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Jonathan H. Oberman

Benjamin N. Cardozo School of Law, joberman3@gmail.com

Ekow N. Yankah

Benjamin N. Cardozo School of Law, yankah@yu.edu

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The Trials of Clinical Education

JONATHAN H. OBERMAN AND EKOW N. YANKAH

The authors are professors at the Cardozo School of Law, New York City.

Law schools have their critics these days. Some want them to do less and advocate lopping a year off the experience. Others want them to do more and expect clinics to pick up society's slack by assisting the elderly, representing immigrants, and even defending people trying to stave off imprisonment. While clinical education can be invaluable to students, it faces real challenges in avoiding the demoralization of participants and the dashing of unrealistic expectations held by the community at large. But before turning to these important issues, a story.

It was an ordinary calendar call, or so it was supposed to be.

The case had been adjourned for what, in New York Criminal Court, is labeled "Response and Decision," the date on which the State, embodied by the prosecutor, files a response to a defense motion, and the court—all too often in a matter of seconds and, at most, minutes—ostensibly reads both sets of motion papers and renders a decision. In general, students in the Cardozo Law School Criminal Defense Clinic experience this calendar call with some degree of dissonance. The speed with which the judge scans the papers grates against their notion of thoughtful jurisprudence as the normative standard of decision making.

Students in the Criminal Defense Clinic come by that expectation honestly. They are, after all, third-year law students, exhaustively schooled in the careful exegesis of Supreme Court and other significant appellate opinions. Whatever students

have learned in the classroom about the ways in which ideology, theory, and policy shape a judge's views, they remain committed to their sense that judges make decisions carefully, grounding them in precedent and facts. The court decisions read, studied, briefed, and discussed in the classroom assume a dimension of reasonableness even if students ultimately disagree with them. The clinic seminar and weekly (sometimes daily) supervision sessions only reinforce the importance of textual dissection and exhaustive factual preparation.

Clinics then focus these skills on specific cases and particular clients' needs. It is in a clinic that many a law student learns how to hone the doctrinal tools from the classroom to the demands of a particular jurisdiction with a particular set of laws. Clinics teach the crucial ins and outs of daily practice, both the mundane acts of managing a filing and the more subtle and intricate art of interviewing a client and eliciting the best and worst facts while cultivating a trial narrative. Lastly, and perhaps most importantly, clinics often empower young law students with the knowledge of what the sometimes staid exercise of mastering doctrine can accomplish. There is little like the experience of helping someone in anxious need—a person desperate to secure unemployment insurance, an immigrant who needs assistance or a family balancing an aging loved one's self-control with the need for guardianship. While students' understanding of the



appellate decisions and statutes discussed in classrooms changes over time, any particular text remains static. In the clinical setting, the analytical process is necessarily more dynamic. It entails continuous reassessment of the case, as the client's understanding of his or her needs and the case's legal posture will often change before final resolution.

Theory and Reality

The appearance for Response and Decision generally comes a few weeks after a client's arraignment, when a student first meets and interviews the client. The client has often been in custody for 18–24 hours at that point. The student will have read the charging document, discussed it with clinical faculty, and then advised the client on any extended plea offers. Perhaps most critically, the student will have made a bail application to secure the client's release on recognizance, nonfinancial conditions, or a modest amount of cash or bond that the client or the client's family can, hopefully, afford. In the weeks that follow, the student spends countless hours meeting with the client and participates in weekly supervision sessions to discuss, plan, and prepare the case. The student conducts a factual investigation,

researches the relevant legal issues (both as to the substantive crimes charged and constitutional questions surrounding evidence collection), then drafts, revises, and finally files the appropriate motions.

On the day of our story, the judge glanced at the motion the student had filed, the product of many hours of work. The case was called. The judge glanced at the papers handed to her by the court officer. In no more than 15 seconds, without reading the papers so carefully prepared by the student, the judge ordered all the requested pretrial hearings. Glancing at the student, the judge asked:

"Would you like to know how I am ruling on your motion to dismiss on legal sufficiency grounds?"

"Yes, your Honor," the student answered.

"That motion is denied. It's a factual matter for the jury and your motion is frivolous."

Supervision had prepared the student for many different possible outcomes, but not this. The student's nervous glance at me made clear just how uncomfortable she was with the substance of what was said and the judge's dismissive manner.

Tentatively at first, but then with growing strength, the student began: "Why 'frivolous,' Your Honor, and why 'a matter of

fact?" In *People v. Blair* and *People v. Cruz*, on facts all but identical to those in this case, the court made clear that the existing factual allegations are insufficient as a matter of law." The courtroom became quiet—a particular kind of quiet when the hum of front-row conversations among the attorneys is silenced by their awareness that something unusual is taking place in the well of the courtroom. The court personnel, both clerks and court officers, stopped what they were doing to watch and listen.

"Those decisions don't interest me. Your motion is denied."

"But, Your Honor," the student persisted, "those decisions are controlling."

"Your motion is denied and you may not file a motion like this again without receiving prior approval of the court. I am from the Commercial Part. This is how things are done there."

As extensive as the work had been to prepare the student, it had left her unprepared for the moment when the judge pushed her case off the rails. This moment, and others like it, requires that the supervising clinician make a choice—to intervene or not. This was not a simulation but a case with a client exposed to real-world consequences. Challenging moments like this present the obvious competing concerns of teaching and representation. They starkly highlight the tension between the theory of what students learn in the classroom and the practice of life consequences absorbed, not by the student but by the client. A student now faced an important lesson, among the last learned by a law student or the first by an attorney. But this lesson seemed to betray all the ones that came before.

The student looked at her instructor and whispered, "This isn't the Commercial Part, right? He's got Sixth Amendment rights, right?"

"Tell her," the instructor said, tilting his head toward the judge.

And the student did. Slowly, quietly, but firmly, in a civil tone, she questioned on what authority the court could order preclearance for a motion, citing the statutory right to file motions unencumbered by a judge's prefiling approval. She gently suggested that those accused of crimes enjoy Sixth Amendment rights and protections that may not attach in the commercial court in which the judge had previously presided. Finally, she reminded the judge that, as her client's lawyer, she was duty-bound by the state and federal constitutions and Rules of Professional Conduct to file motions on her client's behalf. And then she was silent. Her instructor had nothing to add.

"Your motion is denied. The case is adjourned for hearing and trial. Step out of the well."

Many students join the Criminal Defense Clinic certain in their conviction to become public defenders or prosecutors. Others hope that the year-long immersion will help them clarify or discover an area of practice that engages them intellectually and emotionally. Some students complete the year-long

experience committed to their sense of calling. Others spend nine months in criminal court and then begin their professional lives as judicial clerks or associates at private firms. But almost without fail, all come away rejuvenated by the palpable sense that they have made a difference in people's lives, which was perhaps the best reason they'd had for choosing to go to law school.

Hard Lessons

It was hard, on that Response and Decision day, for the student to understand that she had done excellent work as a lawyer, even though she'd lost her motion. "We were right," the student said, as she looked to her instructor for confirmation. Yes, the substantive claim was right and the lawyering had been impeccable, yet we and the client had lost. And that, too, is an important teaching lesson that becomes part of the learning process.

To be sure, clinical students incorporate experience-based learning and become practitioners in ways that their peers who remain exclusively in the classroom do not. That hardly means, however, that the enterprise of clinical education does not depend on and is not organically joined to the academic grounding and analytical skills provided by podium-based learning. Nor does it mean that clinical students exclusively become practitioners during their clinical experience. They practice, to be sure, but the experience is significantly educational too. Predicated on a model of reflective lawyering, the clinical experience self-consciously seeks to meet dual goals, serving clients while also maximally teaching students best practices and problem-solving skills.

Students plan, prepare, act, and then are required to reflect on what they have done with an intention of learning from what they did or didn't achieve. The reflection extends beyond the pragmatic and strategic questions that inform practice, to the underlying theory, values, and assumptions on which the student's and clinician's choices were based. In short, the effort in clinical education is, at every moment, to simultaneously integrate participation in and analysis of an activity, to use practice to reflect back on theory, and to understand how to think more clearly in order to practice at a higher level. Clinicians insist that this process makes for good lawyering and that good lawyering matters. We encourage students to question everything and everyone, to insist—civilly and professionally—that answers be grounded in case law or statute, to be suspicious of and challenge those who cannot satisfy that relatively basic demand. In some sense, we suggest they become the Socratic teachers they have suffered in their classrooms. And then we appear for Response and Decision.

The everyday of law can startle students, from the tedium sometimes necessary to command a case to the suddenness with which a client's story or needs may change to the roughness with

which a ruling can be handed down. The lesson, taken too far, can disillusion a student, particularly in contrast to the “pristine” education that preceded it. For some students, such moments too quickly give rise to the cynicism they see all around them—to a belief that their legal education, and particularly their time in the classroom, is meaningless to the real world.

Indeed, this disillusion can deepen. One of the dangers of clinical education is that, as the incredible value of clinics has been recognized, the demands and aspirations of what clinics can accomplish has grown. In too many places, the fact that law students can do so much to help those who would otherwise be without legal representation has become a convenient excuse to leave deeper structural changes unaddressed. While it is a tremendous benefit to the law student and the public alike for students to help protect the elderly and their families in guardianship, support victims of domestic abuse, help small businesses incorporate, and represent the indigent accused of a crime, clinics are often looked to patch gaping holes in our civic legal services.

In turn, students often become frustrated after doing their best work and taking the clinic’s mission as far as possible only to find their client’s underlying problems remain acute and that deeper structural problems persist. Part of this is an important

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lesson in the limits of law. Even quintessentially legal controversies—New York City’s “stop and frisk” policy comes immediately to mind—are ultimately addressed on a host of different fronts. Law plays only one part, along with politics, media, civic conversation, and community advocacy. Still, some of this frustration is the increasing reliance on legal clinics to provide and supplement civic needs that have been systematically neglected.

The threat is that, against the backdrop of a world deeply cynical about legal education, these frustrations can lead a student to buy in to the idea that her education has been a failure. Of course, it is fair for students both to realize where law schools need improvement and to intelligently critique their own

experience. Indeed, the growth of clinics over the past generation has been motivated by law students and lawyers recognizing the need for law schools to offer more substantive skills trainings. What worries more deeply is the danger that students in the very early stage of their career can become discouraged about blending the knowledge so deeply ingrained in the classroom with the sharpness and skill hard-won in their clinics. It would be as though a young doctor lost faith in the hard-won biology she mastered, after applying her learning but losing a patient. Seeing the young lawyer struggle with the judge dismissing her well-founded claims, her teachers still know how important it is to stay true to both facets of her education.

Bettering Legal Education

Starting from the sensible observation that law schools must continue to provide training that better prepares students for the writing and work of being a lawyer, the very work for which clinics are invaluable, too many critics then indulge the claim that law schools have done nothing to fulfill this charge. And when the claim shifts from the critical (law schools must do better) to the contemptuous (law schools are nearly useless at properly training lawyers), the remedies take a bizarre turn. Instead of focusing on how to make law schools better, those who become cynical about the project of law school quickly decide that the answer is to simply make law schools less: fewer offerings; courses dominated by “practical modules”; and, ultimately, simply less of it altogether, as evidenced by the current groundswell to cut law school to two years. Ironically, these solutions answer the concern about the gap between successful integration of theory and practice by simply deciding to cut them entirely apart.

It is that spirit—the dismissiveness of the grand project of law and its countless iterations—from judge to legislature, from prosecutor to transactional titan, and from public service providers to environmental regulator, that in many ways remains a challenge for clinical training. We must encourage students to resist the easy trope that aims to deflate them. This task starts in our professional “homes,” so to speak. And, of course, it means restoring, as best we can, their faith in what law can look like though it has been bruised by a slipshod ruling that slights the care in their work and the fates of their clients or the disappointment of realizing that even their best lawyering can fail to meet the client’s other serious needs. Because law is powerful, rich, and complex, lawyers and our legal system can only flourish when lawyers are trained to think deeply about the practices and principles behind everyday legal skills. This should be the first commitment of our society and, reciprocally, our law school classroom and clinical training. ■