

Law Students Are Better Off Participating in Clinical Programs
Administered In-House by the Law Schools than Taking Courses in Agency
and Trust Law. No

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A common complaint of the bench and the bar is that the American law schools no longer seem capable of putting their students on the right track to thinking and writing clearly. That the typical law school curriculum has become a doctrinal wasteland has not helped matters. One cannot make bricks without straw.

The proliferation of clinical and writing programs administered in-house by the law schools is exacerbating the problem, the folks who administer them being no fans of traditional doctrinal instruction. Since the 1960's, they, as well as the statists and internationalists, have been waging war on the *private* legal and equitable relationships that are at the heart and soul of the great Anglo-American legal tradition, namely the agency, the contract, the trust, and the bundle of rights and correlative duties we call property. Agency and Trusts are no longer required courses in most law schools. The Property course is a highly politicized shell of its former self. Even Contracts is under siege at the Harvard Law School. Indoctrination is winning the day; doctrine is in full retreat. This is the gist of my NAS essay *Bricks without Straw: The Sorry State of American Legal Education*.

David French, Esq. (the author of a companion piece) and I agree that these clinical programs have an unfortunate criminal/political bias. There are not a lot of business clinics around. We also agree that no law school can make a person a complete lawyer. That enviable status can only come with time and lots of experience.

We part ways, however, when it comes to our perceptions of “the relative effectiveness of additional substantive law classes (such as trusts...) versus the flawed clinics we have now,” his words. Atty. French does not share my reverence for the traditional core curriculum, and I his enthusiasm for in-house clinics.

My almost thirty years of experience in academia has convinced me that the logistical, financial, practical and political barriers to setting up and administering

serious in-house business clinics will continue to be insurmountable, with the occasional transitory exception. This country has way too many law students and way too few experienced lawyers who would be willing to devote the requisite time and effort over the long haul to such a labor of love. “The failure of the modern American law school to make an adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.”¹ That was written back in 1921 in a Carnegie Foundation publication. Nothing has changed and nothing is going to change, unless the legal community adopts something akin to the German *Referendariat*, a serious, methodical, and labor-intensive *post-law school* linking of doctrinal and practical instruction lasting two additional years.

But first things first: There are both practical and cultural reasons why American law teachers need to get back to teaching the basics. I will explain both by analogizing law teaching to the teaching of medicine and the teaching of the language, literature, and history of the English.

Beginning with the practical: These critical common law and equitable relationships comprise the law’s basic anatomy. Together they comprise the foundation upon which all statutory and regulatory regimes are constructed. The typical mutual fund structure, for example, is an entrusted basket of securities nestled in a collection of agencies and contracts. Just as a newly-minted physician lacking a basic knowledge of the circulatory and nervous systems will have a tough time mastering the art of diagnosis, so also will a newly-minted lawyer lacking a basic knowledge of the agency and trust relationships have a tough time mastering the art of legal diagnosis. It is all about connecting the dots. Completing Contracts does not a complete lawyer make, just as knowledge of the human skeleton does not a complete physician make.

To be sure, the inability of newly-minted lawyers to think and write clearly is rooted in the deficiencies of the American K-16 experience, as well as in society’s general cultural debasement. That law schools no longer mandate instruction in critical private legal and equitable relationships, however, hasn’t helped matters any. One cannot make bricks without straw. For a more detailed discussion of the unfortunate *practical* implications of this evisceration of the traditional law school curriculum, see my law review article: *The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School*.²

Turning now to the unfortunate *cultural* implications of the academy’s marginalization of these critical private legal and equitable relationships: Imagine a faculty of English language and literature professors. It has accepted into its programs candidates who are unable to think and write clearly. Upon due deliberation, it votes to eliminate courses in Chaucer, Shakespeare, and the King James Bible in order to make room for more remedial and creative writing clinics.

¹ Alfred Zantinger Reed, Training for the Public Profession of the Law 281 (1921).

² Charles E. Rounds, Jr., The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, 18 Regent Univ. L. Rev. 251 (2006).

First, this curricular reform is not going to solve the thinking and writing problem. One cannot make bricks without straw. Second, this lawyer does not need to lecture NAS members on the unfortunate cultural implications of such a misguided reform effort. The cultural implications of marginalizing Agency and Trusts in the American law school curriculum, particularly their fiduciary aspects, are remarkably similar and just as distressing. This is because the agency is enforced in equity and the trust is a creature of equity. In fact, the trust is said to be the most important of equity's exploits.

What, then, is equity and why, as a cultural matter, should a non-lawyer care about its pedagogical marginalization? Equity is a system of humanizing glosses on the common law that was developed over time by the English Court of Chancery, and memorialized by its scribes. Equity, not to be confused with *æquitas* in the Roman Law, which was merely a frame of mind in dealing with legal questions, has been the heart, soul, and conscience of the common law tradition since the Middle Ages:

[I]n the rough days of the thirteenth century, a plaintiff was often unable to obtain a remedy in the...[English]... common law courts, even when they should have had one for him, owing to the strength of the defendant, who would defy the court or intimidate the jury. Either deficiency of remedy or failure to administer it was a ground for petition to the King in Council to exercise his extraordinary judicial powers. A custom developed of referring certain classes of these petitions to the Chancellor, and this custom was confirmed by an order of Edward II in 1349. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a Court of Chancery as an institution independent of the King and his Council.³

Why has equity been marginalized in the American law school curriculum? For many of the same reasons that Georgetown's English majors are no longer required to take Shakespeare. And why should right-thinking English professors care about the sorry state of American *legal* education? If only because a good case can be made that "[t]he genealogy of modern Standard English goes back to Chancery, not Chaucer."⁴

³ P. V. Baker & P. St. J. Langan, *Snell's Principles of Equity* 8 (28th ed., 1982); *see also* Bogert, *Trusts and trustees* § 3.

⁴ David Crystal, *The Cambridge Encyclopedia of English Language* 41 (1982).