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THE LAW SCHOOL CLINIC: LEGAL EDUCATION IN THE INTERESTS OF JUSTICE

*Stephen Wizner**

INTRODUCTION

Felix Frankfurter once claimed that “the law and lawyers are what the law schools make them.”¹ One need not agree completely with this statement, insofar as it may exaggerate the effectiveness of law schools in teaching professional skills, in instilling professional values, or in affecting the functioning of the legal system, in order to recognize that legal education has an important role to play in all of these areas.

There is an important relationship between legal education, the practice of law, and the functioning of the legal system. While this proposition should appear obvious to legal educators, it remains a somewhat controversial assertion within traditional academic faculties of law. Some legal educators believe that the law school should be an academic department of the university like all others, where the pursuit of truth, research and scholarship, and the transmission of knowledge, are the only proper intellectual activities.² Some remain skeptical of the claim that a law school, as a professional school, also has an educational responsibility to prepare its students to be competent practitioners, to socialize and acculturate its students into the values and norms of the legal profession, and to charge its students with a responsibility for addressing malfunctions in the legal system.³

In this brief essay I propose to make, and defend, three related claims: (1) that there is a vital connection between legal education and the public interest because lawyers use their education, for better or worse, in the real world; (2) that the public interest requires law students to learn they have a social and professional responsibility to challenge injustice and to pursue social justice in society; and (3) that

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1. Jerald Auerbach, *Unequal Justice: Lawyers and Social Justice in Modern America* 149 (1976).

2. See Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 277-79 (1983); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992) (arguing that, while a legal education should focus on intellectual pursuits, it should also teach the practical aspects involved in a legal career).

3. See, e.g., Stevens, *supra* note 2, at 232-47.

the law school clinic is the primary place in the law school where students can learn to be competent, ethical, socially responsible lawyers. In order to do this I will need to provide a description of clinical legal education and an account of its history, and then to situate it within the law school curriculum.

I. WHAT IS CLINICAL LEGAL EDUCATION

On the most basic level, the law school clinic is a teaching law office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to law as taught in the classroom and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules, and procedure; legal theory; the planning and execution of legal representation of clients; ethical considerations; and social, economic and political implications of legal advocacy, are all fundamentally interrelated.

It is the explicitly pedagogical aspects of clinical legal education that distinguish it from the work that law students perform in law offices while attending law school. The law school clinic provides an instructional program, physically located within the law school building, and intellectually situated within the law school curriculum. It is an integral part of the law student's legal education.⁴

II. THE HISTORICAL ROOTS OF CLINICAL LEGAL EDUCATION

A. *Langdell's Case Method: The "Science" of Law*

A century ago, Professor Christopher Columbus Langdell of the Harvard Law School faculty revolutionized American legal education by inventing the case method of teaching law. Until that time, legal education in America had consisted of the study and memorization of legal treatises, and lectures that purported to set forth what "the law" was, as the sole form of classroom instruction.⁵ Langdell proposed the creation of a "science of law" in which students would study the actual decisions of appellate courts, and, on the basis of what appellate courts had done in the past, would learn to predict what courts would do in the future when confronted with similar or analogous legal disputes. In addition to the study of actual judicial opinions, the use of lectures for classroom instruction was virtually abandoned in favor

4. Stephen Wizner & Dennis Curtis, "Here's What We Do": *Some Notes About Clinical Legal Education*, 29 Clev. St. L. Rev. 673 (1980).

5. See Stevens, *supra* note 2, at 52-64.

of the so-called "Socratic Method," which involved the interrogation of students by the professor in order to elicit from them the operative facts, legal issues, and holdings of the cases they had read. The Socratic method also included a critical analysis of the arguments and conclusions contained in the case reports, often through hypothetical variations of the facts in the cases. The case and Socratic methods of teaching remain the prevailing mode of instruction in American law schools today.⁶

The Langdellian case method revolutionized American legal education, because it turned students' attention away from doctrinal treatises to the study of appellate court opinions, and because it required that students learn to "think like lawyers." Indeed, learning to think like a lawyer, rather than memorizing rules and doctrine, became the objective of legal education.⁷ Law students were to be taught abstract, hypothetical, deductive, critical-thinking skills, and to be discouraged from the mere memorization of rules and doctrine.

The problem with Langdell's approach to legal education was that it was static and unreal; static because it focused entirely on past judicial decisions and not on the underlying principles and methods of legal thought and law reform; unreal because the law is constantly growing and changing in ways that cannot be predicted through the study of past appellate court opinions. Moreover, learning to think like a lawyer is only part of what a law student needs to learn in order to be a well-educated lawyer.⁸

B. *From Langdell to Legal Realism*

Beginning in the 1930s a group of academics at the Yale Law School, together with colleagues at Columbia and one or two other law schools, developed a new approach to the study of law, which they called "legal realism." The legal realists shifted the focus from past judicial decisions as predictors of future decisions to the role of lawyers and judges in making the law "work" to carry out its social role and function. They sought to replace Langdell's "science of law" with a functional approach to the study of law.⁹

The legal realists developed an anti-formalist theory of law. They taught that law is not static, but is an ever-changing instrumentality to be used in solving social and economic problems. Therefore, they did not state, or restate, what the law was, but encouraged students to study and think about how the law came to be what it was, whose ends it served, why it should not be changed, and the role of lawyers and

6. *See id.* at 247, 268-69, 276-78.

7. *Id.* at 64.

8. *See* Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 *Yale L. & Pol'y Rev.* 583 (1998).

9. *See* Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986); Stevens, *supra* note 2, at 155-63.

judges in changing it. The legal realists encouraged students to question existing legal rules and arrangements. They challenged students to think about and propose law reforms that would address problems in the society and inadequacies of the existing legal system.

The legal realists emphasized legal craft and law reform. They taught the importance of facts to legal analysis and argumentation. They contended that lawyers should use the tools of the social sciences to study and understand the real world in which law functioned. They argued that law must be flexible and must serve social needs, and that lawyers and judges should learn to use law to respond to those needs and to further social ends.

In their emphasis on the ways in which real life and social conditions shape law, and on the ways in which law can and should respond to social needs, the legal realists were seeking to reconcile legal theory and legal practice. That reconciliation was to be achieved by constructing a functional theory of law that reflected and informed legal practice.

The legal realists taught that legal education should expose students to the dynamic relationship between theory and practice—that good theory is practical, and that good practice is informed by theory. In the words of Jerome N. Frank, one of the patriarchs of the legal realist movement, “An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad.”¹⁰ Frank published two law review articles, the first in 1933 and the second in 1947, in which he advocated the transformation of law schools into what he called “clinical lawyer schools,” where students would learn the interaction of legal theory and legal practice.¹¹

In 1935, Columbia Law School professor Karl Llewellyn, another of the founders of the legal realist movement, gave a talk at Harvard entitled *On What Is Wrong with So-Called Legal Education*.¹² In his talk, Llewellyn criticized the formalist legal education of that time and called for its replacement by a functional approach to legal education that emphasized legal theory and what he called “ordered practical experience.”¹³ It is this notion of “ordered practical experience,” informed by legal theory, and taught in the law school by law school faculty, that lies behind clinical legal education.

The legal realists did not advocate transforming law schools into trade schools that provided only technical training in the practical

10. Jerome Frank, *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303, 1321 (1947).

11. *Id.*; Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933).

12. K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651 (1935).

13. *Id.* at 658.

skills of the lawyer. On the contrary, they proposed to make legal education more useful by making it more theoretical, even as they introduced ordered practical experience into the curriculum. Proper legal education, they contended, should involve the constant interaction of theory and practice, not the learning of rules and doctrine.

C. *The Rise of Clinical Legal Education*

The intellectual roots of clinical legal education date back to the legal realist movement that began in the 1930s.¹⁴ But it was not until the late 1960s that clinical legal education received financial support and found an effective advocate in the person of William Pincus, a Vice-President of the Ford Foundation who was responsible for the Foundation's anti-poverty initiatives.¹⁵ Pincus, who happened to be a lawyer, supported legal services programs for the poor, and believed that law schools had a role to play in addressing the lack of access to justice of poor people with legal problems.¹⁶ Pincus persuaded the Ford Foundation to provide funding for a new foundation that he would head, to be called the Council on Legal Education for Professional Responsibility ("CLEPR"), that would provide grants to law schools to establish legal clinics to serve the poor.¹⁷ Ford provided \$6 million in initial funding, and with that financial backing, Pincus set out on his crusade to transform American legal education.¹⁸

Starting with a small number of demonstration grants at a handful of law schools in the late '60s and early '70s, within a very few years, Pincus had succeeded in introducing clinical legal education into the majority of American law schools.¹⁹ Law schools that received start-up grants from CLEPR had to agree to continue the clinics as part of the law school curriculum after the initial funding ran out, and most of them did. Thirty years ago only a half-dozen or so law schools had clinical programs, all of them funded by the Ford Foundation through CLEPR.²⁰ Today, virtually all of the more than 100 law schools in the

14. There had been a few isolated experiments with law school clinics at Denver, Duke, and Southern California universities during the 1920s and 1930s. See, e.g., John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. Cal. L. Rev. 320 (1930); John S. Bradway, *New Developments in the Legal Clinic Field*, 13 St. Louis L. Rev. 122 (1928); John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. Cal. L. Rev. 252 (1929).

15. Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. Legal Educ. 504, 516-17 (1999).

16. *Id.*

17. *Id.*

18. See Stevens, *supra* note 2, at 240-41; Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 Clinical L. Rev. 1, 18-21 (2000); Holland, *supra* note 15, at 516-17.

19. Barry et al., *supra* note 18, at 19-20.

20. *Id.*

United States have clinical programs²¹ (as do some in Canada, Great Britain, Australia, Latin America, Europe, China, Israel, and elsewhere). In the United States, clinical programs are now included as permanent lines in law school budgets.²² It is not an exaggeration to conclude that clinical legal education represents the most significant reform in American legal education since Christopher Langdell's invention of the case method at Harvard a century earlier.

III. LEGAL EDUCATION IN THE INTEREST OF JUSTICE

Clinics serving low-income clients offer especially valuable opportunities for students to learn how the law functions, or fails to function, for the have-nots.²³

Skills-training through the representation of clients was to be the methodology of clinical legal education. But its educational goal was far more ambitious. It was to get students out of the classroom into the real world of law, from which they would return to the classroom with a deeper understanding of how legal doctrine and legal theory actually work—or don't work.²⁴ It was to teach law students about the actual functioning (and malfunctioning) of the legal system, and to instill in them the value and duty of public service.²⁵

It is a basic assumption of clinical legal education that students can be motivated to learn by being given the responsibility for assisting real clients with their legal problems. As the student becomes aware of the reality of a client's legal situation, and how important legal representation is to the resolution of the client's problems, the student will become ever more conscious of her responsibility to the client. The student's feeling of personal responsibility in representing an individual client can grow into a feeling of social responsibility for the

21. *Id.* at 20.

22. *Id.* at 21.

23. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 199 (2000).

24. In the words of William Pincus, "students have been well insulated from the more miserable facts of the administration or maladministration of justice by being confined to the classroom and casebooks." William Pincus, *Concepts of Justice and of Legal Education Today*, in *Clinical Education for Law Students* 125, 131 (1980). Elsewhere he wrote:

[Clinical education] can develop in the future lawyer a sensitivity to malfunctioning and injustice in the machinery of justice and the other arrangements of society . . . [and can enable students] to learn to recognize what is wrong with the society around [them]—particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.

William Pincus, *Educational Values in Clinical Experience for Law Students*, Council Legal Educ. for Prof. Resp. Newsl., Sept. 1969, at 31-2, reprinted in Council for Legal Education for Professional Responsibility Newsletters 1969-72, at 31-32.

25. I have made this claim previously in a different context. See Stephen Wizner, *Beyond Skills Training*, 7 *Clinical L. Rev.* 327, 329 (2001).

provision of legal services to the poor. As the student realizes that, in all likelihood, the client would not have access to legal assistance but for the law student and the clinic, her consciousness is raised.

This awakening to a sense of social responsibility occurs when students represent low-income clients who are seeking to protect their basic interests in income, liberty, or fairness. Therefore, providing legal representation to low-income clients, both individually and through group representation, has been the basis of clinical practice and teaching. There are important lessons about the role of law and lawyers, and about social justice, to be learned from working on such cases.

What do students learn from representing clients in the law school clinic that they would not learn from their regular academic courses? First and foremost, they learn that many social problems, like poverty, can be seen and acted upon as legal problems. Second, they learn that legal representation is as necessary to the resolution of complex legal problems of the poor as it is to those of the affluent. Third, they learn to develop and apply legal theory through the actual representation of clients. Fourth, they learn to use the legal system to seek social change. And finally, they learn the limits of law in solving individual and social problems. Through this experience the students are required to confront social and economic injustice, and to act on the professional obligation of lawyers to engage in public service and to provide legal assistance to those who cannot afford to pay for it. These are all important intellectual and ethical lessons for law students to learn.

CONCLUSION

The founders of the clinical legal education movement, responding to the social ferment and legal rights explosion in America during the 1960s, envisioned clinical legal education not only as a way of enriching legal education with professional training, but as a means of stimulating law schools to attend to the legal needs of the poor and minorities, and engaging students in the pursuit of social justice in American society.

A central goal of clinical legal education has been to provide professional education in the interests of justice. Its pedagogical objectives are to teach students to employ legal knowledge, legal theory, and legal skills to meet individual and social needs; to expose students to the ways in which law can work either to advance or to subvert public welfare and social justice; to instill in students a professional obligation to perform public service; and to "challenge[] tendencies in the students toward opportunism and social irresponsibility."²⁶

26. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 *Yale Rev. L. &*

The law school clinic plays a unique role in exposing students to social and economic injustice in society. By providing legal assistance to low-income clients who cannot afford to pay for legal representation, law students learn not only about the importance of lawyers in resolving clients' legal problems, but they also learn about poverty and the circumstances of the poor first-hand and experientially, not just as a study of statistics, social policy, and legislation. This is an important lesson, and one that challenges the implicit message of the rest of the law school curriculum, in which law is taught as if everyone in society has equal access to it.

The professional behavior of law school graduates—what they do with the legal education they receive in law school—is not a primordial given. It can be affected by the education they receive in law school, as well as by existing social and economic arrangements in the society in which they will serve as lawyers.

Today, outside of a relatively small number of academic purists, the majority of law teachers would subscribe to the notion that law teachers have at least some responsibility for the socialization and acculturation of law students into the norms and values of the legal profession. The law school clinic provides an educational setting in which that is a primary objective.

Law school graduates become practitioners, leaders of the bar, judges, government bureaucrats, politicians, legislators, teachers, and scholars. In those roles they implement, interpret, challenge, justify, and help create the legal rules through which power is defined, allocated, exercised, and denied in the real world. The practice of law is as much about power as it is about legal knowledge. Law schools have a responsibility to teach students about their social and professional responsibilities in exercising the power of law.

Law students need to be reminded that "justice" is not something that emerges *ipso facto* from the existing legal system. They need to be taught that law is not simply a value-free or value-neutral mechanism for dispute resolution and the protection of private interests, but is also a political mechanism for the acquisition, exercise, and defense of power. They need to learn not only about the importance of legal representation, but also about the maldistribution of legal services in the society, and the resulting lack of access to justice and perpetuation of social inequality.

In the real world the majority of low-income people cannot afford legal services that, in many instances, are essential to the just resolution of their legal problems. This is a malfunction in the legal system that renders the ideal of equality before the law an empty promise. Law schools have virtually ignored this malfunction. They have failed to commit intellectual and financial resources to teaching,

research, and writing aimed at exposing, analyzing, and addressing social justice issues. With few exceptions, they have failed to play a critical role in studying the state of the justice system and what needs to be done to repair it, in teaching students about this, and in proposing and advocating the necessary reforms.

Lawyers should see themselves as trustees of justice. On them rests a fiduciary responsibility to see to it that the legal system provides, as far as practically possible, justice for all citizens, not only for the rich and powerful. Law teachers share that responsibility.²⁷ As members of the legal profession, they must take on the responsibility, through their teaching, research, writing, and example, of striving to democratize the legal culture. It is in this regard that the law school clinic can provide legal education in the interests of justice.

27. For an excellent description of the role of law school clinical instructors in teaching about social justice, see Jane H. Aiken, *Provocateurs for Justice*, 7 *Clinical L. Rev.* 287 (2001).

Notes & Observations