no matter how ugly and socially detrimental some of those realities are; for a lawyer cannot competently represent his clients if he is ignorant of the devices which his adversaries may utilize on behalf of their clients. Second, such instruction would stimulate the contrivance of specific practical means by which existing trial-court techniques can be improved, in order that justice may be judicially administered more in accord with democratic ideals. Third, it would train men to become trial judges."⁷

If instruction of this type can be accomplished without sacrifice of the recognized values of academic law training, it is certainly worth trying. Our experience indicates that through continued effective cooperation with the trial judges, it can be done.

6. *The Courts, the Public and the Law Explosion*, The American Assembly, (Harry Jones, editor), Glenn R. Winters and Robert E. Allard, "Judicial Selection

and Tenure in the United States" (New Jersey: Prentice-Hall, 1965), p. 176.

7. Frank, *op. cit.* at 245.