

2002

Access to Justice: On Dialogues with the Judiciary

Margaret Martin Barry

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Law and Society Commons](#)

Recommended Citation

Margaret Martin Barry, *Access to Justice: On Dialogues with the Judiciary*, 29 Fordham Urb. L.J. 1089 (2002).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss3/14>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ACCESS TO JUSTICE: ON DIALOGUES WITH THE JUDICIARY

Margaret Martin Barry*

The Access to Justice Conference, sponsored by the New York State Unified Court System, represented a commitment by the Unified Court System to making access to the courts a priority throughout the state.

The New York courts and courts throughout the country are struggling to address what Wilhelm Joseph described in the opening plenary as a "serious crisis in justice."¹ Mr. Joseph discussed creating a sense of urgency that action needs to be taken to achieve our constitutional mandate to establish justice.² At a time when our country is experiencing a renewed sense of patriotism and is speaking with conviction about precepts that distinguish the Nation, his reference to this essential mandate is all the more poignant. Central to our democracy is a belief that our legal system is just. This faith has been sorely tested by the experiences of many who seek judicial relief. People enter a system dependent on lawyers whom they often do not trust and more often cannot afford. The legal system has not been structured to accommodate those without professional help. After years of managing unrepresented litigants who do not get justice, there is a growing concern that the movement of cases has subsumed the central mission of the courts. Many of those involved are becoming increasingly disillusioned.

What can law schools do to improve this state of affairs? Law schools are, for the most part, removed from litigation.³ Clinical

* Margaret Martin Barry is an associate professor of law at Columbus School of Law, The Catholic University of America. She acknowledges and especially appreciates the work of her research assistant Tanya Miller.

1. Wilhelm Joseph, Executive Director, Legal Aid Bureau of Maryland, Inc., Remarks at New York State Unified Court System Access to Justice Conference (Sept. 11, 2001).

2. *Id.*; U.S. CONST. pmbl.

3. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 57-66 (1992) (arguing that legal education should focus more on the skills needed to practice); Andrew J. Rothman, *Preparing Law School Graduates for Practice: A Blueprint for Professional Legal Education Following the Medical Profession Example*, 51 RUTGERS L. REV. 875, 879-81 (1999) (summarizing the debate regarding whether legal education provides "the appropriate curricular mix of abstract legal theory and practical training"); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201,

faculty are the exception, and they have produced most of the scholarship on the state of "poor people's courts"⁴ and issues of access to justice. Their scholarship has focused on lawyer-client relationships, ethical issues relevant to court access projects, and the personal experiences of pro se litigants.⁵ Clinical faculty have also worked with courts by contributing to judicial training, developing forms, and providing instruction to litigants on relevant legal requirements and remedies.⁶

This Article will consider how nurturing student interest in public service intersects with the goals of developing lawyering expertise. The Article will then examine what insight clinical programs can offer to the judiciary on making the courts more accessible to the public. My hope is to encourage more dialogue between the judiciary and law school faculty involved with the courts.

222 (1996) (stating that legal education makes "little attempt to look at the law as practice will see it" and that "the content of a student's legal education has simply not prepared the student for the highly competitive practice of law.") (quoting Scott Turow, *Law School v. Reality*, N.Y. TIMES, Sept. 18, 1988, at 54); Rodney J. Uphoff, James J. Clark & Edward C. Monahan, *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. CIN. L. REV. 381, 385-88 (1997) (discussing whether the current legal educational system prepares students to practice).

4. See Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 FORDHAM L. REV. 1785, 1804 (2001) (referring to a "poor people's court" as one that handles housing, bankruptcy, small claims and family matters).

5. See generally Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999) (exploring the possibility of using pro se clinics to address the lack of access to justice among low-income litigants); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (discussing the experience of pro se litigants in housing court); Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617 (1999) (addressing ethical issues related to different clinical approaches such as pro se clinics); Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (1993) (discussing the difficulties pro se litigants have in accessing family court remedies); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (discussing the scarcity of resources in clinical assistance to low-income clients and the appropriate use of triage services).

6. See, e.g., Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y 1, 30-32 (1999) (discussing the use of form pleadings and client tutorials by the Pro Se Litigation Project of the Family Division of the Circuit Court for Baltimore City); Murphy, *supra* note 5, at 139-42 (reviewing the types of pro se assistance available in various Maryland family courts).

I. DIALOGUES FROM WITHIN: THE RESPONSE OF LAW SCHOOL CLINICAL PROGRAMS TO ISSUES OF ACCESS TO JUSTICE

Law school clinical programs assume much of the task of fostering a sense of public service in students. Serving the needs of the poor has been a fundamental aspect of the clinical movement since the 1970s.⁷

Since law school curricula bypass many of the skills required for professional practice, clinical programs seek to fill a broad gap.⁸ Law school clinics usually give students their first opportunity to use the law professionally. The experience is intense and considerable resources are expended.⁹ As a result, students have limited chances to take clinical courses and there is pressure to optimize the experience.¹⁰

7. Margaret Martin Barry, Jon C. Durbin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12-16 (2000) (exploring the development of the public service focus of clinical education).

8. See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001). The article discusses the importance of assessing law school curricula at the tenth anniversary of the *MacCrate Report* and notes that clinical courses teach skills and values that other courses typically ignore. The *MacCrate Report* is the result of the work of the task force on law schools and the profession, chaired by Robert MacCrate, Esq. The *MacCrate Report* identified the gap between the training of lawyers and expected competencies, listed the skills and values that should be provided in preparation for the profession, and made specific recommendations with regard to educating for professional practice. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, THE REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

9. I refer here to in-house clinics. The appropriate teacher-student ratio for in-house clinics is 1:8. See Barry, Durbin & Joy, *supra* note 7, at 18-30 (discussing the costs of clinic programming); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 565-68 (1992) (recommending appropriate student to teacher ratios and case management approaches). Externships require fewer resources, and the role of the student is structured as that of law intern, rather than an attorney. See Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 141-43 (2000) (explaining that externship programs are popular in part because of their relatively low costs and noting that the learning process of externships does not typically allow for students to engage in important case-related work).

10. One day in court, one of our clients asked a law student how long she had to do clinical work before she could represent people on her own. The student replied that she did not have to do a clinic at all. The client said, "You mean you can represent people in court without ever having done it under supervision like this first?" The student answered yes. The client was silent. The ABA says that law schools need to offer "live-client or other real life experiences" but need not offer such experience to all students. Section of Legal Educ. And Admissions to the Bar, American Bar Ass'n, Standards for Approval of Law Schools, Standard 302(c)(2)(2001-2002). Many schools do not.

While in-house clinical programs have focused on full-service representation of low-income clients, the number of clients taken is usually modest.¹¹ Clinical faculty generally hope, if not assume, that upon graduation, their students will be more committed to providing service to the poor and that the cumulative impact of this service will help to solve the access problem. However, if students leave clinics with a sense of the crisis in access to justice, they may question the traditional "thousand points of light"¹² approach to representation. We must consider whether traditional representation sufficiently engages students in responding to the need for legal assistance. Will they take the catharsis of representing a few poor clients and store it away as a precious experience to be treasured? Will they disengage due to frustration over the limited impact their services have when measured against the huge need? Will they regularly engage in pro bono service with the knowledge that they are having a significant impact on the few lives they touch and accept this as the best that can be done? A committed few will become public interest attorneys, but the financial realities of law school make this option difficult for many, thus leaving the access question lingering.¹³ The questions suggest that part of nurturing student interest in and commitment to access to justice lies in involving them in trying to solve the access dilemma. Clinical programs need to openly consider the extent that different approaches to providing legal assistance may expand access to justice. Then

11. See PHILLIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 260-63 (1998) (describing three social security cases per team in a six credit semester and two asylum cases per team in a six credit semester as being too high); David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 84-86 (1979) (observing that the average number of cases per student depends on the type of cases and number of credit hours given for the course; also noting that students taking the clinic for twelve credit hours conducted an average of five trials and 3.3 hearings).

12. See George H.W. Bush, Address at the Republican Party Convention Accepting the Republican Party Nomination for President of the United States (Aug. 18, 1988) (the term was used to illustrate that virtue radiates from the individual through the family to the community and so on, and that we can achieve great results through the compounded effect of individual effort) (*Weekly Compilation of Presidential Documents*).

13. The ABA Working Group on the Cost and Financing of Legal Education reports that the median student debt upon graduation from law school is \$87,898. See ABA Network, at <http://www.abanet.org> (last visited Nov. 2, 2001). Unless their schools offer significant loan forgiveness, legal service work is not an option for most students. Frank J. Macciarolo & Joseph Scanlon, *Lawyers in the Public Service and the Role of Law Schools*, 19 FORDHAM URB. L.J. 695, 705 (1992) (explaining that "loan forgiveness programs help students choose public service").

they must evaluate whether pursuing alternatives to traditional representation is the best distribution of limited clinical resources.

A. What Types of Representation Could Expand Services?

Various methods of expanding pro bono legal services pursued by law school clinicians include impact litigation,¹⁴ community organizing,¹⁵ legislation, mediation,¹⁶ limited or “unbundled” services¹⁷ and community education. This section of the Article considers these methods with an eye to the combined goals of service and developing lawyering expertise. How does each approach respond to the skills students need to develop and the services clients require?

Impact litigation requires students to work directly with a client or group of clients with the knowledge that success can affect a broad group of people.¹⁸ It is akin to legislation and rule making in that it has the potential to affect many lives by establishing standards that benefit the target community.¹⁹ It is traditional, full-service representation, drawing on a range of litigation skills while self-consciously contemplating a broader reach than the needs of an individual client.²⁰ Depending on the issue, the litigation can be quite complex, often spanning years. Thus, in an ordinary law school clinic, students may only get to work on small pieces of the case. Of necessity, faculty supervisors provide the continuity and

14. Impact litigation is litigation that affects a broad group of people beyond the parties involved and usually involves social reform. Kirsten Edwards, *Found! The Lost Lawyer*, 70 *FORDHAM L. REV.* 37, 63-64 (2001); Deborah M. Weissman, *Gender-Based Violence As Judicial Anomaly: Between “The Truly National and the Truly Local”*, 42 *B.C. L. REV.* 1081, 1159 n.268 (2001) (defining impact litigation).

15. See, e.g., Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 *CLINICAL L. REV.* 307, 315-16 (discussing clinics that assist non-profit organizations and other community groups get organized, receive tax credits, and educate the community).

16. “Mediation is negotiation carried out with the assistance of a third party.” *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 123 (Stephen B. Goldberg et al. eds., 3d ed. 1999).

17. See Mary Helen McNeal, *Unbundling and Law School Clinics: Where’s the Pedagogy?*, 7 *CLINICAL L. REV.* 341, 349-50 (2001) (describing “unbundled” services as “the division of legal assistance into discrete tasks, with an understanding between the lawyer and client that the lawyer will provide only selected legal services that may not address the client’s entire legal problem”).

18. Lopez, *supra* note 15, at 319 (noting that impact litigation is “viewed as teaching students about the potential for having a broader impact than the individual served”).

19. See Weissman, *supra* note 14 (noting impact litigation’s systemic effects).

20. See Lopez, *supra* note 15 (describing pedagogic aims to serve a broader social good in clinical legal education involving litigation skills).

much of the direction. This can limit the students' sense of ownership and inhibit the attorney-client relationship. Despite these shortcomings, the issues are often compelling and thus worth working on.²¹ I know of no clinic dedicated to pursuing impact litigation per se, but many have seized the opportunity to change harmful laws, procedures, and practices through litigation consistent with a client's goals.²²

Legislative advocacy clinics seek to develop lawyering skills that are significantly different from those used in traditional litigation.²³ Legislative advocacy requires students to identify the issues, reduce them to a legislative remedy, and learn the drafting and lobbying process.²⁴ Issues synthesized for consumption by legislators are several degrees removed from the people affected. The legislative process and the power of legislation to respond to societal problems is something that students should understand and be able to employ.²⁵

Similarly, community organizing involves a specialized set of skills that is often painstaking and lengthy. Connected to legislation, and sometimes to impact litigation, it is the consensus-building process that lays the foundation for legislative activity and litigation on behalf of groups.²⁶

Limited or unbundled services seek to respond to the paucity of pro bono representation by helping larger numbers of people with discreet aspects of their cases.²⁷ Service is limited to advice, help

21. See *id.* at 318 n.69 (comparing arguments for and against impact litigation as a clinical teaching tool). See generally Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 *RUTGERS L. REV.* 855, 855 (1999).

22. See, e.g., Stephen Wizner, *Papers Presented at the Rutgers-Newark Law School Conference on "The Social Justice Mission of Clinical Education": Beyond Skills Training*, 7 *CLINICAL L. REV.* 327, 334-35 (2001) (describing the work of students on behalf of nearly 1000 homeless families that resulted in a statewide injunction that provided housing for the families for nearly a year).

23. See, e.g., Abby J. Leibman, *The Past and Present of Legal Services*, *L.A. LAW.*, June 24, 2001, at 60.

24. See Chai R. Feldblum, *The Teaching of Legislative Lawyering*, at <http://www.law.georgetown.edu/clinics/flc/teaching.html> (last visited Jan. 31, 2002).

25. See, e.g., *id.* (describing the teaching methods and skills focus of the Georgetown University Law Center's Federal Legislation Clinic).

26. See Lopez, *supra* note 15, at 325 (observing that students often come to realize that the "law simply offers no adequate response to the community problem and they have to . . . engage in community organizing and empowerment to assist the community in working on its own issues").

27. See Andrew Shepard, *Editorial Note: Tragedy and Hope*, 40 *FAM. CT. REV.* 5, 6 (2002) (discussing the problems of pro se cases and the need for unbundled legal services).

with pleadings, and referral. Such services are particularly useful at court where they can supplement the more limited input of clerks and reach people at the optimum point in their process.²⁸ Depending upon the approach, interviewing, counseling and some research, writing, and problem-solving skills can be developed. The increased volume of clients allows students a greater opportunity to build these skills, but the service offered lacks the depth implicit in full representation.

Community education²⁹ spreads legal services even further. Like unbundled services, it has the potential to empower clients to pursue their legal rights despite a lack of representation.³⁰ While education workshops often include assistance with forms, the advice given is very general. For the students, the opportunity to analyze and convey laws and procedures to people seeking to use them develops important skills, such as public speaking, legal analysis, and limited client counseling.

Mediation has the potential to expedite matters and to provide a more accessible forum.³¹ Courts are increasingly using mediation to address issues presented by poor and unrepresented litigants. It can serve as a less intimidating, less humiliating, more accessible, and more responsive experience than trial for certain types of cases.³² However, mediation also can act as a barrier to the judicial process since litigants are shunted into it, sometimes repeatedly, even if they feel that mediation is not working for them.³³ For stu-

28. The New York judges included similar services in their access plans. See Joseph, *supra* note 1 (describing "advice clinics staffed by bar volunteers").

29. Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 442 (1998) (discussing community education, which includes workshops, pamphlets, news columns, television and radio shows, and "do-it-yourself" kits).

30. *Id.* at 436.

31. See Rhode, *supra* note 4, at 1817 (inferring that mediation is a more accessible judicial remedy than other dispute resolution methods).

32. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2007 (1999) (explaining the increase in "court-connected mediation"). While I oppose mediation for domestic violence cases, it may provide an attractive alternative for clients and pro se litigants who are frustrated and hurt by procedural insensitivity and substantive inequities experienced in litigation. It is easy to dismiss their reactions as inevitable responses to losing a court battle, but these responses come from even people who have won their cases.

33. See *id.* at 2006-07 (discussing the limits of mediation, particularly because those forced into it have little information on which to proceed); cf. Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 996 (2000) (noting dissatisfaction with mediation among parties undergoing divorce proceedings).

dents, mediation develops lawyering skills such as interviewing, identifying the interests of parties, and problem solving. It also can alert students to the dynamics of power in conflict resolution and to points at which there should be no middle ground.³⁴

Each approach has the potential to serve the under-represented while developing important lawyering skills. The law schools must determine what works best for their clinical objectives. The clinical program can be more expansive if a school is committed to providing students with several clinic opportunities in law school. At present, however, most schools will continue to offer students only one clinic opportunity if any at all.³⁵

B. What Is the Best Distribution of Limited Clinical Resources?

If students only have one opportunity to take a clinic, then individual, full-service client representation should be the goal. Each stage of the case is developed in close consultation with the client. Students gain a depth of understanding and a connection to service that they would miss in a more expansive alternative.³⁶ To the extent that an alternative grows out of the full-representation clinic and is part of solving the problems of the client base, then the students have a greater context in which a given approach is to work.³⁷ They understand the situations that will be addressed and are alert to the limitations and possibilities of such solutions.

If limited service projects are pursued, they should be developed within full-service clinics. Students who have represented individual clients gain a sense of the trade-offs in distributing services

34. See generally Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (exploring control issues within the context of arbitration and mediation).

35. ABA Standard 302(c)(2) provides that law schools must offer clinical programs, but they do not have to make them available to all students. ABA, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(c)(2) (2001).

36. Mediation raises a different issue. Cases that are mediated involve many of the benefits of cases that are litigated in terms of developing rapport with the client and learning investigation, research, and client counseling skills. Lawyers should understand and learn to use mediation, but not to the exclusion of developing the litigation skills that their clients most rely on. Cf. Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses*, 21 SW. U. L. REV. 1317, 1321 (1992) (arguing that the challenges of mediation enhance students' overall lawyering skills).

37. See Engler, *supra* note 32, at 2043-47 (discussing the importance of context in responding to the needs of unrepresented litigants).

more broadly. Their level of preparation, including problem solving with their clients, helps them understand just what the clients who receive the abridged services are losing. Given the availability of clinical programs, providing only limited legal assistance solidifies students' views about the level of legal services that are appropriate for low and moderate-income litigants. This is dangerous because clinics should foster the recognition that while limited assistance is preferable to no assistance, it is by no means ideal.³⁸

Some limited services are more restricted than others. What have been described as "brief and specific" advice clinics are so abridged that marginal service is the only teaching goal achieved.³⁹ These advice clinics provide little opportunity for supervisory input and assessment, since the exchange involves specific answers to narrow questions, usually handled by telephone. Students can go to their teachers for guidance, but the process is streamlined to the point of having little chance for feedback and developmental benefit. On the other hand, supervisors can sit in on and provide specific feedback when clients come to the clinic for more detailed diagnostic interviews.⁴⁰ Clinics that include limited legal services should seek to develop effective communication with clients through problem solving, application of the law to the facts presented, consideration of ethical issues, and an understanding of the challenges and obligations that underscore the unmet need for legal services.

Due to the inevitable settlements or withdrawals, students do not always obtain the full range of litigation experience in a traditional case. Nevertheless, they enter their relationships with clients fully prepared to pursue the entire case. In the course of that work, they can connect to the drama of their clients' lives in a way not guaranteed by other options, and solve problems with clients

38. Some of my students have expressed surprise at clients who are demanding or critical. One aspect of the surprise is the expectation that their clients should be grateful for being represented at all. These reactions change during the process of working closely with clients and learning to appreciate their clients' right to expect no less than quality service.

39. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1775-78, recommendations 58-64 (1999); see also McNeal, *supra* note 5, at 2621-22 (explaining what types of legal assistance are included in a definition of "brief, specific advice"). Two examples of such advice are whether someone has to pay a parking ticket for a car registered under his name and what steps one should take to revise an incorrect credit report. *Id.*

40. McNeal, *supra* note 5, at 2635, 2647 (observing that "effective diagnostic interviewing is critical for the success of limited legal assistance" and is "the critical component" of providing limited legal services).

who understand that their student attorneys are committed to serving their interests.

Clinics have an obligation to imbue students with a sense of responsibility for providing quality representation and to train them in competent lawyering.⁴¹ Since a symptom of quality is exclusivity, students in full-service clinics begin to recognize that while it takes time to provide good service, the more time spent on each case, the fewer people they can represent. Although students expect that efficiency increases with expertise, they are able to observe, in working with opposing counsel or observing other cases, the cost of poor or hasty preparation and disregard for the client. They notice that some clients appear to be completely alienated by the process and that many litigants have no representation at all. These unrepresented litigants are silenced by their lack of information and guidance, frustrated by failed attempts to communicate their goals, and under-served due to their ignorance of the legal remedies available.⁴²

The clinic agenda is different from that of a legal services office in which the sole consideration is how to best allocate limited resources on behalf of a vastly under-served community.⁴³ So long as clinic opportunities are limited, the best way to develop basic professional competencies and values is to provide full representation to a manageable number of clients. This teaches students to appreciate the responsibility of representing clients, to gain insight into the complexities of developing a case, and to benefit from the excitement of rising to the demands of such an experience. At the same time, students can benefit from looking beyond the parameters of their cases to think systemically about the narrow swath cut by pro bono representation. While such reflection does not require actually participating in an alternative response to the problem, experience is central to clinical methodology.⁴⁴ Pursuing community education or limited services after experience with traditional representation yields a richer consideration of the benefits and limita-

41. Barry, *supra* note 5, at 1920 (discussing the public service goals of clinics and the need for law students to understand their role in addressing access to justice issues).

42. See generally Bezdek, *supra* note 5, at 536-42 (observing the difficulties that pro se litigants experience in housing court).

43. Tremblay, *supra* note 5, at 2490-93 (examining factors to be considered in assessing how clients can most effectively to use the resources of a clinic).

44. See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 141 (1993-94).

tions of such services.⁴⁵ Mediation pursued as an approach to solving a client's case can bring the complexities of this approach to the student without sacrificing the other lawyering skills developed through direct representation. Clinics should incorporate these experiences and related discussions whenever it is possible, but should not do so by sacrificing the training in full-service representation that students should expect from their clinical experience.⁴⁶ Through the experience of working with clients and reflection on the representation process, students gain an understanding of the need for change and their role in achieving it.⁴⁷

II. ON DIALOGUES WITH THE JUDICIARY

As circumscribed above, law schools should only play a limited role alleviating the problem of access to the courts. It is important to recognize these limitations, as the services that law students can provide are often factored in to court access plans. With these limitations in mind, we can begin to explore a useful role for law schools to play in addressing access problems.

One possibility that I have not heard mentioned is the role students can play in providing feedback to the courts. Each semester, our students do court observation memos.⁴⁸ In addition to gaining some orientation to the court process, they also are asked to consider how the court is conducted. Their comments offer some useful insights on the impact of judicial demeanor and how to improve the process:

The judges with their wisdom and understanding of the law . . . were not interested in the case. Some yawned during the hearing and some just showed frustration with the attorneys.

[J]udges too are only human, and they also seem to have gotten trapped by the system.

Like the defendants and prosecutors, the judge was also guilty of causing the court to run inefficiently. On both days I went to observe, the judge did not start until 10:30 a.m. Then she took a

45. See McNeal, *supra* note 17, at 387 (noting that prior experience with traditional representation helps students better understand the limitations of services provided by clinics).

46. Indeed, clinics often do just that. See, e.g., Barry, *supra* note 5, at 1901-04 (discussing Maryland's various clinical programs that combine differing types and levels of client services).

47. *Id.* at 1919-20 (discussing the benefits that students receive from clinical participation).

48. Ours is a one-semester clinic, so we have a new group of students each semester.

two-hour lunch break at 12:30. Granted, I recognize that the judges follow a rotation schedule and have carry-over obligations and pressing matters, however, they could ease the strain on the system most if they actually spent more time on the bench.

The judge lacked patience with the parties before her. This impatience seemed to lead to different reactions on the part of prose victims. Many of the women seemed defensive and uncooperative.

It appears that the problems of domestic violence and family child support issues plague African Americans and Latinos in the lower income bracket Unfortunately, these problems have become so mundane that many of the judges involved have become desensitized to the plight of those who are suffering its effects.⁴⁹

There were many comments about poor lawyering as well. For example, one student observed, "Defendants' counsel were barely capable and seemed not to care about the outcome. I saw only three attorneys who really advocated for their clients."⁵⁰

These observations speak to procedures that frustrate the process of seeking justice from the courts. Judges are aware of problems in their courtrooms, but the pressures of managing large dockets with limited resources can obscure the goals of providing procedural and substantive justice.⁵¹

Students have useful observations for judges regarding the impact on parties and their experience of the justice system. Judges have more power than they acknowledge over the extent to which poor people are hurt by the court system. As the top managers in the courts, they can pay more attention to the demands on litigants' time. Judges need to focus more on running efficient dockets and attending to time impositions on those caught up in the system. All too often, poor and low-income litigants are herded around and patronized by clerks and judges.⁵² Cases are regularly

49. Memoranda from the Students of the Catholic University's Columbus School of Law Families in the Law Clinic (Fall Semester 2001) (on file with author).

50. *Id.*

51. Peggy McGarry has observed that process is very important, and both lawyers and judges, familiar with the rigid roles assigned to them in the legal system, are impatient with it. Peggy McGarry, Center for Effective Public Policy, Remarks at the New York State Unified Court System Access to Justice Conference (Sept. 11, 2001).

52. For example, litigants seeking emergency protective orders in the Superior Court of the District of Columbia's Domestic Violence Unit have been called before the court in groups of three or more and questioned, at times with little sensitivity or

continued, with grave consequences for litigants.⁵³ Respect for the litigants is often lost in the process of moving crowded dockets, with issues categorized as routine and with non-conforming facts disregarded. If litigants have counsel, they must be held to appropriate standards of competence and demeanor.⁵⁴ More attention to these matters would constitute important steps towards achieving both procedural and substantive justice. There are judges sitting in congested courtrooms who demonstrate that this can be done. For example, commenting on a new rotation in the same set of courtrooms, the next semester of students made the following comments:

[The judge] seemed sympathetic and sincerely interested in helping both parties. [She] was very concerned that both parties understood what was happening as well as that the hearing covered everything they wanted covered.

[The judge] seemed very helpful in guiding the [respondent], who appeared pro se, in understanding the process and the consequences of her decisions and answers.

The judge's ruling was very clear and concise. This judge seemed to take his time more and explain things in detail to the respondent. The process was what I expected.⁵⁵

cohesion, about their cases. There is no pretense of creating a reliable record, and the litigants' dismay and confusion is palpable.

53. On the morning of her case, one client spent the time waiting for her case to be called fidgeting and expressing anxiety about her infant daughter, whom she had left with a neighbor. She worried about how careful the neighbor would be, about nursing the infant, and about the mounting cost of paying for the neighbor's service. At 12:30 p.m., the case was called. We were told that the court could not hear the case that day. I argued that we were scheduled and prepared, that we had very few witnesses, and that it would be a considerable hardship for my client to return. The court was unmoved and unapologetic. The judge's calendar was full indeed, but attention to scheduling could have led to a continuance earlier that day, or even the day before we came to court. There was no appreciation expressed for the stress of separation and the expense involved for my client, who could ill-afford the costs of that wasted morning in court. My client left angry and committed to not returning.

54. Recently, as I sat in court waiting for my case to be called, I observed a hearing in which defense counsel turned to her client and snapped her fingers twice at him as her method of having him respond to an inquiry by the judge. It was such a demeaning gesture that the crowded courtroom fell silent. I have had opposing litigants approach me to help them contact their court-appointed attorneys whom they had not seen since their initial hearing and who would not return their calls.

55. Memoranda from the Students of the Catholic University's Columbus School of Law Families in the Law Clinic (Spring Semester 2002) (on file with author).

While these judges may reflect the power of rotating calendar appointments fairly regularly, their approach demonstrated that attention to an accessible, fair process was far from inefficient.⁵⁶

The Access to Justice Conference underscored the New York court system's understanding that it is a hollow, unworthy admonition to tell poor and low-income people that they should get a lawyer and operate as though their lack of counsel is a calculated risk. If the system is to be fair, the court must be actively vigilant in assuring that justice can be achieved. Vigilance requires that courts, at a minimum, undertake certain changes, and many innovations are being considered, as the plans submitted by the New York judicial districts demonstrate.⁵⁷ The following components should be included in the plans of courts addressing access to justice.

A. Clear Guidelines for Handling Pro Se Cases

Many judges are not clear about what intervention is appropriate in assisting pro se litigants.⁵⁸ Fairness suggests an obligation to make pro se litigants aware of their legal rights and obligations and sufficient inquiry to make sure that they have had an opportunity to address them.⁵⁹

56. Judges in the courtrooms commented on by the students rotate out after one year, unless an extended term in the unit is specifically requested.

57. New York State Unified Court System Access to Justice Conference (Sept. 11-12, 2001).

58. According to ninety-one percent of judges surveyed, courts have no general policy addressing the manner in which pro se litigants should be handled in the courtroom or general litigation process. Engler, *supra* note 32, at 2013 (quoting Jona Goldschmidt, How Are Judges and Courts Coping with Pro Se Litigants?: Results from a Survey of Judges and Court Managers 16 (May 1997) (unpublished manuscript)) (considering the policy issues raised by the increase in pro se litigants).

59. The parameters become more challenging, but essentially no different, when one side is represented and the other is not. On one occasion, the judge called our pro se opponent to the bench and suggested questions for him to ask on cross-examination. He stood by the bench as the judge coached him during the examination. While her behavior was, in my experience, exceptional, it does suggest the need for more guidance on how to appropriately intervene to achieve just results. In that particular case, the judge could have asked a few clarifying questions on cross herself. Justice would have been served in making the opponent aware that the court needed him to address certain issues and what would guide her decision-making. To the extent that the pro se litigant did not elicit this information from a witness, she could ask a few questions on point. In this instance, her neutrality was compromised, in appearance if not in fact, by her coaching of the litigant.

B. Clear Guidelines for Clerks on How to Assist Litigants

Clerks should be trained on what information to provide. If people say they want divorces, it is reasonable in a no fault jurisdiction to ask how long they have been separated from their spouses, and to tell them that they must consider what, if any, custody or property issues need to be resolved. Handing out appropriate forms and printed instructions at that point is important, along with providing information about filing, service, and the scheduling process. If a person asks what to do if she cannot afford the filing fees, the clerk should feel comfortable telling her that she will have to inform the court of her financial situation, and offering appropriate forms.

C. Consider the Role Lay Advocates Can Play in Assisting Pro Se Litigants

Lay advocates can provide services that litigants would otherwise do without because they cannot afford a lawyer.⁶⁰ The bar has consistently raised legitimate concerns about the potential for lay advocates to do far more harm than good in providing assistance to litigants.⁶¹ However, lay advocates with experience and training in certain specialized services are often more competent than lawyers whose expertise is more generalized.⁶² Nevertheless, the education and work of lay advocates are not regulated, and there is no system in place designed to protect clients.⁶³ Similar concerns could be raised about the extent to which the educational and licensing requirements for lawyers provide quality control. While licensing

60. Engler, *supra* note 32, at 2042 ("Rather than resisting the presence of lay advocates in court or in mediation, the courts should be assisting the efforts to expand, upgrade, and oversee available non-attorney counseling.").

61. See Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2243 (1999).

62. Deborah Rhode talks of targeted legal training that would be more useful, particularly given the specialization in law practice today. She describes law school as both over preparing and under preparing students for practice. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 190 (2000).

63. See Hurder, *supra* note 61, at 2241 (discussing the risks and benefits of lay lawyering and concluding that it is beneficial for some law-related activities); see also Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2595 (1999) (describing the assumption that unauthorized practice rules are necessary to protect the public as paternalistic and perpetuating a system in which the legal needs of many low and moderate income households are not addressed at all).

provides some protection for clients,⁶⁴ the extent to which the self-regulation anticipated by the licensing structure for lawyers achieves this goal has been the subject of some public antipathy.⁶⁵

Training for lay advocates could target subject matter of particular relevance in addressing the unmet need for legal assistance. Professor Deborah Rhode of Stanford Law School observes that

Almost no institutions require students to be proficient in areas where unmet legal needs are greatest, such as bankruptcy, immigration, uncontested divorces, and landlord-tenant matters. Other nations permit nonlawyers with legal training to provide these services without demonstrable adverse effects. American law schools could offer such training and help design licensing structures that would increase access to affordable assistance from paralegal specialists.⁶⁶

Collaboration between law schools and the courts in setting standards for training and licensing of lay advocates would respond to concerns about the quality of lay advocacy and provide protection for clients.⁶⁷ Lay advocacy would not help litigants who are unable to pay even the reduced cost of lay services, but there is no reason why some level of pro bono work should not be expected from this group.

D. Help Pro Bono Triage Efforts by Acknowledging Pro Bono Attorneys' Time Constraints

Attorneys who regularly practice in poor people's courts waste less time than pro se litigants in those courts, but this is relative. Cases are readily continued, often over the objection of all parties. If heard, they are often called hours after the scheduled time, and once started may be interrupted by other matters coming before the court. One possibility is systematizing the priority lawyers already acquire through status, familiarity, and manipulation in these matters. On the one hand, each pro se litigant's time is valuable and the need to attend to matters outside the courtroom often competes with the issues before the court. If limited pro bono ser-

64. See, e.g., Toni M. Massaro & Thomas L. O'Brien, *Constitutional Limitations on State Imposed Continuing Competency Requirements*, 25 WM. & MARY L. REV. 253, 255 (discussing the inadequacies of licensing).

65. "The bar dismisses about 90 percent of complaints about attorneys; less than 2 percent result in public sanctions. Most litigation misconduct goes unreported and unsanctioned." RHODE, *supra* note 62, at 208.

66. *Id.* at 190.

67. See Engler, *supra* note 32, at 2054 & n.304 (referring to the need to upgrade non-attorney counseling).

vices, including the number of cases that law school clinics can reasonably assign, are to be optimized in an effort to respond to the need for pro bono representation, then the court has a role to play in helping to assure efficient use of services. One way to address this is to schedule cases in which pro bono counsel provide representation to one or both of the parties in the afternoon when busy calendars tend to clear. This will avoid directly competing with other litigants. Discussion with pro bono attorneys, including law school clinics, could lead to other efficiencies as well.⁶⁸

E. Seek Input from the Public

While courts tend to hear from the bar fairly regularly, broader feedback is needed if access to the courts is a priority. Courts need to hear from the breadth of people who use their services, including litigants, lay advocates, and law students.⁶⁹ Law school clinics have direct experience with the access issues courts need to address, and their students bring needed vitality to the discussion, particularly since their expectations for procedural and substantive justice allow them to scrutinize proceedings with a perspective that is no longer available to seasoned attorneys. Law faculty can also bring expertise in ethics and jurisprudence that can help courts determine how to frame their approaches to assisting pro se litigants.

III. CONCLUSION

Commitment to justice is part of our national identity. We all have a stake in making sure that the legal system is worthy of the faith we put in it. The New York State courts, by virtue of the Access to Justice Conference, seem open to and desirous of collaboration as they assess the challenges of responding to this fundamental goal. Maybe the conference will open the door to creative exchanges with law schools within the state, and this work can in

68. See Tremblay, *supra* note 5, at 2475-79 (discussing the need for triage in determining how to allocate scarce poverty law resources, and arguing that triage determinations are inevitably the responsibility of the poverty lawyer). Courts have a role to play in this process since they can, and do, identify cases in which representation is most needed. I know I am not unique in receiving calls from judges seeking to place cases in which they believe a litigant could not proceed effectively without representation.

69. The feedback would have to be given in a manner that avoids personal attacks on judges. This could be accomplished by having the presiding judge, an administrative judge, or a court-appointed commission gather the information. The goals of assuring understanding, attention, and fairness in the judicial process would need to be sought without creating a sense that rulings are to be attacked outside of appellate procedures.

turn serve as a model for other jurisdictions. The exchange will be most effective if the courts consider that law school clinics are educational programs that, while driven by a strong interest in serving poor people in need of legal representation, will always seek to balance service with educational goals. The two goals converge in that most clinical programs recognize service to poor people as an important aspect of a law student's training. However, clinics that do their jobs well will not represent significant numbers of people. Law schools, however, particularly clinical programs, can nurture student interest in access to justice. They can do this by exposing students to high standards for providing full representation for poor people in need of legal services. In the context of such representation, or with the experience of such representation as a foundation, clinic students can pursue, test, and assess models for expanding services.

Educating law students involves developing in them a clear sense of their heightened obligation as legal professionals to pursue the constitutional mandate to establish justice. If that message is effectively delivered, then much of what a law school can hope to contribute to the serious crisis in justice is achieved. The texture of that message is richer when it is connected to the struggles of the institutions that dispense justice—the courts.