1969

Training the Trial Lawyer

William Burns Lawless
Notre Dame Law School

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The late Robert H. Jackson, distinguished judge and advocate, wrote a law review article as a young man, in which he described an American jury trial with something less than complete adulation. He said:

> . . . Compared with the dignity, simplicity and sincerity of a British trial, the tone of the average American trial is decidedly low. Some of the wide publicity resembles in dignity and intellectual effort the hog calling contests that are popular at Western county fairs. ("Advocacy as a Specialized Career," 7 *New York Law Review* 77, 80 [1929])

THE ART OF ADVOCACY

Although that article was written in 1929, much the same feeling was afoot in the mid-twentieth century when Lloyd Paul Stryker in his book, *The Art of Advocacy,* entitled a chapter "Present Low Estate of Advocacy." Mr. Stryker stated:

> The Art of Advocacy! It is an art indeed, but one which these latter days has fallen into neglect, judging by the lack of enthusiasm evinced for it in many of the law schools as well as in the forum where both its theory and its practice are of such vital moment to those who would essay it as well as to those for whom it is essayed. Advocacy, indeed, in many quarters is looked upon with disfavor and with a feeling not far removed from contempt.

Mr. Justice Arthur T. Vanderbilt, former dean of the New York University Law School, observed when he spoke at the dedication of the Hall named in his honor:

> Advocacy is not a gift of the gods. In its trial as well as in its appellate aspects it involves several distinct arts, each of which must be studied and mastered. Yet no law school in the country so far as I know pays the slightest attention to them. It is blithely assumed with disastrous results that every student is a born Webster or Choate. That the art of advocacy of late years has been declining—indeed, that it has now reached its lowest point—is unquestionably the fact, a fact for the proof of which many witnesses might be called.

Speaking at the dedication of the Stanford Law School in 1950, Mr. Justice Robert Jackson observed that "the unsolved problem of legal education is how to equip the law student for work at the bar of the court. . . ." He told his audience that the greatest opportunity for improvement in the legal profession, and where it is now most vulnerable on the score of performance, is its work in the trial courtroom. "It seems to me, that while the scholarship of the bar has been improving, the art of advocacy has been declining."

Justice Jackson himself was a product of the old apprentice system, never graduated from a law school and yet became one of our outstanding trial lawyers and a highly literate Supreme Court justice. He concluded in a trenchant observation that:

> If the weakness of the apprentice system was to produce advocates without scholarship, the weakness of the law school system is to turn out scholars with no skill at advocacy.

My report for 1968, as the fledgling dean of the Notre Dame Law School, is distinctly more cheerful; I would say that the observations of Mr. Justice Jackson, Lloyd Paul Stryker and Judge Vanderbilt do *not* presently apply in our law school and from reading approximately 50 law school bulletins in the last few months, I would judge that this is no longer true in the leading law schools of the nation. Naturally, I am not prepared to evaluate what other law schools are doing to train lawyers for the trial bar, but I can outline what we are doing at Notre Dame Law School to do so.

Every student who graduates from Notre Dame Law School will have prepared and

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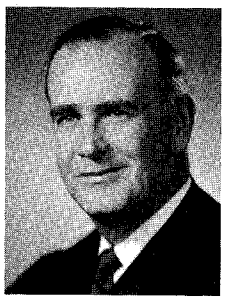

WILLIAM B. LAWLESS, before assuming the post of dean of Notre Dame Law School in 1968, was a justice of the New York Supreme Court.

tried a complete case, civil or criminal, under the supervision of a faculty member and a judge or judges of the federal and state courts of Indiana or Michigan. Further, every student will have briefed and argued a complete appeal.

NOTRE DAME'S CURRICULUM

First-year students at Notre Dame carry the usual load of Torts and Contracts and Property and Procedure. They also carry a first semester intensive course in legal research and brief writing. At the conclusion of the first semester, every student is automatically enrolled in the Moot Court Competition, which requires at least one appellate argument during the course of his first year. The Moot Court Competition is supervised by the students themselves. They conduct about twenty appeals for first year men and those who are successful in the first round advance to second-year competition. The appeals are heard by panels of lawyers and judges drawn from the community. The Moot Court Society offers four separate class sessions during the first year to guide first-year students in the preparation of their briefs and their work with records on appeal. The Moot Court Society itself is drawn from honor students interested in trial work.

In the second year those students who were successful in the Moot Court Competition of the first year advance to a series of arguments, usually three or four during the year. In the third year, four are selected to argue before a panel of three judges, invariably headed by an associate justice of the United States Supreme Court. The panel this year will be presided over by Mr. Justice Thurgood Marshall who will be assisted by Judge Roger Kiley of the Seventh Circuit and Judge Myron H. Bright of the Eighth Circuit.

The briefs of these men in the second and third-year phase of the competition are uniformly excellent. I have not yet heard the final oral arguments, but I am reliably informed of their high quality.

You may wonder what happened to the students who failed to advance in the competition. If they have a special interest in the Moot Court Society, they are invited to assist the Society in sponsoring the program or they may elect to shift their activities to the Legal Aid and Defender Association, which assists local lawyers in preparing for trial and appeal in conjunction with the local O.E.O. program. Some of our finalists in the Notre Dame Moot Court Competition have served as law secretaries to distinguished judges in the United States Supreme Court, the Courts of Appeal and the important state courts throughout the nation. Mr. Justice Brennan has very kindly taken one of our men and Chief Justice Warren selected Paul J. Meyer from Evergreen Park, Illinois for the present term.

I believe that the Notre Dame Moot Court Program today is one of the finest in the nation, and numerous deans and professors from other law schools apparently think so, too, because of the inquiries that come in from other law schools seeking to set up a program similar to the one at Notre Dame.

TRIAL PRACTICE

What I have described up to this point relates to the arguing of appellate cases. Too much time is spent in law school resurrecting appellate briefs and records and the need is really to prepare the young men for the trial court itself—that great pit from which all justice ultimately emerges.

Every one of our students is required in the third year to investigate, prepare and try one complete case. This is arranged in a most in-

genious manner. We have in the Law School in Professor Edward F. Barrett, former professor of law at Fordham University Law School and before that a leading trial lawyer in Buffalo, New York, a highly talented person. Professor Barrett spends virtually his entire year in selecting records on appeal, abridging and rewriting them for student use and setting up a series of 20 to 30 trials for the third-year students. The students are given a set of trial rules which apply in the Court of Hoynes, named after an earlier dean in the Notre Dame Law School. They are given the re-written record from which they may draw their questions. They are told who the witnesses are in their case. The witnesses are usually people in the community whose background is the same as the witness they are to portray. In fact some of the students amusingly told me that Professor Barrett once changed gas stations when a gasoline attendant refused to testify as a gas station mechanic in one of his trials. This man does a remarkable job of making life-like the entire pretrial process.

One afternoon a week he holds a motion term and hears all sorts of appropriate pretrial matters, deciding most from the bench and offering general guidance to the students. To further show the planning that he puts into the program, two students are assigned to the plaintiff and two students to the defendant in each case. The week before they actually come into court to try the case, the four students are assigned to the courtrooms in South Bend to act as judge's secretary, court clerk, and bailiffs, so that they will become acquainted with the courtroom and will have heard one case tried under the rules of Hoyne. The following week they advance to trial. To save court time the jury is selected at Notre Dame Law School on Friday afternoon. The jury is composed of first and second year law students, secretaries, local citizens, friends and suppliers to Professor Barrett's household and other friends of the Law School. On Saturday morning, court convenes promptly at 8:00. The selected jury takes its place in the box in the United States District Courthouse or in the Superior Court of Indiana. One of the local trial judges presides at the trial and the presiding judge has before him his law clerks' summary of the case, appropriate bench notes, proposed rulings of law on expected questions and, indeed, even a proposed charge to the jury. The function of the secretary to the judge is performed by one of the students who will come before the bar the following week on a different case. Hence this experience is particularly helpful to him. For fun, Professor Barrett sometimes includes questions of law on which the trial judge has been reversed on appeal. This is especially true if the reversal was based on his charge to the jury. In such cases, the law student had better be aware of that reversal or his grade will show the consequence. Ordinarily, the trial is concluded at approximately 4:00 on Saturday afternoon, and the case is submitted to the jury. Last week the jury reached its verdict at ten minutes before six and the losing counsel immediately moved to set aside the verdict on the grounds that the jury's verdict was influenced by the late hour, lack of food and anxiety about the weekend. One can see that the students have a fertile imagination, not unlike some practicing lawyers.

Professor Barrett hears motions after trial and requires the successful parties to prepare a judgment roll under his supervision. The case is as close to being lifelike as possible and while the students complain that they spend every free moment in his course in Practice Five, which also meets for lectures twice weekly during one semester of the third year, the students go away believing that they have had an unmatched experience in preparation

for trial work.

To top it off, Professor and Mrs. Barrett invite to Sunday dinner the four lawyers who have argued the case on Saturday to provide a personal critique and analysis.

You may be further interested to know that Professor Peter Thornton of Brooklyn Law School, who formerly gave the Practicing Law Institute course in practice and evidence, is now on our faculty and is assisting Professor Barrett in his unique program.

SECOND YEAR ABROAD PROGRAM

The young men of Notre Dame Law School will, I am confident, do more than convert jury trials into "hog-calling" contests when they take their place at the bar. To further assure this, we have initiated a Second-Year Abroad program whereby any member of the second-year class who wishes to read law in England may be assigned to University College Law Faculty, University of London. The Notre Dame students attend the same course of study with the British students, but meet with a member of our faculty abroad each day in preparation for the English classes, read the American materials which share a development to English rule and are prepared to discuss them in class. We have also arranged for them to have English tutorials wherein in classes of two or three students they meet with the English Professor of Law. In addition, they have a wide choice of seminars which range from English Trial Law to African and Hindu Law. Those interested in trial work may visit the Inns of Court Law School and the Inns of Court themselves. Through the kindness of the Attorney General of England, they are invited to use the facilities and to attend lunch as guests of Gray's Inn. We hope that they will absorb the rich traditions of the British bar—the dignity, simplicity and sincerity to which Mr. Justice Jackson alluded—and will come home ready for the trial obstacle course which Professor Barrett is preparing for them.

I have tried to sketch in broad strokes what is happening in at least one American law school to meet the problem of preparing trial lawyers—a problem so well defined by Lloyd Paul Stryker, Justices Jackson and Vanderbilt, and other leaders of the bar. Although we know that the large law firms may be more interested in hiring law review men to spin the corporate wheels of the nation through the legal maze, we also know that the law meets its moment of truth in the trial court and the real power of the law is brought to bear in the trial of cases and the arguments on appeal.

To create an outstanding trial lawyer, of course, requires many unique components—a keen mind, a quick response, a perceptive sensitivity, an interior toughness, a vision of an American community which has not lost confidence in its courts, or in its judges or in its legal process. To the extent we are humanly able at Notre Dame we will train trial men with these qualities. We will do it in an atmosphere of confidence in the judiciary and complete confidence in a system which may need re-tooling here and there, but which is basically sound.