Notre Dame Law Review

Volume 55 | Issue 4 Article 2

4-1-1980

Opportunity to Be Different and Equal--An Analysis of the Interrelationships between Tenure Academic Freedom and the Teaching of Professional Responsibility in Orthodox and Clinical Legal Education

Steven H. Leleiko

The Opportunity to be Different and Equal— An Analysis of the Interrelationships Between Tenure, Academic Freedom and the Teaching of Professional Responsibility in Orthodox and Clinical Legal Education

*Steven H. Leleiko**

I. Introduction

The purpose of this essay is to identify and discuss the critical issues which arise from the interaction of five primary factors in legal education. These factors are the place of tenure in the career of the law teacher,[1] the standards used to judge individuals for tenure,[2] the introduction of clinical legal education into most law school curriculums during the past decade,[3] the responsibilities of the

* Assistant Dean, Clinical Associate Professor, New York University School of Law; Executive Director, Washington Square Legal Services, Inc. Washington Square Legal Services is the umbrella corporation for the clinical programs at New York University supervising law student practice. The author was appointed general counsel to the South Bronx Development Office in February 1980. B.A., Brooklyn College, 1963; J.D., New York University, 1966.

This article is the second of what I consider a three-part series considering the relationship of clinical education to traditional legal education. The first article, *Clinical Education, Empirical Study, and Legal Scholarship,* was written in 1976, and appears in 30 J. LEGAL EDUC. 149 (1979). It discusses the potential clinical education has as a source for interdisciplinary and empirical research.

This article discusses the value systems of faculty as expressed in tenure standards, and examines the impact of these values on clinical law, professional responsibility and research. It was in preparation prior to the creation of the AALS-ABA Committee on Guidelines for Clinical Legal Education and my appointment as the Committee's Project Director. The views expressed are solely mine and do not relate in any way to my work with the Committee. This article explores issues which have concerned me as a consequence of my experience overseeing the development of the clinical programs at New York University School of Law and my discussions through the years with teachers and students at other law schools.

The third article in this series will be a discussion of the role of clinical law in preparing students to engage in policy formation.

1 Approximately ninety percent of the law schools recognize tenure rights. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, ANATOMY OF MODERN LEGAL EDUCATION: AN INQUIRY INTO THE ADEQUACY AND MOBILIZATION OF CERTAIN RESOURCES IN AMERICAN LAW SCHOOLS 209 (1961) (hereinafter cited as ANATOMY OF MODERN LEGAL EDUCATION). The discussion in this article is premised on the assumption that tenure will continue as the distinctive feature defining the employment relationship between law professor and law school. If the economic problems which are predicted to accompany the decrease in college applicants in the 1980's alter the institution of tenure, this will undoubtedly affect clinicians. If the thesis developed in this article is correct, however, it may suggest that clinicians will continue to require the protection which tenure affords because of their minority status.

The ABA Standards for Approval of Law Schools require: The law school shall establish and maintain conditions adequate to attract and retain a competent faculty. The law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory. *Annex I Principles of Academic Freedom and Tenure,* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 12-13 (1977).

2 *See* ANATOMY OF MODERN LEGAL EDUCATION 184-89; FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 34-41 (1973).

3 *See* Gee, *Survey of Clinical Legal Education* in SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1977-1978 xviii (1978). For 1970-1971, 100 law schools reported 204 clinical programs involving 14 fields of law. For 1977-1978, 131 law schools reported 470 clinical programs involving 58 fields of law.

clinical teacher,[4] and the responsibility of legal education to prepare students in professional responsibility.[5]

As an introduction, it may be helpful to the reader to know the perspective which I bring to the discussion which follows. The traditional first year of law school can and should serve three initial functions. First, appellate case study confronts students with developing the abilities to identify and analyze legal principles.[6] The prominence of the judicial process in our legal system makes these critical abilities.[7] Second, the lawyer's capacity to participate in policy formation—public and private—is materially assisted by the reasoning process learned through case analysis. This process develops and sharpens the individual's ability to pinpoint questions at issue. Third, the substance of first-year courses deals with legal rules which have developed historically to channel and confront the primary social, economic and political relationships within our society. An understanding of the interrelationship between these rules and forces is part of the lawyer's professional foundation.[8] My position, however, is that traditional studies confront only a part of the primary intellectual abilities and human understanding which the lawyer must have to represent individuals or institutions as clients.[9]

---

4 *See* Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology* in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973); Leleiko, *State Rules Permitting the Student Practice of Law: Comparisons and Comments* in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 922-23; 930; 932-36 (1978); Pye, *Comment,* in CLINICAL EDUCATION FOR THE LAW STUDENT 21 (1973); *Training Manual for the Association of American Law Schools* 1978 CLINICAL TEACHER TRAINING CONFERENCE 50-169 (Barnhizer ed. 1978).

5 The ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS provide: 302(a) The law school shall offer:

(i) instruction in those subjects generally regarded as the core of the law school curriculum,
(ii) training in professional skills, such as counselling, the drafting of legal documents and materials, and trial and appellate advocacy,
(iii) and shall provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the A.B.A. Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 7 (1977).

6 K. LLEWELLYN, THE BRAMBLE BUSH 41-53 (1951).

7 B. CARDOZO, THE GROWTH OF THE LAW (1924); THE NATURE OF THE JUDICIAL PROCESS (1921).

8 *See* H. HART, THE CONCEPT OF LAW 28 (1961). Contracts, criminal law, property and torts all consider legal rules which have developed to channel the basic interpersonal and institutional relationships in society. How agreements are reached and enforced, what is the nature of property, the rights of the individual to physical and mental integrity, and how individual misconduct is regulated arise out of the elemental relationships of people in organized society. The philosophy and history of the principles studied in these courses reveal much about the way society organizes itself and its basic values. To be effective, the lawyer must have this broader understanding gained from learning how to weave these themes within the fabric of each client's legal problems and the related law.

9 *See* Pye, *supra* note 4, at 30-34. It is my view that traditional legal education fails to confront law students with the human element in the legal process. The historic view of lawyers' work is that it is intellectual and mental. This view is reflected in the traditional classroom law teacher. The human element is deemed "soft" and "anti-intellectual." Not only does this lead to a failure to confront the lawyer's development as a counselor, but it contributes to blinding the student to the full role of communication as a tool for the lawyer, and the lawyer's responsibilities in dispute resolution in society. The student as lawyer is not trained to see the effect of interpersonal conduct on the resolution of problems between people and people representing institutions. The consequence may be a diminution of the lawyer's capacity to use the legal process to contribute to peaceful change, whether individuals or institutions are the parties. *See* T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING (1976).

See also G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978), for his discussion of the "lawyer for the situation." Change in this context has to be understood from the perspectives of individuals who may desire a new contract, as well as that of institutions which may desire changes in corporate or tax laws.

My discussion of "scholarship" requirements for faculty is based on the belief that traditional doctrinal analysis[10] is only one of the valuable types of research possible and needed for the development of a legal system in which the primary policymaking institutions are legislative, administrative, executive and personal.[11] The failure to study and to analyze the behavioral processes of institutions and people results in a failure to prepare lawyers to function competently in these forums. This gap in legal education results in law students and law faculty having little sensitivity for the problems arising from the interaction of and between people and decision-making institutions in the context of a democratic society.[12]

This article reflects the fundamental tension arising in legal education from the efforts to satisfy the dual goals of helping students to understand the growth and functions of the law, and to develop a sense of professional responsibility. These goals are not necessarily antagonistic. The present conflict,

---

The traditional posture of the Code of Professional Responsibility regarding the lawyer's duty to his client has not focused on the fact that today most dispute resolution occurs without the parties entering the courthouse or administrative hearing. A broader understanding of the dispute resolution process is required to develop a more realistic set of guidelines defining attorney competence and the lawyer's professional duties. Such guidelines would more fully develop the lawyer's responsibilities in attempting to resolve disputes, while still recognizing the lawyer's obligations to achieve his client's goals.

Watson in discussing the abilities of law faculty and their relationship to teaching in the classroom states:

> The possession of impressive intellectual capacities often causes excessive use of the defense of *intellectualization.* This is a psychological maneuver whereby persons relate to each other and themselves primarily through ideas, even when emotional matters may be more pertinent. While this device is useful for neutralizing anxiety, it is my impression that lawyers use it to an extensive and inappropriate degree. It causes them to place too much emphasis upon the verbal aspects of communication, and not enough on the feeling—content and connotations which are present. To make it worse, lawyers have a multitude of technical tools, such as the rules of evidence, which reinforce that tendency. Their proclivity for playing semantic games is enough to drive off many less hearty souls, a fact often commented upon by lawyers' wives. I have often heard these women say that their husbands attempt to control their household conversations by the rules of evidence. It is a fortunate lawyer whose wife overrules him! While such devices do possibly improve the communication potential in the courtroom setting, in ordinary social circumstances they tend to leave out highly significant parts of interpersonal communication. In the classroom setting, these views about communication often blind law teachers to the effect their classroom technique has on students. Relying mainly on the spoken word, they do not readily see all of the emotional cues of distress which emanate from their students. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education,* 37 CINN. L. REV. 91, 113 (1968).

The problem is that the present legal system and code of professional conduct assume that the best interest of the client is consistent with an adjudicating system to resolve disputes. If the adversary system is, however, no longer capable of resolving disputes for the average citizen, does this require a model of professional conduct which does not seek to rely on the court for dispute resolution? Is the appropriate model for attorney conduct based on what best contributes to voluntary resolution of the dispute or best in the context of an adversary contest which assumes the ultimate capacity of courts to resolve the dispute?

If it is correct to recognize that settlement without trial is the basic legal dispute resolution mechanism, then the lawyer's fundamental role is to achieve for his client the best acceptable settlement. The process and abilities required for achieving this may differ from that of trial, and the lawyer's responsibilities will accordingly change. What satisfies the lawyer's fiduciary responsibilities may also have to be redefined.

10 I use this term to include both the study, interpretation, and application of case and statutory law within a particular subject area, and the process of developing law through reasoning by analogy.

11 While constitutional law should make this clear, the law student is not prepared for this reality. The student is trained to think in relation to the exceptions where the courts must resolve disputes as to what the law is, rather than the general practice where what the law is and how it is applied, is established and determined by the people and governmental and private institutions involved. In relation to the government, this means the legislature, the executive, and the independent administrative agencies. With respect to people, "The power . . . conferred on individuals to mould their legal relations with others by contracts, wills, marriages, etc., is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats." H. HART, *supra* note 8. *See also* L. BROWN and E. DAUER, PLANNING BY LAWYERS (1978).

12 Cahn and Cahn, *Power to the People or the Professional?—The Public Interest in Public Interest Law,* 79 YALE L. J. 1005, 1025-31 (1970).

however, is a product of the socialization process of legal education, and the consequent abilities, values and role identifications of law faculty. The body of discussion argues the affirmative thesis that clinical law is essential to the development of the student's sense of professional responsibility. Conversely, the process of socialization often prevents law teachers from obtaining the experience necessary to develop the insight required to teach professional responsibility, with the consequence that teachers do not develop attitudes conducive to valuing and teaching professional responsibility.

Finally, too many law school teachers give minimal, if any, consideration to the fact that legal education is part of the total intellectual and emotional development processes of law students as full people.[13] The failure to recognize and to respond to this reality is one of the factors contributing to the significant pressures experienced by today's students and faculty.[14]

II. Tenure

The professional lives of each law school faculty member hired to teach on the tenure track are fundamentally controlled by the tenure decision. Although institutions may vary in the length of time taken to determine whether a person should be granted tenure,[15] the tenure decision revolves around an evaluation process in which an individual's teaching performance, scholarship, school citizenship, and contributions to the legal profession[16] are evaluated by either a dean and/or a group of tenured colleagues.[17] Eliminating the possibility of "personality clash,"[18] the tenure decision usually focuses on an individual's

13 *See* Bruner, *The Relevance of Skill or the Skill of Relevance,* in THE RELEVANCE OF EDUCATION 108-17 (1971); REDMOUNT AND SHAFFER, *Learning the Law—Thoughts Toward a Human Perspective,* 51 NOTRE DAME LAW. 956 (1976):

> Finally, and most critically, legal education seems to lack the consciousness that learning is an intimate personal and psychological experience. The accumulated clinical insight of generations of psychological, psychoanalytic, and psychiatric experience illuminates as well as complicates our understanding of human behavior, but is lost on those who tune themselves out, who protect themselves from involvement with other persons. Tuning out on the personal experiences of students in learning is a doubtful luxury that, in any event, teachers can ill afford. The failure to accord dignity and sensitivity to students as individuals and as learners compounds the learning task. It frustrates learning because it does not recognize the importance of motivating and supporting the student. The student has intrinsic mechanisms which spawn interest and curiosity, and fear and doubt, and concern and decency. The teacher plays on these dispositions and tendencies; in doing so he helps or harms the student, both as a person and as a learner. He sets a precedent, knowingly or not, for the young lawyer's professional behavior by the sensitivity or insensitivity he shows in the critical human relationship of education. He has these influences whether he realizes it or not; his failure to recognize them probably makes his influence worse. *Id.* at 965.

See also Silberman, *Educational Trends and the Law* in IV CLEPR Newsletter 180, August 1970.

14 *See* Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392 (1971); Watson, *Some Psychological Aspects of Teaching Professional Responsibility,* 16 J. LEGAL EDUC. 1 (1963).

15 *See* ANATOMY OF MODERN LEGAL EDUCATION 168-73.

16 *Id.* at 184-89.

17 *Id.* at 175-84.

18 Unfortunately, law schools harbor the "ghosts" of incidents where promotion and tenure were denied to a particular individual because of the personal opposition or enmity of a powerful colleague. Where an institution has to choose between promoting a junior colleague over the objections of a senior colleague teaching in the same field, it is unlikely that it will have the moral strength to affront the senior colleague. If it wasn't for the fact that such a negative decision may often spell the end of a teacher's career, the policy considerations in favor of collegiality and cooperation might be considered to outweigh the arbitrariness of the decision. Faculty and schools fail to see that a decision-making process which gives precedence to arbitrariness provides a model for students and faculty who as lawyers will be involved in decision-making in public and private institutions. It is a raw example of the relationship between interpersonal dynamics and decision-making which constitutes part of the subject matter of clinical law.

teaching ability and scholarly contributions. For the purposes of this discussion, I shall initially concentrate on the question of scholarly contribution. Later, the question of teaching ability will be considered.

When scholarly contribution is required, the work products most heavily relied on are either law review articles, casebooks, or analytical studies which involve doctrinal analysis.[19] It is this orthodox scholar's work which is held out to the fledgling professor for emulation because, theoretically, it represents the *sine qua non* of the successful law professor at the prestigious law school.[20]

There is good reason, however, to doubt that this theoretical model adequately describes the typical law school professor at even the most prestigious schools over the course of a whole career,[21] and it is not descriptive of the full body of law teachers who gain tenure at schools throughout the country.

> . . . We must admit, however, that their (law teachers) research output is rather slight. Legal writing has tended, until very recently, to be primarily doctrinal and to be based mainly on research in the law library. To the extent that law teachers have written, their books have tended to be treatises (often multivolume) on doctrinal subjects. Their articles, published in the 80-odd law reviews, have been treatments of less general problems, again purely from a doctrinal, analytic standpoint.[22]

For the purpose of the following discussion, I am going to assume that the theoretical model does actually describe the typical law school teacher at the prestigious law school because, whether accurate or not, new teachers are led to believe its validity.[23] The consequence is that, to the extent this perception is inculcated, institutions have faculties which are focused on mastery of the legal principles in particular fields of law. This intellectual energy is concentrated on the primary source material for doctrinal analysis, appellate case opinions.

Scant consideration is devoted to interdisciplinary factors[24] or empirical

---

19 *See* H. PACKER and T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 32 (1972); ANATOMY OF MODERN LEGAL EDUCATION 513.

20 *See* Griswold, *The Future of Legal Education,* 5 J. LEGAL EDUC. 438 (1953).

21 Griswold, *Teaching Alone Is Not Enough,* 25 J. LEGAL EDUC. 251 (1973); Hurst, *Research Responsibilities of University Law Schools,* 10 J. LEGAL EDUC. 147 (1957). Hurst does not assume that the primary research responsibility of law schools can or should be met by all members of the law faculty. He proposes that law schools should subsidize research faculty who devote themselves primarily to research and have a limited teaching load. Griswold's advocacy of an activist role for law professors raises several interesting questions. First, can professors pursue traditional scholarship while engaged in activism? Second, should they be expected to engage in both pursuits simultaneously? Third, should brief writing or preparation of reports and studies be considered scholarship satisfying publication requirements for tenure? Fourth, if activism is good for law professors, why shouldn't the experience of practice be as valuable in evaluating a candidate for a faculty position as is law review experience? From a realistic point of view, an individual may have more to contribute to scholarship and legal research after practicing than before.

22 H. PACKER and T. EHRLICH, *supra* note 19. It has been stated that:

> Men can become professors in major law schools without any publications (other than their student work on the law review); and they can lead a life as capable teachers and consultants (for example as arbitrators) with very little writing, none of it "research," or at any rate none of it regarded as a contribution to cumulative scientific endeavor. Riesman, *Law and Sociology: Recruitment, Training, and Colleagueship,* in LAW AND SOCIOLOGY 34 (1961).

23 The professional image of the best professor is of one who writes. "The researcher, himself, becomes a better, more profound teacher. Thus, the students gain an important benefit. An instructor without the interest, time or support to engage in research will, in most instances, be incapable of anything but an impoverished performance." ANATOMY OF MODERN LEGAL EDUCATION 372.

24 Riesman, *Some Observations on Legal Education,* 1968 WISC. L. REV. 63, 74; *see* Note, *Developments in Law and Social Sciences Research,* 52 N.C.L. REV. 969 (1974); *but see* Cavers, *"Non-Traditional" Research by Law Teachers: Returns from the Questionnaire on Law-Related Studies,* 24 J. LEGAL EDUC. 534 (1972).

problems in administration of justice.[25] Packer and Ehrlich state that law ". . . badly needs to be broadened to include the insights of the best behavioural sciences as, in the words of the Carrington Report, it supplements the 'intuitive prudential values which the profession brings to official decision making.' "[26] In itself, interdisciplinary study presents serious challenges to the status quo. "Changes such as those that the Carrington Report advocates in the curriculum require that law teachers retool themselves to incorporate a broadly based familiarity with the aspects of the behavioral sciences into their teaching."[27]

In understanding the orthodox teacher's value system, it may be important to note the interrelationship between law school teachers and appellate judges. The latter are imbued by society with ultimate decision-making powers in matters of law.[28] This gives their work great importance. The law professor in explaining or successfully criticizing appellate decisions becomes associated with this process. Association with such decision-making is tantamount to being one with the powerful elite.[29] In a society which rewards and acclaims the powerful, the drive for recognition and such success within one's profession is realized through such identification, and reinforces the values placed on doctrinal analysis by its practitioners. During this century, law faculty have traditionally contributed to the legal profession by influencing the judicial development of law. The history of the American Law Institute is but one example of how scholars have played a prominent role in influencing judicial decision-making.[30]

The appellate judge's role, however, is generally confined to review of questions of law and not of fact. The law teacher's focus thus is on the analysis of law, including the formal judicial requirements for the processes to be followed in determining facts. It is not concerned as a general rule with the correctness of the fact finders' determinations or the problems involved in arriving at the facts. It thus eschews the panoply of interdisciplinary and interpersonal problems which arise in the fact-finding processes of decision-making institutions. This means that sensitivity to and ability to consider these problems are not necessary attributes of the orthodox law teacher. To the contrary, such abilities are irrelevant in a system whose focus is identification and analysis of

---

25 Law schools offer very few courses in judicial administration. Traditional procedure and administrative law courses pay almost no attention to problems in administration. As a consequence, the interrelationships between administration and legal processes are ignored. *See generally* E. GEE and D. JACKSON, BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION (1975).

26 H. PACKER and T. EHRLICH, *supra* note 19, at 57.

27 *Id.*

28 K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 282 (1962); F. FRANKFURTER, LAW AND POLITICS 21 (1939).

29 Note the following observation:

> It should be observed at this point that one of the characteristics of the role of the law professor is that it provides a position from which one can be aggressive. This can be done without much counterattack since the rostrum affords great protection. In contrast with the adversary situation of a courtroom, the professor may carry on an essentially one-sided battle, always able to be the ultimate judge and decision-maker. I believe this to be highly important as a motivating factor to those who become law professors. I anticipate challenge here.

Watson, *supra* note 9, at 114. *See also* E. ERICKSON, THE PROBLEM OF EGO IDENTITY AND ANXIETY 37-38 (1960). The issue of identity is a central focus in Watson's article entitled, *Some Psychological Aspects of Teaching Professional Responsibility,* 16 J. LEGAL EDUC. 1 (1963).

30 *See* Crystal, *Codification and the Rise of the Restatement Movement,* 54 WASH. L. REV. 239 (1979).

the legal principles applied by appellate courts. Its consequence is the definition of legal studies primarily in terms of the law which the law courts apply, rather than in relation to the decision-making processes sanctioned through law by society for ordering human and institutional relationships. The latter includes but would not be limited to the law applied in particular situations. One consequence of focusing on the law as opposed to decision making in particular cases is to deemphasize the effect of law on the individual in his or her moment of confrontation with the law. The difficult problem of doing justice to the individual in the course of the daily administration of the law is not considered.[31] This prevailing value system in law schools establishes the role model for new teachers,[32] who in turn project a model to their students.[33] This role model

31 Cahn and Cahn, *supra* note 12.

32 The new law teacher has been previously exposed to the values of the law teaching profession while a student. These values include:

> (1) [A] supercilious attitude toward the practice of law. As a result, comparatively few really experienced practitioners are found as full-time faculty members in many leading law schools. The reluctance to hire experienced practioners cannot be based on the practicing lawyer's lack of teaching experience—few, if any, law professors have any background in teaching when they are first hired. Rather, faculty recruitment policy shows a discernible preference for specific types—law review at a leading law school, clerkship with an appellate court judge, then a year or two with a government agency or large law firm I. REICHERT, LAW IN A CHANGING AMERICA 174 (G. Hazard ed. 1968).
>
> (2) "Learning to think like a lawyer," the acquisition of analytical skills, and, most importantly, the understanding of the theoretical and conceptual basis of the various law subjects, all serve to get the individual to develop "within a groove," taking on the narrow *weltanschauung* and modes of experiencing life derived from one profession. This conception of the socialisation process at work in professional education does not entail the individual adopting and internalising the "overt" beliefs . . . [of the profession], but rather involves the moulding of the way in which he responds to social stimuli, and formulates his own goals. Thus does the process of socialisation instill a "world view."
>
> Redmount adds a further dimension to the above points. Speaking of the highly specific analytical approach adopted in much legal education, he argues that the end result of this type of approach may well be that the individual's mode of experiencing becomes almost exclusively intellectual. "The outcome is a relatively high degree of thinking and reasoning skill that serves as a system for identifying and interpreting experience." Yet as Redmount points out, this at least raises a question as to whether such emphasis on the intellect inhibits or even destroys sensibilities for gauging and dealing with experience. Such a question, of course, ultimately gets back to the debate about the appropriateness, or even the value, of rationality as the sole or principal organisational basis for society. There seems to be no reason why this debate should be the exclusive province of the philosopher or psychoanalyst. Educators (though few legal academics are trained educators) have a responsibility to formulate and declare their views on the matter.
>
> The overt idealogy of a profession, consequently, will not reveal the world view and values that professional socialisation imparts, and indeed may not even contain them. Moreover, the socialisation process, in addition to being carried on by the conceptual and analytical teachings of professional education, may also be carried on by the role-identification of the student within the social nexus of the professional school. The student is in a social setting where to feel that he belongs, he must accept or seem to accept the values and norms that his peers hold. His relationships with staff and students mould his perceptions of, and reactions to, this situation. The individual develops a commitment, in terms of self-identification, to the role he sees himself in, and indeed there may be considerable social pressure on him not to deviate from this role. The extent to which the values and norms internalised in this fashion are shaped by the active process of professional education is unknown. (As is the extent to which they correspond to the overt idealogy of the particular profession).
>
> There is also evidence that the development of identity is not only a process of "adopting a role," [*sic*] but also a process of "discovering who you are." [*sic*] This view has important applications for the present study, in as much as family background, friends, and other influences outside the law school may shape the current identity of the student as much as the law school itself does. Socialisation may be to a large extent an extension of existing tendencies.

Hannan, *Knocking Which Corners Off?—The Study of Law as a Mechanism of Social Integration,* 8 VICT. U. OF WELLINGTON L. REV. 379, 385-86 (1977) (footnotes omitted).

As a new teacher, one is exposed to the socialization process of the profession, which can be defined as "The process by which people selectively acquire the values and attitudes, the interests, skills and knowledge—in short, the culture—current in the groups of which they are, or seek to become members. It refers to the learning of social roles." MERTON, READER & KENDALL, STUDENT PHYSICIAN 287 (1957).

33 Watson, *supra* note 14, at 10-13.

permeates the tenure granting process.[34]

From an historical perspective, clinical legal education represents a partial change of focus from the overriding search for uniformity and clarity in legal principle. This need for clarity and certainty was occasioned by the nineteenth-century economic development of the United States. This development integrated commerce across individual state jurisdictions, and the multiplicity and rapidity of decisions within individual jurisdictions clouded what was the common law. The twentieth century has seen the rise of the "consumer perspective"[35] which seeks to develop a balance within the law to make the legal system responsive to the needs of individuals within a society which is primarily urbanized, organized institutionally, and legally designed to confront the problems of "mass" or "group" needs. In such an institutional context, the individual citizen is affected in his or her daily life by the multiplicity of legal regulation. Clinical legal study, focused on the lawyer's responsibilities to the individual client, is confronted with the essential problems of assisting people affected by the institutional nature of society and the laws it has given rise to, and with how the individual lawyer under these circumstances can effectively discharge his responsibilities to the individual.

The focus on and identification with the individual client's needs and the problems of rendering justice while administering the law have a parallel in the historic concerns of equity.[36] Clinical legal study represents a need to sensitize the legal system to its impact on human beings, and to develop appropriate changes in both the law and how the law is administered. This in turn requires careful study and analysis typically associated with the university's educational and research roles.

What are the educational purposes served by the institution of tenure? The *Statement in Regard to Academic Freedom and Tenure* adopted by the New York University Board of Trustees parallels that adopted in 1940 by the Association of American Colleges and the American Association of University Professors[37] and is adhered to by most institutions of higher learning.[38] It states: "Academic tenure is a means to certain ends, specifically: (1) freedom of teaching and research; and (2) a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability."[39]

34 This is manifested in the traditional scholarship standards employed in making promotional and tenure decisions. With respect to the profession of law teaching, the more narrowly defined its focus, the easier it is to set qualifications which are limited to satisfying this focus. The consequence is a process of severely limiting, by definition and qualifications, those who may be members of the profession. Parsons states:

> Professional authority, like other elements of the professional pattern, is characterized by "specificity of function." The technical competence which is one of the principal defining characteristics of the professional status and role is always limited to a particular "field" of knowledge and skill. This specificity is essential to the professional pattern. . . .

W. PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 38 (1954).

Clinical law challenges the traditional definition of the law-teaching profession. The fields of knowledge and skills required for such teaching are broader than those traditionally required. As a consequence, clinical law is a revolutionary force within the law-teaching profession.

35 E. CAHN, *The Consumers of Injustice; Law in the Consumer Perspective; The Shift to a Consumer Perspective;* in CONFRONTING INJUSTICE, THE EDMOND CAHN READER 5, 15, 385 (L. Cahn, ed. 1966).

36 *See generally* F. MAITLAND, EQUITY: A COURSE OF LECTURES 1-11 (2d ed. Brunyate ed. 1936).

37 *See* Annex I to ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1.

38 Keast, *Preface to Tenure:* A REPORT AND RECOMMENDATIONS BY THE COMMITTEE ON ACADEMIC TENURE ix (1973).

39 *Statement in Regard to Academic Freedom and Tenure* in FACULTY HANDBOOK, NEW YORK UNIVERSITY 27 (1972).

Whatever historical validity there may be in some fields regarding point two, it is not a factor in legal education today.[40] Point one, however, is at the heart of the role of the university in a democratic society and is directly linked to academic freedom.[41]

The Board of Trustees avers: "Academic freedom is essential to the free search for truth and its free expression. Freedom in teaching is fundamental for the protection of the rights of the teacher in teaching and of the student in learning. . . ."[42]

The history of efforts to restrict free inquiry by totalitarian governments, religious institutions, groups of people in society and individuals,[43] is the basic justification for tenure. In the context of the American legal system and legal education, tenure should help to assure a process of expert analysis and criticism of the legal system, its laws, institutions, and the individuals responsible for administration of the law, and within law schools of the teacher's thoughts. Such criticism and analysis is a vital component of the dialogue required for the development of law in a democratic society. At its best, tenure should function as a stimulus and guarantor of independent thought and study. The question to be asked is, "Does tenure fulfill this function in legal education?" It is my observation that to a considerable degree rather than serving to advance "the free search for truth" it functions as an instrument of socialization[44] and maturation,[45] with the consequence of inhibiting and censoring creativity, independent research and study, and freedom in teaching methodology.

---

40 Interest in law school teaching is extremely high. This is evidenced by the hundreds of individuals who seek positions each year through the annual recruitment program facilitated by the Association of American Law Schools, and the large number of people who submit unsolicited resumes to individual law schools. The profession of law teacher is well recognized, and individuals even while in law school are deciding upon careers as teachers.

41 C. BYSE & L. JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION 2-5 (1959).

42 *See* note 39 *supra.*

43 *See generally* R. HOFSTADER & I. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN AMERICA (1955); R. HOFSTADER & W. SMITH, AMERICAN HIGHER EDUCATION: 1 & 2 A DOCUMENTARY HISTORY, 393-474; 841-92 (1961); S. HOOK, ACADEMIC FREEDOM AND ACADEMIC ANARCHY (1970); R. HUTCHINS, TOWARDS LIBERAL EDUCATION 82 (1957).

44 *See* note 32 *supra.*

45 See Silberman's discussion of the socialization process in legal education and its effect on the idealism of the law student in *Educational Trends and the Law,* IV CLEPR Newsletter, Aug. 1971, No. 2 at 1. The deadening of the student's idealism once he is in law school as compared with his ideals prior to starting school ultimately evidences itself at the classroom podium when student becomes teacher. The new teacher matures by adopting the prevailing values of his profession. Albert Schweitzer has said the following about maturity:

> The epithet "mature," when applied to people, has always struck me as somewhat uncomplimentary. It carries overtones of spiritual impoverishment, stunting, blunting of sensibilities. What we usually call maturity in a person is a form of resigned reasonableness. A man acquires it by modeling himself on others and bit by bit by abandoning the ideas and convictions that were precious to him in his youth. He once believed in the victory of truth; now he no longer does. He believed in humanity; that is over. He believed in the good; that is over. He eagerly sought justice; that is over. He trusted in the power of kindness and peaceableness; that is over. He could become enthusiastic; that is over. In order to steer more safely through the perils and storms of life, he has lightened his boat. He has thrown overboard goods that he considered dispensable. But the ballast he dumped was actually his food and drink. Now he skims more lightly over the waves, but he is hungry and parched.
>
> Adults are only too partial to the sorry task of warning youth that some day they will view most of the things that now inspire their hearts and minds as mere illusions. But those who have a deeper experience of life take another tone. They exhort youth to try to preserve throughout their lives the ideas that inspire them. In youthful idealism man perceives the truth. In youthful idealism he possesses riches that should not be bartered for anything on earth.
>
> Those who vow to do good should not expect people to clear the stones from their path on

What evidence is there to support this position? First, since Dean Langdell succeeded at Harvard, the primary focus of legal education has been appellate case study.[46] Second, a general resistance exists in legal education to interdisciplinary study.[47] Third, a general resistance persists in legal education to studying the administration of justice.[48] Fourth, there is the general resistance which has been exhibited by traditional classroom teachers to clinical law and clinical methodology, but which more recently is turning to vacillation.[49]

The purpose of this essay is to interrelate tenure as an institution, the spirit and substance of academic freedom as the cornerstone of free inquiry, the development of clinical law, the use of clinical methodology, and the development of the student's sense of professional responsibility. Legal practice and clinical law share a common focus, the client, whether it be an individual or an institution.

Clinical law seeks to prepare the student to represent clients. Professor Harry Subin, who directs the Criminal Law Clinic at New York University School of Law, has written:

> . . . the students exposed to three years of traditional legal education will, most likely, have general substantial insight into the process of legal analysis, and a significant amount of substantial information. The[se] student[s] will not, however, have learned very much at all about the complex problems involved in ascertaining facts upon which a legal analysis can be made (the diagnostic process); about the equally complex problems involved in implementing a strategy for advocating a client's cause (the prescriptive process); or about the problems presented in performing the diverse and often conflicting roles implicit in lawyering (the psychodynamic process).[50]

These are the primary intellectual concerns of clinical law. I would add that if the process of case analysis did not so dominate the remainder of the law school curriculum, it would be included because it is clinical in nature.

Clinical methodology relates to various teaching techniques which have become associated with the development of clinical law courses. Professor Gary Bellow of Harvard speaks:

> . . . of clinical education as a method . . . having three main features: (1) the student's assumption and performance of a recognized role within the legal system; (2) the teacher's reliance on this experience as the focal point for in-

---

this account. They must expect the contrary: that others will roll great boulders down upon them. Such obstacles can be overcome only by the kind of strength gained in the very struggle. Those who merely resent obstacles will waste whatever force they have.

A. SCHWEITZER, THE TEACHING OF REVERENCE FOR LIFE 43-44 (1965).

46 Today this is acknowledged by everyone who writes about legal education, regardless of their feelings about clinical education.

47 *Training for the Public Professions of the Law: 1971, Part One, Section II, Proceedings, Association of American Law Schools, 1971 Annual Meeting* in NEW DIRECTIONS IN LEGAL EDUCATION 147-48 (1972) (hereinafter cited as CARRINGTON REPORT); H. PACKER and T. EHRLICH, *supra* note 19 at 57-58.

48 *See* Cahn and Cahn, *supra* note 12.

49 *See* H. PACKER and T. EHRLICH, *supra* note 19, at 37-46; Allen, *The New Anti-Intellectualism in American Legal Education,* 28 MERCER L. REV. 447 (1977); Carrington Report, *supra* note 47, at 133-35.

50 Subin, *Memorandum on Goals and Obstacles to Special Committee on Clinical Education at New York University School of Law* 2 (Nov. 25, 1975) (unpublished but available from Professor Subin). A revised version of this memorandum will appear as a consultant's study in *Clinical Legal Education:* THE REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980).

> tellectual inquiry and speculation; and (3) a number of identifiable tensions which arise out of ordering the teaching-learning process in this way.[51]

In the context of the present structure of legal education, it is necessary to distinguish between clinical law or clinical legal studies and clinical methodology. To do so is to maintain that the traditional law school course can employ clinical methodology as a teaching vehicle for case analysis and the learning of substantive law, without being concerned about clinical law.

Statistical information compiled annually by the Council on Legal Education for Professional Responsibility indicates that during the past decade clinical education has been introduced into the curriculums of most law schools[52] and that over eighty-eight percent of the cost of these programs is borne by the law schools.[53] The range of subjects considered in clinical work is continually broadening, so that while in 1970 fourteen subjects were covered, in 1978-79, fifty-eight subject areas were involved in clinical fieldwork.[54] The number of programs in which student fieldwork is completely supervised by the law school has also been increasing and now includes over one-half of the country's clinical legal courses.[55]

It is the role and place of the individuals teaching in the clinical courses which crystallizes the tensions between clinical law and traditional legal education, and the dangers to academic freedom which are present today in the American law school.

The responsibilities of individuals teaching in clinical courses may include, one, all, or a combination of the following: teaching the classroom component, assisting the student in preparing for his fieldwork, reviewing the papers the student prepares, developing and participating in simulations of lawyering roles performed by each student, accompanying the student as he or she fulfills fieldwork responsibilities, evaluating the student's work in each of these contexts, similating lawyers' roles, handling cases directly, and being responsible for the administration of the clinic.

The substantive core of the learning process in the classroom component may involve one or more of the following: teaching the students the substantive and procedural law they will need to handle their cases; discussing in organized fashion comparable to a traditional seminar a body of law related to the student's fieldwork; analyzing clinic cases for the purpose of planning strategy to be used; evaluating whether a case was properly handled; studying the processes involved in lawyering—namely interviewing, counseling, negotiation and advocacy;[56] and studying problems in professional responsibility.[57] These

51 Bellow, *supra* note 4, at 379.
52 Gee, *supra* note 3, at ii, v.
53 *Id.* at xii, xxvi-xxvii.
54 *Id.* at vi-vii.
55 *Id.* at vii. For 1978-1979 as reported in the CLEPR Survey, 42.2% of the clinics were school operated and supervised law offices, and 15.4% were field placements in another agency's law offices where the school completely supervised the student work.
56 Currently, there are several published books which are defining the initial foundation for clinical law. These include, G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1978); T. SHAFFER, *supra* note 9, A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976).
57 *See* note 56 *supra*.

require the teacher to have the requisite legal and, where necessary, interdisciplinary learning.[58] Simulations[59] require the capacity to demonstrate and evaluate what it is the student is to do,[60] and to work with students on a one-to-one basis.[61] Simulating lawyers' roles, handling cases directly, and supervising and evaluating student simulations and fieldwork require the capacity to engage in open, continuous and candid discussion with students. Such discussion involves being criticized as well as offering criticism.

Administration of a clinic or clinics may include the ability to organize and run a law office, recruit, evaluate and supervise clinical faculty or supervising attorneys, handle cases when the students are on vacation, and work with the law school administration to integrate the clinic from administrative and decision-making perspectives with the rest of the law school.

Problems arise for individuals teaching in clinics as a consequence of their roles. In some schools, one person is expected to fulfill all or most of the responsibilities mentioned above. If such a person is on the tenure track, he or she may also be expected to produce scholarship in the same vein as the orthodox faculty member. Experience and common sense suggest these facts. First, under current employment relationships, the clinician likely does not have the time to produce scholarship.[62] Second, most people involved in clinical teaching which includes supervision would probably be interested in research which is not strictly doctrinal in nature, but rather relates to analysis of how the legal system in fact functions, and which would usually require analysis of the primary constitutional policy formation institutions—the executive, administrative and legislative branches of government. Third, to orthodox faculty, such work is often irrelevant to tenure considerations, because it may not concentrate on doctrinal analysis.[63] Parenthetically, it also detracts from the role of the appellate judge, thus diminishing the importance of the courts with the consequence of reducing the central importance of evaluating and criticizing the doctrinal development of law. Such a process constitutes a threat to the orthodox faculty member's value system.

---

58 One cannot teach about interviewing and counseling without having an understanding of the psychological factors which affect these processes. In the handling of client cases, the teacher and student are often required to understand scientific and social science processes. This is demonstrated extremely well by the problems posed in A. WATSON, PSYCHIATRY FOR LAWYERS (1968).

59 Professor Joseph Harbaugh at Temple Law School has developed extensive simulation problems for integration into the clinical curriculum. He is one of the leaders in this field.

60 *See* Meltzer and Schrag, *Report from a CLEPR Colony,* 76 COLUM. L. REV. 581 (1976).

The teacher must be able to do what is being asked of his or her students in order to provide a model of how the lawyer should perform and to maintain one's credibility.

61 The capacity to work with students on an individual basis is the foundation of clinical law. The value of the clinical experience is to attend to the development of the individual student and work with him or her on problems which often go to the core of one's professional development. The teacher must have the patience and ability to relate to each student as an individual and adjust his pedagogical goals in relation to the particular needs evidenced by each student. It is in the one-to-one dialogue carried on continuously through the clinical experience that the teacher does his or her most important and difficult teaching.

62 "The common clinical teacher is almost always totally consumed by her or his instuctional tasks. Unless special arrangements for research leaves or sabbaticals are made as suggested above, there is not time available to perform the other faculty functions . . ." Ruud, *Agenda for Symposium on the Clinical Law Teacher* 9 (April 29-30, 1977) (on file in *The Notre Dame Lawyer* Office).

63 The focus on doctrinal analysis identified by Packer and Ehrlich interrelates with the evaluation of nondoctrinal analysis which teachers may have done. At some law schools, briefs written for actual cases, descriptive studies prepared of the operation of aspects of the legal system, and preparation of studies for the development of public policy may not be considered or will be given less weight for satisfaction of tenure requirements than the traditional law review article or textbook. The only documentation of this is the word of mouth stories which circulate.

Teaching ability is central to this discussion. For the orthodox law school professor, teaching ability is usually evaluated through class observation by tenured faculty members.[64] In some schools, students evaluate teachers, and these evaluations are given whatever weight the decision-makers choose. Classroom observation affords the opportunity to measure the capacity of a teacher to communicate his or her knowledge and challenge his or her students to think critically. Doctrinal analysis remains the key—that is what the teacher is to excel at and that is the capacity to be developed in one's students. In the case of the clinical teacher, the problem of evaluating teaching competency can be much more complex. The teacher who supervises fieldwork or simulations usually is teaching in a variety of places, including the classroom, in review and analysis of students' fieldwork and simulations, in individual conferences with students, and in the example he or she sets in practice or performance in the clinic's cases and simulations, respectively.

If a person teaches only the classroom component of the clinic, the process of evaluation may not differ from the traditional teacher's if the class is devoted to the type of analysis related to orthodox law school legal questions and problems. Difficulties arise if the classroom component deviates from the orthodox, or if the clinician's work involves fieldwork supervision.

The danger arises that tenure, to the extent that it applies to clinicians, will be granted to individuals whose primary responsibility is the classroom. Some schools have already opted for this model. The consequence is that the attorney supervising the students' lawyering is relegated to a less valued position. This solution relieves the law school of the problem of identifying and evaluating the intellectual processes involved in lawyering, reinforcing the primacy of the only skill it does evaluate—doctrinal analysis. This path produces a clinician similar, if not identical, in image to that of his or her orthodox law school colleague. It tells the clinician that he or she should pursue doctrinal analysis in the orthodox mode or if one deviates by teaching about the lawyering process to do so by concentrating on more theoretical approaches to explaining human behavior and ignoring or downplaying an empirical foundation for student study. The fact that empirical study over a long period may contribute to the development of new theory is generally not recognized.

In relation to clinical methodology, the components which Professor Bellow has identified make experience of central importance to both the student and the teacher. Current institutional biases often deny the foundation of clinical methodology as defined by Professor Bellow. The consequence is abridgement of the professor's academic freedom to experiment with and use

64 The Tenure Policies and Procedures by the New York University School of Law faculty state on pages 5 and 7, respectively:

> . . . Various assigned committee members visit the classes of nontenured faculty each year and report their observations to the Committee, which also considers student evaluations, scholarly production, work on Law School committees and in other Law School and University assignments, and professional and public service outside the University.
>
> 8. Although the Status Committee is responsible for evaluating the teaching performance of nontenured faculty members, this responsibility can only be adequately performed if the full-time tenured faculty recognizes its continuing obligation to assist the Status Committee by attending classes of the nontenured faculty. Members of the Status Committee will request their tenured colleagues to assist in the task, perhaps through utilization of the new faculty group(s), and the tenured faculty should honor these requests.

differing teaching methodologies based on experience. The individual who has joined a faculty which adheres to orthodox values quickly learns the qualities looked for in the tenure process. Inclination toward exploring new teaching vehicles is effectively stymied. In some cases, the effect is to destroy the vitality and originality which new members of law faculty may have—whether their starting methodologies are orthodox or clinical. The full impact of the prevailing value system is to communicate to orthodox and clinical fledglings that in relation to scholarship, traditional and not empirical based research is the road to tenure.

Analogous problems face the individual in the role of clinical director responsible for identifying, supervising, and evaluating lawyers who, whether or not they are considered faculty members, are hired by the school to supervise students engaged in fieldwork. While recognizing that academic tenure is not usually awarded for the performance of administrative responsibilities, the clinical director's responsibility vis-a-vis supervising attorneys often include academic duties of traditional departmental chairmen. To be a good clinical director, one must be knowledgeable about the substantive as well as practical components of the clinic, and have the capacity to work with the supervising attorneys regarding teaching techniques and substantive expertise. The clinical director in this context is in an anomalous position since law schools do not have departments and most courses do not involve team teaching. The clinical director's problems in being evaluated parallel those of the individual teacher who both teaches a seminar and supervises student fieldwork. No consideration may be given to the director's abilities to work individually with his supervising attorneys, advise them and guide them with respect to the full range of their duties or coordinate the development of their respective clinical curriculums. Law schools may have to examine the role of department chairmen and directors of services in medical schools and teaching hospitals to begin to appreciate the actual responsibilities of the clinical director who is responsible for a team of supervising lawyers.[65]

III. Teaching of Professional Responsibility

The dramatic consequences of the preceding analysis are most easily identifiable when we consider the law school's responsibility to educate law students in professional responsibility. The American Bar Association Standards for Approval of Law Schools mandate that schools provide "instruction" in professional responsibility.[66] Canon 6 of the Code of Professional Responsibility states the attorney's responsibility to act competently.[67] To fulfill this

65 *See generally,* C. SHEPS *et al,* MEDICAL SCHOOLS AND HOSPITALS: INTERDEPENDENCE FOR EDUCATION AND SERVICE (1965).

66 *See* note 5 *supra.*

67 *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6. DR 6-101 states:

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR 6-102 Provides: "(A) A lawyer shall not attempt to exonerate himself from or limit his liability to a client for his personal malpractice." ABA CODE OF PROFESSIONAL RESPONSIBILITY 30-31 (1977).

mandate requires training students in the diagnostic, prescriptive and psychodynamic processes described earlier.

The challenge which faces clinical law is the development of curricula embodying "principles and attitudes" which the student can learn and later apply in his professional work.[68] It is this which differentiates clinical law from the teaching of specific skills which will be applied repetitively. Professor Subin[69] has analyzed the failure of orthodox legal education in these areas. His views reflect the observations of many clinicians, and document the seminal discussion of Judge Jerome Frank four decades ago.[70]

Whether law schools recognize the scope of the substantive requirements of the Code of Professional Responsibility and their responsibility to educate law students who can competently represent clients is a fundamental question confronting the legal profession. There are some within the law teaching profession who believe to cross this bridge would turn the legal profession into a craft.[71] They resist under the banner of protecting the intellectual rigor of legal education and the intellectual discipline of lawyers. Others believe that such resistance is undermining the capacity of law schools to fulfill their responsibilities to prepare lawyers capable of confronting the challenge to improve the quality of justice in our society.[72]

The challenges confronting the development and application of legal rules in urban judicial and administrative processes require professional judgments which must integrate a broad spectrum of human knowledge and understanding. One strength of the law school within the university is the home it provides for interdisciplinary study of the human condition and experimentation with different methods for guiding men and women in such study.[73] The continuing democratization of American society and the burgeoning "consumer perspective"[74] require sensitivity and response to the problems confronting the citizenry as a whole from professional and educational institutions.

To some espousing intellectual traditions which fail to consider the advent of the scientific method and its application to physical and social sciences, learning based on an integration of cerebral and theoretical analysis is not only of a higher order—but it is the only learning deserving of a place in the university.[75] The effects, however, of the scientific and industrial revolutions have been to advance human knowledge and develop societal institutions which demand the exercise of intellectual vitality and continuous study at least the equal of that which traditionally had been the province of an elite few in the religious and educational institutions. Modern society demands the exercise of judg-

68 The authors cited in note 53 *supra* are establishing the initial foundations for curricula which require the student to focus on principles of lawyering and the abilities underlying these principles.

69 Subin, *supra* note 50, at 3-7.

70 Frank, *Why Not a Clinical Lawyer-School?* 81 U. PA. L. REV. 907 (1933).

71 R. HUTCHINS, THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEAL 5 (Haber and Cohen ed. 1968).

72 Hook, *Comment* THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEAL 38 (1968); Silberman, *supra* note 45. *See generally* Levi, 4 *Talks on Legal Education* (1952) and Redmount and Shaffer, *supra* note 13.

73 *See* Standard 210 in ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS AT 4 (1977).

74 E. CAHN, *supra* note 35.

75 *See* R. HUTCHINS, *supra* note 71; *contra* Hook, *supra* note 72, at 52.

ment dependent on an understanding of complex empirical and theoretical learning. Today, knowledge is so complex that to engage successfully in theoretical speculation, one must integrate an understanding of the body of human experience which affects the theory under consideration. The law school has a responsibility to help students establish an intellectual framework which is able to approach, order, analyze and apply empirical and theoretical knowledge. In so doing, no university can assume, absent the test of challenge and examination, that one view or methodology or source of understanding is the key to intellectual excellence, understanding, and the development of professional judgment.[76]

Discussion of this basic issue occurred at a Rutgers Law School Symposium held in 1966 and entitled: The Law School of Tomorrow: The Projection of an Ideal.[77] The distinguished University President Robert Hutchins maintained that clinical education is destructive of the role of the law school.

> If we see the university as a center of independent thought and criticism and the law as an ordinance of reason directed to the common good, we understand how the two come together and how the one requires the other. The intellectual community has to think together about important matters: the law is the application of thought to what is perhaps the most important of all matters, the regulation and direction of the common life. Law teaches us how to lead the common life and disseminates newly discovered moral truths.
>
> The law becomes a university subject as distinguished from one appropriate to a multiversity, when it is seen not as a collection of coercive rules to be manipulated by the technician, but as a body of principles of the highest moral and pedagogical value. The task of the university law school is the clarification and refinement of these principles, which are relevant to the life and to the study of everybody inside and outside the university. Since law is architectonic, which means that it shapes the conduct of society, everything in the society is relevant to it.
>
> The study appropriate to a university law school is jurisprudence. . . . But consider what jurisprudence is in Lon Fuller's definition of it. He says, "Jurisprudence is concerned with the nature of law, its purposes, the means (institutional and conceptual) necessary to effectuate those purposes, the limits of the law's efficacy, the relation of law to justice and morality, and the modes by which law changes and grows historically."
>
> I think you will agree that the subjects included in this definition are matters a lawyer ought to understand. I think you will agree, too, that the graduate of a how-to-do-it law school is unlikely to understand them. I am sure you will agree that these are matters the lawyer cannot come to understand in the practice. The only place he can do so is in university law school that has been shaken out of the how-to-do-it mold.
>
> I hope you will agree that the lawyer will be a better practicing lawyer if he understands these matters. He will be able to understand the direction of change and the reasons for it. His university and his law school will have been examining these issues. . . .
>
> . . . .
>
> The university should be restricted to teachers and students of the great intellectual disciplines. . . .
>
> . . . .

76 Academic freedom is intended to promote challenge and questions.

77 R. HUTCHINS, *supra* note 71.

> A learned profession is one based on great intellectual discipline. It has intellectual content and has it in its own right. A learned profession has something of its own that it can bring to the task of drawing the circle of knowledge and facing the great problems of modern man.
>
> Such a profession is the law. What it can bring to the common task is jurisprudence, through which it gains insight into what reason ordains to achieve the common good. To serve the common good by discovering what reason ordains for its achievement is the sworn duty of the legal profession. A graduate of a university law school such as I have briefly sketched would be qualified to take an honorable place at a bar dedicated to this duty. The university and the university law school might in some such way as this place the study of law in the mainstream of humanistic tradition. Can it be done?[78]

The distinguished philosopher, Professor Sidney Hook responded as follows:

> What has been left out? Precisely what justifies the existence of a law school—the study of types of legal problems which arise in daily life, and the methods of resolving them satisfactorily, with the least amount of injustice and suffering. Law schools are set up not for the sake of the law or lawyers, but ultimately to help human beings to solve legally the problems and predicaments encountered in the pursuit of conflicting social ends.
>
> Let me make the point clearer with an analogy. Suppose someone were to define a medical school, along the lines followed by Dr. Hutchins, as one whose subject is to understand the nature of the human body and its healthy functioning. Now we know perfectly well that this can be done and is being done by the biological sciences. But the justification of a medical school, as distinct from an institution devoted to the study of the pure, theoretical sciences of biology, is instruction in clinical medicine. A medical school exists not merely to discover biological truths but to solve problems of human health. If anyone were to recommend that the clinical aspect of medicine be left to the on-the-job training of the medical apprentice, after he has studied only the theory of health, he would be encouraging widespread manslaughter. I doubt that Dr. Hutchins would entrust himself to a fledgling surgeon who understood the theory of anatomy but who was learning to operate on the job. Why should anyone with an acute legal problem that might spell great financial loss or even loss of his freedom entrust his fate to someone whose only preparation for the practice of law is the understanding of its theory.
>
> It is this clinical aspect of the law, and its intelligent study in the law school, that Dr. Hutchins totally neglects. Yet this is the aspect of the law that not only has the greatest impact upon the ordinary man, to whom the lawyer owes a moral obligation to help when he has taken his retainer; its upshot constitutes a crucial test of what the law is declared to be.
>
> A far better case can be made for revising the law school curriculum so that students, under the guidance of their teachers, get some first-hand experience of the law in action in the courts, serving in organizations seeking to defend, extend, or change the law in different sectors of social life, or by serving in government and administrative agencies, than for cutting loose altogether the practice of law from its theoretical study.
>
> Dr. Hutchins protests that such clinical study of law is a waste of time because the law changes so rapidly that any know-how acquired in law school soon becomes obsolete. This I question on several counts.
>
> . . . .

78 *Id.* at 17-23.

> [M]ost important on this issue, to recognize and to be prepared for legal change is not incompatible with education for practice. By "practice" I don't mean the knacks and tricks of the trade that may end in what Verblen called "trained incapacity" when new inventions make the trade superflous. Nor do I mean merely the procedural know-how of where and when to file papers, which can be performed by the legal automaton that Mr. Hutchins speaks about, but rather analytical know-how, the capacity to engage in fruitful research, to view problems from new angles, to look for fresh analogies, especially the ability to apply principles and rules to specific cases, distinguishing between the relevant and irrelevant. These are the basic skills. Clinical medicine shows far greater changes than legal practices, but the properly trained physician can master these changes in virtue of the basic skills he has acquired. In law, as in medicine, a good practical education can nourish and strengthen the powers of flexibility.
>
> Finally, Dr. Hutchins' insistence in the paper he originally submitted—also implied in what he said this morning—that purely theoretical study of the law is the best practical education, makes no sense on his own premises. A pragmatist like Dewey can say, "Of all things, theory is the most practical," because for him ideas are plans of action. But Hutchins' theory of ideas makes practice or experiment emphatically irrelevant both to their meaning and their truth.[79]

IV. Academic Freedom, Learning and the Teacher

The principle of academic freedom requires the opportunity to demonstrate the intellectual vitality and importance of clinical law and clinical methodology.[80] The constitutional, statutory, and professional responsibility mandates of the right to competent counsel relate directly to clinical law and clinical methodology. While doctrinal analysis has failed to define meaningful standards for representation by counsel,[81] an educational process rooted in student clinical study and research based on the experience gained from clinical practice may contribute to developing standards of professional competence.

After the public, the primary victims of traditional legal education's biases are our students. Students who wish to be lawyers go to law school because society has made completion of a law school degree a requirement for admission to practice.[82] Students come and very quickly find their intellectual expectations undermined. Most essential in this process is the one-dimensional picture presented of what is intellectually correct in reference to legal studies. The stress on doctrinal analysis with its lack of concern for moral, ethical, and humanitarian instincts or the development of professional judgment based on actual life experience is contrary to the students' intuitive sense of the issues

79 Hook, *supra* note 72, at 41-43.

80 This requires the absence of deliberate road blocks. It means that individuals should be able to teach clinical law, including developing curriculum and course materials. It requires the opportunity to employ clinical methodology. Budgetary constraints are valid considerations in the context of changing the total curriculum to a clinical model. Budgetary constraints are not, however, justified where the law school affords faculty the opportunity to teach electives and/or employ seminar-type study. Where money is an issue, the spirit of academic freedom requires a good faith effort to coordinate teaching assignments to allow those faculty interested in clinical law and clinical methodology the opportunity to develop these interests.

81 *See* Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1 (1973).

82 With some variations, all states require or expect completion of law school for admission to the bar. *See* Mavity, *State Rules Governing Admission to the Bar: Comparisons and Comments* in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 19-21 (1978).

which face the lawyer[83] or the philosopher.[84] The consequence is that the orthodox professor does not provide a positive model for many students.

Concurrently, teachers join clients and students as victims. Restrictions on how educators teach through the role model they project directly relate to academic freedom and tenure for both the orthodox faculty member and the clinician supervising law student fieldwork. The following description of the role of the teacher by Martin Buber points to this, and indicates why students so highly value the one-to-one relationship in supervised clinical law.

> Can one educate through instruction? Instruction wants to influence the thinking of the pupil, education, his being and his life. Is it sufficient, as Socrates believed, to awaken the knowledge of the right in him for the right to be realized in his being and his life? But even Socrates himself exercised his decisive effect not through what he taught but through his life. It is not the instruction that educates but the instructor. The good teacher educates by his speech and by his silence, in the hours of teaching and in the recesses, in casual conversation, through his mere existence, only he must be a really existing man and he must be really present to his pupils; he educates through contact.
>
> Contact is the primary word of education. It means that the teacher shall face his pupils not as developed brain before unfinished ones, but as being before beings. He must really face them, that means not in a direction working from above to below, from the teacher's chair to the pupils' benches, but in genuine interaction, in exchange of experiences, experiences of a fulfilled life with those of still unfulfilled ones. But the latter experiences are no less important than the former. For what is needed is not mere seeking of information from below and giving of information from above, also not mere questions from here and answers from there, but genuine dialogue. The teacher, to be sure, conducts and governs this dialogue, but even so he must also enter it with his own person, directly and candidly. This dialogue shall continue into silent being with one another, indeed undoubtedly only here will it first properly culminate. It is this which I call the dialogical principle in education.[85]

The low student per teacher ratio in clinical law is rooted in providing for dialogue between student and teacher which integrates consideration of the diagnostic, prescriptive, and psychodynamic processes. The dynamics of simulation and fieldwork require that in the process of dialogue the student directly challenge the teacher's judgments. This opportunity to participate personally in the learning process of the teacher affords the student a critical role model, for the clinical teacher in turn is personally integrating the roles of student and professional. This, more than the orthodox teacher's activities, reflects the challenge which confronts practicing lawyers. Working with fellow students and clinical teachers, the student begins to respect his own individuality, as he sees the different strengths, weaknesses, and perspectives of others. The flexibility of the clinical methodology allows the teacher to work with each student in relationship to that individual's own professional development.[86]

---

83 Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965); Watson, *supra* note 14.

84 Hook, *supra* note 72.

85 M. BUBER, A BELIEVING HUMANISM: MY TESTAMENT 1902-1965, 102 (1967).

86 The fact that the educational process in law school involves teaching individuals who have individual needs and abilities is ignored in the traditional literature on legal education. *See* Redmount and Shaffer, *supra* note 13, for an analysis of the weaknesses of traditional education and the need to apply the

The crucial significance of the need for individualized educational courses is usually lost on the orthodox legal educator whose pedagogy is based on the assumption that all students must and do learn in identical ways. The consequence is severe when evaluation of students is premised on this traditional assumption. To the extent that the education process grades based on a common denominator of whether limited abilities are demonstrated, it fails to afford students the opportunity to manifest individual strengths and abilities. Equally important, it fails to allow teachers to build on individual student strengths and use different paths to reach common educational goals. It denies students the opportunity to be different and equal. It stymies rather than stimulates the future intellectual growth of students.

A particular example of this is the reliance on doctrinal analysis of cases to train students in legal reasoning. Many individuals find it easier to understand and analyze the theoretical basis of a principle only after they have a comprehension of how the principle applies and operates in live situations. Seeing the principle in its concrete application gives it meaning which is more easily grasped by many students. In some instances, motivation is increased because the principle becomes "alive." Discussions with many students confirm this insight. Clinical methodology is premised in part on this knowledge of learning. Traditional legal education, however, ignores this insight, to the detriment of students and teachers. Its consequence is to downgrade individuals who might develop a fuller and deeper understanding of legal principles because of the integration of theory and experience.

Professor Jerome S. Bruner of Harvard, an educator who has contributed to our understanding of the learning process states:

> With respect to matching successive prerequisites to the "natural" limits of developing intellectual skills, most work suggests that it is often done first through embodiment of principles in action, then by the supplement of image, and finally in symbolic form. Whether one is teaching set theory, the conservation of momentum and inertia or the notion of representation before law, one does well to begin with concrete actions to be performed, passing on to a vivid case of paradigm instance, and coming finally to the formal description in natural language or mathematics. It has been true of various curriculum projects that their success depended upon the invention of appropriate embodiments of ideas in these three modes-in-action, image, and symbol.[87]

---

understanding of "seminal" thinkers such as Jerome Bruner and Jean Piaget to legal education.

The importance of clinical law and clinical methodology, particularly that which is structured with both faculty supervision of the student's fieldwork and/or simulations, and faculty teaching of an accompanying clinical seminar, is that it provides teachers with the opportunity to observe the law student's responses to fulfilling professional responsibility. The teacher is confronted with learning about his student in an in-depth manner which traditional law school methodology and subject matter do not require. The clinical teacher is expected to engage in a continuing dialogue with each of his students as individuals, evaluating their professional conduct. Seminar and small group discussions allow for exchange of experience and ideas regarding professional development. In this context, the crucial role of and interrelationship between each component of clinical teaching—the supervision of the students' fieldwork and simulations, the individual conferences between teacher and student, and the clinic seminar—become clearer, and integrate into a whole. This suggests the importance of having the same teachers involved in as many of these components as possible. At New York University School of Law, the clinical faculty teaches each of these components in the clinics which involve law student practice. Ten individuals devote full time to their clinical teaching responsibilities and one individual devotes half time. It is because of the teaching time required that the "in-house" model of clinical education is preferable to models where the student is supervised by practicing lawyers whose principal responsibilities are to their practice rather than to teaching.

87 Bruner, *The Psychobiology of Pedagogy* in THE RELEVANCE OF EDUCATION 122 (1971).

Professor Bruner's analysis developed from experience in the teaching and learning of math should be considered by legal educators. The significance of individual development in the education process has been discussed by many, including Dr. Hook.

> [A] . . . legitimate education request students have a right to make is one rarely heard although it is far-reaching in its implications. This is the right to the individualization of the curriculum as far as possible within the resources available—and where not available, the right to request the reordering of educational priorities to make it feasible.
>
> It is a commonplace that each student differs from every other in his needs, his background, his interests. He responds differently to different kinds of instructions, to different stimuli. Those teachers who set out to teach a class of students equally, that is to say, with an eye on what they presumably have in common, rediscover Aristotle's insight that such equal treatment does an injustice to every student who has more or less than what is assumed to be common.[88]

A further aspect of the problem of academic freedom relates to the issue of the subject matter and types of cases being handled in the clinics. Often clinical legal studies are based on poverty law, discrimination, and government benefits cases. The law and problems in these areas are not considered of major significance to most law school curriculums. The orthodox view is that the legal problems involved are secondary, and often not part of the mainstream of the law.[89] This attitude contributes to downgrading the intellectual ability of the clinical law teacher. Further, clinical legal studies based on poverty law cases provide a balance to the traditional law school curriculum which fails to consider fully the legal interests of the poor and racial minorities. Finally, the human level of the legal problems faced in the clinics is the fundamental mechanism for bringing the immediacy and power of the legal system in the lives of the individual citizen into the law school, and for providing an understanding of the interrelationship between and the urgency of the racial, economic, and legal crises permeating people's lives in our urban society.

As teaching tools, the legal problems of the poor and minorities have general applicability in relation to the pedagogical goals of clinical law. Their cases in judicial and administrative forums provide students with the opportunity to confront the basic processes in client representation (fact determina-

88 S. Hook, *supra* note 43, at 68-69.

89 This attitude is manifested in the continuing criticism that clinical courses based on poverty law are not valuable. It is also reflected in the relative paucity of traditional and seminar courses devoted to these fields. At the same time, the legal issues and public policy questions presented by these areas are among the most controversial and politically sensitive in the nation. *See* E. Gee and D. Jackson, *supra* note 25, at 28-29 & 40-41. The information cited reveals "a very small allocation of school resources" to the area of discrimination, but a "sizeable proportion of school resources" to law and social issues. This latter category includes a broad range of courses besides poverty law and government benefits. The finding about courses considering discrimination casts some shadow on whether courses on law and social issues confront the issues raised by poverty and discrimination. At New York University School of Law, a major commitment was made in the 1960's through the Project on Urban Affairs and Poverty Law to develop substantive courses considering areas such as welfare, urban redevelopment, economic development and minorities, consumer law, family law and the poor, and education law. Most of the courses developed between 1968 and 1971 are no longer taught, but the clinical courses which evolved in conjunction with these substantive areas have prospered. In actuality, consideration of the core legal issues raised by poverty and discrimination are considered in the clinical curriculum. It is possible that this development has occurred more generally, and is good fiscal policy since law schools have limits to their financial resources.

tion, professional responsibility, counseling) and advocacy (negotiation, preparation for and presentation of cases for fact finding in the light of the law). In terms of understanding problems in the administration of justice in the American legal system, they mirror the problems confronting all those who are not either government, rich, or able to interest the limited number of public interest lawyers in their causes. Ultimately, the contrast between the legal system which functions for the few in the federal courts and some state courts, as contrasted with the legal system which relates daily to millions of people must be confronted by those who study, teach and practice law. The joint issues of dispute resolution and delivery of legal representation are among the most crucial facing the legal profession. They are ripe for research.

The tragedy is that law schools, by refusing to examine closely what is actually occurring in the students' clinic cases, are ignoring consideration of some of the most fundamental problems in the law and simultaneously assuring that the expertise of the clinician will not be utilized to its fullest potential. The fundamental assumption of the lack of intellectual worth of the clinician made by many orthodox faculty members produces a self-fulfilling prophecy, for these assumptions are the tools used to deny the clinician the opportunity to demonstrate the intellectual vitality and importance of his work. Having assumed the unimportance of the clinician's work, the orthodox teacher is thus able to justify both his judgment and his refusal to devote the considerable time required to learn what actually occurs in clinical law and in the use of clinical methodology. This position also has the consequence of victimizing the poor and discriminated against by assuring an absence of concern for the relationship between the legal system and these segments of our society.

The response from those law schools which place the individual who supervises fieldwork in a second-class status constitutes a direct signal to teachers and students, affects the courses teachers teach and students select,[90] and for many students creates significant conflict because of the tension between the professional values expressed in the law school as contrasted with the values inherent in the professional responsibilities they will be expected to fulfill upon graduation.[91] Ultimately, tenure is used as a form of censorship. Tenure has defined the institution's values in terms of what "ideas" and teaching methodologies are sanctioned. It stifles the academic freedom of the teacher on the tenure track. It denies the clinician the opportunity to be different and equal. It ignores the unique capacities and educational needs of the students. It reveals that many law teachers have refused to consider the complexity of the learning process.[92]

V. Conclusion

If there is passion in the preceding analysis, it is because of the pain I have witnessed watching colleagues struggle to produce articles designed to satisfy

90 *See* Stone, *supra* note 14, at 427; Watson, *supra* note 14, at 12.
91 *See* Stone, *supra* note 14; Watson, *supra* note 14.
92 *See* Redmount, *A Conceptual View of the Legal Education Process,* 24 J. LEGAL EDUC. 129 (1972); Redmount and Shaffer, *supra* note 13.

others while their own intellectual interests, originality, and idealism were being suppressed. There is the pain of our own students confused because they feel totally unprepared to function as lawyers and unsure of their professional responsibilities. And finally, but of equal importance, is the injury to the individual client who will not be properly represented by an unprepared law school graduate.

The post-World War II period has seen the slow, but steady progress of the "consumer perspective."[93] The legal profession, no more than the medical profession, can escape its implications.[94] As long as law schools are a step in the state's process of regulating the profession, law schools will not be able to avoid increasing their responsibility to prepare law students to be competent practicing lawyers.[95]

For legal education to adjust to the realities confronting professional education and its own responsibilities to the profession it must prepare students for the performance of what Professor Bruner terms "unpredictable services."

> By unpredictable services, I mean performing acts that are contingent on a response made by somebody or something prior to your act. Again, this falls in the category of tasks that we shall do better than automata for many years to come. I include here the role of the teacher, the parent, the assistant, the stimulator, the rehabilitator, the physician in the great sense of that term, the friend, the range of things that increase the richness of individual response to other individuals. I propose this as a critical task, for as the society becomes more interdependent, more geared to technological requirements, it is crucial that it not become alienated internally, flat emotionally, and gray.[96]

To accomplish this requires the capacity to develop and use intuitive skills.[97] It requires the ability to be logical and analytical. It demands the capacity to integrate the abilities needed to be a competent professional. To achieve such goals requires a modification of the law school's personality as

---

93 E. CAHN, *supra* note 35.

94 The increasing regulation of the medical profession and efforts to assure accountability in delivery of services is beginning to be evidenced by the inclusion of lay persons on bar disciplinary panels. *See* Hochberger, *Lawyer and Discipline: ABA Draft Differs from New York Structure,* 180 N.Y.L.J. 1-2 (Aug. 28, 1978).

95 See the following excerpt from the Report of the Chairman of the ABA Section of Legal Education and Admissions to the Bar on bar admissions. It indicates the importance placed on study at ABA approved schools.

II. *Bar Admissions* With approval of the Board of Governors, a brief *amicus curiae* was filed in behalf of the American Bar Association on April 19, 1978, in the Supreme Court of Minnesota in the matter of *Application of Byran M. Hansen to Write the Minnesota Bar Examination.* The brief supported the Supreme Court of Minnesota rule requiring graduation from an ABA approved law school as a requisite for taking the Minnesota bar examination. The honorable Erwin N. Griswold represented the American Bar Association in the brief and participated in the oral argument held May 25, 1978. Copies of the brief are available by writing Mr. Frederick R. Franklin, Section of Legal Education, American Bar Association, 1155 E. 60th Street, Chicago, Illinois 60637.

The Section also requested Board of Governor's permission to file a brief *amicus curiae* in the case of *Feldman v. Gardner,* pending in the U. S. District Court for the District of Columbia, to uphold the District of Columbia bar admission rule which is similar to that of Minnesota. The plaintiff in this case did not graduate from any law school; he "read law" in a Virginia lawyer's office (Virginia being one of only five states which permit this), and thereafter passed the Virginia bar examination and was admitted to the practice of law in Virginia. The Board of Governors declined the request to file a brief at the district court level; however, if the matter reaches the Supreme Court level, the Board stated it would consider a renewed request. IX Legal Educ. Newsletter, July, 1978, at 1-2.

96 Bruner, *Culture, Politics and Pedagogy* in THE RELEVANCE OF EDUCATION 98, 104 (1971).

97 Bruner, *Toward a Disciplined Intuition* in THE RELEVANCE OF EDUCATION 82 (1971).

embodied in the faculty. The tenured faculty cannot be composed of individuals who are all similar in terms of ability, personal needs, and professional goals. As discussed, clinical law and clinical methodology embody values which are fundamentally different than those of many orthodox teachers and their educational agendas. The values of the orthodox law teacher are based on the abilities to excel at doctrinal analysis and writing. The capacity to engage in educational dialogue as Buber defines it is not a primary value. To the contrary, traditional faculty whose strength lies in this capacity are usually considered "soft" by their colleagues. This fact is reflected in tenure standards.

For clinical law to be able to make a meaningful contribution to legal education and the legal profession requires a fundamental modification of the standards used to determine excellence as it applies to clinicians. The critical abilities are the capacity to use the process of dialogue as a teaching methodology, practice law competently, supervise and evaluate students, and teach the theoretical and empirical bases of the diagnostic, prescriptive, and psychodynamic processes in which lawyers are required to engage. If afforded appropriate time, the clinician should also be expected to engage in research and publish. Such research should include empirical study, analysis of how the legal system functions, seminal descriptions of aspects of the legal process, or traditional doctrinal analysis.

For people to succeed as teachers in clinical law and use clinical methodology, they must fully express and embody the values implicit in competent professionalism. The resulting tension for the clinical teacher who tries to balance the expression of his own values within a decision-making process which postulates a different set of values is destructive both to the individual and the institution. Law schools must recognize that the legal educational process has become too sophisticated to remain inflexibly tied to the traditional values which define the teacher's responsibilities and underlie the basic decision-making processes for appointment, promotion, and tenure.

This does not mean that traditional values should be or have to be abandoned in recruiting faculty to teach the traditional curriculum. What it does require is flexibility. The failure to develop and articulate standards which reflect an understanding of the differences in educational goals and teaching responsibilities within traditional and clinical curricula reinforces the conformist pressures of present tenure standards, and constitutes a refusal to recognize the abilities needed to excel at clinical law teaching. It creates the illusion of standards, but in reality contributes to "lawlessness" in the decision-making regarding clinicians because it provides for the application of standards which do not relate to what clinicians do. When the faculty does not find the qualities in the clinician which it believes each of the nonclinicians possess, it usually renders a negative decision regarding the clinician. This process ultimately degrades everyone participating in it.

The work of Robert Redmount, Thomas Shaffer, Alan Stone, and Andrew Watson[98] contributes to the conclusion that different values and different methods of evaluation should be given precedence in identifying individuals for

98 Redmount and Shaffer, *supra* note 13; Stone, *Responsibility,* 16 J. LEGAL EDUC. 1 (1963); Watson, *supra* note 14, at 10-13.

faculty positions intended to train students to be practicing professionals. A teacher cannot successfully work with students in the development of their individual senses of professional responsibility, unless the teacher is prepared to work on an individual basis with each student and spend enough time exploring fundamental issues in order to identify those areas which require in-depth work with the student. This requires that the teacher have a fundamental interest in and commitment to working with students on an individual basis, and an interest in the law as it relates to and affects the client as an individual in society. These values directly conflict with the prevailing values expressed in large class instruction, limited office hours for student consultation, doctrinal analysis, time for outside consulting, and interest primarily in law reform or policy type issues.

This tension is magnified by the traditional standards for selection of faculty which focus on law school excellence, clerking for a judge, and work for a large, prominent law firm. All these positive qualities usually have the negative quality of the absence of experience working with individual clients. Pure intellectualization has been the foundation for success and the cycle is completed by returning to engage in traditional law school teaching. The problem for legal education is that individuals whose basic interest is in developing the professional competence required to practice law will often not define their values to include the need to excel at intellectualization unrelated to actual people and their problems, and thus their law school performance may not be an accurate reflection of their abilities to practice law and to teach law students how to be competent professionals. The method to evaluate a professional, including his intellectual ability, is to examine his or her work and talk with those he or she has served. As law schools seek experienced practitioners and litigators, they will find the correlation between law school record and professional competence significantly weakened.[99] This is particularly so since the paths which one takes if one excels at law school often do not contribute to developing the abilities required in clinical law, and in particular, ability to represent individual clients. Legal educators must recognize that professional responsibility can inspire a standard of excellence as rigorous as that offered by intellectualism. Equally important, if people do not see or understand or are uninterested in the nature of excellence and competence required by professionalism, a serious question is raised as to their competence to teach that part of the law school curriculum designed specifically to prepare students to be professionals.[100]

One major problem in cracking the monolith of legal education is the lack of factual data about law professors. There are no studies which provide a good picture of the teacher—indicating when one writes, how much one writes and of what impact such writing is on the profession. We do not know what writings satisfy "publication" requirements. We do not know if publication as a requirement functions as an initiation rite or as a guarantor of continuing

99 Changing standards to reflect this reality may be thwarted as much by a fear on the part of the professors that the image of their school will be lessened by using a different standard when other schools aren't, as by an unwillingness to recognize its validity. This dynamics will most likely manifest itself in the "prestige" law schools.

100 *See* Watson, *supra* note 14, at 10-13.

scholarship and thoughtful teaching. We need to know all of this to either substantiate the image of the law teacher as a doctrinal scholar or to lay it to rest or to modify it. At this juncture, we need to know whether the 17% of clinical teachers[101] now eligible for tenure are being asked to confine their teaching to the classroom and abandon being practicing professional teachers and the concomitant role model.

The history of legal education since World War II presents an interesting parallel. Leading legal educators postulated the need to invigorate and increase the research output of law school teachers. The pathway to achieve these goals was to be interdisciplinary study and research. The hope contained in the ideas of people like Edward Levi[102] and Willard Hurst,[103] however, has not been realized. To read Paul Carrington,[104] Francis Allen,[105] Herbert Packer and Thomas Ehrlich[106] makes it clear that the goal of fruitful scholarship through interdisciplinary work is unfulfilled, and so is the goal of broader scholarship.[107]

Perhaps the primary explanation lies in the fact that the image and substance of the law school teacher have not significantly changed. The consequence is that those who teach have not had the motivation to prepare themselves for interdisciplinary work, and those who might be interested in interdisciplinary work have not been willing or interested in expending the intellectual energy and time to first prove themselves as orthodox faculty to gain the opportunity to do interdisciplinary work.[108] It is the exception for one individual to be an outstanding orthodox legal scholar and also be expert in an interdisciplinary context. This is particularly true since the latter often moves individuals toward empirical study, and the law school has not been a fertile environment for such research.

Further, it must be remembered that traditional legal studies and interdisciplinary study embody different basic starting points and perspectives.[109] The orthodox law school teacher's field of vision differs from that of the interdisciplinary teacher. Legal education, with its static qualifications for the law teacher, has severely hampered interdisciplinary work. The same may occur with respect to clinical law.

The basic fact is that the different perspectives of the clinician and academician also make different professional demands. Ultimately, to succeed as teachers, the clinician must know the law, just as the academician must know and communicate the societal reality in which legal subjects live. But the

101 Gee, *Survey of Clinical Legal Education* in SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979 xviii (1979).
102 *See* Levi, *supra* note 72.
103 Hurst, *supra* note 21.
104 CARRINGTON REPORT, *supra* note 47.
105 *See* Allen, *supra* note 49.
106 H. PACKER and T. EHRLICH, *supra* note 19, at 37-46.
107 *See* AIMS AND METHODS OF LEGAL RESEARCH, CONFERENCE HELD AT UNIV. OF MICHIGAN LAW SCHOOL (Conard ed. 1955); Conard, *The Quantitative Analysis of Justice,* 20 J. LEGAL EDUC. 1 (1967); Dworkin, *Legal Research,* 102 DAEDALUS 53 (1973); Kirby, *The Teaching and Research Missions of the University Professional School,* 32 OHIO S.L.J. 253 (1971).
108 Cavers, *supra* note 24, at 565-66. *See generally* Dworkin, *supra* note 107.
109 *See* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS (Evan ed. 1962); Galanter and Friedman, *The Future of Law and Social Sciences Research,* 52 N.C.L. REV. 1060, 1068 (1974); Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency,* 1977 B.Y.L. REV. 695, 934.

successful clinician is not required to excel at scholarly doctrinal analysis. Only rarely does a case turn on such an ability, for the problems in life involving the law are usually not settled by original doctrinal analysis.[110] The law to be applied and the potential available adjustments in legal principles are known. The good clinician will know these, or know how to learn these, in the context of live cases. He must also, however, have an understanding of how institutions actually function and how human beings act and interact. The integration of all this understanding must occur for the exercise of living judgment which is the core of the clinician's responsibility. The clinician lives and works in a world of uncertainty, while his academician colleague does not have to confront the variables which affect the law's application in individual cases.

These differences contain extraordinary opportunities to render legal education more capable of preparing lawyers to fulfill their professional responsibilities to clients and to improving the legal system. Research in clinical law may help to provide more exact definitions of attorney competence and a better understanding of the problems of achieving fair administration of the laws.

Educationally, clinical law and clinical methodology present important opportunities for research studying teaching and learning, particularly as to the effects of the absence and presence of experience in learning about and how to develop and apply principles guiding human and institutional conduct.[111] It is possible that one of the most important aspects of clinical methodology for some students is that it can help them achieve a mastery of legal principles more effectively than can the traditional classroom, and a better understanding of the role of law in society. This ultimately may increase students' capacities for research and scholarship.[112]

If clinical legal study is in fact intellectually impoverished, then it will be abandoned by law schools. If, however, the depth and scope of the challenge to give substance to defining professional responsibility and studying its components have hardly been developed, then the future intellectual life of law schools and universities will be enriched and the nature and role of law schools significantly changed by both clinical law and the clinical methodology.

If one of the purposes of the University is to expand human knowledge, then it is essential that the University explore the nature of the professional's responsibility to those served. The impact of the professional on our society is one of the crucial areas for contemporary study. Inherent in the attorney-client relationship are basic political, economic and social considerations which raise fundamental ethical and moral questions. For students and faculty to study the attorney-client relationship and explore the responsibilities of the professional in American society requires understanding which can be gained in part only by experience and observation. Clinical law affords an avenue for such work. To accomplish this, however, will require recognition by the public and the profession that quality legal education shall cost more and that resources must be allocated to accomplish it.[113]

110 *See* O. HOLMES, THE COMMON LAW 1 (1881).

111 Redmount and Shaffer, *supra* note 13; *see generally* J. BRUNER, THE RELEVANCE OF EDUCATION (1971).

112 *See* Levi, *supra* note 72, for an early discussion on the relationship between a "graduate clinic" and the law school.

113 If clinical law and clinical methodology are as important as their proponents believe, student tuition

In concluding his analysis at Rutgers Law School Dr. Hook stated:

> Your students should have a touch of dedication as well as being intellectually gifted. Select them, therefore, from among those who have a calling or vocation for the law, a sense of it not only as a way of earning a living but as a way of living one's life, who want to succeed but who also want to be "moral men [and women] in a moral society."
>
> Were there a legal equivalent to the Hippocratic oath, your students, upon the completion of their studies, would not swear allegiance to any creed. Their pledge would be to the service of man—to all men—in the never-ending task of resolving human conflicts in order to maximize human freedom under law.[114]

Perhaps, the challenge for the legal profession and legal education is now to reach for our own "Hippocratic oath" and prepare students to fulfill its obligations.

---

will have to be increased to provide at least part of the additional resources required to meet the expense of making clinical study available to the student body generally. Additionally, the nonteaching costs—including the costs of operating law offices, and providing service to the client, should be subsidized at least in part by the government. Cost formulas could be provided to reimburse law school clinics for handling cases of the poor. Reimbursement would be made through the National Legal Services Corporation. It is also time to think of federal legislation to support the construction of law school clinical offices. Such legislation would be based on the experience gained in the construction of hospitals after World War II with the Hill-Burton legislation, 42 U.S.C. § 291 (1976). The problems faced by our judicial and administrative agency systems in providing justice for the individual in our urban society require the allocation of financial resources to make them more effective. Our existing machinery of justice was not intended to handle the volume and nature of problems which have arisen during the twentieth century as a consequence of a highly technological society.

114 Hook, *supra* note 72, at 55.