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CLINICAL LEGAL EDUCATION: IS TAKING RITES SERIOUSLY A FANTASY, FOLLY, OR FAILURE?

Steven D. Pepe*

Now that clinical legal education programs are midway into their second decade of development, a number of forces call into question the future of this experiment. A changed social context, declining law school enrollments, and general economic constraints on universities may again prove that "[i]nnovation in legal education comes hard, is limited in scope and permission, and generally dies young."¹

Clinical programs were the outgrowth of several forces in the sixties. The war in Vietnam, racial explosions in the ghettos, and the growing visibility of unjustified economic, social, and sexual inequality caused a stirring from which law schools were not exempt. Law students began questioning the relevance of their courses that aimed primarily toward the service of the existing social and economic order and ignored the most pressing problems of the day. Many students wanted legal careers more directly linked to their values and idealism.

A ten million dollar grant from the Ford Foundation to the Council on Legal Education for Professional Responsibility provided the economic base that, when merged with the student discontent in law schools, would make possible the initial development of clinic programs. While limited follow-up funding from the Department of Education continues, clinics today are more dependent for their continuance on private foundation grants and law school budgets. Many faculties, concerned with shrinking law school budgets and growing gaps between the salary levels of practitioners and law professors, are asking whether the unsubsidized costs of clinical programs are worth the benefits clinics provide. This questioning occurs at a time when clinical programs have demonstrated their educational worth to the satisfaction of most law school faculties. Fieldwork clinics'

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1. R. REDMOUNT & T. SHAFPER, *LAWYERS, LAW STUDENTS AND PEOPLE* 21, 24 (1977).

growth period has ended. Now that clinicians and others have developed respectable simulation teaching methods, simulation courses prove more attractive to satisfy the pressures for more practical offerings than the more expensive fieldwork clinical models.

A glut of law graduates in a leveling legal market creates student concern about finding an entry level job. Student enthusiasm for legal services for society's disadvantaged has faded. Some students worry that experience in a clinical course in a legal services setting raises suspicions in large firms about their priorities and career interests. Students also consider that clinical programs, even absent any "poverty law taint," are less marketable in resumes and their accompanying transcripts than safer traditional law school offerings. When these factors are combined with the voting strength of clinicians and their allies on most faculties, the future of clinical fieldwork courses appears problematic.

This article assesses the primary product of law schools—the practicing lawyer—and reviews the criticisms of the adequacy of the initial training for attorneys that law schools provide. After a brief review of goals of legal education and goals of clinical teaching methods, the article argues that properly structured clinical programs are not based on flawed premises and that the nation's law schools, particularly the leading schools, should not abandon their clinical experiments without further efforts to help clinical legal education achieve its unfulfilled promises. The premises and assertions of this article are not new. Indeed, they are reiterations of a controversy that has been ongoing, with varying degrees of intensity, for over a half century.

I. THE LEGAL PRACTITIONER

Nearly ninety percent of the graduates of Michigan Law School practice law in some form. A total of less than five percent enter either teaching, the legislative, or executive branches of governments.² An analysis of the various elements that define an attorney highlights those elements of a lawyer's skills to which law schools can make their most effective contributions. A

2. Adams & Chambers, *The Recent Alumni of the University of Michigan Law School: A Report on a Survey of the Classes of 1966 and 1967 Fifteen Years After Graduation and the Classes of 1976 and 1977 Five Years After Graduation* 26 (1984) (on file with U. MICH. J.L. REF.).

simplified scheme can serve as a heuristic model. The scheme conceives of a lawyer as a series of overlapping collections of experience, knowledge, and beliefs that could be grouped in the following categories of legal doctrine, institutional understanding, skills, professional role, and personal identity.

A. Legal Doctrine

Lawyers differ from other individuals because of their specialized knowledge of substantive and procedural rules, including both the specific rules and the general policies, norms, and processes that compose our legal universe. The ideas in this collection of specialized knowledge provide the primary focal points of legal educators and bar examiners.

B. Institutional Understanding

Legal doctrine is institutionally based. Attorneys cannot usefully apply legal doctrine for clients without acquiring a vast knowledge about the interpersonal and institutional elements of the settings in which their clients operate. This knowledge commonly affects outcomes more than does legal doctrine. Lawyers learn about the structure, reward system, access and leverage points of courts, probation departments, law enforcement agencies, social service departments, corporations, insurance companies, trade or labor unions, legislatures, and law firms. Effective service to clients requires coping, persuading, bargaining, manipulating, or avoiding maneuvers in various institutional transactions. Commonly, legal doctrines affect modes of persuasion, bargaining, and the relative power of the parties. Other factors such as personality, bias, status, power, money, and a certain degree of fortune also affect outcome. In such transactions, legal doctrine may have little relevance if other dynamics are mishandled.

The legal realists noted that the law could not be understood apart from these institutional and interpersonal elements. Such an understanding gives legal doctrine a more humble, but more accurate, meaning. Law schools have begun to focus more attention on this interplay of legal theory and institutions. Yet, cognitive classroom studies can teach only a limited amount about these extralegal factors. A fuller comprehension of such elements and their interactions develops only in the world of experience

and practice.

C. *Skills*

Many discussions about clinical legal education suggest that traditional law school pedagogy is theoretical and that clinical programs develop practical skills. The truth is that law schools have always focused on skills training. The skills, however, are the skills of legal analysis, analogic thinking, and persuasive argument. Such skills are central to legal practice, but their usefulness to law professors does not make them any the less *skills*. No one argues that training in these traditional law school skills is inappropriate for law school education merely because they are also practice skills. Nor is there the assumption that they are skills that cannot be taught. While the vehicle used to teach these skills—legal doctrine—is theoretical, the pedagogical method of teaching them is not theoretical. Rather, like many skills, they are taught by teacher modeling and student drill within the classroom dialogue. The legal academy deems this skills training one of its greatest achievements, teaching novitiates how to think like lawyers.

Other skills are necessary for novitiates to think and act like lawyers. These include the skills involved in interviewing, counseling, decision making, problem solving, case planning, advocacy, and bargaining. While the methods used to teach these skills may differ, and law faculty members may have lesser inclination, talent, or experience to train in these skills, the skills are no less amenable to modeling and drill than the legal analysis exercises that occur in law schools. Nor are these skills any less appropriate for law school training than legal reasoning skills. Each of them is subject to thoughtful analysis about theories of effectiveness and, like legal reasoning and argument, each of these skills has a cognitive element and a performance element capable of being evaluated and improved.

D. *Professional Role*

In addition to the doctrinal base, institutional understanding, and practice skills, lawyers assume a professional role comprised of behavioral and dispositional expectancies. Professional codes of conduct define many of these expectancies through minimum requirements for competency, diligence, and concern for client,

accompanied by limits on exploitation of client and opponent, adversarial conduct, business activities, and misuse of office. In addition, lawyers are socialized in the informal rules, customs, and procedures of the tribunals and agencies before which they practice. The professional role creates performance demands as well as a set of permissions and privileges that facilitate lawyers' work. All these factors define the lawyer's public self.

E. Personal Identity

There is another part of all attorneys—the private self—those meanings and values that define the person. The private self chooses relationships and degrees of responsibility to others and society. From one's identity flow philosophical and political beliefs, the capacities for creativity and aesthetic appreciation, religious sentiments, love, and trust relations. As one of my students cynically stated, "This is the part of yourself that you leave on the doorstep as you enter law school and hope it's still there three years later when you leave."

Although law school does not focus on this, the relation between the professional and personal identity defines each lawyer's future. Some lawyers attempt to separate their professional role and their personal identity. During the day these lawyers act as "hired guns," remaining neutral to clients' motives and ends. They use their professional role as a justification to distance themselves from any accountability for the consequences of their actions or the unfairness of the ends they may serve. After five o'clock, these lawyers can again become humanists, concerned about others and society. This relationship of personal identity and professional role may lead to a schizophrenia and self-delusion risky to both the lawyer's personal and professional existence.

Another resolution, visible in the 1960's and early 1970's, allows the personal portion of the self to dominate and demean the professional role. One's personal or political goals are served through manipulation of the professional role, undercutting all limits imposed by professional codes of conduct. Instrumental manipulation of the rules, deception, and coercion are limited only to the extent that such tactics would not be effective.

In the most frequent resolution, the professional role dominates the personal identity. Most lawyers occasionally allow role appropriate behavior to surface in inappropriate settings; a modest example is the attorney whose dinner conversations with a

non-lawyer spouse are governed by the Federal Rules of Evidence. Adversarial behavior sometimes occurs in personal relations when listening, caring, and supporting would be more appropriate responses. For some lawyers, occasional becomes habitual; adversarial, analytic, non-emotive responses erode other personal capacities. In the extreme case, this role encroachment is so complete that "being a lawyer" defines one's total self.

Obviously, a healthy resolution of one's professional role and personal identity enables personal meanings and values to find expression in professional work. An integrated and autonomous person maintains the capacity, disposition, and sensitivity to respond appropriately when acting in or out of a professional role. While professional tasks serve personal values, personal motives do not sabotage role obligations. For a well-integrated person, the learning, choices, and actions of professional tasks are congruent with furtherance of the personal dimensions.

II. THE CRITIQUES OF LEGAL EDUCATION

The case method has been the predominant mode of legal education since Langdell introduced it at Harvard in 1870. Through case analysis students are introduced to the basic doctrines of the law and the modes of analysis and fact analogy that are essential to legal thought. Students study legal reasoning and policy analysis in the broader context of the Socratic dialogue on a case. The case method was seen as an escape from legal formalism, a way to teach "the living law" instead of abstract legal theories.³ Over sixty years ago, however, Alfred Reed criticized the case method, especially in the second and third years of law school.⁴ He focused on overreliance on the case

3. Roscoe Pound, whose training was in science, not law, noted in 1903: "As teachers of science were slow to put the microscope and the scalpel into the hands of students and permit them to study nature, not books, so have we been fearful of putting reports into [law students'] hands, and permitting them to study the living law." J. REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 41 (1914), quoted in R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 119 (1983). It is ironic that the bar was inclined to more overarching theories of formalistic jurisprudence, and considered the case method "a mass of . . . 'practical' rubbish." The case method was too disconnected and detached to show the continuous and steady flow of the law and its more unitary concepts. *Report of Committee on Legal Education*, 15 A.B.A. PROC. 350, 368 (1892), quoted in R. STEVENS, *supra*, at 59.

4. A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW* 285, 369-88 (1921), cited in Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 703 n.10.

method, flaws in the content covered, pedagogic inefficiency, and the failure of law schools to provide adequate practical instruction to enable graduates to perform basic lawyering tasks competently.

Many of today's criticisms of legal education sound strikingly similar to Reed's. They can be divided into four areas: (a) a *professional critique* of the content and scope of legal education; (b) a *pedagogical critique* of the methodology and its structural and psychological deficiencies; (c) an *academic critique* of the sufficiency of the law's intellectual basis for university study; and (d) a *sociological/political critique* of legal education's failure to prepare graduates adequately for service to society.

A. *The Professional Critique*

1. *Case method content*— Even before the Reed Report, the bar criticized law schools' predominant fascination with analysis of appellate cases. The case method was accused of inadequately teaching the statutory and administrative law commonly used by lawyers. Critics also noted that many important legal and social issues do not find their way into appellate cases.

2. *Case method distortions*— Critics also charge that the case method provides an unrealistic view of legal disputes and distorts students' understanding of how the law operates in society. The law school's simplistic model of rule analysis and application does not consider the essential ingredients in interpersonal and institutional complexities that give the law its ultimate meaning. The case method takes the facts as given by some appellate court or as varied by a law professor. Such facts are artificial; they have been filtered by the judge, lawyers, and parties. In reality, the incompleteness, tentativeness, ambiguity, and conflict regarding facts, coupled with their malleability by the biases of parties, witnesses, lawyers, judges, and jurors, make the application of legal doctrine far different than the Socratic dialogue would suggest. The case method focuses more on legal issues than on the actors and institutions involved. Such an abstract approach is not the "living law." The case method fails to train students to think like lawyers because its analysis is incomplete. Although the classroom discussion may appropriately screen out the multiple complicating factors to initiate analysis of an "ideal type" of legal problem, it does not later add the rich context, the partial information, and the attempts to manipulate that exist in the institutional settings in which legal doctrines

find their real meaning.⁵

The professor may acknowledge the existence of these contaminating factors but discounts them as not being worthy of intellectual attention and analysis. When law professors—the major role models in law students' initial professional socialization—focus on abstract ideas and legal issues to the exclusion of the people involved, they convey an unstated message that the legal issues, not the clients and their problems, are of greatest importance. A second message exists, that there is a hierarchy of interesting problems that great minds find worthy of analysis. Many law graduates consider a matter worthy of their interest only if it contains complicated legal issues. Yet most legal problems, whether a securities registration or a divorce, do not involve complicated legal issues. Many practitioners tend to discount their work and to be discounted by other lawyers if they are not working on complex or cutting-edge legal issues. If the non-doctrinal issues of practicing law are given thoughtful attention, they are as interesting and complex as the substantive law. Most clients and legal problems are of enormous complexity and interest if the personal, skills, and institutional dimensions of the case are thoroughly considered. Law schools miss an opportunity to demonstrate areas of importance and interest that accompany even the most commonplace legal matter. A truly humanistic legal education would infuse legal problems with a serious analysis of the formidable personal and psychological elements of the participants, including the lawyers. This would engage the students in the emotional depths of a case. If legal theory and humanistic perspectives are taught without being rooted in and reinforced by the problems of practice, students may more easily discount or forget law school lessons on the connection of theory to personal performance and institutional dimensions once they commence their professional careers.⁶

5. Frank compared the Langdell case method to a trip to a city in which the ultimate destination was omitted from the ticket. J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 231 (1949).

6. Dean Terrance Sandalow notes the necessary relation of law, emotion, and a recognition of life's complexity:

A failure to devote class time to probing beneath the abstract language that judicial opinions typically—and statutes invariably—employ conveys to students the lesson that emotion and the complexities of life are irrelevant to law. And by leading students during a formative intellectual period to think only in abstract categories, legal education can dull both feeling and their sensitivity to complexity The appropriate objective is not the release of feeling, but its education. This requires . . . bringing feeling into contact with the full range of life's possibilities, but it also requires [that] it be brought into contact with those general ideas we call knowledge.

The case method obscures what is important in legal practice. Law professors teach students not how to be practitioners but how to be law review editors, appellate court clerks, law firm memo writers and, if they are lucky, law professors. These lessons, of great importance for all lawyers, are nevertheless incomplete. Such lessons must be demythologized by contact with the world of practice where many cases involve only interesting people and not interesting issues, and where economic realities or institutional tolerance will not permit the full briefing and argument that law school learning anticipates.

Another criticism of the focus on appellate disputes suggests that it socializes lawyers into greater reliance on the adversarial mode, making the profession more litigious and confrontational and less amenable to cooperative modes of private ordering and regulation.⁷

3. *Curricular scope and method*— Critics assert that the law school curriculum focuses too much attention on doctrine. The areas of substantive law have mushroomed, precluding the possibility of teaching the *corpus juris* in law school. Whether because of the pressures of the bar exam or because of the desire to maintain legal education as the cheapest form of graduate education and to assure a market for the wares the faculty has to offer, legal doctrine dominates the legal curriculum. Law schools have diversified their offerings in recent years, but usually without dropping courses from the range of the legal subjects taught. With statutes outdistancing case law in doctrinal expansion, the case method has yielded to the problem method for teaching

Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 172 (1984). Sandalow suggests that this can adequately be done in the classroom: "A skillful teacher will lead students to read opinions imaginatively, with attention to the human possibilities that lie beneath their abstract language. The exploration of these possibilities, conjoined with consideration of their implications for judgment, offers opportunity for developing that fusion of feeling and intellect we call sensibility." *Id.* Sandalow does not address the issue of whether the law professor, with no academic training or little or no practice experience in these areas, is capable of developing adequate conceptual models for abstract discussion of these subjects.

7. As Langdell assumed the deanship at Harvard, the leaders of the bar believed that law school should prepare graduates for corporate practice and feared the case method's preoccupation on litigated cases would encourage attorneys to sue rather than restrain their clients' urges toward litigation.

The result of this elaborate study of actual disputes, and ignoring of the settled doctrines that have grown out of past ones, is a class of graduates admirably calculated to argue any side of any controversy . . . but quite unable to advise a client when he is safe from litigation . . . The student should not be so trained as to think he is to be a mere hired gladiator.

Report of Committee on Legal Education, 15 A.B.A. PROC. 317, 340-41 (1892), quoted in R. STEVENS, *supra* note 3, at 59.

many statutory subjects. Yet, whatever the method of teaching doctrine, much of this learning will become substantially outdated by legislative changes or will never be used by law graduates in practice. Most doctrine used by lawyers is learned or relearned after graduation. Law schools should focus on teaching how to learn and use the law competently and efficiently and not on how much law can be taught in three years.⁸

Bar review courses, commercial treatises, specialized reporter services, and continuing legal education programs demonstrate how well doctrine can be taught after graduation. Many of the legal subjects law schools will insist on retaining could be taught in less expensive ways. Law schools could use modern electronic methods to cut costs and bring the best law professors into every law school to teach doctrine. Programmed learning and computer networking offer opportunities for greater learner participation in coursework addressed to doctrine than do most law classes. The resulting savings could be invested in small group, in-depth teaching in selected areas of law and in courses on areas of legal practice presently neglected by most law schools.⁹

4. *Practical skills*— The longstanding critique that the overly theoretical nature of legal education distorts a student's understanding of the law has had as its handmaiden for the last half century the critique that law schools fail to train students on the rudimentary skills necessary for minimal competence.

For over a century the bar has played a dominant role in setting the goals of legal education through bar admissions examinations and law school accreditation. While instrumental in the formation of the Association of American Law Schools¹⁰ and generally supportive of law schools' efforts to raise admission standards, the ABA also struggled against what it viewed as the excessively academic hiring and education patterns of law schools.¹¹

8. Many law students take more and more doctrine courses because of insecurity when, in reality, doctrine can be learned more readily in practice than can a thorough understanding of many of the practice skills.

9. Bar examiners may need to cooperate by allowing the bar examination to be phased over the first years of practice, like an actuary's examinations. Bar exams for certification in areas of specialty would allow the initial exam to cover fewer areas, allowing for issuance of a limited license, the continuation of which would be contingent on passing additional examinations.

10. The Section on Legal Education and Admission to the Bar, at the urging of Henry Wade Rogers, dean of the Michigan and Yale law schools, provided the organizational initiative in 1899 that led to the formation of the Association of American Law Schools. R. STEVENS, *supra* note 3, at 96. It was not until 1914 that the AALS held meetings separate from the ABA meetings. *Id.* at 114.

11. In 1910 the ABA recommended a one-year clinical internship after law school

The goals of legal education have found various articulations. Early in the century, Dean Roscoe Pound noted that legal education should (1) teach the basic mental skills of legal analysis and synthesis, (2) provide an understanding of the basic authoritative materials, (3) provide students a sense of the law as a social institution furthering social policies, and (4) lead students to internalize a sense of craft in their future accomplishments and undertakings in all these areas.¹² In his twenty years as Harvard's dean, this non-lawyer leader of the nation's most powerful law school accepted the Langdellian premise that the study of cases was the study of legal practice. Yet Harvard students attacked the school for overreliance on the case method and a bland curriculum.¹³ Harvard's most recent curriculum study shows that law schools continue to struggle with the same dilemmas that existed in Pound's time.¹⁴

Dean Terrance Sandalow expressed concern about the risks to legal education of aiming only at "fitting law students to the professional roles"¹⁵ they will play upon graduation. Such vocationalism demeans the students and the opportunities for intellectual and personal growth during law school. "The main object of legal education [should be] the enhancement of [students'] capacities to realize their human potential as it is understood in our culture."¹⁶ Law school goals include the formation of those character traits and intellectual capacities that enhance clear thought, intelligent feeling, and knowing action. This entails more than the lawyering skills of analysis and advocacy. Legal education should assist students to "avoid common hazards to clear thought, such . . . as self-interest, provincialism of time and place, overdependence on familiar categories of thought, the inability to tolerate uncertainty, and sentimentality."¹⁷ These temptations are hazards to clear thought precisely because they

before admission to the bar. This is strikingly similar to Chief Justice Burger's recent suggestion. The ABA unsuccessfully asked for its acceptance by the AALS in 1913. Dean Rogers, who earlier had criticized the case method as not suitable for all students, led the academic attack on this clinical year by asserting that the case method provided practical training sufficient for admission to the bar. R. STEVENS, *supra* note 3, at 120. See also Manning, *Law Schools and Lawyer Schools—Two-Tier Legal Education*, 26 J. LEGAL EDUC. 379, 382 (1974).

12. Prof. David F. Cavers, Seminar on Legal Education, Harvard University Law School (1973).

13. R. STEVENS, *supra* note 3, at 137 & n.53.

14. See Michaelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 353 (1982).

15. Sandalow, *supra* note 6, at 167.

16. *Id.* at 168.

17. *Id.* at 171.

affect a lawyer's feelings, motives, and actions. Principles and feelings must be informed by a "knowledge of life" in guiding or judging conduct for the lawyer. Dean Sandalow notes that the skills of analysis and synthesis are broadened by contact with new subjects other than legal doctrine.

Sandalow, however, seems to have confidence that such goals can be achieved without going beyond the walls of the legal academy. Frank Michaelman suggests that active or experimental learning about practice "is an inseparable aspect of proper cognitive learning. It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention, and apter recall of the cognitive material."¹⁸ Law schools have an educational responsibility to offer some applied skills courses to give students confidence in their ability to perform effectively as lawyers. This criticism of the law school's failure to teach students the skills necessary to be competent trial lawyers has intensified since Chief Justice Burger's Sonnett Memorial Lecture in 1973.¹⁹

Many have criticized law schools for failure to teach human relations skills such as interviewing, counseling, decision making, fact investigation, and case planning. The counter argument notes that law schools provide a unique educational opportunity for students to immerse themselves in theoretical analysis. Practice skills can be acquired more efficiently after graduation. A university-based school of law should make those contributions to critical reflection and theory that are less available after graduation.

This argument assumes that teaching students to think like lawyers requires most of the three years of law school and that added doctrinal courses are useful vehicles for the continuation of this thought development process. It could be, however, that refinement of legal thinking would better evolve in the more complex arena of actual cases, where it will need to be exercised in the future, rather than in additional courses on doctrine. The modeling and application of law school's high standards of thought and analysis to the multiple dimensions of an on-going legal problem would make law school learning more transferable and durable in practice. Lawyers are taught in law school how to learn doctrine. This equips graduates with a competence to ex-

18. Michaelman, *supra* note 14, at 353-54.

19. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973).

pand their knowledge of the law. Law students are not equipped with similar competence in how to develop other legal skills.²⁰

While books and Continuing Legal Education programs have refined the teaching of doctrine, thoughtful training in fact investigation, interviewing, counseling, advocacy, and negotiation are less well developed, less widely available, and demand blocks of time that are awkwardly large for most practitioners.

Both law students and practitioners want more practical offerings in law school. Zemans and Rosenblum²¹ found that practitioners feel that law schools ignore many of the skills most important to their current practice—the communication skills of counseling and interviewing, negotiations, investigation, and advocacy. Their schools did not even apprise them of the importance of such skills to their future professional competence. These attorneys believe that many such skills areas can be effectively taught in law schools.²²

In the Zemans and Rosenblum study, lawyers ranked four skills as most important: (1) fact gathering; (2) capacity to marshal facts and order them so that concepts can be applied; (3) instilling others' confidence in the attorney; and (4) effective oral expression. These practical skills are not peculiar to the practice of law. The three skills or areas of knowledge ranked next are more central to the law school mission: (5) ability to understand and interpret opinions, regulations, and statutes; (6) knowledge of substantive law; and (7) legal research. Then came: (8) negotiating; (9) drafting legal documents; and (10) understanding others' viewpoints to deal more effectively with them. Three of four lawyers responding ranked all of these as important. Only about one in three lawyers ranked knowledge of political science, psychology, economics, sociology, and accounting skills as important.²³ The attorneys attributed learning of the four most important skills to their own experience;²⁴ the next three they credited to their legal education. The Chicago lawyers

20. Most lawyers in the Zemans and Rosenblum study of the Chicago bar felt that the capacity to define a problem and to know where to seek the answer are vital skills law schools provide. F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 136-39 (1981).

21. Zemans & Rosenblum, *Preparation for the Practice of Law—The Views of the Practicing Bar*, 1980 ABF RESEARCH J. 1, 5-6 (1980).

22. The Stevens, Pipkin, and the Zemans and Rosenblum studies found that law students wanted more practical courses. They wanted more emphasis on legal research and writing. See Pipkin, *Legal Education: The Consumers' Perspective*, 1976 ABF RESEARCH J. 1161, 1169-73; F. ZEMANS & V. ROSENBLUM, *supra* note 20, at 135-44.

23. See F. ZEMANS & V. ROSENBLUM, *supra* note 20, 135-44.

24. See *id.* at 135, Table 6.4.

thought that law school could appropriately contribute to acquisition of certain skills—fact gathering, effective legal drafting and oral argument, interviewing, and understanding the viewpoint of others. Law schools were not viewed as capable of developing the ability to inspire the confidence of others.

Similarly, Baird studied the classes of 1955, 1965, and 1970 from six schools (including Michigan) five years or more after their graduation.²⁵ With the exception of knowledge of statutory law, which was ranked second, the practitioners rated general practice competencies more highly than substantive knowledge as the elements essential to adequate legal performance. Baird, like Zemans and Rosenblum, found that the law school competencies were important to practice, particularly the ability to analyze and synthesize law and facts. Yet, four out of ten lawyers considered the ability to write, communicate effectively, research, draft legal documents, counsel clients, and negotiate essential, while only one in four considered knowledge of common law essential. Baird found that overall, lawyers were not dissatisfied with their legal education for what it did, but felt it failed to attempt to do more.

Most practitioners acquire practice skills by muddling through, commonly at the expense of their initial clients. They develop these skills by non-critically adopting behaviors of available role models, good or bad. New attorneys who enter more elite practice settings, with better role models and more attention focused on refinement of practice skills, may develop good skills with speed, efficiency, and reflective competency. Yet, many law firms do not provide the attention and supervision required for adequate skill development. The bulk of law graduates not entering elite law firms or governmental departments acquire a deficient post-graduate education where ineffectiveness often masquerades as competence.²⁶

B. Pedagogical Critiques

1. *Structural efficiencies*— Commentators criticize legal training for its lack of clear structure. A smorgasbord of doctrinal offerings fails to recognize the basic premises of learning the-

25. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978).

26. Access to *competent* legal assistance at affordable costs for Americans other than the rich or the exceptionally injured constitutes one of the greatest challenges to our system of justice.

ory that learning be structured to challenge students continually and to build on past learning. The curriculum also contains considerable overlap in coverage of doctrine. The course structure maintains student dependence and teacher control in the second and third years instead of greater student responsibility and autonomy for their own learning as their competencies develop.

2. *Psychological deficiencies*— Most law students approach graduate education with a predisposition to learn, based on their past successes. Law school confronts them with its Socratic puzzles that seem to have no closure, apparent structure, or relevance. Students commonly receive negative classroom feedback. Evaluation occurs by exams scheduled after long periods of students' uncertainty about their progress. Student evaluation generally consists of a grade with no explanation of what they did well and where they can improve.

For many, this frustrating experience destroys the self-esteem and confidence necessary to take the risks required to learn. The experience and insecurities that result retard motivation, inquiry, and creativity for these students. Many law students learn to hate learning and the law school process; some become seriously alienated.²⁷ Others defend their sense of self by disengaging from law school and taking comfort in the hope that "real lawyering" is not like law school. In the second and third years increased absence from and passing in class occur as students put more of their energy into job hunting or part time jobs.²⁸

C. *The Academic Critique*

While the law school holds itself out to the non-university world as providing service to society in both training professionals and providing analysis to guide appellate courts and law makers, it represents to the university world that law professors are serious academics. In what now seems a hoax, when law initially gained university admission, it held itself out as a science.

27. Carrington & Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977); Carrington & Conley, *Negative Attitudes of Law Students: A Replication of the Alienation and Dissatisfaction Factors*, 76 MICH. L. REV. 1036 (1978). Discussions with more recent students reveal continued frustration that limits motivation. The Carrington-Conley survey should be conducted again to compare current students' levels of dissatisfaction and alienation.

28. Stevens found a sharp decline, after the first semester, in the time and energy students devoted to law school; by their senior year many students spend the equivalent of only two days a week studying for their courses. Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 652-53 (1973).

Even law's modified policy science aspirations after World War II did not command the respect of the university's true intelligentsia. The addition, in recent years, of psychology, economics, history, philosophy, and jurisprudence to the law school curriculum provides limited justification for the law school's claim to be an extension of liberal education in the university's humanist tradition.

Law schools are powerful units of a university, not always because of the strength of their intellectual scholarship, but because of their connections to power in the broader society. Another source of strength is that legal education, with the Socratic method, is cheap—law schools provide the cheapest form of graduate education and make money for some universities. Although many faculty members have made important and unique contributions to fields of study, most legal scholarship would not find acceptance in other academic units.²⁹ Much of the best legal scholarship is not strictly academic, but rather focuses on practical application of legal theories to current political issues. These contributions are indeed important to society—though possibly not as important as law faculties might like to think. Law professors teach seminars on areas of research interest. Yet, students commonly view seminars as intellectual hobby horses on which they must ride only because faculty have imposed a seminar requirement. Many students do not get into the seminar of their choice; others have no desire for specialized research. Without students with a serious academic interest, even these focused seminars rarely provide occasion for law teachers to advance their research.

Without some radical change in the generalist inclinations of most law students or the structure of legal education, academic policy analysis and empirical research are not likely to receive greater attention. If law schools created separate programs of professional and research degrees, at least one portion of the law school would attract a cluster of scholars and students committed to academic research.³⁰

Thus, law schools face a dilemma. When they increase the sophistication and empirical basis of legal scholarship, they distance themselves from the interests of the majority of law stu-

29. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645-46 (1968).

30. The Curriculum Study Project Committee of the American Association of Law Schools, in 1971, suggested a two year J.D. degree followed by either practical training or more academic research for graduate students interested in teaching, not practice. P. CARRINGTON, TRAINING FOR THE PUBLIC PROFESSION OF LAW 2 (1971).

dents and the practicing bar.³¹ The purer the legal academy's thought, the greater its impotence.

Many serious academics in the university are critical and resentful of the higher pay, lighter work loads, and the lesser quantity and quality of intellectual production in the law school.³² They also question whether law schools have a sufficiently consistent theoretical or methodological framework with which to provide students with the skills and data needed to attempt an analysis of society's fundamental problems or to examine society's fundamental premises.

D. *The Sociological-Political Critique*

The treatment of students in the classroom and throughout the law school experience inspires another critique of law schools. Although they cater to academically gifted students, law schools do not treat most students as adults. Faculty, with varying degrees of intensity, view many students as ignorant, unmotivated, insincere, selfish, materialistic, and unwilling and unable to take greater responsibility for their professional growth and development.

Commentators attack the classroom experience as demeaning, threatening, and damaging to students' egos.³³ In the classroom, the intellectually more powerful demonstrate how to treat the less powerful. Students come to accept as inevitable, even legitimate, the hierarchical ordering in class rankings, firm rankings, client rankings, substantive law rankings, and social rankings.

31. For a concerned analysis of legal scholarship, see *American Legal Scholarship: Directions and Dilemmas*, 33 J. LEGAL EDUC. 403 (1983).

32. For a criticism by a political scientist, see Hacker, *The Sham of Professional Schools: How Not to Educate an Elite*, HARPER'S, Oct. 1981, at 22.

33. Nader has referred to the Socratic method as a game that only one can play:

Harvard Law's most enduring contribution to legal education was the mixing of the case method of study with the Socratic method of teaching [T]hese techniques were tailor-made to transform intellectual arrogance into pedagogical systems that humble the student into accepting its premises, levels of abstractions and choice of subjects. Law professors take delight in crushing egos in order to acculturate the students to what they called 'legal reasoning' or 'thinking like a lawyer.' The process is a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage.

Nader, *Crumbing of the Old Order: Law Schools and Law Firms*, NEW REPUBLIC, Oct. 11, 1969, at 20. See also Kennedy, *How Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970); Kennedy, *Legal Education and Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) [hereinafter cited as Kennedy, *Legal Education*]; Savoy, *Towards a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

They view realist, abstract, "hard" thought as supreme and emotive, value-laden, "soft" idealism as inappropriate in addressing the tough issues of the law.³⁴ In law school competition, contentious individualism, aggressiveness, ruthlessness, pragmatism, instrumentalism, and the capitalistic ethic are stressed over cooperation, accommodation, compassion, community, idealism, and a principled or professional ethic.³⁵ The emotional rage that may be the motivating force necessary for serious law reform is not welcome in law school discussions.

Critics charge that law schools, in addition to teaching students to accept hierarchy, socialize students into accepting the legitimacy of the primary economic, social, and institutional ordering of society. A formalistic approach to morality limits normative thinking and proper behavior to rules and rule compliance. Without the intellectual training to question the basic premises underlying the legal system and to construct alternative models that have greater claims on justice, law students acquire an incremental, reformist attitude toward law and society. They are taught that things are basically okay, and the legal system needs only some minor adjustments.³⁶

Law schools also convey the message that lawyers deserve power, status, and material rewards because they safeguard the social order. The social order functions autonomously while the legal system provides a procedurally fair approach to resolving conflicts through the courts. The system of technical and procedural law absolves "neutral, professional" lawyers of responsibility for their clients' ends and behaviors. With political activism and resistance seen as unlawyerlike and excessive reformism seen as unprofitable, students are presented with limited career images related largely to types of lawyering and of clients.

Students are graduated from law school unprepared to practice law, and dependent on future learning opportunities to complete their professional development. Large firms have greater resources for providing such clinical training than most other career options except a limited number of government jobs. Train-

34. In comparing the specific legal skills of Chicago lawyers with the Heinz and Laumann prestige ranking of law areas, Zemans and Rosenblum found that the high prestige specialties were associated with the hard analytic skills and the less prestigious specialties were associated with the softer, interpersonal skills. See Zemans & Rosenblum, *supra* note 21, at 5-6; Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978).

35. See Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978).

36. Kennedy, *Legal Education*, *supra* note 33; see also Cramton, *supra* note 35; Cramton, *Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321 (1982).

ing opportunities, combined with the economic and status rewards of large firm practice, make the preferred career choice all the clearer.³⁷

Thus, law schools are criticized for channeling students to large firms that address only a limited number of society's most pressing problems. The best students, best firms, and best faculties are happy with this arrangement. Students want access to the rewards offered by large law firms. Firms want students ranked by grades, dependent on the law firm's training, deferential to partners, and accepting of the existing legal order. Faculty members want students who show respect for their superior intelligence, defer to their authority and status, and make limited demands on their time. They may also want a wealthy, prestigious, and powerful alumni—more readily assured by directing students to large law firms.

Law schools have a responsibility to present students with alternative views of practice and legal careers as possible and worthy goals. Law students begin their studies with great idealism. Many wish to serve disadvantaged persons or causes. Yet, they do not find in the law school a professional role model that will allow them to fulfill the social responsibility of the profession to seek greater justice. The present isolated, esoteric, and largely non-critical curriculum constitutes inadequate preparation for this undertaking. As Derek Bok has argued, if law schools were "not training lawyers but preparing 'leaders of the bar' . . . one would suppose that students . . . would be studying ways of creating simpler rules, less costly legal proceedings, and greater legal protection for the poor and middle class."³⁸

If law reform were the goal of legal education, law schools would need to be radically changed. Lawyers make and enforce the law, and they assist clients in their struggles for power through the law. Yet, entrenched injustices cannot be countered without lawyers. Law schools could do more in devising theories and models for reforms in the legal and social systems. These efforts would encompass new career options as well as enhanced opportunities within traditional career choices for professional service to society.

The multiple criticisms of law school have been summarized in the shrillest terms by one of the primary exponents of clinical

37. Large firms also have a generous government subsidy for their on-the-job clinical training because the client fees that support the training are tax deductible to corporate clients.

38. Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, 45.

legal education, Gary Bellow:³⁹

Most law is taught as if marshalling arguments on both sides of an issue were its end all and be all. There is very little closure around the question of right and wrong as the class moves from one case to the next. Indeed, justice as a criteria for decision is often dismissed in the first three days of classes as soft-headed and unrealistic. . . . [L]aw school is empirically irrelevant, theoretically flawed, pedagogically dysfunctional and expensive.

III. GOALS OF CLINICAL LEGAL EDUCATION

Clinicians have variously identified the educational goals of clinical legal education over the last decade of experimentation. There has been some debate about whether clinical legal education is a methodology for teaching about practice or a series of separate substantive subjects. As a colleague stated, clinical law "puts color in the empty outlines of the legal comic book."⁴⁰ While clinical teaching methods can present substantive law with greater depth and comprehension than a more traditional course, it is an expensive means to teach substantive doctrine. Traditional law school methods are more efficient, even though they may engage the students less intensely than a clinical course. If second and third year law students become bored studying more areas of substantive law, the solution does not lie in teaching all of these subjects clinically, but in cutting down on doctrine and focusing on other aspects of learning essential to effective and reflective practice.

In clinical legal education, substantive subjects should be vehicles for learning about the difference between legal theory and the law as it operates in practice—the contextual, interpersonal, performance, and social elements of applying legal theory. Many substantive subjects can effectively carry these educational messages. The lessons learned in any appropriately selected area of doctrine can be transferred by the student to other legal areas, providing further insights, professional growth, and personal development in future practice.

39. Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 622 (1983). (The last sentence is Al Sacks's summary of Bellow's thesis.)

40. Conard, *Letter from the Law Clinic*, U. MICH. L. QUADRANGLE NOTES, Fall 1973, at 16, 18.

An effective clinical teacher acts as a translator and interpreter for the students. The clinician introduces the students to the workings of the legal system. More important, the clinician helps the students become familiar with their new role and identity. Although people learn from unguided experience, analysis and interpretation quicken the pace of learning and foster the habit of reflection on experience.

Building on the analytic skills learned in traditional classes, clinical teachers should encourage similar habits of inquiry, testing, and critique about the skills of legal practice—interviewing, counseling, decision making, investigation, case preparation, negotiation, and advocacy. Clinics should continue students' development of research and writing skills. Students will confront their ignorance in addressing real problems. Lessons in developing and maintaining a high level of competence in a real world context with its time and resource constraints will prove more durable than the lessons learned in the more artificial and protected classroom setting.

Clinics should focus student attention on the interpersonal and institutional dimensions of the world of law practice. Clinical instructors help students analyze their experience by questioning how decisions are made in client interviews, student-supervisor interchanges, and the institutions in which the students are practicing. Students should be encouraged to articulate the power and authority relations, emotive inputs, hidden agendas, institutional access and leverage points, as well as the effect of personality, bias, emotion, and status on outcome. Students must struggle with their own decision making and actions under conditions of incomplete information and uncertainty.

Clinical education permits students to integrate into a single case the multiple subjects that they learn separately in their other course work—civil procedure, contracts, commercial transactions, creditor's rights, evidence. In supervised fieldwork, students will also integrate their knowledge of legal theory, of legal context, and of psychology with their own personal abilities, insecurities, efforts, values, and judgments.

Clinical teachers find students motivated to learn in clinical courses. In such courses students gain confidence and a sense of accomplishment that adds to their self-esteem.

Students should also experience the meaning of the special role limitations and obligations that constitute professional responsibility. Clinical teachers should aid students in "issue spotting" the pervasive ethical problems of legal practice. Yet, effective clinical training must go beyond this to provide an open

environment for discussion and debate about what behaviors are appropriate for a lawyer and how appropriate behavior is commonly sabotaged by psychological blind spots. Student attorneys will be involved in the fact development process in which lawyers affect what facts get disclosed and how they are developed. They can see how confidentiality affects communication and trust. Students will experience the constant choices about deception and manipulation that lawyers and clients face in their interactions with each other, opponents, and legal institutions.

Throughout the clinical work, the supervisor should assist each student to gain self-knowledge. Students can be encouraged to discuss how their emotions, personality, and behaviors may limit their effectiveness with clients, opponents, or the institutions in which they operate. Supervisor feedback and use of videotape can help students develop a better understanding of how they present themselves—what verbal cues and self-effacing or self-aggrandizing characteristics they manifest, how well they listen and empathize, and how appropriately they respond. Students can become more aware of the effects of their insecurity, anger, and confusion. Their interactions with clients, opponents, judges, supervisors, and other students provide opportunities to analyze how they use and respond to authority and the degree that they act on untested assumptions, struggle to control situations, and attribute their own meanings to relations with others, thereby failing to achieve real understanding. Clinic students experience feeling responsible for a client who is dependent on their competence, effort, and support. Student self-awareness can more easily be encouraged if the seminar includes some individual case review with a person well trained in psychology. Such a person can help students perceive external demands and internal impulses that sabotage professional behavior.⁴¹

In fieldwork, the temptations to turn a principled ethic into an instrumental morality to achieve a client's end become visible. Unlike courses on professional responsibility, clinical experiences demonstrate the important difference between the intellectual task of defining the right action and the psychological and motivational states necessary to take the appropriate action. The rewards from minor rule breaking are high and risks of detection and sanction are low in legal practice. Desires to help

41. See Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 20-23 (1963); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 153-57 (1968); Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248, 265-78 (1975).

clients and to succeed in a task enhance the temptations to amoral instrumentalism. Clinical supervisors should use the ethical dilemmas and temptations of clinical fieldwork to assist students to develop an awareness that professionalism entails not only knowing rules, but also a sense of obligation, a disposition to act appropriately, and an inner discipline for clear thinking and right action in the face of temptations to blindness, rationalization, or intentional deviance from rules.⁴²

Students in fieldwork can often observe in other attorneys the end product of patterns of professional corner-cutting. Such behaviors have consequences for the lawyer that are cumulative, corrosive of capacities to recognize and select appropriate behavior, and hard to contain or reverse. In clinics, students should look beyond fixed ethical rules and begin to derive from their experience their own generalizable principles for professional behavior. A clinic experience cannot complete this process, but it can help students begin to develop habits of more careful thought and considered action about ethical problems that lawyers encounter.

While a clinical course cannot comprehensively cover all interpersonal, professional, and psychological skills, it can demonstrate to students their importance in the practice of law and initiate the habits of asking questions and seeking answers about such subjects. The clinic experience makes such topics a proper subject for public articulation and questioning with other lawyers. Students should be urged to find colleagues in practice who will continue the enterprise of dialogue and analysis.

If clinical education can help broaden the agenda of analysis beyond the legal doctrine and the immediate skill involved to the broader questions about the contextual, the personal and psychological, and the ethical and social elements of legal practice, then the experience will enrich the students' future practice and enhance their chances for personal and professional growth. Clinical education seeks to teach students to become self-learners in their practice of law. Unlike the doctrine courses that may never be used or may become obsolete, an appropriate clinical

42.

If we lived in a State where virtue was profitable, common sense would make us good, and greed would make us saintly But since in fact we see that avarice, anger, envy, pride, sloth, lust and stupidity commonly profit far beyond humility, chastity, fortitude, justice and thought, [we] have to choose, to be human at all . . . why then perhaps we must stand fast a little

Thomas More to his daughter, Margaret, in Act 2, R. BOLT, *A MAN FOR ALL SEASONS* 140-41 (1962).

agenda for learning will stay relevant throughout the student's legal career. If students get some direction in law school and build confidence in developing their lawyering skills, they may feel less constrained in their initial job choices.

The above agenda for clinical courses make the learning from experience in the inhibiting and distracting world of practice the prime subject. Such learning complements traditional learning from law school authorities. Learning to learn from experience does not entail abandoning theory and ignoring the ideas of others. If undertaken properly, clinical teaching should encourage such pursuits.⁴³ Autonomy, however, requires learning from experience as well as from authorities and their theories. Autonomy requires freedom from dependence on received wisdom alone. It entails testing the theories of others and generating your own theories. Because all theory is rooted in experience, students cannot effectively learn how to test and generate the theories of practice without some exposure to the actual world of law.

For most law students, clinic provides a demythologizing experience as they test the theories of law in practice. In clinics that represent the accused, the mentally ill, or the poor, the theory testing and theory building is even more dramatic as students examine the market system of delivering legal services and the workings of "law" and "justice" at the bottom of the legal system. Experience representing the least advantaged in society provides unique opportunities to critique the legal system and the adversary model. Learning to cope in cases representing the least powerful eases the transition to representing more powerful clients. If law schools would focus more attention on these broader subjects and modes of thinking that arise in practice and lessen slightly the number of courses on doctrine and legal analysis, law graduates would be better prepared to serve themselves, their clients, and society.

Such a clinical agenda, if done thoughtfully, is neither anti-intellectual, unbecoming of a university, nor mere vocationalism. It is in full accord with the goals of legal and humanistic education. Supervised instruction in the world of practice—to which law students are soon to be abandoned—offers the best potential "to enhance the capacity of students to think clearly, to feel in-

43. "An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory." Frank, *A Plea for Lawyer-Schools*, 56 *YALE L.J.* 1303, 1321 (1947).

telligently, and to act knowingly.”⁴⁴

IV. STUDENT AND ALUMNI RESPONSE TO CLINICAL COURSES

Clinical legal education has been labeled the most significant innovation in legal education in recent decades.⁴⁵ Arguments over its pedagogic utility have been fought and won at most law schools. Evaluations by Michigan students from 1973 to present show that 99% of clinic students would recommend it to others. The overwhelming number of students who have completed the clinic felt that they learned a great deal. For those skeptical of student evaluations as a measure of the worth of a course, the Student Senate in 1981 polled a random sample of nearly 200 Michigan graduates who had taken the clinic from 1970 to 1980 to determine if practitioners were less enthusiastic than students. Ninety-five percent of the respondents stated that they would take the clinic again instead of a comparable number of credit hours in traditional classes, if they were in law school today. A similar percentage disagreed with the statement that clinic experience was unnecessary because it provided what they would have learned anyway in their first year of practice. When asked to compare the applicability of their clinical experience with their other law courses, 94% found it at least as useful, and 69% found it more useful.

General Michigan Alumni Surveys of the classes of 1966, 1967, 1976, and 1977 show 28% of the respondents suggested clinical courses be increased in the law school.⁴⁶ Of all the doctrine and skills courses listed, clinical law received the second highest response for increases, following only suggestions for more courses on negotiation.

A research effort by Educational Testing Service to measure clinical skills demonstrated that law students with clinical experience were more effective in interviewing exercises than non-clinical students.⁴⁷

Clinical legal education joined the law school club when students and the bar were criticizing the overly theoretical curricu-

44. Sandalow, *supra* note 6, at 173 (1984).

45. Gee & Jackson, *supra* note 4, at 881 (footnote omitted).

46. See Adams & Chambers, *supra* note 2, at 18.

47. The author and several other clinicians developed several simulation interview exercises, which ETS field tested for reliability before assessing law students. D. ALDERMAN, F. EVANS & G. WILDER, *ASSESSING CLINICAL SKILLS IN LEGAL EDUCATION: SIMULATION EXERCISES IN CLIENT INTERVIEWING* (1980).

lar offerings of law school. It was a period of optimism about the law's ability to effect reform if the disadvantaged obtained representation as competent as the representation available to the privileged. The Ford Foundation's seed money provided the final important ingredient.

Today, students are less interested in law reform. Many of the easy victories in civil rights, welfare law, and housing procedures have been won, only to be undercut by other social forces. Advances in criminal procedure have limited the worst abuses but hopes for comprehensive reforms in criminal justice are diminished; few lawyers believe that they can affect the causes of crime or the chances for rehabilitation of the convicted. Reformist notions, while not less needed, have encountered resistance in society. With lessened opportunities for students to act on their idealism through reformist activities, law students in greater numbers have turned to concerns about careers in a tightening job market. Thus, the early reformist forces of clinical programs have faded.

With declining law school enrollments and limited external funding for clinical courses, economic pressures encourage law schools to reduce clinical fieldwork courses and substitute simulation courses that focus primarily on lawyer's skills. Although clinical teachers have refined and widely adopted simulation exercises for skills training, students have consistently given them lower evaluations than actual fieldwork experiences. Simulations are effective for certain learning but they are always artificial; students are less motivated to participate than they are in a few, carefully selected, real cases.

Given the changes of attitude and economics, clinics must prove their worth in their capacity to train law students in the skills and professional dimensions of their work that traditional law school courses neglect.

V. THE LIMITATIONS AND PROBLEMS OF CLINICAL LEGAL EDUCATION

In the years that clinical programs were struggling to gain a foothold in law schools, they were overzealous in their claims. The most thoughtful criticism of clinical programs has come from within its ranks, through the writings of Robert Condlin. He criticizes clinics for not having a sophisticated understanding of lawyering or of domination and manipulation in the world of practice. Clinicians fail to demonstrate the critical self-reflection

that they purport an ability to teach. They focus almost exclusively on adversary skills to the exclusion of developing more collaborative modes of lawyering better equipped to serve the needs of society. While purporting to have a reformist agenda pointing toward a fairer legal system with a greater claim to justice, clinicians have no coherent theory from which to criticize the present system. Absent a consistent theory of law, practice, or society, clinical programs cannot offer viable hopes for a better system that will redress the issues of racial and sexual discrimination, the maldistribution of resources and opportunities, or the unequal access to affect and use the law in our society. Finally, Condlin asserts that clinicians have no research methodologies from which they could generate sophisticated knowledge of the operation of the legal system in society. Having little of intellectual interest to share with their non-clinical colleagues, they distance themselves from the remainder of the faculty and defensively immunize themselves from criticism.⁴⁸

All of these criticisms are legitimate. The fact that many of them could be addressed to most traditional law faculty does not remove their sting. To these failings, others could be added. Clinics' desire to find threshold cases appropriate for student trial experience conflicts with the possible social good of simplifying the law and delawyerizing many areas where access to a fair and legally correct outcome depends on access to a lawyer.⁴⁹

Being victims of their own legal education and practice experience, clinical teachers are generally unversed in those theories from neighboring fields that are relevant to their teaching. Most clinicians are not well read in psychology, economics, history, and philosophy, nor do they affiliate with others who have adequate training and experience in these fields. As a result, clinical educators, failing to generate new theories about the law in operation, are also ineffective in applying such learning that exists in related areas of study.

48. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 607, 610 (1983). See also, Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 278-81 (1981).

49. For example, a dose of the adversarial system has been prescribed for juvenile, mental health, and child abuse and neglect proceedings. Because threshold practice opportunities and funding opportunities exist in these fields, some of which may still get government funding, many clinics seize the chance for courtroom exposure. In doing so, the clinics continue to professionalize the field and increase individuals' dependence on lawyers. Some clinicians legitimize extension of the adversary model to every case. To assure a continued flow of cases for students to test their adversary skills, clinicians may blind themselves to both the need and the potential for reform and delawyerizing many tasks.

A final criticism attacks the overall legal and academic quality of most clinical teachers. Many are undistinguished in either their academic or practice backgrounds and are considered of lesser intellectual merit than the average traditional law teacher.

Notwithstanding these legitimate criticisms, the clinical movement in its first decade has had some success. For example, a number of educational materials on interviewing, counseling, case planning, trial advocacy, and negotiations have been developed. Although these materials vary in scope and degree of sophistication, they are far more structured and thoughtful than anything that law students were exposed to in the past.⁵⁰

Various videotape materials have also been developed, as have innovative teaching methods to enhance the clinical experience. Law school programs using clinical methods and materials can provide far more organized and less pressured learning of lawyering skills than is generally available in the serendipitous initial years of legal practice. With better teaching materials, a more careful choice of cases to maximize learning instead of generating a fee, and clinical teachers whose primary goal is educational, a good clinical course provides superior professional training than is available in even the best law firm environments.

If one focuses on the more modest claim of clinical education—that it can contribute to professional development by introducing students to the rules, role demands, rites, and rituals of legal practice—it has not been a failure. Clinical programs are providing students with a more thoughtful, structured, and useful skills training than heretofore offered in law schools or in the initial years of practice. In addition, many dedicated clinical teachers provide greater insights into the ethics of lawyering and the problems of manipulation through domination and deception than students will receive elsewhere. Many clinical pro-

50. Some examples of the clinical materials available to teach lawyering skills are: G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); P. BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* (1979); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978); K. HEGLAND, *TRIAL AND PRACTICE SKILLS IN A NUTSHELL* (1978); J. JEANS, *TRIAL ADVOCACY* (1975); MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (1980); M. MELTSNER & P. SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION* (1974); T. SCHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1976); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

Negotiation training materials include R. FISHER & W. URY, *GETTING TO YES* (1983); Lowenthal, *A General Theory of Negotiation Process, Strategy and Behavior*, 31 *KAN. L. REV.* 69 (1982); S. Pepe, *Introduction to Legal Negotiation* (1980) (copy on file with U. MICH. J.L. REF.).

grams expose their students to a demythologizing and critical experience about how the legal system works for the people most in need of society's protection. Students who take clinics find the learning complementary to their other courses.

While customer satisfaction may warrant a future for clinical programs, the growing constraints on law schools will likely require multiple justifications for relatively costly clinic programs. Because curricular changes commonly serve faculty needs more than student needs, Gee and Jackson found that, to survive, a legal curricular change need only be *minimally* successful in conveying ideas and skills to students. Other factors are equally or more important. Educational innovations that survive in law schools must be (1) less costly than alternatives, (2) easy to administer, (3) congruent with the overall structure of the institutions, (4) easily integrated into legal tradition and habits, and (5) positively reinforcing for administrators, teachers, and "to some extent, students who are involved in the program or practice."⁵¹

Law school innovations that are costly, involve high levels of time and energy to sustain, require substantial institutional adaptation, and are inconsistent with the current incentive system of the law school will probably fail. Indeed, Gee and Jackson used clinical legal education as their hypothetical case for likely demise. They found costs of clinics high. Clinical teaching was "exceptionally hard work." Absent full-time clinical semesters, like medical schools, clinical courses did not integrate easily with the rest of the curriculum. Clinical faculty recruitment, promotion, and tenure criteria did not easily fit the traditional institutional model. Clinicians "burned out" from their low status, "exhausted with their workload, with the absence of positive reinforcements, and with their battles against deans and faculty."⁵²

If clinics are to continue they must not only prove their worth to law schools by making greater contributions in the training of law students; they must also solve some of the structural problems that isolate and remove clinical programs from the mainstream of legal education.

Given the salary levels, status limitations, and working conditions of clinical fieldwork teachers, it is no surprise that the brightest law graduates and lawyers have not been queuing up for these positions. When these factors are added to the admin-

51. Gee & Jackson, *supra* note 4, at 969 (emphasis omitted).

52. Gee & Jackson, *supra* note 4, at 973.

istrative and practical frustrations that come with the supervision of students in an active case load, fieldwork instruction is difficult to sustain. This is particularly true if the clinic is operating under conditions of scarcity of staffing and resources. A traditional classroom with its twenty hour teaching week is far easier than a forty to fifty hour clinical teaching week. Clinical fieldwork, even at a manageable student-supervisor ratio of ten-to-one, precludes the time for academic reading that is essential to meet traditional university role expectations. Summers provide limited time for recovery, catch-up reading, and some research. If fund raising, proselytizing, and apologetics are also necessary to defend and maintain an educational program having an uncertain institutional status, the reasons why clinical legal educators have not been able to live up to their rhetoric becomes clear.

Many of the problems of workload, incentives, status, and security can be solved by law schools. Law faculties, on present funding, could maintain a limited clinical program for a limited number of students. Such an effort would probably require more than the three to five percent of their budgets that some law schools currently devote to clinical programs. Faculties concerned about lower academic standards applied in hiring clinical teachers could attract "more qualified" candidates by increasing the priority given such appointments as well as the incentive packages offered to the clinicians. If the clinical program structures required no more than one semester per year of fieldwork, clinical teachers could teach traditional courses in alternate semesters and receive traditional pay for a nine month academic year. This would necessitate at least two permanent clinicians for each sustained clinical course, but might attract more qualified lawyers. Additional supervisors would still need to be recruited on fixed period contracts.

Clinical programs cannot thrive on law school budgets and limited grants. If they are to grow, the problem of funding must be solved. The solution requires the help of the private bar. The bar complains about the overly-theoretical nature of law schools. They have supported the clinical movement, but solutions to the funding problem require greater help. It is unrealistic to expect law school funds to support legal services distributed without charge through clinic programs. No medical school could maintain their clinical programs on such a premise.

The organized bar should support public funding for services provided by law schools to the indigent. It should permit student practice in fee-producing cases or should collectively pro-

vide some alternate funding source for clinical programs. The American legal profession, one of the wealthiest occupational classes in the world,⁵³ should assume some responsibility for funding this aspect of the education and quality standards of its ranks. The bar could also urge that those using the courts pay for training of its future officers by a slight increase in filing or motion fees.

Such funding for law school clinical and other professional development programs would provide the economic base for schools to obtain qualified clinicians. More and more secure funding would permit clinical faculty to make the teaching and research contributions necessary for clinical studies to fulfill its potential and justify a permanent place in the university law school.

The organized bar could also relieve the substantive law demands on students and schools by limiting the number of subjects on the initial bar exam and providing follow-up examinations for practice in areas of specialization. Continuing legal education programs could teach much of the substance that law schools are attempting to cover. For many practitioners, learning such subjects *after* graduation might upgrade the quality of the teaching through recorded lectures by preeminent authorities.

Substantial changes in law school curricula occur slowly. Clinical programs are likely to instigate only modest modifications. They have moved, in models and materials, beyond anecdotal *ad hominem*s to the beginnings of a thoughtful and structured approach to professional training. While it might be regretted that the Council on Legal Education for Professional Responsibility did not provide more funding directed to development of materials and models rather than mere expansion of numbers of programs, such mistakes cannot be undone. Although clinical courses have made advances in methods, materials, and messages, clinical studies must continue to grow in theory and structure to establish permanent roots in the academy. Clinical programs need to develop more insightful explanations about lawyering and legal institutions that can be generalized and transferred to other settings to fulfill their promise. Developing theories, research models, and teaching methods in these fields will be sufficient to warrant a legitimate place for clini-

53. Its fees each year have been estimated to be about \$30 billion. Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1016 (1981). One tenth of one percent of this would be \$30 million. If each of the nation's 500,000 lawyers were assessed an added \$50 bar dues each year, \$25 million could be provided to law schools for clinical programs and public legal service.

cians in law schools.

It would be interesting to compare the progress made in the fifteen years of clinical legal education with the progress of the legal educational innovation begun 100 years earlier. If the Langdellian case method were evaluated in 1885, it may not yet have fulfilled its potential. It had its detractors among legal academics; it may have had a less welcome reception among the bar and law students than has clinical legal education. The case method fulfilled a law school need; it flourished and has today generated hundreds of casebooks of substantial intellectual sophistication. If law schools provide a similar welcome to clinical legal studies, I feel confident that the textbooks for clinics in 2085 will be respected by all fair-minded academics.⁵⁴

Although clinics have not fulfilled their potential nor lived up to their aspirations, this failing is not unique to clinical education. Throughout their history, law schools have aspired to achievements beyond their immediate reach. Even the most generous reading of alumni surveys shows that the goals of legal education outdistance its accomplishments. The criticism leveled at clinical programs, that they have not developed a coherent and critical theory for our legal system, and have not developed adequate alternatives to the system of law and delivery of legal services that have a better claim to distributive and procedural justice, are criticisms that can be shared with law faculties generally.

Given the recruiting patterns, the time demands, and the professional inclinations of most clinical teachers, even under the better funded scenario, it is unrealistic to expect that clinical teachers will generate the critical body of theoretical knowledge needed to reform the legal and social order. Such knowledge is more likely to come from a limited number of the traditional academic faculty who can devote the time needed for such an undertaking. Clinicians can play a supportive role. They can develop examples and counterexamples for critical theory. They can provide useful contributions to joint empirical research activities. From their unique involvement with lawyers' behavior, clinicians can add insights and normative suggestions on how lawyers can and should act in various contexts. Clinicians can interpret critical theory, giving it meaning in specific contexts, and reinforcing its importance to students in fieldwork and case seminars. Students will credit the utility of such theory if they

54. For an imaginative view into the future, see Amsterdam, *Clinical Legal Education—A Twenty-First-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

find it discussed in and connected to the world of practice they are entering.

Demands for greater practical and clinical involvement in law schools surfaced in the days of Pound and Reed, they resurfaced with Frank and Llewellyn,⁵⁵ and have now reappeared. Today, law schools have responded more fully than ever before. While some legal academics would like to end this "trendish fad" and return to "purer forms" of legal education, such regression would be a mistake. It might satisfy faculty needs, but not the needs of students, the bar, or society. It would not end the complaints about the fundamental flaws of legal education.

Law schools should not use growing student careerism and diminishing law school resources as the occasion for ending clinical legal education or reducing it to simulations that introduce more artificiality to law school. Faculties deceive themselves if they think that students weaned from clinics will return with renewed devotion to law school classes and seek added offerings in psychology, history, philosophy, and economics. Many law students want to learn how to be lawyers. Instead of delaying and frustrating this desire, law schools should utilize the student motivation attached to it. If done carefully, clinical work can provide the educational vehicle to teach a broader and more humanistic view of legal practice and professionalism. Leaders in legal education need to work with leaders in the bar to capture the learning and successes of the last fifteen years of clinical legal education and build on its future potential to address and resolve a problem of mutual interest.

55. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948).

