

Good Vision, Overstated Criticism

A Comment on
“Is ‘Thinking Like a Lawyer’ Really What We Want To Teach?”

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Dean Nancy Rapoport describes what she sees as the current state of legal education, finds it seriously wanting, and begins a sketch of how it should be improved. She writes that legal education, by and large, seeks to train law students to “think like a lawyer” rather than to “be” lawyers.

Dean Rapoport’s definition of what it means to “think like a lawyer” was a little hard for me to discern. At one point, she says, “thinking like a lawyer” means “the ability to analyze critically and convey that analysis cogently”² At another point, she gives a seemingly broader definition: “thinking like a lawyer” is “dissecting legal arguments, analyzing the available rules, and constructing cogent statements about what the law is (or should be)”³ And in another passage she adopts an even broader meaning: finding a “problem or conflict in the law, [criticizing] how others have dealt with the problem, and propos[ing] a solution.”⁴ Nevertheless, she does exclude the following from her definition: (1) writing effectively, (2) “understanding how other fields relate to law and to solving of complex problems,” (3) “understanding the non-legal reasons why people choose to take certain actions or behave in certain ways,” (4) the lawyer’s role in solving problems, (5) a “grounding in economics, statistics, accounting, psychology, sociology, and history,” (6) “speak[ing] well,” (7) “think[ing] strategically,” (8) “work[ing] in teams” and (9) “relat[ing] to other people.”⁵

Dean Rapoport’s thought-provoking paper raises interesting factual and normative issues. Some questions of fact: Do law schools believe that training students to “think like lawyers” is their sole mission? If so, do they define “thinking like lawyers” rather narrowly, as Dean Rapoport seems to do, or do they adopt a broader definition, including some of the items she

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2. Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ALWD 91, 102 (2002).

3. *Id.* at 92.

4. *Id.* at 101.

5. *Id.* at 102-03.

excludes? If law schools do not view their sole mission as training to “think like lawyers” (however broadly or narrowly defined) what else do they seek to do?

The normative issues include: What should the modern law school curriculum be? Should it contain the full list of Dean Rapoport’s now excluded items? If so, how should these competencies best be taught? Should all law schools have the same curricula, or should they vary among schools, depending on the talents and career prospects for its students? (For example, should the curriculum of a school that sends a large percentage of its graduates to clerkships and big firm positions differ from a school that sends a large percentage of its graduates into small firm and local government positions?)

I have no particular expertise in addressing the factual issues. In thirty years in legal education, I have taught at only two law schools. Unless one has been on the faculty of a law school, it is very difficult to know what the curriculum entails. And even then, law faculty often only have a very general sense of what their colleagues are actually doing in their courses. (For example, how much economic theory does professor X incorporate in his contracts course? How much “strategic thinking” is taught in the corporate reorganizations course? How much behavioral psychology is included in the children and the law offering?) Of course, as a dean for twenty years, I have looked at hundreds of law school catalogs and law school magazines, attended dozens of meetings at which curricular issues are discussed, and had many informal conversations with colleague deans on curricular matters. Still, my comments about the facts of current legal education must remain, by any reasonable social science standard, impressionistic and anecdotal.

That said, I would be very surprised if the prevailing view of law professors is that the sole function of legal education is training students to “think like a lawyer.” Of course, law faculties would say this is certainly a *part* of what legal education does. But, even so, they would probably give the phrase a more expansive definition than Dean Rapoport does. Perhaps something along the following lines:

“Thinking like a lawyer” involves the interpretation and use of legal materials (cases, statutes, administrative orders, private contracts, etc.) to serve clients’ interests. Sometimes serving those interests involves using legal knowledge for counseling, sometimes for negotiation, sometimes for lobbying for a change in a relevant statute, sometimes for litigation. Moreover, in certain fora (an appellate court or a legislative body), “thinking like a lawyer” requires normative arguments, which involve considerations of such values as efficiency, corrective justice, and wealth distribution.

The first-year curriculum evidences this broader interpretation. Classroom exercises call for students to serve client’s interests by analyzing

hypothetical problems and determining how best to proceed (e.g., What are the best arguments for a client? What are the client's chances of prevailing on those arguments? What should the client be willing to settle for?) The curriculum also often calls for students to bring other disciplines to bear to assess the soundness of a legal rule. (Is a tort rule efficient? Does it serve corrective justice? Which of these two values should be paramount where they conflict?)

From my perspective, there is a much better fit than Dean Rapoport sees between the classroom experience in the first year and the course examinations. Consider her use of the analogy to piano playing. To me, the following is a closer analogy to what transpires in first-year legal education: Piano instruction involves the study of the musical texts to learn how to translate them to finger strokes on the keyboard. To be sure, understanding the difference between various types of music and analysis of great works is a part of the instruction. But in almost all class sessions, students would be asked to play examples of the different styles that they are studying from scores that they had not seen before. The analysis of the various works would be aimed at helping them to interpret the music creatively and thus play it better. For such a course, a final that asked the students to play a previously unseen piece from one of the styles that they studied would be a perfectly appropriate test of their skill as competent piano players.

Even if most legal educators would adopt a broader definition of "thinking like a lawyer"—one that involves a lot of "doing" through classroom hypotheticals—I doubt that they would say that this is the law school's sole mission. They would agree, as Dean Rapoport urges, that the schools have a responsibility to train students to "do" law. And, again, the curricula evidence law schools' acknowledgment of this responsibility. There are ever-expanding opportunities for students to study and actually to perform the full range of activities that Dean Rapoport suggests should be included in the law school curriculum. The proliferation of clinical courses, both simulated and those involving live clients, has been remarkable. The courses go far beyond the traditional "legal aid" settings to include such topics as business planning, immigration, and taxation. Clinical courses regularly allow students to work in groups. They also provide instruction in the assessment of clients' needs and motivations, and they provide opportunities for strategic thinking and problem solving. Further, the relevance of other disciplines is widely recognized. Thus, courses in subjects such as accounting for lawyers, social science methodology in law, and a string of "law and . . ." offerings are common.

During their three years of law school, many students, at least in urban institutions like mine, work as legal professionals. They are exposed to what it means to be a practicing lawyer in a fairly intensive way. First, the law school's own internship and externship programs give students an opportunity to work for public interest firms, public agencies, and judges for credit. Second, there are ample opportunities for students to work full time in

the summers and part time during the school year for legal employers. It would be interesting indeed to know how many “apprentice hours” a typical student has accumulated at graduation. (Students’ opportunities for such experiences outside the law school building might, in fact, be a relevant consideration in curricular design.)

In sum, from what I know of legal education at the beginning of this century, I think legal academics would respond to Dean Rapoport’s description along the following lines:

You are not describing legal education as we know it. First, while teaching students to “think like lawyers” is certainly part of what we do, we have a broader understanding of what this means than you do. Second, we don’t believe that training students to “think like lawyers” is all that we should do. We understand ourselves to be educating students to be competent, ethical professionals who can “do” law and our curricula increasingly recognizes that obligation.

But if Dean Rapoport’s factual report is perhaps not entirely an accurate account of legal education today, we can still welcome the wisdom of her recommendations. If her recommendations are sound, we can embrace them, even if for most, if not all, schools they amount to an exhortation to keep doing what we have already begun to do in significant ways.

I certainly agree with the general thrust of her positive program. We should do most of the things that she recommends, because, as I have stated, most law faculty agree that we have a responsibility to train competent, ethical professionals who can serve their client’s needs effectively and who can speak intelligently about the strengths and opportunities for the legal system. And Dean Rapoport has, generally, a good list of the competencies that are necessary for these tasks. (One skepticism about her recommendations: I doubt that law schools should attempt to provide their students with “the classic liberal education that represented Nineteenth Century high-quality education.”⁶)

One is therefore interested to see what will come next in her work. For the chapter we have ends with the very question that should help us understand whether the methods that I believe legal education has undertaken are the appropriate response to Dean Rapoport’s exhortation. She is concerned with what we should do to prepare our students to be lawyers and not just think like lawyers. It will be interesting to compare her forthcoming recommendations to what I perceive to be well underway in legal education.

6. Rapoport, *supra* n. 2, at 102.