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Legal Education: Nemesis or Ally of Social Movements?

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Abstract

There is much in legal education which contributes to lawyering practices that are fundamentally at odds with the formation of social movements. These practices include the "individualization" of client problems; the reshaping of the realities of clients' lives into legal categories or boxes; the commitment to instrumentalism (that is, to securing a favourable legal result); and lawyer domination and control and the correlates of client silence and passivity. The genesis for these features of dominant lawyering practices can be traced, at least in part, to legal education. More specifically, legal education's emphasis upon doctrinal analysis, its tendency to trade upon an existing stock of legal categories or stories, and the relative inattention paid to fundamental critiques of the status quo contribute to these lawyering practices.

LEGAL EDUCATION: NEMESIS OR ALLY OF SOCIAL MOVEMENTS?©

BY JANET E. MOSHER*

There is much in legal education which contributes to lawyering practices that are fundamentally at odds with the formation of social movements. These practices include the "individualization" of client problems; the reshaping of the realities of clients' lives into legal categories or boxes; the commitment to instrumentalism (that is, to securing a favourable legal result); and lawyer domination and control and the correlates of client silence and passivity. The genesis for these features of dominant lawyering practices can be traced, at least in part, to legal education. More specifically, legal education's emphasis upon doctrinal analysis, its tendency to trade upon an existing stock of legal categories or stories, and the relative inattention paid to fundamental critiques of the status quo contribute to these lawyering practices.

L'éducation juridique, sous plusieurs aspects, contribue à forger des pratiques du droit qui sont fondamentalement opposés à la formation de mouvements sociaux. Ces pratiques incluent «l'individualisation» des problèmes des clients; le façonnement des vécus des clients de manière à les faire entrer dans des catégories juridiques; l'engagement envers l'instrumentalisme (c'est-à-dire l'obtention d'un résultat favorable); ainsi que la domination et le contrôle des avocats auxquels sont reliés le silence et la passivité des clients. L'origine de ces pratiques du droit remonte, du moins en partie, à l'éducation juridique. L'emphase que celle-ci met sur l'analyse doctrinale, sa tendance à abuser des catégories juridiques existantes et l'inattention relative qu'elle porte aux critiques fondamentales du statu quo contribuent à maintenir de telles pratiques.

As part of these anniversary celebrations, the conference organizers asked that I address the question of whether law schools have responded to social movements. Given the nature of the celebration under way, and more particularly the title of this panel, "The Transformative Potential of Clinical Legal Education," I also understood my task to include speaking to the role that clinical education plays, or might play, in facilitating the responsiveness of law schools to social movements.

Before I begin to answer these questions it is important to unpack certain assumptions embedded within the question of "whether law schools have responded to social movements?" Implicit in the question are the assumptions that law schools, and thus law, *can* respond (that law can be called to the aid of social movements) and that law schools *ought* to respond. I also want to suggest that underlying these

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assumptions is a compelling normative vision of lawyering which is fundamentally at odds with the vision which currently pervades legal education.

In what follows, I argue that responsiveness to social movements ought to be measured by reference to the extent to which a law school systematically produces lawyers with the skill, knowledge, and ability to work with members of subordinated communities, and with the movements of which they are a part, in ways that facilitate social transformation. Without having engaged in an extensive empirical investigation to answer this question, I do think that I am on safe ground in concluding that no Canadian law school can persuasively claim to have accomplished this, nor even to have made many major steps in this direction. Indeed, I doubt that any Canadian law school has self-consciously undertaken such an enterprise as part of its "mission." In coming to this conclusion I rely upon two bodies of literature: that which assesses the impact of current poverty law practices; and that which describes and critiques the current state of legal education.

The insights from this literature suggest that law schools transmit a vision of practice—a vision later manifested in the practice of their graduates—which is not only unresponsive to social movements, but which in fact undermines their very existence. As such, it is a vision of lawyering that fails to assist subordinated people in any meaningful way. This critique ought not, however, to lead one to give in to despair (a despair that is rather pervasive in some circles) about the potential of law and lawyering to facilitate social transformation. To the contrary, the critique contains the outlines of a vision of an alternative mode of lawyering, and of practices which facilitate, rather than impede, social movements. The shift from lawyering that truncates, to lawyering that empowers, occurs when the emphasis of lawyering practices shifts from outcome to process; from getting to becoming; from instrumentalism to empowerment.

In many respects my article, like Professor Lucie White's, argues that there is much in the existing practices of many progressive lawyers which is deeply troubling. I attempt to document what I see some of those troubles to be, and to explore their relationship to legal education. Professor White has aptly turned the question of the transformative potential of clinical legal education on its head, to ask about the potential of clinicians and clinical legal educators to transform themselves and their practices, "so as to open those practices to the knowledge, the power, and human agency of the people with whom we work?" I think it appropriate to extend the audience to whom this challenge is directed, to include all those who engage in the practice or

teaching of law with the hope of improving the lives of the marginalized and oppressed. This would obviously include those practitioners who self-consciously engage in a process of lawyering for social change, undertaking explicitly politicized practices, but would also include those who assist individuals in the securing of their legal rights and entitlements; to obtain for them what various social institutions formally proclaim is theirs, yet fail to yield up voluntarily. The net might be cast more widely still, to include all those lawyers who envision themselves as champions of justice, rather than as instrumental maximizers of private rights and profits, because part of what is at issue here is whether lawyers ought to be the privileged guardians of justice which they are now.

What is it then that these lawyers do? This question could be answered on at least two levels; the first I will describe and leave, for it is the second which is most relevant to my inquiry. At one level, these lawyers do what Professor White has described: they secure rights and entitlements; they organize communities; they lobby for progressive legislative change; and/or they seek systemic reform through test-case litigation. These outcomes, though always intended by the lawyers seeking and securing them to be beneficial, are not always so in fact.¹ The harms worked here are of two sorts: harms to individual clients because the legal "remedies," much to the surprise of the well-intended lawyers securing them, on occasion actually worsen clients' situations; and the systemic harm of daily and routinely turning to existing social structures and institutions demanding, and more importantly assuming, that justice will be dispensed.

The second level at which one might talk about what it is that lawyers do, is to focus not upon outcomes, but rather upon the process of lawyering itself. It is here that my inquiry is focused. The description of the lawyering process which I offer below is painted in broad-brushed strokes, focusing upon several of what I take to be its pervasive characteristics.² The analysis which accompanies this description suggests that, in our role as lawyers, as "representatives" of our clients or

¹ See G.P. López, "The Lives We Know So Little About" (1989) 42 *Stan. L. Rev.* 1.

² Some of the characteristics which I identify Anthony Alfieri has described as "habits of perception." See A.V. Alfieri, "The Antinomies of Poverty Law and a Theory of Dialogic Empowerment" (1988) 16 *N.Y.U. Rev. L. & Soc. Change* 659 at 663 [hereinafter "Antinomies of Poverty Law"].

Lawyers might consider taking up the challenge which Alfieri posed at the Parkdale anniversary conference—to go back through your files and examine how frequently these "habits of perception" are present in your work and in particular, to search for moments when you have actively suppressed client narrative or utilized other methods of lawyer control and domination.

as “advocates” on behalf of the poor or other marginalized groups, we engage in practices (practices which are at the core of, are indeed constitutive of, our professional identity) which undermine progressive social change. Progressive social change is undermined because lawyers routinely and actively suppress the voice and agency of the persons they purport to “represent.” For decades lawyers have purported to know what it is that their marginalized clients need (they have frequently been authoritative arbiters of such needs) and while they have engaged in zealous efforts to satisfy those needs, they have done so in a manner which includes the “client” as at best a marginal player, but more commonly as an observer or mere object of the lawyering efforts. That such a charge should be levied against lawyers is not at all surprising given the current socio-historical context in which Enlightenment claims of universality, objectivity, and neutrality are being increasingly challenged by voices from the margins. One can no longer purport unproblematically to identify and speak on behalf of the needs of others. Nor, in the context of multiple discourses of what justice requires, can lawyers—largely white and middle class—continue to regard themselves as its sole (or privileged) champions.

As indicated earlier, the description of lawyering which follows is drawn with broad-brush strokes. However, it is important to add at the outset a few more subtle, nuanced strokes to ensure that the general description is not mistaken for the whole. There are lawyers who strive in their daily practices to subvert these characteristic features of lawyering. These lawyers have already identified aspects of the “traditional” lawyering process to be harmful to their clients, and have worked to change their methods of practice.³ Of these lawyers, some are clinical legal educators, who have changed not only their personal style of practice, but have attempted to impart these lessons to their students. But the challenges of doing so are enormous, particularly given students’ exposure to the mainstream curriculum of legal education and the lessons about lawyering which it communicates.

In the main, lawyering is about the provision of legal services to individual clients on a case-by-case basis. “Individualization” describes aptly not only the formal delivery of legal services, but also the conceptualization of client problems. Problems facing any given client are assessed and understood within a context whose outermost boundaries are those drawn by the particular client’s life. Broadening the context to question whether others share a similar problem, or to

³ In Ontario, such lawyers are most likely to be found in community legal clinics, such as Parkdale Community Legal Services.

include an assessment of social, economic, or political structures, is beyond the reach of most lawyering. Problems belong to clients; they are possessions, like the clothing on their backs.

Problems which clients present to lawyers are quickly conceptualized and categorized as “legal” problems. Avenues open for the resolution of any given problem thus, not surprisingly, appear to lie within the boundaries of the legal system. In practice, lawyers routinely deny—or perhaps it is more appropriate to say, rarely advert to—the possibility of non-legal forms of action and remedies. Thus, the lawyer’s world is professionally centred and dominated; some might say myopic. Part and parcel of this tendency of lawyers to look to the law and the legal system is the belief that legal remedies are both attainable and efficacious.⁴

A third feature of lawyering is its commitment to instrumentalism. Perhaps precisely because lawyers believe in the efficacy of legal remedies, their practices are dictated by efforts to obtain them. Within this outcome orientation (wherein the world of possible outcomes is circumscribed by the notoriously narrow range of judicial remedies), “success” is understood to be the securement of a favourable legal result.⁵ This is true both of individual client representation and of instances of “interest group” representation, wherein groups seeking social change have optimistically (but often unrealistically) presupposed that the securement of a favourable judicial result would lead to substantial change in the lives of their members.

An important offshoot of this belief in the efficacy of legal technique and legal remedies is that it privileges lawyer know-how, and thus justifies lawyer dominance and its correlate of client silence.⁶ Because the problem is categorized as “legal,” and the available avenues

⁴ Alfieri, in “Antimonies of Poverty Law,” *supra* note 2 at 671-72, has described this belief in the efficacy of legal remedies as one of the core myths at the centre of lawyering.

⁵ The prevalence within the profession of an ethic of partisanship reinforces and perpetuates this instrumentalism. For a description and critique of this ethic see, for example, D.L. Rhode, “Ethical Perspectives on Legal Practice” (1985) 37 *Stan. L. Rev.* 589; and D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton, N.J.: Princeton University Press, 1988).

⁶ Alfieri’s work on the silencing of client narratives is instructive. See “Antimonies of Poverty,” *supra* note 2; A.V. Alfieri, “Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative” (1991) 100 *Yale L.J.* 2107 [hereinafter “Reconstructive Poverty Law”]; “Speaking Out of Turn: The Story of Josephine V.” (1991) 4 *Geo. J. Legal Ethics* 619 [hereinafter “Speaking Out”]; “The Politics of Clinical Knowledge” (1990) 35 *N.Y.L. Sch. L. Rev.* 7. See also M. Spiegel, “Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession” (1979) 128 *U. Pa. L. Rev.* 41, who notes the lack of consensus regarding which decisions are appropriately those of the “client” and who argues for the application of the law of informed consent to the lawyer/client relationship.

of redress or resolution are to be found within the legal system, it seems axiomatic that lawyers ought to be the predominant problem solvers. Notwithstanding the law of agency which ascribes to the "client" the legal status of principal, and to the lawyer that of agent, and notwithstanding the rhetoric in codes of professional conduct that position the client as the person in control of the relationship, often it is the lawyer who dominates and controls.⁷ This control is often exercised through manipulation and coercion and justified by paternalistic assertions that lawyers know what is best for their clients. Thus, paternalism is justified by reference to outcome—another indication of the instrumentalism which characterizes the practice of law. Of course, what often goes unstated in this assertion is its necessary implication that clients do not know, and are unable to protect or promote, their needs and interests.⁸

In part, the client is understood to be incompetent because of the elevated status accorded to legal knowledge and to lawyering. Clients cannot possibly be given responsibility for important decisions relating to the legal process, for they simply do not—and

⁷ Stephen Ellman explains the tendency towards lawyer control in the following way:

[a]ttorneys, after all, wield technical expertise, enjoy exclusive or privileged access both to other lawyers and to officials of the state, and bring familiarity and detachment to situations in which clients are often frightened, angry, and uninitiated. Often social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due. Even lawyers not eager to embrace class privilege may accept traditions and habits of professional autonomy which restrict the spheres of client decisionmaking and active involvement. All of these factors encourage lawyers to assume, and clients to cede, a major role not only in the implementation of client choices but in the making of the choices themselves.

S. Ellman, "Lawyers and Clients" (1987) 34 UCLA L. Rev. 717 at 718. See also "Speaking Out," *supra* note 6; R. Wasserstrom, "Lawyers as Professional: Some Moral Issues" (1975) 5 Hum. Rts. 1; and S. Sarat, "Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education" (1991) 41 J. Legal. Educ. 43.

⁸ See D. Luban, "Paternalism and the Legal Profession" [1981] Wis. L. Rev. 454, especially at 458-59, wherein he argues that lawyers frequently manipulate a case or client for what the lawyer takes to be the client's own good.

Alfieri also argues that traditional practices of lawyering are tied to the notion of client helplessness: see Alfieri references, *supra* note 6. As part of a project in which I was involved to develop curricula on wife abuse for law schools in Ontario, I wrote to a number of groups and individuals who provide shelter, support, and/or advocacy to abused women inviting their input into the curriculum. Basically, I asked them what law schools ought to be teaching future lawyers. The responses which I received detailed a number of complaints about lawyering practices. One of the most common complaints was that lawyers all too frequently assume their abused women clients to be incompetent and attempt to control and manipulate them.

cannot—understand the nuances and complexities of law and lawyering.⁹ Not only are clients seen to have little to contribute to decisions made in the lawyering process but their interventions are frequently thought to potentially jeopardize the securement of the legal remedy around which the lawyer's strategies are constructed.¹⁰ Thus, clients are often seen as having very little to contribute to their own cases.¹¹ Lawyers purport to know what it is that their clients need (and as suggested this "need" usually takes the form of some sort of legal remedy) and act on their clients' behalf (not in concert with them) in an attempt to ensure such needs or interests are satisfied. Lawyers position themselves as actors—the doers—and position their clients as the beneficiaries of the bestowal of their expertise.¹²

Before embarking on the analysis of why these aspects of lawyering are troubling, it is necessary first to set forth a theory of how it is that progressive social change comes about, since as suggested earlier, this is what I maintain is undermined by these lawyering practices.

"Social movements" are a form of expression by a group of people who share a common oppression of their refusal to live with that oppression. Allies of oppressed persons sometimes join in these struggles, but there is often good reason for social movement actors to

⁹ This argument resonates with those made by the legal profession regarding the need for the profession to be self-regulating. Like other professionals, lawyers see themselves as possessors of expertise, a possession which they and others believe entitles them to an elevated and protected status. Lawyers, individually and as a profession, anxiously guard their professional turf from encroachment by non-experts (be they paralegals or their own clients).

¹⁰ See "Reconstructive Poverty Law," *supra* note 6 at 2129-30; and L.E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 *Buff. L. Rev.* 1.

¹¹ This process of privileging lawyer know-how and viewpoint is well developed and explained in work of Alfieri. See references *supra* note 6.

¹² Many parallels can be drawn usefully here between law and medicine. So, for example, there is a wealth of literature which critiques the tendency of medical practitioners to organize knowledge into categories of organic disease; to assume that patients are not valuable or reliable sources of information and to thus rely upon technological diagnostic measures; to assume that solutions to patients' medial problems reside in the correct bio-medical response (as opposed, for instance, to residing in safer and healthier communities, etc.); to "medicalize" social problems (to assume that they are medical in origin and that they are best addressed through medical responses) and to assume that they know what is in the best interests of the "patient" and to take charge of the relationship. This latter assumption has, in recent years, been fundamentally challenged, including through the development, at law, of the doctrine of informed consent. It is quite striking to compare the wealth of literature addressing the day-to-day interactions of physicians and their "patients" and in particular, the literature on "patient autonomy," to the dearth of such literature on the day-to-day interactions of lawyers and their "clients," on securing client autonomy in the lawyer-client relationship, or more broadly, on the role of power in the lawyer-client relationship.

be suspicious of these self-proclaimed allies.¹³ Though social movements are expressions of collectives, the “conscientization” of individuals is critical to social movement formation.¹⁴ Conscientization refers to the process of developing a critical consciousness of one’s life situation. Thus, conscientization entails reflection upon social, economic, political, and legal structures, and upon distributions of resources and power. Social movements emerge when individuals with evolving critical consciousness come to see that, not only are the harms which they endure shared by others, but that the source of the harm is structural, not individual, in origin. Critical consciousness breeds action(s) to end oppression through the fundamental transformation of the social, economic and/or political conditions which permit and perpetuate that oppression. Social movements are, fundamentally, a challenge to the existing order and to the label of “just,” which, through an act of self-ingratiation, that order has bestowed upon itself.

This understanding of social movements is linked to a particular understanding of how the social change necessary to end oppression occurs. In this vision of social change, oppressed people who have developed critical consciousness come together to act upon the world in order to transform it. It is through the dialectical relationship of critical consciousness and action that social change occurs. People, not governments or states, are the agents of change. In this understanding of social change, law is important for at least two reasons. First, as a primary mechanism through which the existing order is reproduced and its justness proclaimed, the law is an object for critical reflection about power and justice—a site of contestation. The dialectical relationship of theory and practice also means that the law is an object which itself must

¹³ As argued in the text, many lawyers who commit their practice lives to working on behalf of the oppressed routinely deny client agency. This is evidence in itself of the need to be sceptical about self-proclaimed allies. Paulo Freire’s more general remarks about members of the oppressor group who seek to ally themselves with the oppressed are apt:

They almost always bring with them the marks of their origin: their prejudices and their deformations, which include a lack of confidence in the people’s ability to think, to want, and to know. ... Those who authentically commit themselves to the people must re-examine themselves constantly. ... The convert who approaches the people but feels alarm at each step they take, each doubt they express and each suggestion they offer, and attempts to impose his “status,” remains nostalgic towards his origin.

P. Freire, *Pedagogy of the Oppressed*, rev. ed., trans. M. Bergman Ramos (New York: Continuum, 1989) at 42-43.

¹⁴ This understanding of social movements, and of social change, draws upon the work of Freire, *ibid.*, and upon the Latin American literature of the “new legal services.” See, for example, F. Rojas, “A Comparison of Change-Oriented Legal Services in Latin America With Legal Services in North America and Europe” (1988) 16 *Int’l J. Soc. L.* 203 at 206 and 210.

be transformed through action. Second, the law can be, on occasion, utilized instrumentally as a strategic resource in concrete struggles for particular change.¹⁵

In an individualized, case-by-case approach to lawyering, harms are largely understood to be individual and private; not shared and social. Because problems are understood as individual in nature—as aberrations in an otherwise just social and legal order—that order goes unchallenged. The active critical stance essential to social movements not only fails to materialize, but is actively suppressed, in the lawyering process. The lawyering process tends to be decidedly anti-critical.

Moreover, the manner in which legal services are organized—individual and case-by-case—creates few opportunities for the sort of collectivization of experience which could permit insights into the structural roots of client suffering.¹⁶ And the failure to collectivize experience means that the development of a critical stance towards the existing order is unlikely to occur. Thus, both the content and structure of the lawyering process run contrary to the objectives of social movements which seek to challenge and displace existing structures and discourses through the emergence of critical consciousness and the creation of alternative, competing discourses.

One discourse, in particular, which is frequently challenged and contested by social movements is needs discourse. As Nancy Fraser argues,

¹⁵ This understanding of social change can be juxtaposed against an alternative and pervasive theory of social change, wherein change is seen to emanate from favourable judicial and legislative decisions and in which the primary agents of change are thought to be lawyers, judges, and politicians. While it is beyond the scope of this article to develop this analysis in depth, my premise is that this “top-down” version of social change has been demonstrated time and again to be ineffectual.

¹⁶ Legal services can be organized in more collectivized ways, as experience from “new legal services” (see *supra* note 14) providers in Latin America illustrates. For example, Casa de la Mujer in Bogota has a multi-disciplinary staff whose aim it is to develop, through the process of popular education, the consciousness of women in terms of gender with a goal to raising their awareness and their self-esteem. The office will not initiate a legal process for a woman who comes for legal assistance until she has participated in two workshops. The participants in the workshops include other women who have experienced a similar problem, a lawyer, and perhaps a psychologist. In the first workshop, the women reflect critically upon the concept of women’s rights in terms of their benefits and limitations. The second focuses upon women’s position in society, attempting to identify the power structures at play and to articulate the larger structural changes which must come about if women’s lives are to be enhanced. As part of these workshops, women also plan mutual and self-help strategies. These workshops seek to accomplish two purposes: to assist individual women in deciding what action to take to address her current situation; and to create a critical mass of women who are empowered to change the world around them.

needs-talk appears as a site of struggle where groups with unequal discursive (and nondiscursive) resources compete to establish as hegemonic their respective interpretations of legitimate social needs. ... [N]eeds become politicized when, for example, women, workers and/or peoples of color come to contest the subordinate identities and roles, the traditional, reified, and disadvantageous need interpretations previously assigned to and/or embraced by them. By insisting on speaking publicly of heretofore depoliticized needs, by claiming for these needs the status of legitimate political issues, such persons and groups do several things First, they contest the established boundaries separating "politics" from "economics" and "domestics." Second, they offer alternative interpretations of their needs embedded in alternative chains of in-order-to relations. Third, they create new discourse publics from which they try to disseminate their interpretations of their needs throughout a wide range of different discourse publics. Finally, they challenge, modify, and/or displace hegemonic elements of the means of interpretation and communication; they invent new forms of discourse for interpreting their needs.¹⁷

Lawyers routinely take for granted what it is that clients need, proceeding as though the needs of the poor and other marginalized groups are uncontested and uncontestable. Client needs are, as suggested earlier, packaged into existing categories of legal causes of action and remedies; that is, repackaged into the form of expert needs discourse.

As a result, the need is decontextualized and recontextualized ..., [and] the people whose needs are in question are repositioned. They become individual "cases" rather than members of social groups or participants in political movements. In addition, they are rendered passive, positioned as potential recipients of predefined services rather than as agents involved in interpreting their needs and shaping their life conditions.

¹⁷ N. Fraser, "Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies" [1989] 99 *Ethics* 291 at 296 and 303.

By virtue of this administrative rhetoric, expert needs discourses, too, tend to be depoliticizing.¹⁸

By characterizing client problems as legal (and thus denying the efficacy of non-legal responses and solutions), and by denying the possibility of client understanding of the legal world, lawyers effectively render clients as passive observers of their own lives.¹⁹ The denial of client agency sends a message to clients that they lack the ability to name their needs, to contest what have been assumed to be their needs, to contest what it is that “justice” requires, or to take action themselves.²⁰

¹⁸ *Ibid.* at 306-07. Fraser develops the example of the role of shelters for abused women, which offers, in my view, many parallels to the critique of legal services. The earliest shelters were based upon an understanding of abuse as a social, not an individual, problem requiring a dramatic redistribution of social power and resources to eradicate it. Moreover, shelters were integrally connected to a social movement—the battered women’s movement. Consciousness-raising and women-helping-women were its methods. Increasingly, as shelters became dependent upon the state for funding, they became more professionalized (services delivered by “professionals”), individualized (individual battered women were offered therapy and treatment), and depoliticized. Similar arguments, in the Canadian context, have been developed by N.Z. Hilton, “One in Ten: The Struggle and Disempowerment of the Battered Women’s Movement” (1989) 7 *Can. J. Fam. L.* 313; and by G. Walker, *Family Violence and the Women’s Movement: The Conceptual Politics of Struggle* (Toronto: University of Toronto Press, 1990).

As Fraser points out, at 294, there is a further issue as to whether “socially authorized forms of public discourse [here legal discourse] ... are skewed in favor of the self-interpretation and interests of dominant social groups ...” Here, one need only think about who has participated historically in the shaping of legal categories, causes of action and remedies, and the frequency with which “novel” litigants are forced to defend motions for the failure to disclose a “reasonable cause of action,” to be firmly persuaded that legal discourse is skewed in favour of the interests of dominant social groups. This no doubt helps to explain why, in some instances, the securing of the legal “remedy” brings, as noted earlier, more harm than good. See the discussion *infra* note 30 and accompanying text regarding the use of categories.

For cases where the claims of novel litigants have been challenged see, for example, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.), aff’d 58 D.L.R. (4th) 396 (Ont. H.C.J.); and *Finlay v. Canada (Finance)*, [1986] 2 S.C.R. 607.

¹⁹ As Alfieri has pointed out in his work, the denial of client agency arises in large measure because of the lawyer’s focus upon outcome and not upon process. He notes in “Reconstructive Poverty Law,” *supra* note 6 at 2146-47:

Even when the advocacy is vigorous and well-intentioned ..., there is a cost. The cost is paid for by the lawyer’s purchase of the client’s story, and with it, her voice and narrative. This is the historical price of poverty law, the image of the unspeaking client. The legacy of winning is client powerlessness.

²⁰ As Martha Minow has argued, “claims to speak for others by people not in the group are vulnerable on the grounds that participation itself is a value and the process of representing a viewpoint is an exercise of power that should be enjoyed by those on whose behalf the exercise is claimed”: M. Minow, “From Class Actions to Miss Saigon: The Concept of Representation in the Law” (1991) 39 *Clev. St. L. Rev.* 269 at 286.

In sum, the process of lawyering actively works against the creation of counter-hegemonic discourses about needs, and about justice, and contradicts a fundamental premise of social movements—confidence in the ability of the oppressed to name, and to take action to change, the unjust order which shapes their everyday realities.

But to what extent can we peg the blame for these practices on legal education? While other confounding variables are no doubt at play, a brief walk through current legal education will, I believe, reveal legal education as making a significant and enduring contribution to these practices.

The core of legal education continues to be the appellate court decision, and learning to analyze these decisions continues to be legal education's central (though not exclusive) preoccupation. While no doubt an important skill, its central role in the curriculum is disturbing for a number of reasons, relating both to what is expressly excluded, and what is communicated both explicitly and implicitly by it.²¹

A central message communicated through the study of appellate court decisions is that lawyering entails the rational application of law to facts (neutral technique), in a world where facts are "found" (not contested), the law is given and applied, and concrete, legitimate results are produced.²² This central message of legal education is arguably the precursor of many of the deleterious practices observed earlier.

First, doctrinal analysis routinely obscures the reality that both facts and law are deeply ambiguous. A consequence of this reality is that relevant questions about the role of values, emotions, and political choice—in both legal process and substantive outcomes—are rarely posed. Serious attempts to uncover and critique the social, economic, and political conditions underpinning legal doctrine, legal process, and

²¹ Several authors have observed that much of what students learn in law school, they learn through the messages about law and lawyering implicit in the formal curriculum and its delivery. This observation and its implications are thoughtfully developed in an article by Howard Lesnick: "Infinity in a Grain of Sand: The World of Law and Lawyering As Portrayed in the Clinical Teaching Implicit in the Law School Curriculum" (1990) 37 UCLA L. Rev. 1157.

Karl Klare has labelled these implicit messages "the hidden curriculum." These messages, he argues, are "contained in the instructional methods, the emotional setting of the classroom, and the social hierarchy of the law school, and in the array of course offerings and requirements, the sequencing and pacing of courses, and indeed in the overall structure of the formal curriculum": K.E. Klare, "The Law School Curriculum in the 1980s: What's Left?" (1982) 32 J. Legal Educ. 336 at 336.

²² See Klare, *supra* note 21 at 339-40, Lesnick, *supra* note 20; and G.P. López, "Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education" (1989) 91 W. Va. L. Rev. 305 [hereinafter "Training Future Lawyers"].

particular legal results are largely absent.²³ Thus, much of legal education simply accepts existing social, political, and economic arrangements as givens—neither open to, nor worthy of, serious consideration and critique. In doing so, legal education communicates to students that, as lawyers, their role is not to seek substantive change to the existing order, but to get what they can for their clients within that order.

The central place of doctrinal analysis in legal education is consistent with what many have maintained is the primary purpose of legal education—to legitimize and reproduce the *status quo*.²⁴ In this view, doctrinal analysis is but one device through which legal educators, both consciously and unconsciously, legitimate the existing social,

²³ Here too, a number of authors have commented on the absence of critique in legal education. With respect to Canadian legal education Jamie Cassels and Maureen Mahoney have observed that, “despite many good intentions and limited reforms, Canadian legal education has always perpetrated attitudes and practices hostile to legal critique and social transformation”: “Critical Legal Education: Paralysis with a Purpose”: (1989) 4 Can. J. L. & Soc’y 99 at 100. In this respect, an article by Stephen Halpern is revealing. Halpern was a political science professor who returned to school to complete the first year of law. He comments upon his experience as follows:

The case method teaches the student to think of law primarily in terms of how different legal rules are applied in varying factual circumstances. It hampers and discourages students from placing the issues raised in the cases into a social context which transcends particular disputes or the rules which purportedly explain why the cases were resolved as they were. ... It structures a student’s thinking so as to ignore the extent to which cases and legal rules reflect underlying patterns of social conflict or organization or the distribution of power in society. The relationship between the case law and the social structure in which it operates is tacitly excluded from any serious and systematic consideration. The cases and the law itself are divorced from social realities. ...

The first-year student studies contract, property, torts, and constitutional law and finds virtually no attention given to the role of social class, political power, distribution of wealth, and their respective influences on the substantive law in those fields. ...

Students learn, as they read and discuss the “issues” in the cases, that questions of social justice are largely irrelevant to the study or practice of law. This is beyond peradventure one of the most notable, if dubious, achievements of American legal education. It first deadens the sense of social consciousness in the law student and then imposes a proper professional, largely apolitical, consciousness in its place:

S. Halpern, “On the Politics and Pathology of Legal Education (Or, Whatever Happened to That Blindfolded Lady With the Scales?)” (1982) 32 J. Legal Educ. 383 at 384, 385, and 387. See also “Training Future Lawyers,” *supra* note 22; and Klare, *supra* note 21, both observing that legal educators spend little time on the political and economic theories underlying legal arrangements.

²⁴ Cassels & Mahoney, *supra* note 23 at 101, argue that “a primary function of legal education has been to produce legal workers in a manner consistent with existing structures of privilege.” In coming to this conclusion they rely, in part, upon Blaine Baker’s historical work on the Law Society of Upper Canada. See, for example, G.B. Baker, “‘So Elegant A Web’: Providential Order and the Rule of Law in Early Nineteenth-Century Upper Canada” (1988) 38 U.T.L.J. 184. See also Klare, *supra* note 21; Halpern, *supra* note 23; and N. Redlich, “Clinical Education: Stranger in an Elitist Club” (1981) 31 J. Legal Educ. 201. This theme was also developed by a number of speakers who participated in Parkdale’s twentieth anniversary conference.

political, legal, and economic order. Other devices include the socialization process of the law school experience²⁵ and the direct admonition of radical lawyering. In this latter regard, consider for example the remarks made by Mr. Justice George Finlayson to young lawyers during their Call to the Bar ceremony in 1980, at which time he was the treasurer of the Law Society of Upper Canada.

Please remember that you are not law professors, students of human behaviour, or social or political scientists. You are lawyers, first and last. Your mandate is not to change the world: yours is a much higher calling. You are charged with the defence of the freedom of the Queen's subjects under the law.²⁶

Even if one is prepared to go only part way down the path of this descriptive claim, there is ample evidence to suggest that legal education does not prepare students to engage in the critical evaluation of existing social, economic, political, or legal arrangements. Rather, legal education prepares students to work within the existing order, marginally, incrementally modifying it through litigation. A reasonable deduction which follows is that lawyers trained in this anti-critical educational environment are unlikely to see client problems as anything other than individual problems, are unlikely to search for systemic patterns of oppression, are unlikely to attempt to understand the structural roots of client problems, are even less likely to challenge those structures, and thus, are unlikely to practise in ways that render them allies of social movements. In sum, anti-critical legal education is the forbearer of anti-critical lawyering practices.²⁷

Second, the central message of lawyering taught through doctrinal analysis—that the primary skill of the lawyer is the ability to apply an existing stock of legal categories to a set of abstracted facts—combines with the socialization process of law school, to teach

²⁵ Halpern, *supra* note 23 at 388, argues that rank authoritarianism, “[f]ear, intimidation, and psychological manipulation of a law student’s sense of self is an integral part of the first year of legal education.” He characterizes law schools as “fancy trade school[s] where people do not want to shake up the system but rather to make it within the system”: *ibid.* at 390.

²⁶ G.D. Finlayson, “The Lawyer As A Professional” (1980) 14 L. Soc. Gaz. 229 at 235.

²⁷ Klare, *supra* note 21 at 339, has argued that students:

learn that the only lawyer-like way to view the world is *moderately*, through the window of moderate conservatism or liberal reformism. They learn that the only lawyer-like way to think about social change is in terms of atomized, marginal, incremental reform through governmental regulation of private conduct Finally, they learn that lawyers do not possess intellectual skills and preoccupations appropriate to discussion and analysis of fundamental issues of social and political organization and thoroughgoing social change [emphasis in original].

students to distance themselves from their clients' lives.²⁸ This process, its links to practice, and its harms to social movements, are vividly captured by López:

Generic legal education methodically disciplines students not to immerse themselves in their clients' lives—to extract and attend to only that which is “legally” relevant in a situation, to disregard what other professional and lay people may be doing in response to problems, to underappreciate what clients themselves may have done and may be capable of doing. And generic legal education effectively persuades students to think of themselves as the preeminent problem-solvers in any situation, with little to learn from those around them—about the worlds in which lawyers intervene, about constellations of strategies from which lawyers should be helping people to choose a course of action, about the lasting practical effects, if any, of the lawsuits lawyers so frequently file, about ways of reconceiving what lawyers do in the fight for social change. ...

What kind of collaboration with subordinated people can you reasonably expect from lawyers systematically socialized away from subordinated communities and methodically trained to pay as little attention to their clients as possible? And what kind of world can you fairly hope to bring into existence through fights that almost “naturally” privilege the narrowest sort of lawyer know-how and that regularly dismiss what subordinated people (and their other allies) know about life, about problem-solving and about change itself?²⁹

Let me attempt to develop, in greater detail, how doctrinal analysis results in the distancing of lawyers from clients' lives and the harms which this works. Doctrinal analysis teaches students, as López argues, that answers to client problems are to be found in the application of the proper legal category to the relevant legal facts (if you get the right legal category and apply it appropriately the client's problem will be solved). As only those trained in law are in a position to know which facts are relevant and to decide which is the applicable legal category (after all it takes years of training for lawyers to learn how to do this), clients have little meaningful input to contribute. Immersion in the client's life is irrelevant to the lawyering tasks at hand, thus distancing is appropriate. The central place of doctrinal analysis in legal education breeds the lawyer arrogance, domination, and instrumentalism—and all of the accompanying harms to social movements—observed in the earlier discussion of practice.

²⁸ See “Training Future Lawyers,” *supra* note 22 at 353. With respect to the socialization process, López observes that it runs “diametrically opposed to the needs of these future lawyers and clients. ... Whatever else law schools may be, they remain intensely mainstream in terms of race, gender, and class; in terms of how authority is exercised; and in terms of what counts as wisdom and insight.” Cassels & Mahoney, *supra* note 23 at 109, also argue that legal education legitimizes hierarchy; that students are taught that “subordination and conformity are natural and inevitable incidents of legal knowledge and practice.”

²⁹ “Training Future Lawyers,” *supra* note 22 at 353-54. It is also important to note that the distancing from client lives means that lawyers will often not serve clients well in their private quests for relief.

The method of doctrinal analysis also works to distance lawyers from their clients' lives. Doctrinal analysis teaches students to box experience into a relatively static, pre-existing set of categories (expert needs discourse).³⁰ As Peter Shane explains,

[t]his impulse towards categorization—and towards the perception that categories are oppositional or mutually exclusive ... leads us to abstract from the accounts we receive of other people's experiences and concerns only those details that mesh with our own favored categories—and to insist that the proper categorization of anyone's experiences and concerns be both singular and universally recognizable . . .³¹

To get other people's accounts of their experiences to fit our Procrustean categories, it is often necessary to ignore those aspects of experience that are individual, nuanced and unfamiliar.³²

This method of analysis, which students are pressed to acquire, impairs their ability to hear multiplicity. Only those aspects of experience that resonate with the stock of stories or categories that have been etched into the vinyl recording that constitutes legal knowledge are heard. Lawyers remain at a distance, in part, because the method of analysis which they so routinely employ impairs their ability to hear, even if they desired to, the full context of a client's life.³³

The final point to be made about doctrinal analysis is that not only is its method flawed (as the second critique suggests), but so too is its content. Here, I refer not to what is excluded, as the first critique does (the unreflective acceptance of the *status quo*), but of what is included. Existing legal categories suffer from what Mari Matsuda has

³⁰ See P. Shane, "Why are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education" (1990) 75 Iowa L. Rev. 1033 at 1036. This form of criticism is relevant not only to law, but really to all "disciplines." Each has its "boxes" or "categories" through which client's or patient's lives are organized and interpreted. There is an extensive literature on this in medicine. See, for example, C. Warshaw, "Limitations of the Medical Model in the Care of Battered Women" (1989) 3 Gender & Soc'y 506.

³¹ Shane, *supra* note 30 at 1036.

³² *Ibid.* at 1039. Shane uses the term "diversity" as capturing two aspirations: to undo the historical domination by white men; and a "solicitude for encompassing and valuing multiple perspectives, multiple experiences, and multiple methods of teaching and doing research in the higher education environment": *ibid.* at 1037.

He also argues that a second habit of thought—the imperialist mindset—impairs lawyers' ability to embrace the diversity aspiration. As Shane suggests, at 1048, and others confirm, lawyers are "notoriously" imperialist in pronouncing authoritatively upon the meaning of events in other people's lives.

³³ Carol Warshaw, *supra* note 30, makes a similar observation in the context of medical practice. She argues that the standard medical description format, which is itself premised on categories of organic disease, limits the ability of physicians even to see signals of wife abuse presented by their patients.

described as the “apartheid” in legal knowledge.³⁴ As a system of knowledge that is constructed from the inside, passed from lawyer to lawyer wherein lawyers decide what is on the inside/out, legal knowledge routinely fails to be informed by, and thus to reflect, the perspectives of outsiders.³⁵ It is not simply then that categorization renders it difficult to hear and assess context, but that existing categories themselves are unlikely to “fit” the lives of the oppressed. In other words, some lives can be made to fit (boxed into) these categories with less harm than others. Matsuda makes explicit the implications of the apartheid in legal knowledge for lawyering for the oppressed:

When outsiders’ perspectives are ignored in legal scholarship, not only do we lose important ideas and insights, but we also fail in our most traditional role as educators. We fail to prepare future practitioners for effective advocacy and policy formation in a world populated by women and men of differing points of view.³⁶

The failure to attend to—indeed, the rendering irrelevant of—the voices of outsiders, other perspectives, other forms of knowledge, other ways of doing, is an act profoundly violative of social movement formation and mobilization. At the very core of social movements is the challenge to existing orthodoxies. The stock of stories upon which we trade in law routinely perpetuates, rather than challenges, these orthodoxies. And traditional legal reasoning produces habits of thought that limit lawyers’ abilities to see that these are orthodoxies, not “truths,” and to acknowledge the harms which they perpetuate.

Thus far, the review of legal practice and legal education suggests that law schools not only fail to produce lawyers able to work as allies of social movements but rather, they impart ways of lawyering that undermine them. While the broad-brushed description thus far does, I believe, hold true for Canadian legal education, it is also the case that Canadian legal education has changed and is changing in ways which

³⁴ M. Matsuda, “Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground” (1988) 11 *Harv. Women’s L.J.* 1 at 2.

³⁵ *Ibid.* at 3. Dorothy Smith has described this process—one she argues is common amongst professionals—as an “ideological circle”: D.E. Smith, *The Conceptual Practices of Power: A Feminist Sociology of Power* (Toronto: University of Toronto Press, 1990) at 89-100. The failure of legal education to attend to the voices of outsiders is an experience which women students and faculty have often written about. The failure to include these voices—in effect, to attend to the realities of people’s lives—or the trivialization of them once raised, has the result of silencing the outsider and thus of confirming the legitimacy of the existing stocks of knowledge. See, for example, L. Finley, “Women’s Experience in Legal Education: Silencing and Alienation” (1989) 1 *Legal Educ. Rev.* 101.

³⁶ *Supra* note 34 at 4.

render it potentially more responsive to social movements.³⁷ Let me briefly describe some of these changes.

Most, if not all, Canadian law schools, have introduced courses that seek to make explicit the role of law in reproducing the oppression of particular groups. In placing law as an object for critical reflection about questions of power, justice, and oppression, such courses are consistent with the aspirations of social movements. One might think about courses on gender issues and the law as an example. Here, a law school might claim that social movements have been heard and that the law school has responded. I do think that such a claim correctly portrays the nature of the causal relationship here; without women's movements, law schools would likely never have adopted such courses.³⁸ I also think that these events in the life of the law school in some manner "count" as indicia of a response to social movements. Changes to admissions policies that are designed to attract, and the addition of support programs that are designed to retain, more students from diverse racial, cultural, and economic backgrounds are also probable "response" candidates. While curriculum changes, admissions policies, and support programs are important, one must simultaneously acknowledge that they have not resulted in a major rethinking about the way in which law is taught. In the main, changes in the curriculum have been at the periphery, with little impact upon the core of legal education, particularly the formative first year curriculum. Perhaps more importantly, these changes have not caused most legal educators to think critically about the vision of lawyering which they impart to students. And my hunch is that even those legal educators who pervasively incorporate critique rarely work with their students on the task of translating critical perspectives on law into critical perspectives on lawyering.

A similar observation can be made about changes to admissions policies. The admission of greater numbers of students of diverse racial, ethnic, and class backgrounds creates the potential to eliminate the apartheid in legal knowledge. It seems to offer the ingredients of an environment where students and faculty might learn about multiple ways

³⁷ The claims made here about Canadian legal education are not based upon a detailed empirical review, but rather upon conversations with students, legal educators, and the secondary literature. Hence, the claims that I make, while I believe them to be generally reflective, in the main, of Canadian legal education, may not reflect your own experience.

³⁸ In a similar vein, Cassels & Mahoney, *supra* note 23 at 106, maintain that "[g]ains for women have been achieved because of external social movements unaided in any manner by law schools admission policies."

of knowing, doing, and being. But for the most part this has not materialized. Rather, women students, and students of non-dominant ethnicities, races, and classes, have written about the experience of being "Admitted But Not Accepted."³⁹ These students are permitted into the enclave of law on the condition that they acclimatize themselves to the *status quo*.⁴⁰ Many newcomers have been admitted, but few have been welcomed and, as such, law schools have failed to redefine themselves in ways potentially responsive to a more diverse student body and to the communities of which these students are a part. As Matsuda argues,

[a]ffirmative action, a concept we have accepted in respect to bringing new colors and shapes of human bodies into law schools, should also apply to our primary function as scholars: the exploration of human knowledge. The new individuals we are bringing to the law schools also bring new ideas about law. Instead of bending their minds to conform to the knowledge of the formerly segregated law school, perhaps we should bend our shared legal knowledge to accommodate new visions.⁴¹

In sum, law schools have taken some steps—and indeed have taken these steps in response to pressure from social movements—towards change. But the core of legal education, and in particular the traditional vision of lawyering which it imparts, remains quite firmly in place. As such, there is every reason to believe that through their educational processes, law schools will continue to yield forth into the world lawyers who practise in ways which undermine, rather than enhance, the emergence, flourishing, and objectives of social movements.

At this juncture, it seems appropriate to move forward from the debris of the critique and ask "what then is it that law schools should be doing?" We might suppose, for a moment, that there exists a law school which has self-consciously chosen to make the training of lawyers to work with subordinated communities in their struggles for social transformation part of its "mission." How might such a school begin to make good on this commitment? In addressing this question, there exists, I believe, a tension which needs to be explicitly acknowledged. On the one hand, there is much to be learned from the history and current state of legal education and legal practice in terms of what law schools ought *not* to be doing. These lessons tempt one (such as myself) towards prescriptiveness. But here arises the tension, for being bound

³⁹ See S. Homer & L. Schwartz, "Admitted But Not Accepted: Outsiders Take an Inside Look at Law School" (1990) 5 Berkeley Women's L.J. 1.

⁴⁰ Shane, *supra* note 30 at 1034.

⁴¹ Matsuda, *supra* note 34 at 2.

to the apparent lessons of history, particularly if it is legal educators who pronounce on the meaning and implications of that history, is worrisome. Prescriptiveness by legal educators, in fact, simply relives a past and a present wherein academics and practitioners are the knowers and the doers. So as I proceed, I am conscious that I am treading on this fine line. You must be the judge as to whether I have gone too far in either direction.

Legal education must, in my view, embrace critique—of existing social, economic, political, and legal orders—pervasively. This critique however, must be informed by the insights of social movements. Critique uninformed by social movements once again transmits a message that it is academics, not social movements, who are the creators, guardians, and transmitters of knowledge. Such critique also arrogantly presupposes that academics are able to develop insightful, progressive, useful critique without immersing themselves in the lives of the oppressed. In my view, this is blatantly false. As Matsuda argues, we “learn and grow through interaction with difference, not by reproducing what [we] already know.”⁴²

Legal educators must also bring to the surface the implicit messages about lawyering which legal education imparts. In doing so, the notion of lawyering as the application of neutral, apolitical, instrumental technique must be challenged, and normative visions of lawyering explored. In this process as well, the active participation of social movement actors is necessary. First, while I have suggested a number of harms which I believe current legal education and legal practices work, surely these ought not to be accepted at face value. Rather, dialogue with social movement actors about these practices and the lessons they may teach must be pursued. Dialogue is necessary, not only to the telling of the history and harms of legal services and legal education, but also to constructing visions of future practice. What skills do lawyers need to work with subordinated communities and their members? Surely the details of this can only be determined in conversation with social movement actors. And because social movements are dynamic, evolving, and constantly changing, so too, we might expect, will be the skills required of lawyers.

Though dialogue is necessary to determine the details, at any historical moment, of these skills and practices, I do think that some general things can be said as to what is required on the part of lawyers. I agree with López that lawyers need to learn “how to work with clients ..., how to collaborate with allies ..., how to take advantage of and how to

⁴² *Ibid.* at 3.

teach self-help and lay lawyering ..., how to be a part of, as well as knowing how to build, coalitions, and not just for the purposes of filing a lawsuit.”⁴³ It also seems to me that we can identify certain “skills” necessary for this meaningful and productive dialogue to occur, and thus, skills which will be essential to a lawyering practice that is responsive to social movements. One is the ability to listen—which necessitates moving beyond existing categories and indeed beyond the process of categorization itself. Another is the ability to share power—which presupposes demystifying and de-privileging what lawyers do. A third is a willingness to open oneself up to critical examination, for meaningful dialogue cannot occur unless one is open to change. And I suppose a fourth might be an active imagination.

In general, what I envision is a much more dialogic and dialectic relationship between social movement actors and legal educators. It also strikes me that *clinical* legal education (by which I mean educational processes in which learning is derived from engagement with potential or actual “clients,” be they individuals, groups, or communities) is the most promising vehicle through which this dialogue may occur. But history teaches us that this is a promise only, and one not easily kept.

It is not a new idea that clinical legal education might be the vehicle for the kind of dialogue and outcomes I have described. Indeed, in the formative years of clinical legal education, its proponents scripted an almost identical role. Clinical education, so the script foretold, would immerse students in the lives of their clients.⁴⁴ Clinics would provide opportunities for critical analysis of law’s impact.⁴⁵ And clinics would help students come to understand that lawyering is not about technique

⁴³ “Training Future Lawyers,” *supra* note 22 at 356.

⁴⁴ *Ibid.* at 339-40.

⁴⁵ A number of authors have described this potential for critique in the clinic setting. See for example, D. Barnhizer, “The University Ideal and Clinical Legal Education” (1990) 35 N.Y.L. Sch. L. Rev. 87 at 89-90, who includes amongst the primary themes informing clinical work, “the importance of developing and implementing practical conceptions of justice.”

Similarly Cassels & Mahoney, *supra* note 23 at 124-25, describe clinical legal education as, “an important ... vehicle through which a more fully integrated critique could be carried on in a sustained manner,” and wherein one is able to “... uncover the political dimensions of law and the pathology of dominant gender and group power.” James Hathaway also characterizes clinics as creating opportunities for students to focus on the relationship between law and justice: J.C. Hathaway, “Clinical Legal Education” (1987) 25 Osgoode Hall L.J. 239.

Finally, see M.V. Tushnet, “Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education” (1984) 52 Geo. Wash. L. Rev. 272 at 278. Tushnet maintains that “[c]linical education provides a tremendous opportunity for people to learn about the law in action ... [to] observe the systematic methods by which institutions produce results that are perhaps consistent with the statutes but are nonetheless unsound policy.”

(or not solely), and thus would prompt the search for normative visions of practice.⁴⁶

But clinical legal education, so history reveals, neither necessarily nor naturally facilitates transformative practice. In practice, clinical legal education has often been (and continues to be) permeated by the same vision of law and lawyering that informs classroom instruction. Indeed, many authors have critiqued law school clinics for their failure to reflect critically about justice or about practice norms, and for the control and manipulation to which they routinely subject clients.⁴⁷ Condlin sums this up well when he says:

The underlying assumptions are that there are set ways, known to experts, of performing lawyering tasks, and that a novice's best course is to ask an expert about them. ... Other discussion ... is about the manipulation of rules, procedures, and institutions for the purpose of gaining an instrumental advantage against an adversary. This "ends-means" thinking ... like any puzzle-solving, can be complicated and challenging, but it need not be critical political thinking, and usually it is not. The assumption in "puzzle solving" is that the structure of the puzzle is legitimate, so much so that awareness of the underlying question of legitimacy recedes into unconsciousness. ... In such a world questions about the justice of individual outcomes will sometimes be examined ... but questions about the justice of systemic or institutional arrangements or standard practice methodologies will usually go begging. Ends-means thinking makes it difficult to see the forest for the trees

⁴⁶ Joseph Tomain and Michael Solimine develop this claim most fully. They argue that part of what clinical education has been about is the development of theories of lawyering "to contribute to an active dialogue about alternative visions of law practice; and to help students develop a reflective model of professional training and continuing legal education ...": J.P. Tomain & M.E. Solimine, "Skills Scepticism in the Postclinic World" (1990) 40 J. Legal Educ. 307 at 310.

Robert Condlin also argues that, in theory, clinical legal education is:

concerned with understanding and evaluating the manner in which such practices [the skills practices of lawyers] contribute to the justice of the legal system. These practices are important because they make up the low-visibility ways in which lawyers amend, abrogate, and enforce the law, and in the process, determine much of law's meaning for persons who come into contact with it.

R.J. Condlin, "Tastes Great, Less Filling: The Law School Clinic and Political Critique" (1986) 36 J. Legal Educ. 45 at 47-48 [hereinafter "Tastes Great, Less Filling"].

⁴⁷ Condlin also argues that clinical instructors:

teach students to manipulate and dominate others as a matter of habit. We teach these processes not as part of a larger set of communicative practices that include ways to cooperate and share power with others or in the context of a moral or political theory, but as a complete repertoire of interactional skills.

R.J. Condlin, "Clinical Education in the Seventies: An Appraisal of the Decade" (1983) 33 J. Legal Educ. 604 at 605.

Similarly Tomain & Solimine, *supra* note 46 at 312-17, especially at 313, conclude that clinical education has failed by failing to go beyond technique to link means and ends and by failing to explicitly confront questions about the role and responsibility of lawyers in search for justice.

Cassels & Mahoney, *supra* note 23 at 125, suggest that clinics have become a "mere adjunct to the state" wherein students are "taught to deal with individuals on an independent and atomised basis in the hopes of quelling instead of activating the desire for social transformation by those whom they serve." See also Hathaway, *supra* note 45 at 240.

and undercuts a lawyer's capacity for utopian thinking, an attribute one ordinarily would think desirable in a social engineer. ... Clinical teachers seem to view prevailing methods for performing lawyer practices as received wisdom rather than data, and measure success more by how students imitate these methods than by how they analyze them.⁴⁸

The failure of much of clinical legal education to live up to its professed ideals does not lead inevitably to its abandonment as a vehicle used to enhance law schools' responsiveness to social movements. The subversive and transformative promise of clinical legal education that fuelled the clinical movement (itself arguably a form of social movement) in its early days has waned but not died. In addition to the changes described earlier that are necessary if legal education is to train lawyers as allies of social movements, returning clinical legal education to its roots is one of the challenges that lies ahead.

⁴⁸ "Tastes Great, Less Filling," *supra* note 46 at 57-59.

