



Trial practicum integral to first-year law school curriculum

by RUSSELL E. LOVELL, II

First-year law students observe attorney Michael Carroll in action in a federal employment discrimination case

Creative collaboration between the courts and the academy has created a first-year experiential education jewel at the Drake University Law School. The First-Year Trial Practicum (FYTP) is a structured educational experience in which every first-year Drake law student observes an actual jury trial at the Neal and Bea Smith Law Center court room on campus. The FYTP is not a moot court or mock trial experience. The case observed is an *actual* jury trial. Conceptually, it may be helpful to think of the FYTP as the laboratory component to the classroom. It is a unique law school academic enterprise¹ in that it requires the collaboration of the academy *and* the judiciary. The FYTP would be just another law professor's idea gathering dust had the chief judge and the judges of Iowa's Fifth Judicial District failed to envision its educational value or lacked confidence that the dignity and integrity of the trial, and court security, would be preserved.

Although unique, the First-Year Trial Practicum can no longer be characterized as a pilot project. It has been battle-tested over the past nine years. This educational experience, in the foundational first year of legal study, utilizes many lenses, but its focus on the jury trial, to borrow the words of former ABA President Robert J. Grey, recognizes the jury "is one of the most important democratic institutions ever conceived and is still the bedrock of the justice system."²

The FYTP is a comprehensive experiential education, in

contrast to the solo observation experiences in the British pupillage and the post-graduate experiences mandated by a small number of American courts. Its seminar components ensure interactive dialogue among students and faculty and commentary and feedback from lawyers and judges who are observing the same trial. The FYTP's centrality in the Drake first-year curriculum also resonates with recent institutional efforts to strengthen the jury system. The House of Delegates of the American Bar Association adopted the ABA Principles Relating to Juries and Jury Trials in 2005, and the American Judicature Society opened its National Jury Center in 2004 to help develop professional and lay understanding of the jury's integral role in the judicial system.³

Observation of an actual jury trial in a structured educational setting lets first-year Drake Law School students see "law in action." A trial practicum should be included in curriculum reforms.

The exceptional enthusiasm of Drake students and faculty

1. The FYTP is not without precedent in American higher education. The beginning course for future elementary and secondary teachers at many colleges of education is a practicum in which students are placed individually with and observe experienced classroom teachers. The education school practicum is distinct from the familiar student-teaching experience (during the student's final semester), an experience analogous to the clinical (participation) experience afforded law students in their second and third years.

2. James Podgers, *Man On the Go*, ABA JOURNAL 61 (April 2005) (quoting ABA President Robert Grey).

3. See generally, Allan D. Sobel, *Executive Director's Report*, 88 JUDICATURE 153 (Jan.-Feb. 2005).

4. See, e.g., Delaware Supreme Court Rule 52 requiring observation of nine trials and an administrative hearing as a condition of admission to the bar, and South Carolina Rule 403 and Georgia Rule 8-104(D), requiring observation of nine and two trials, respectively, as a condition to court appearance on an individual basis without co-counsel.

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ulty and the judiciary and court personnel for the FYTP educational experience, and the renewed commitment to the jury trial and the democratic values that underlie its dispute resolution role, suggest the FYTP warrants careful consideration by the nation's law schools, and perhaps by bar examiners and courts,⁴ for broad-based adoption.

The opportunity for curricular change is rare,⁵ but now appears upon us. Last October the Harvard Law School faculty approved "sweeping revisions to its first-year curriculum," and its leadership will undoubtedly provide a window of opportunity for curricular reform.⁶ The Harvard revisions clearly reshuffle the deck, with a broadening of the subject matter in the first-year to include courses in comparative-international law, legislation-regulation, and "Problems & Theories." The problem-solving course may include an experiential learning component.⁷

As law schools take this opportunity to reexamine their first-year and required courses, I encourage faculties to review the Drake model and consider inclusion of the Trial Practicum in the first-year experience. The FYTP's observation/study of an actual jury trial appropriately focuses on the penultimate lawyering experience in problem-solving, and its experiential education format will provide the first-year course of study with a new synergy and invaluable pedagogical diversity. It

has greatly enriched the first-year education of Drake law students, and has a lasting positive impact on their understanding and view of lawyers, judges, jurors, litigation as a method of dispute resolution, professionalism, civility, effective advocacy, and the reality of law in action.⁸

How it works

The FYTP is the first leg of Drake Law School's experiential education pyramid: OBSERVATION - SIMULATION - PARTICIPATION. Experiential learning at Drake is not a supplement at the conclusion of law school, but an integral component throughout a student's education.⁹ Since the Spring of 1998, every member of the first-year class has observed an entire jury trial from jury selection through jury verdict in a setting that includes small group discussions led by faculty, seasoned judges, and veteran attorneys (who volunteer one week of their time to observe the trial and meet with students) and post-trial debriefings of trial counsel, judge, and jurors. One week in February is

reserved in the first-year academic calendar for the FYTP, so there is no conflict between the trial and classes.¹⁰ The five-day time commitment permits the inclusion of complex cases and enables students to observe the entire process from jury selection to closing arguments to verdict.

The daily small group discussions, which dissect each day's proceedings, are central to the learning experience. One student aptly described her small group session as "an instant replay, complete with expert commentary and feedback." The small groups meet Monday morning before the arrival of the jurors (for introductions and an overview session on the jury trial) and then daily at the close of the day's proceedings to discuss the evidence and testimony, the judge's rulings, the lawyers' presentations, and the translation of the law by judge and advocate into lay person's terms.

Two debriefing sessions conducted after the trial have proven to be consistent highlights of each FYTP. The first



A small group discussion with Iowa District Court Judge Rob Blink.

5. Last year AALS President and long-time University of Iowa Dean Bill Hines reported that the first-year curriculum of the nation's law schools has remained largely unchanged for half a century. N. William Hines, The President's Message, "Reporting 'Down Under' About U.S. Curriculum Developments," *AALS Newsletter* 1 (April 2005).

The glacial pace of curricular change has not been limited to law schools: "Trying to change a college curriculum is like trying to move a graveyard." Frederick Rudolph, *CURRICULUM: A HISTORY OF THE AMERICAN UNDERGRADUATE COURSE OF STUDY SINCE 1636*. (Jossey Bass Wiley, 1977).

6. Paras D. Bhayani & Javier C. Hernandez, *Law Profs Overhaul 1st Year Courses*, The Harvard Crimson (10/6/2006 On Line Edition).

7. See Memo to the Faculty from Curricular Innovations Committee, dated Sept. 26, 2006. The memorandum states the Problems & Theories course "would allow students to reflect on what they have learned through a systematic treatment of methods of statutory and case analysis, discussion of different theories of law, and work on a complex problem (or problems)

beyond the bounds of any single doctrinal subject, explored through simulation and team work." *Id.* at 4.

8. The selection of a jury trial for observation, over a business or real estate transaction involving legal counsel, is not meant to suggest one is more important than the other. Rather, it reflects the reality that the public has a constitutional right to observe trials. Transactions are typically private and not accessible by the public.

9. The FYTP experience is followed in the second and third years by simulation courses, such as trial advocacy and negotiations, and by clinical and internship courses where the student becomes a student-attorney participating in the actual representation of clients under faculty and attorney supervision.

10. The FYTP is a required course. Students must attend every session. No examination is administered and students receive "Credit/No Credit" rather than a letter grade. Students who miss sessions because of illness must observe the missed sessions on videotape and submit typewritten summary of the proceedings to receive credit.

is held with the lawyers who tried the case; the second is with the jurors. These sessions enable students and faculty to question the lawyers as to their strategies and to inquire of the jurors as to the rationale for their decision and the effectiveness of the lawyers' presentations. Lectures and practice panels—focusing on the key legal and procedural issues and on the litigation strategies and techniques of the lawyers trying the case—and daily informal brown-bag luncheons, where groups of 20 students meet with the presiding judge, also contribute to the educational process.



Drake law students, along with the jury, view the evidence in *State v. Sayles*, a felony child endangerment case, in the state-of-the-art Neal and Bea Smith Law Center courtroom.

Trials observed

Four Trial Practicums have involved criminal trials, tried by 12-person juries, with Iowa district court judges presiding. The prosecution obtained convictions in three—burglary, murder, and felony child endangerment. In the fourth the defendant was acquitted of the charge of armed robbery. In each case students quickly grasped that criminal cases are tragedies and the stakes are large.

Five other Trial Practicums have featured civil trials, tried by eight-person juries. Defense verdicts were achieved, in 2003, with a federal court jury rejecting a claim of disability employment discrimination, and, in 2004, with a state court jury rejecting a damages claim alleging whiplash injuries from an auto accident in which the plaintiff was rear-ended. The plaintiff won a \$10,000

damages judgment in 2000 based on constitutional tort and defamation; with the inclusion of attorney's fees, the case was ultimately settled for \$40,000. In 2006 the plaintiffs won a \$30,000 judgment in a premises liability suit against a pool hall arcade.

Space permits only a brief discussion of three of the cases observed. The trial in *State v. Willis* in February 2001 involved an armed robbery and eyewitness identification was the critical issue in the case, made more complex by the special challenges of cross-racial identification issues. Fireworks started during jury selection when the district court upheld defense counsel's *Batson*-objection, finding the assistant county attorney's explanation for striking the lone black juror was pretextual. The jury acquitted, but students' questions at the juror debriefing brought

out juror misgivings. It proved an excellent teaching moment for the small group sessions that followed. The lesson most drew was the jurors believed it was likely that Willis had committed the robbery, but defense counsel persuaded them they must acquit because guilt had not been proven beyond a reasonable doubt.

The trial in *State v. Sayles* in February 2002 resulted in the conviction of a young man on a charge of felony child endangerment. Everyone agreed, including the experts, that Sayles' two-month old baby had been blinded for life, the victim of shaken baby syndrome. The evidence was all circumstantial and included a powerful computer graphic animation. The defense presented expert testimony that sought to create a 48-72-hour "window of opportunity" as to when a number of caregivers had

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sole access to the baby. A 12-person jury convicted. A number of students were surprised by the guilty verdict; the juror debriefing immediately following the verdict helped the students to understand the evidence the jurors found persuasive and the factors they considered in determining the credibility of witnesses and discrediting the defense expert.

The 2005 case, *Morgan v. Hairy Mary's*, featured two prominent Des Moines trial attorneys and a factual scenario familiar to many students. The plaintiff's arm and wrist were badly broken during a heavy metal concert at a popular bar near the Drake campus. The bar contended the plaintiff was drunk, lost his balance, and broke his arm in a fall to the floor while slam dancing in the mosh pit. Plaintiff contended that his injuries were due to the negligence of the bar in failing to warn patrons of the start of the show and to keep the moshing safe and under control. The jury found both sides equally responsible and awarded damages of \$24,000 for medical expenses, which were cut in half due to plaintiff's fault.

Students saw contrasting advocacy styles in 2005, and how each can be very effective. One advocate might be characterized as charging and relentless; the other as a counter-puncher or matador. The jury debriefing, as always, provided many insights. Many students and faculty thought plaintiff's counsel had made a tactical mistake in a cross-examination that had brought one witness to tears; jurors quickly debunked this concern, observing they had little sympathy for the witness and had not found her credible.

An extraordinary success

The FYTP has been an extraordinary success that Drake believes can and should be replicated at law schools nationwide. Anonymous evaluations by students and feedback from faculty, attorneys and court personnel have uniformly praised both the fair-

ness with which each trial has been conducted and the dynamic learning experience each Practicum has afforded. However, the reader should not underestimate the curriculum reform issue the FYTP poses.

Without question the Drake Law School's longstanding and excellent relationship with the bench and bar has been critical to the success of this curriculum innovation. We worked hand in hand with Iowa district court judges from the outset. We convinced them not only that observation of a jury trial (with professional feedback and commentary) was a worthy educational experience, but also that Drake could conduct a fair, professional jury trial at its on campus court room. After pioneering with the state courts for the first five years, the federal courts participated for the first time in 2003.

Student enthusiasm for the FYTP, measured by anonymous evaluations, has exceeded our highest expectations, with the overall educational experience consistently earning ratings of 4.6 on a 5.0 scale (with 5.0 defined as "excellent"). Students write pages and pages of comments, praising the experience for myriad reasons. A sample of those comments from the 2004 *Reed v. Carter* case follows. *Reed v. Carter* was the most mundane of the eight FYTP cases, an automobile negligence case in which the defense was successful with an argument similar to the "swoop and squat" fraud argument we have seen in State Farm insurance television commercials. Student comments from *Reed v. Carter* are provided because they unquestionably speak to the entire educational experience largely uninfluenced by the drama of the case itself.

It was a great experience and it has made me want to refocus on my class work even more.

An amazing experience for first year law students.

It was truly a great learning experience to see the book work in action.

It was wonderful and very worthwhile. So many things make more sense now that I have seen everything in action.

Educational value

At the beginning of the 20th century Dean Roscoe Pound introduced the concept of "law in action," as distinct from "law in the books."¹¹ He recognized that the application or implementation of law, both caselaw and statute, has a decidedly human dimension. His paper demonstrated the "divergence between legal theory and actual practice." Among many examples, Dean Pound pointed out the "play in the joints" that the jury provides the justice system. Dean Pound also recognized law students came to law school to become lawyers, to enter a profession; they were not graduate students whose academic discipline was law. He fully appreciated the legal knowledge that every lawyer and judge must possess to succeed, but he also knew professional success required a synergy of that knowledge with problem-solving and advocacy and counselling skills.

Dean Pound's vision of the integration of law in the books with law in action is central to the first-year legal educational experience. The jury trial lies at the heart of the American justice system and many believe it is the most challenging work a lawyer can do. It is law in action in its most public forum. Its foundation, of course, is law in the books. The Trial Practicum builds upon that foundation and provides an introduction to law in action.

Trial by jury is the law's most public and democratic forum. It is where those learned in the law, judges and lawyers, work hand-in-hand with 12 lay persons to resolve disputes. For all involved, it is a peak load experience. While it is true 98 percent of all cases settle, the attorney who is fearful or uncertain about trial will achieve a settlement that shortchanges his or her client. Good settlements are achieved by attorneys who do not fear trial, and who have the confidence and competence to try the case, if necessary. The appellate cases in the casebooks studied in the classroom, in most instances, were preceded by a trial. Preparation for the legal profession should at a minimum include observation and study of a jury trial.

11. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

Such a focus could readily include discussion of alternative dispute resolution mechanisms.

The Trial Practicum teaches powerful lessons about proof, facts, evidence, and the lay jurors' role in our judicial system. It brings to life the substantive and procedural law taught in the first year, diversifies the learning theory by which our students are taught, and provides professional role models in action. The structured observation and study of a jury trial is an appropriate counterweight to the study of appellate caselaw throughout the first-year courses (and law school generally). We have also found that first-year students have, through the small group discussions, been able to grasp evidence issues quite well. Service learning research confirms that the educational value of the Trial Practicum will be significantly enhanced when classroom faculty draw upon and interweave the featured FYTP case with law in the books.

The nature of the case chosen, the case selection process, the complete presentation of the case "in person" rather than on a television monitor, and the hands-on educational structure of the classroom component of the Practicum easily distinguish the FYTP from Court TV. Less obvious, but very important, is the wonderful interactive dialogue the Trial Practicum facilitates among the students. There is a perceptible "buzz" during every break as the students discuss the prospective jurors struck by each lawyer from the jury venire, innumerable choices in lawyering strategy, the credibility of particular witnesses and conflicts in eyewitness testimony, the attentiveness of jurors, the elements of proof in a motion for a directed verdict and jury instructions, proof beyond a reasonable doubt as applied to real facts, the harshness of mandatory sentencing laws, the evidence that proved persuasive to the jurors, and on and on. It is a dialogue that continues far beyond the walls of the Smith Law Center at Drake and continues long after the conclusion of

the Trial Practicum, at least throughout the students' law school years. This extraordinary dialogue occurs because of the students' common immersion experience.

Drake Law School Dean David Walker captured the authenticity aspect of the experience when he wrote: "Students observe the behavior of the lawyers toward all participants in the process and consider aspects of civility . . . They understand, they *feel*, the respect owed the Court and the Judge. They can sense the sometimes competing notions of the lawyer as an officer of the court and the lawyer as advocate."

I may be preaching to the choir when I seek to persuade members of the bench and bar about the educational value of the FYTP jury trial observation experience. The larger issue is whether this educational experience should become a central component of the law school curriculum, ensuring a holistic educational experience, or a largely unstructured solo post-graduate experience done on a catch-as-catch-can basis. I am confident there is significant value in post-graduate experiences, but my thesis is they are minimalist educational experiences when contrasted with the Drake FYTP experience.

Post-graduate experiences

The British have a formal trial observation experience, but theirs comes only at the conclusion of all coursework, and only for those lawyers aspiring to become barristers. Observation is included in the post-graduation individualized pupillage component required of those who aspire to become barristers in the UK. It is not experienced by solicitors, the substantial majority of British lawyers.

During 2004–2005 an Iowa State Bar Association committee studied pre-licensing continuing education requirements imposed by state supreme courts in Delaware, South Carolina, and Georgia. Delaware Supreme Court Rule 52(a)(8) requires that candidates for admission to the bar must complete a five-month clerkship after matriculation at law

school and no later than the calendar year after passing the bar examination. Delaware prescribes 30 mostly litigation-related experiences that a candidate must complete during the clerkship, including attendance at six trials and one administrative contested case hearing.

South Carolina and Georgia also impose requirements that a new attorney must meet before he or she can appear in court without the presence of co-counsel. South Carolina Appellate Court Rule 403 requires observation of nine trials and one administrative hearing; these observation experiences can occur after completion of half of law school or after graduation.¹² Georgia Rule 8-104 requires new attorneys to observe two trials and a deposition, mediation, and an appellate argument; three of the five required experiences may be obtained prior to admission to practice (which presumably would include while in law school).¹³

These post-graduate trial observation educational experiences are far less central to the educational enterprise than the FYTP is at Drake. Most come after formal law study has concluded and none contain a classroom or seminar component. As a result, the opportunity to examine and discuss the trial observed is greatly constricted. I submit the FYTP experience substantially improves on these post-graduate efforts both in design and in timing—in short, the centrality of the educational experience. The substantial incorporation of clinical education into the American legal education, rather than as a post-graduate pupillage experience as in Britain, is likely sufficient answer to the timing of the post-graduate alternative. The FYTP is a learning experience that should be foundational, not a third-year elective or post-graduate extracurricular option.¹⁴

12. For an entire listing of the lawyering experiences required for admission to the bar, see <http://courts.delaware.gov/bbe/cc.htm>.

13. State Bar of Georgia and the Commission on Continuing Lawyer Competency, Transition into Law Practice Program, Executive Summary (March 15, 2005), describing the five Mandatory Advocacy Experiences required by Rule 8-104(D).

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Overcoming logistical obstacles

Case volume, or lack thereof, may preclude the FYTP at some law schools. The week of the trial represents only the tip of the iceberg in terms of the preparation that goes into identifying the case and coordinating the week's programming. The greatest challenge is identifying cases that actually will go to trial, that can be tried within one week's time, that can be tried in the FYTP setting with the consent of the litigants and counsel, and that are educationally valuable with a subject matter connection to first-year courses. Approximately 8,200 state court felony and civil case filings on average yield only 114 jury trials and 683 bench trials annually in Polk County, Iowa. We now screen 200 cases each year to identify the case to be included and several backup cases, and the courts have aided our efforts by "over-booking" trials the week of the FYTP. Law schools located in small communities will have to assess carefully whether their courts' case dockets afford a sufficient assurance that viable cases will be regularly available.

There are other obstacles or factors that are resistant to change, but are not insurmountable. Moving a jury trial from the court house to the campus, for example, poses logistical challenges. It requires careful collaboration with court security on the criminal cases where the defendant is in custody, and coordination with court administration on a range of smaller issues, such as compatibility of computer programs to transportation of jurors.

There may be few on-campus court rooms configured to accom-

modate an actual jury trial. Most law schools have court rooms, but they are set up for appellate argument and lack jury boxes. While reconfiguration of the court room may be required to host the trial on campus, the cost of renovation should not be prohibitive. Another option, and one we have explored with the federal court in Des Moines, is to bring our students to the court house to observe the trial.

While the on-campus trial is convenient for students and faculty, and has worked wonderfully at Drake and minimized expense, other schools may prefer to bring their students to the court house for a number of additional reasons. The most important of these is the reduction of ever increasing security concerns because the court house's normal sophisticated security machinery would be employed. Try as we might, the on campus court room setting will not be as secure as the actual court house. Bringing students to the court house will ensure that no cases are eliminated due to security concerns, thereby increasing the pool of cases and the likelihood there will be a case to observe on the FYTP specified date.

There is risk that there will be no case available on the scheduled Practicum dates. This is a reality that can be minimized, but not eliminated. Careful screening of cases and coordination with the judiciary and attorneys reduces this risk. Drake has now completed nine FYTP cases without a miss, but intensive juggling has been required on occasion. In the event no case is available Drake has decided the best contingency plan is to try again—return to classes and reschedule the FYTP for the first jury trial week in April. Obviously, another option would be to show a videotape of an earlier year's case and to base programming on the taped case—that is, conduct small group sessions and seek to secure counsel to return for a "live" debriefing.

A future option may be distance learning through Drake. Drake intends to explore the possibility of developing an on-line FYTP course,

likely for one credit hour, with a package of DVDs of the trial, case and course materials, and opportunities for interactive discussion with Drake law faculty.

The FYTP requires a different skill set than the traditional class room. The professor's role is analogous to that of a producer of a Hollywood show. Most of the work—collaborating with judges and court personnel, screening cases, working with and seeking consent of counsel, coordinating security, obtaining and editing case documents, and recruiting attorneys and judges as small group leaders—is back stage rather than front and center.

The FYTP is Drake's 21st century implementation of legendary Dean Roscoe Pound's early 20th century insight that the application of law has a decidedly human dimension, a distinction between "law in action" and "law in the books." The FYTP and the post-graduate trial observation experiences should not be seen as "either-or" alternatives. I encourage faculties to consider the Trial Practicum as they study first-year and/or required course curricular reform. There is room for both the FYTP and courses such as Harvard has adopted. It should not be seen as a zero sum game. Likewise, the FYTP and post-graduate trial observation significantly improve the educational experience in law school, and will provide the foundation for a much more meaningful post-graduate trial observation experience, should the bar decide to impose such a requirement. ☞

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14. We experimented with the optional approach at Drake. The trials went very smoothly from the perspective of the justice system, but it became quickly apparent the optional approach failed as an educational experience. The most straight-forward of cases take a minimum of two days when tried to a jury. Students can ill afford to cut two or more days of class. It was clear that the jury trial's educational potential could only be unlocked if the law school were to make an academic commitment enabling students to observe the entire trial and participate in seminar-quality discussions about the trial. This necessarily requires a substantial commitment of class time and teaching resources.