

From the Bag

Legal Practice & Clinical Programs

THE CHICAGO VIRTUES OF JAMES PARKER HALL

Richard A. Epstein

READING THE BRIEF ESSAY that James Parker Hall wrote in the *Green Bag* over 90 years ago makes me proud to hold the chair at the University of Chicago Law School that bears his name. The essay appeared just after Hall was appointed the first permanent dean of the law school, at the tender age of 33. He was to serve as dean for 24 years, until his early death in 1928. His essay therefore holds more than a passing interest because it represents the thoughts of a new dean in a new law school whose basic program anticipated much of the modern concern with interdisciplinary activities. As befits the *Green Bag*, Hall wrote his essay in an informal style, shorn of the elaborate apparatus that often makes legal scholarship so impenetrable to the outsider and tedious for the expert. The essay expresses a strong point of view, and it shows the kind of intellectual tough-mindedness that has marked the

University of Chicago Law School from its creation.

The topic that Hall set for himself was the role of practice courses in law school. These come in two types. The first are pure practice courses that cover pleading, trial practice and appellate work. The second are more hands on: mock jury trials, or what we might call more generally clinical legal education. Hall takes these up in sequence, and so will I.

PRACTICE COURSES

The basic purpose of practice courses is to make sure that lawyers do not stumble in the course of routine litigation. And to avoid error the lawyer must know a host of detailed legal rules whose details are largely unimportant, in that the times, dates and places that they contain could be altered without destroying the soundness of the underlying institutional

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arrangements. The world will not come to an end if the time allowed for appeal is extended from 60 to 90 days, but woe befalls the lawyer who thinks that 90 days are allowed when only 60 are permitted. The rules are not difficult, but they must be mastered.

The question then arises how these rules of practice ought to be taught. To some degree, they must be included as part of courses in civil procedure that address the function of a complaint, the principles of discovery, the role of summary judgment and the like. But one's impression from Hall's essay is that he is primarily concerned with rules of a smaller bore, and for those rules he takes a typical (and sound) Chicago approach: local option. He instinctively recognizes that all law schools and all students in all law schools need not profit from the same course of study. He therefore concludes that decentralized decisions are the best way to match program with both school and student.

In particular he draws two lines of distinction. First, he thinks that practice courses will function more smoothly in those local law schools whose students are mainly drawn from a single state. Second, he thinks that practice courses are more likely to be of benefit to graduates of law school who start out life as sole practitioners. The students who join law firms on graduation will have experienced lawyers (and today paralegals) to run interference for them, and will be better able to pick up the fine points of legal practice as they gradually gain experience. But even for the national law school, Hall does not wish to ban these courses or regulate their content. Some of these schools' students might become sole practitioners, and others might want to start practice with this information under their

belts. For these students, he thinks that schools "might wisely offer at least elective instruction in practice." Those who want it can have it; others need not.

Hall's words ring even more true today than they did when he wrote them. So many graduates of law school today do not choose conventional legal practice for their career paths. Clerkships aside, many work in legislative or lobbying activities; others become corporate house counsel; still others go into various businesses – venture capital, real estate development – for which knowledge of the fine points of legal practice count for little. And these students might profit not only from the more theoretical courses, but also from interdisciplinary work that stresses statistical analysis, economics, or finance theory – the very sort of thing that was stressed at Chicago from the outset.

This wide dispersion of career paths from law school has had profound effects on the modern legal curriculum, beyond the role of practice courses. The ratio between required and elective courses has had to move sharply in favor of the latter. And the number of elective courses has had to increase as students today struggle to find niches in immigration and refugee law, intellectual property, financial institutions, poverty law, international trade and other areas. At the University of Chicago, many more second and third year courses are being offered today than ever before.¹ The need to master the core disciplines of property, contract, tort, criminal law and the like still remains, even if in most law schools less time is devoted to them than in years past. But the degree of specialization by the third year has become so manifest that modern law schools must supplement their own faculty resources

¹ In the 1997-98 academic year, the University of Chicago Law School offered 121 discrete second and third year courses (including seminars), and the catalog listed 160 such courses. In 1981-82 the Law School offered second and third year students a choice of 82 courses, while the catalog listed 89. The 1949-50 catalog lists 36 second and third year courses.

by relying on skilled practitioners to teach everything from the fine points of federal criminal law to real estate syndication.² The multiple career paths mean, in addition, that standard bar examinations test an ever smaller fraction of what students actually must know when they go into their chosen field of practice. These examinations do not usually cover much of federal law, and certainly do not touch (nor should they touch) such specializations as health, communications or international trade law.

These recent trends strongly suggest that decentralized market mechanisms will play an ever larger part in determining what students do after they graduate from law school, and whether they will be a success in their chosen careers. With the number of options increasing at a dizzying rate, Hall's basic willingness to let students decide these matters for themselves takes on greater wisdom. Frequently, law school faculties do not know enough about the various career paths to advise students on either how to choose the correct path, or how best to prepare for the paths chosen. And neither law school faculties nor bar examiners know enough to coerce students into specific lines of study, once we pass beyond that core of minimum competence which, while increasing in absolute size, has become an ever-smaller portion of the whole.

In this framework, one should take, I think, a somewhat skeptical view of the MacCrate Commission³ recommendations that urge law schools to assume a greater role in teaching professional skills. At some level, it is hard to quarrel with the Commission's wish-list: problem solving, legal analysis and reasoning, legal research, factual investigations, commu-

nications, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognition and resolution of ethical dilemmas. Yet the implementation of these programs at the law school level must overcome a number of obstacles. The first is that law school faculties do not consist of lawyers who are jacks-of-all-trades. Many professors have never been in practice at all, but have spent their time acquiring Ph.D.s either before or after their appointment; and those with full-time practice experience may have left that line of work a generation ago, making their skills wholly obsolete to handle computer technology in the multi-office law firm. We are a motley crew ill-equipped to handle these practice obligations.

The second obstacle is that academic work does not pull most professors in the direction of practice issues. Even those who consult tend to be called upon to deal with broad strategy issues or complex appellate litigation. So long as practitioners have a comparative advantage in practice matters, they would be foolish to hire uninformed academics to teach them what they already know. Far better it is to take advantage of the differences in specialization between the bar and the academy. The successful collaboration allows the strong academic to blend his or her academic sophistication with the industry-specific and problem-solving experience of the skilled and experienced lawyer. These scholars are not hired for their practice skills; nor are they well-equipped to teach practice skills that are more easily learned in the field. It may well be therefore that much of the teaching of these skills is better taught in the field by persons who use them on a daily basis.

2 Between 1949 and the present the ratio of full-time permanent faculty to students at the University of Chicago has remained essentially unchanged, despite the growth in course offerings.

3 The Task Force on Law Schools and the Profession, *NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM* (1992). The Report is named after its chairman, Robert MacCrate.

The third is that specialization in the firm removes many of the details of law office practice from lawyers proper. To be sure, only a lawyer can object to the introduction of evidence at trial, thus preserving a point for appeal. But suppose the issue concerns the coordination of attachments across multiple jurisdictions; or tracking statutes of limitations; or controlling documents in complex litigation; or organizing computer databases; or dealing with expert witnesses and billing issues. It is clear that law firms have to deal with these case and firm management issues. But it is far less clear that lawyers have to deal with all of them without powerful logistical support. At some level technical people may do better in organizing computer systems; MBAs and finance types may know more about accounts payable and accounts receivable; specialized consultants may be needed to organize a consistent marketing plan; and paralegals may understand the mysteries of document and file management. The division of labor is still a potent principle, and the rise of the modern far-flung multi-city or international law firm, as opposed to Hall's more restricted law office, could well require major changes in industrial organization that farm out or delegate huge portions of the legal business to nonlawyers.

Finally, we must come to grips with the fact that law schools no longer train just lawyers. While it is true that virtually all members of the legal profession have graduated from law school, the converse does not follow: many graduates of law school do not practice law, or do not practice it for that long a period of time. For these individuals, certain practice skills recede in importance, and they will choose training that reflects their anticipated career paths. Similarly, those who go into legal practice may know in advance that tax, communications, health, or civil rights law is their chosen field, and will want to emphasize those practice skills that fit

with their chosen specialty. The uses of a legal education continue to get broader, and that trend suggests that any one-size-fits-all approach has less validity now than it had in Hall's day. If he was right about practice courses then for reasons he articulated, then he is even more right, as it were, today for reasons that he could not have anticipated.

MOCK JURIES ☺ CLINICAL EDUCATION

The second portion of Hall's article is one on which I have less confidence. It asks about the benefits of mock jury trials for law students. His objections surely have a real plausibility about them. Staged cases can never have the uncertainty and drama about them found in real litigation. The passions and untruths that lurk in every contested trial are often scrubbed out of any mock proceeding, no matter how carefully witnesses are coached on the fine points of their new roles. But some objections can surely be met. We no longer have to rely solely on law students drawn from a narrow social class to take the role of all witnesses. It is easy to draw on students from colleges, high schools and other departments to fill in the slack; and the natural diversity on most campuses brings a greater degree of realism to any trial. So some of the objections that Hall raises to mock trials have been met effectively by ingenuity, initiative, and plain hard work.

In addition, mock trials are not the only form of practical education that is available to students. Virtually every law school today sports a clinical program which features supervised student lawyers doing legal work in real-life contested cases before real judges. The realism and drama of the cases that come out of the University of Chicago Clinic have none of the flatness of which Hall complained, and I have seen students totally drained by their all-too-*vidid* practical encounters with the law. Similar stories can be

told about the clinical component of every major law school.

Hard questions remain on how clinical programs should be organized; how much credit they should receive; what kind of supervision should be given to student lawyers; and whether litigation should be preferred to transactional work, including appearances before administrative boards in such contentious areas as zoning variances and occupational licenses. At the University of Chicago, our programs traditionally have been devoted to criminal defense, to employment discrimination, to mental health, and to welfare programs. But recently the Law School has approved an experimental transactional clinic, which in cooperation with the Institute for Justice hopes to help start-up and small operations face the variety of contractual, tax, and regulatory barriers through which they must navigate in order to become viable operations.

I do not know what James Parker Hall would have thought about the claims that today's clinical education make on the curricu-

lum of modern law schools. He might well think that academic powers should be concentrated on the theoretical matters that undergird the law; or he might conclude that a well-run clinical program avoids all the narrow vices of the conventional practice course while allowing students to get some feel about the style and pace of litigation. My own guess is that he would come to see the value of both clinical programs and the more souped-up versions of trial practice found everywhere in legal education. I certainly see the benefit of such programs, within limits. But whether he would share in my clear (if qualified) endorsement of these programs, I am confident that he would have insisted, more strongly perhaps than he did in 1905, on the importance of decentralized decisions, both among and within law schools. Friedrich Hayek was a mere tike when Hall wrote his essay. But the implicit distrust of centralized planning is a feature that happily links both of them together, as readers of James Parker Hall's vigorous essay can rediscover for themselves.

Practice Work in Law Schools

James Parker Hall

ONE OF THE DIFFICULTIES confronting the persons yearly honored by invitations to read papers before this Section 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 more effectively than

argument, and, like our theological brethren, the temper of these gatherings is passing from the rigor of doctrinal debate to the genial toleration of the experience meeting. So long as our greatest court decides its most interesting cases by a five to four vote we must admit that reasonable men may differ about some of our questions; and one over which disagreement is certainly reasonable is how far practice should

Hall's essay was originally published at 17 GREEN BAG 528 (1905). The graphic on page 410 followed Hall's essay in the original.

be taught in the law school. Some consideration of this will form the first part of my paper.

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. In 1894, there was published in the minutes of this Section,¹ a table prepared by Frank L. Smith of New York, purporting to show that nearly one-half the points passed upon in ordinary civil cases by the appellate courts of the United States and Canada in 1893 did not involve the merits of the causes, but concerned evidence, pleading, or practice. This table is the basis for the statement referred to. Nearly one-third of the points included in it are in evidence or pleading, regarding the teaching of which there is no general controversy. The thirty-five per cent remaining, however, seemed extraordinarily large, and to test the figures I examined the reports of the highest courts in Massachusetts, New York, Michigan, and Illinois for the year 1902-3, tabulating the practice points and endeavoring carefully to distinguish them from points of substantive law. It appeared that less than ten per cent of practice points were passed upon by these courts; and I strongly suspect that Mr. Smith's system of classification must have been very liberal toward the practice headings.

Really, the case against our practitioners is not nearly so bad as even this, for many practice questions are included by counsel as makeweights in cases where the appeal is really taken on the merits or for delay. That such objections are overruled in an appellate court does not stamp either lawyer as incompetent. They are simply playing all of the

points in the game. In about one-fourth only of the practice points raised in the cases I examined, was the practice followed held bad where an alternative existed, and in part of these the questions must have been doubtful and no more to be settled without litigation than are moot points in substantive law. Badly-drawn statutes and rules of court are responsible for much earnest controversy over points of practice. The proportion of practice points on appeal in which the lawyers might reasonably have been expected to do better, is thus probably somewhere between one and two per cent, a showing much more encouraging than the fifty per cent version. Just how good or bad this is we cannot tell because we have no record of the proportion of errors in practice which do not get into the reports. Granting, however, that mistakes are too numerous to be creditable, how far might law-school instruction reduce them?

In answering this, a distinction should be made. Many rules of practice depend in detail upon no principle, but are arbitrary rules of convenience. Of this class, for instance, are many of those relating to appellate procedure. A variety of things are to be done in a manner and at times that are minutely specified. 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. Now, it is precisely this class of questions which is raised most frequently. About one-third of all practice points concern the one subject of appeal and error; and such topics as judgment, judicial sale, levy and seizure, limitation of actions, replevin, and attachment, all of them bristling with minute statutory regulation, form a considerable part of the remainder. The experienced

¹ 17 AMERICAN BAR ASSN. REPORTS, 367 (1894).

lawyer becomes familiar with the common details of practice in these matters, but even for the tyro the information is plainly written out in the statute or contained in his annotated manual of local practice, and if he be careful and intelligent there is little the law school can give him on such points which he will not readily acquire for himself. The attitude of the law school toward such matters should be that expressed by one of the New York Board of Bar Examiners, when he said before this Section a few years ago: "We know that the legislature is apt to repeal at any time all we know on the subject of pleading and practice, and as we practice with a Code on our desks for ready reference at all times, we will not exact from the student knowledge we do not possess in an eminent degree ourselves."²

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 in the law school 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 methods of doing typical acts. No doubt the best method of teaching what is typical in practice, even in schools whose students come from many states, is to base the instruction upon the practice of one state, as Professor Redfield suggested a few years ago, emphasizing what is essential rather than details. The important elements of common practice, including the steps in the principal forms of action through judgment to execution, with their ordinary incidents, the procedure in the

chief provisional remedies, and the typical procedure of an appeal, may be fairly well covered in the equivalent of two hours of class-work 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. Not only are they likely to be better taught than a number of the courses in substantive law, but there are no valuable elective courses to be substituted for them. 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 had 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. Prob-

² AMERICAN BAR ASSN. REPORTS, 533 (1899).

ably ordinary practice can be learned with less difficulty than most branches of substantive law. It is chiefly statutory, the statutes are abundantly annotated and there are usually excellent local books upon it, its precedents are rarely sought outside the local jurisdiction, its historical roots are of little consequence, it is not a reasoned system based upon complex conceptions of social warfare, it is not related to other branches of law in evolution or by analogy, and its problems conspicuously lack that wealth of circumstance and variety of incident which create so much of the fascination and difficulty of the substantive law. The student who enters an office for a short time after leaving the law school, will not at once have to decide emergency questions of practice on his own responsibility, and a reasonable amount of systematic study in connection with his office work will make him a fair practitioner in those matters in which proficiency can be gained without considerable experience.

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. The unwritten customs of lawyers approve ways of doing things puzzling to one acquainted only with the annotated practice act. 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. Even in those schools whose graduates generally enter offices there are a respectable number who wish to

begin practice for themselves at once, or to whom it is important to have a fair knowledge of practice immediately upon entering an office. Certainly there are circumstances where such knowledge is of substantial advantage at the start, and its ultimate value as compared with another course in substantive law the student can probably determine as well as anyone else. The theory of elective studies in law schools rests largely upon the belief that there may be a reasonable difference of opinion regarding the best courses for the individual needs of students, and that the student may ordinarily be trusted to decide this for himself. There must be many instances where students might reasonably think a course in practice more beneficial to them than certain courses in substantive law, and 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. It is true an elaborate system of such trials has been in existence at the University of Michigan for several years, and has been introduced in some other schools; and it is true that members of the Michigan law faculty for whose judgment I have the highest respect believe in their value. In spite of this, I think one may have serious doubts. 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 time for. 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.

The witnesses are all intelligent young men, somewhat versed in law. There is among them neither the variety of intelligence, training, age, sex, occupation, social condition, or even of character, which marks the ordinary witness

and is the distraction of the trial lawyer. The same is true of the jurors. The mere fact that they are accustomed to legal ways of thinking makes them totally different material from the juries of our courts. Then there is the evidence. If it is merely learned by the witnesses there will be almost no element of reality in their examination. If, as at Michigan, the witnesses actually see the facts to which they testify acted out before them, this is better; but even here there can be no real element of passion, bias, or interest to color their testimony, to induce falsehood and concealment, and to be exposed by cross examination; and there is an additional artificiality in that the witnesses know beforehand that they are to observe what goes on in order to tell of it in court. Such observation must be much less casual and less likely to be mistaken than is that of most real witnesses. Finally, the sense of responsibility on the part of the attorney, which is so great an educational factor in real trials (as in all real life), must be largely lacking in the imitation.

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. The cases that are adapted to mock trials lie in a narrow compass. The classes of facts most difficult to deal with in actual litigation are in general those least suited to the moot court, such as questions of negligence, value, damages, mental states, expert opinion, and the like. 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 rather consist 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 theoretical 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 more difficult matters and those which better repay theoretical study. The trouble with the young lawyer is not that he does not know these things in cold blood, but that he doesn't remember some of them at the right time in the excitement of trying a case. He will lack self-possession more than knowledge, and until he has tried enough cases so that certain processes have become almost habitual he will continue to make simple errors. A ready command of trial procedure is to be gained only like a ready command of the rules of evidence – by constant practice at the real thing. There could be no simpler rule than that requiring an exception to be taken in order to preserve an overruled objection for appeal, and yet a failure to do this was one of the most frequent errors in practice which I found in the reports of the four states which I examined. The lawyers who made this mistake knew better, but they forgot, and it is hardly conceivable that they would have done better had they participated in a few mock jury trials before beginning practice.

These are the reasons why I do not think that a law school of high grade which offers more courses in substantive law than can be taken in three years, should encourage its students to spend any of their school hours in trying mock jury cases. The really difficult things about trial litigation cannot be learned in this way, and the easy ones can be acquired elsewhere with an expenditure of less valuable time. I do not lay any particular stress upon the fact that the great majority of lawyers do practically no trial work. This would be a good reason for making such work elective, but not for omitting it entirely, if we believed that the law school could do work in this direction comparable in value to what it does in substantive law. *GB*