ON THE MARGINS OF LEGAL EDUCATION

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INTRODUCTION: A SELECTIVE HISTORY OF CLINICAL LEGAL EDUCATION[1]

The history of contemporary clinical legal education has had four phases. These phases can be distinguished both chronologically and by the predominant concerns.

Phase one began in 1968[2] and was characterized by a concern for service and lawyering. The goal was to meet the needs of low-income clients for previously unmet legal services, while at the same time teaching students practice competency. Confronted with these demands, the traditional relationship between student and teacher began to change, as both found themselves "on the line," and "at risk." The sweeping claims of clinical teachers about their ability to teach practice competency proved illusory for they had developed neither the descriptive nor the conceptual tools necessary.[3] They did not anticipate the limited impact of clinical activities in the context of a student's

1. This account relies extensively on an unpublished presentation made by Gary Bellow and Jeanne Charn at the Sixth National AALS Clinical Teachers' Conference, June 19-26, 1982, Minneapolis, Minnesota. For a comprehensive history of clinical legal education in the United States, see Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162 (1974). See also R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983); L. Brickman, CLEPR and Clinical Education: A Review and Analysis, in Clinical Education for the Law Student 56 (1973).

2. In 1958, the Ford Foundation funded the National Council on Legal Clinics (NCLC) to test the educational potential for law students' involvement with actual clients. Prior to this time, clinical legal programs were in operation in very few law schools, most notably University of Tennessee, Duke, and New York University. The NCLC was administered by the National Legal Aid and Defender Association and provided internship opportunitites for law students, usually during the summer, with legal aid societies, prisoner assistance programs, and other settings where students would be exposed to representation of indigent clients. Between 1959 and 1965, NCLC funded nineteen experimental programs at a cost of over $500,000. Ferren, Prefatory Remarks, 29 Clev. St. L. Rev. 351 (1980); McKay, Prefatory Remarks, 29 Clev. St. L. Rev. 368, 370 (1980).

In 1964 the Ford Foundation funded a neighborhood legal services program as part of Community Progress, Inc., in New Haven, Connecticut. This became a prototype for the OEO Legal Services program established a year later. Ferren, supra note 2, at 352. See Pincus, Programs to Supplement Law Offices for the Poor, 41 Notre Dame Law. 887, 891 (1966). In 1965, Ford funding was renewed, the AALS became the sponsoring agency, and NCLC was renamed the Council on Education in Professional Responsibility (COEPR). By 1968, the board of trustees of Ford, after the decade of effort of NCLC and COEPR experimentation with neighborhood law offices for the poor, created the more ambitious and independent Council on Legal Education for Professional Responsibility, Inc. (CLEPR). William Pincus, Ford's program officer for NCLC and COEPR, became CLEPR's first and only president. By 1978, CLEPR had made 209 grants exceeding six and a half million dollars to 107 law schools. Ferren, supra note 2, at 352.

3. In every city with an elite bar, law schools have provided graduates with preliminary training in research and writing for large firm entry-level positions. There has been and continues to be a breakdown in preparation for other legal employment settings — particularly those requiring early factual application, client contact, diversified responsibilities, minimal supervision, and immediate productivity.

total law school experience. Most importantly, they failed to understand the power of the practice environment which confronted students after law school.

Clinical teachers were unable to deliver quickly on their competency claims and as a result found themselves vulnerable. Their more traditional colleagues, out of continuing desires for academic dominance, identified themselves as theoreticians. Clinical teachers thought of themselves and were thought of as practitioners — which was appropriate since many had come directly from active practice. But this identification relegated clinical education to the margins of legal education. As this first phase concluded, clinical education came under attack by mainstream law faculties. Clinical opponents urged the abandonment of actual client representation by students in favor of case simulation which would be less expensive, more easily administrable, and more educationally predictable.

Phase two of contemporary clinical education was discernable between 1974 and 1975. Clinical teachers began to organize themselves — both within their individual schools and nationally — in response to law faculty criticism. Professional responsibility was incorporated into the clinical curriculum as well as lawyering courses. The pedagogical claims also changed. The claims of teaching law practice competency yielded to claims of teaching self-learning; lawyering theory gave way to learning theory. The goal became a holistic approach to intellect and feeling.

This investigation of learning was not without differences. Meltsner, Schrag, and Himmelstein of Columbia University borrowed from humanistic psychology and were particularly influenced by Carl Rogers in their work on the interpersonal, subjective impact on task performance.[4] In contrast, Robert Condlin and others at Harvard relied more on teaching and learning theory and professional educators in their theoretical and descriptive work.[5] In 1976, these distinctions represented no more than differences in emphasis; however, they did foreshadow the subsequent diversification of clinical education.

Some law school clinical programs continue to address phase one concerns. In fact, economic constraints have forced some programs to abandon any attempt to conceptualize about and to teach lawyering; instead, these programs justify their existence by teaching students mechanical proficiency in trial skills. Other programs are devoted to psychological concerns and interpersonal dynamics. But by far, the largest number of currently existing programs represent the third phase of clinical education. Consolidating the approaches of phase one and phase two, these programs emphasize limited client representation in specific areas and expose students to supervised practice situations. Students compare their actual performance with prevailing

4. See, e.g., E. Dvorkin, J. Himmelstein, & H. Lesnick, Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism 44-46, 109-15, 175-76 (1981).

5. R. Condlin, More Notes on a Theory of Fieldwork Instruction (unpublished manuscript submitted in satisfaction of L.L.M. degree, Harvard Law School) (May 14, 1976).

standards of competency, and are encouraged to reflect and generalize about their experiences.

If phase three represents consolidation and begrudging institutional recognition, phase four represents a period of emerging criticism. By 1976, some of those actively involved in clinical education were beginning to feel profoundly uncomfortable with the psychological preoccupation of the second phase of clinical education.[6] These critics believed clinical legal education had turned in on itself, and away from earlier motivating concerns of access and justice. The commitment to meaningfully expose students to the gross injustice and unfairness of our legal system had been abandoned. It is not enough to attend merely to the personal fulfillment of a handful of students.

A second strand of emerging criticism focused on the failure of traditional legal education to produce graduates competent to practice law. In a recent symposium review of clinical education, Frank Munger wrote:

> As the experience of clinicians has grown, evidence of the relationship between the shortcomings of the traditional system and the incompetence of law school graduates has accumulated. . . . The law graduate may "think like a lawyer" to the satisfaction of his law teachers, but not know how to elicit information from a client, determine what a client's priorities are, or effectively convey legal theories to a client . . . . [T]he graduate himself may not know how to choose among alternative courses of action, never having had to consider more than an extremely narrow range of options in law school.[7]

The Legal Services Institute was a partial response. The Institute, jointly sponsored by Harvard and Northeastern Law Schools, was a school within a school, a neighborhood legal aid office, a training site for alternative career lines, and an experiment in the delivery of legal services. It represented a return to the delivery of services in a community setting and an attempt to build a link between law school and law practice. One notable shortcoming of the Institute, as with many law school clinical programs, was that it failed to meaningfully remove the barriers which have prevented clinical education from influencing traditional education to solve the problem of law graduate incompetency.

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6. William Simon has called this preoccupation a new legal formalism. Simon, Homo Psychologicus: Notes on a New Legal Formalism, 32 Stan. L. Rev. 487 (1980).

7. Munger, Clinical Legal Education: The Case Against Separatism, 29 Clev. St. L. Rev. 715, 722-23 (1980). It would be more precise to say that there are three strands of emerging criticism. The third strand has been articulated by Robert Condlin who criticizes clinical educators for their neglect of the "intellectual dimension" and lack of "critical perspectives [which] has caused us to replicate many objectionable practices to which our movement [clinical education] was a reformative response. We have lost sight of our roots, our objectives, and our potential . . . ." Condlin, Clinical Education in the Seventies: An Appraisal of the Decade, 33 J. Legal Educ. 604, 604 (1983). But see Bellow, On Talking Tough To Each Other: Comments on Condlin, 33 J. Legal Educ. 619 (1983).

> The law school clinic has had an uncertain or inferior status.
>
> During the past two decades, clinicians have been the major source of innovation in legal education; [yet,] [t]hese innovations have been slow to enter the mainstream of legal education . . . . Clinical faculty are viewed as a special interest group having little in common with the rest of the law school faculty, and even more disturbing, clinical faculties themselves have come to espouse the separatist role. Clinicians are often isolated by virtue of the location of their offices, their workload and the nature of their work. Joining the clinic is not recognized as a form of legal scholarship . . . .[8]

This together with a view of clinics as a "refuge for the more ideologically motivated students who are seriously considering a legal aid or public interest practice upon graduation" has limited the clinic's potential constituency in the student body.[9] Curriculum and staffing are dealt with as administrative matters of the clinic, not as topics for regular faculty deliberation and decisions. As a result, clinics at most law schools have become isolated, separate entities. If, as some would claim, "the future of clinical education lies in its [potential] contributions to the classroom, rather than in its function as an independent source of training,"[10] this isolation must be overcome.

The promise of the clinical method for legal education and legal practice has not been realized. Despite an increasingly rich body of literature describing the shortcomings of traditional legal education,[11] experimentation with new clinical forms has been tentative and short-lived.[12] Shrinking applicant pools, decreased government and foundation funding, and distraction by clinical teachers with concerns about their own academic status have contributed to a pervasive malaise. Even more damaging is the long-standing hostility of legal academics to educational innovation and change. Now is the time to reconsider clinical education. In Part II of this article, I describe the clinical method theoretically; and, in Part III, I offer specific proposals for the thorough integration of a comprehensive clinical program into the law school curriculum.

I

CLINICAL EDUCATION AS METHODOLOGY[13]

Clinical legal education has been called a "wide range of tenuously re-

8. Munger, supra note 7, at 715, 719.

9. Id. at 720.

10. Id. at 716.

11. See, e.g., Kennedy, Legal Education As Training for Hierarchy, in The Politics of Law: A Progressive Critique 40 (D. Kairys ed. 1982); Feldman & Feinman, Book Review, 82 Mich. L. Rev. 914 (1984).

12. The Legal Services Institute was the most important experiment in clinical legal education in a decade; yet, after only three years of operation its funding was reduced and its program conception compromised.

13. The phrase and idea is from Bellow, On Teaching the Teachers: Some Preliminary

lated educational approaches and processes."[14] The term has been applied to virtually any legal activity involving students outside the classroom — and even to a number of traditional activities like moot court and research and writing.[15] When considering clinical education (to borrow an idea from Justice Stewart), most of us think we know a good clinical program when we see one. Nevertheless, it is difficult to articulate the factors that make a program good or bad. It is easy to be overwhelmed by staffing issues, student-faculty ratios, credit and grading policies, case selection criteria, funding difficulties, scheduling, location, administration, etc.

This preoccupation is understandable given the scarcity of resources available to clinical programs and, thus, the never-ending struggles for survival. This preoccupation mirrors the larger unreflectiveness about pedagogy and educational issues in law schools generally.[16] Legal academics know little about teaching and learning. They have no knowledge of the relevant educational literature, no vocabulary by which to even discuss educational issues. There are no explicit criteria for good teaching. Educational theorists are accused of having neither insight nor empirical evidence to support their claims. Despite the need for interdisciplinary perspectives, such work has been rarely undertaken or considered in its implications for legal education.

A 1973 article by Gary Bellow provides a conceptual framework within which to discuss clinical education. The article distinguishes the methodology of clinical education, describes its major components and their relationship, and begins an inquiry into the reasons for its potential and the objectives it should serve.[17] Bellow's conceptual approach has several advantages. First, it is a way to answer the following questions: What is clinical education? How will it work? What can it accomplish? Second, it provides a way to evaluate, in educational terms, the myriad of activities labelled clinical. Finally, it is a way to emphasize the usefulness and importance of clinical education throughout the law school curriculum.

A. Essential Elements of the Clinical Method[18]

There are three essential elements of the clinical method: role perform-

Reflections on Clinical Education as Methodology, in Clinical Education for the Law Student 374 (1973) [hereinafter "Bellow"].

14. Barnhizer, The Clinical Method of Legal Instruction: Its Theory and Implementation, 30 J. Legal Educ. 67 (1979) [hereinafter "Barnhizer"].

15. In June 1982, I attended the Sixth National AALS Clinical Teachers' Conference, at the University of Minnesota Law School, which brought together clinical teachers and administrators. This quotation from Bellow accurately described the situation: "Even among those . . . engaged in clinical teaching, there is no agreed-upon way of talking or thinking about the enterprise in which we are involved. Too often we talk past each other, rarely delineating the common features of our efforts or confronting the basic questions involved in understanding what we are doing and how our various approaches differ and compare." Bellow, supra note 13, at 375.

16. See, Feinman & Feldman, Pedagogy and Politics, 73 Geo.L.J. __ (1985) (forthcoming).

17. Bellow, supra note 13, at 376.

18. Frank Block suggests, I think unfairly, in the Vanderbilt Law Review that "a coherent,

ance by students, pedagogical focus upon student experience, and motivational tensions resulting from the interaction of performance and pedagogy.[19]

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methodology-based justification for clinical programs does not exist." Block, The Andragogical Basis of Clinical Legal Education, 35 Vand. L. Rev. 321, 324 (1982). He does, however, elaborate on the very useful concept of andragogy first introduced in 1970 by Malcolm S. Knowles to distinguish the concerns that are particular to adult education:

> In coining the new term, which is derived by substituting the Greek stem *andr*, meaning adult, for the stem *ped*, meaning child, as the latter is used in the term pedagogy, Knowles intended to communicate that andragogy is "the art and science of helping adults learn." Knowles felt that a distinction between andragogy and traditional pedagogy was necessary because, as the dominant use of the term pedagogy in education literature implies, "most teachers of adults have only known how to teach adults as if they were children." (citations omitted).

Id. at 326-27.

> Knowles' theory of andragogy is premised on four underlying assumptions about the characteristics of adult learners . . . .
>
> The first assumption which Knowles makes is that adults see themselves as self-directing personalities, unlike children who expect the will of adults to be imposed on them . . . .
>
> The second assumption underlying the theory of andragogy is that adults accumulate a greater amount and variety of experience than children, and as a result, their experience becomes a greater resource for learning . . . .
>
> The third assumption . . . [is that] adults also will have a heightened readiness to learn those developmental tasks that are appropriate for them . . . .
>
> Knowles final assumption is that adults seek to apply learning immediately, while children tend to see acquired knowledge solely as a future benefit. (citations omitted).

Id. at 328-29.

> These underlying assumptions lead to a set of implications which in turn serve as a guide for an andragogical methodology for "legal education in general and for clinical education in particular." (citation omitted).

Id. at 330.

> According to Knowles, the most important aspect of the adult learning environment is the psychological climate, which "should be one, which causes adults to feel accepted, respected and supported; in which there exists a spirit of mutuality between teachers and students as joint inquirers . . . ."
>
> Andragogical methodology favors participatory experiential learning techniques . . . indeed, they [adults] may even resent learning situations in which their experience is not being used . . . .
>
> Concerning adults' readiness to learn, . . . adult students should be taught matters that relate to [their changing roles]. Thus, the curriculum must be timed to coordinate the teaching of subjects or skills with the development tasks facing the students . . . .
>
> The major element of andragogical methodology that is related to adults' orientation to learning is based on the change in adults from a subject-centered to a problem-centered frame of mind. (citations omitted).

Id. at 330-32.

19. See Bellow, supra note 13, at 379-94. This narrative borrows extensively in content and language from Bellow. I have at selected points made additions or subtractions in accord with my own views.

Robert Condlin suggests that Bellow probably does not mean it literally when he suggests that role performance, learning grounded in experience, and the use of role adjustment tensions in teaching are distinctive to clinical legal education.

> Those characteristics also describe most of the pedagogy of the first year of law school during which students assume the law firm associate role of an intellectual apprentice who solves analytical puzzles within a mentor's definition of a problem. The differ-

1. Role Performance and Pedagogical Focus Upon Student Experience

The first two elements, student role performance and pedagogical focus on that experience, are closely linked and best understood together. In the clinical method, students must confront practice problems. Practice is defined as the full range of functions performed by lawyers from counseling and planning to lobbying and drafting to the resolution of conflicts in adversarial and non-adversarial ways. It includes the full range of subjects and practice specialties encountered by lawyers in all walks of professional life.[20] Students confront these problems in the role of lawyers, responsible for making decisions, taking action, and accepting consequences. In all of this, they must interact with others.[21]

In most law school teaching,

> the case provides the raw material from which meanings are drawn; the analysis of case meanings remains the dominant methodology for investigating thought and process in the legal system. In clinical teaching, the . . . decisions [of students as lawyers] in a variety of roles and contexts are the central sources of meaning; the diverse ways of examining and evaluating problem-solving experience provide the basic models of explanation.[22]

This pedagogical approach focuses upon the student's experience, an essential element of clinical methodology.

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ence between first-year study and clinical instruction is that the roles are different, but that is not a methodological distinction.

Condlin, Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction, 40 Md. L. Rev. 223, 224 n.3 (1981) [hereinafter "Condlin, Socrates' New Clothes"]. Condlin also notes that there is an important issue as to whether clinical instruction should be thought of primarily as a methodology, a new subject matter, or both.

> The question of subject matter versus methodology is more than a matter of whether the glass is half empty or half full. Within the law school culture, a characterization of clinical instruction as a "subject matter" would press teachers more firmly towards explication of idea content, research agenda, and basic theory than does the characterization "methodology." If clinical teachers were pressed harder to identify, explain, and test what they purport to teach, several benefits might follow. The ideas that this . . . would produce could become a core cognitive content that would allow clinical instructors to make more use of classroom and pre-planned simulation pedagogy than they do now. Fieldwork programs could become the final rather than the first or only setting in which clinical instruction occurred. Clinical instruction could occur in "courses" (as much as in "programs") that could proliferate, be subdivided by subject matter, and be arranged in sequences, each building on the learning of its predecessors.

Id. at 225 n.3.

20. Though I believe there are compelling reasons to concentrate on the problems of the poor and unrepresented, there is nothing within the clinical methodology per se which requires such a choice. In fact, some law schools have made very different choices. If, however, clinical education is to be more than mere technique, it must include normative content.

21. A. Amsterdam, Opening Remarks, American Bar Association, Section of Legal Education and Admissions to the Bar, Deans' Workshop 2-4 (held in Chicago, Ill.) (January 23, 1982) [hereinafter "Amsterdam"].

22. Bellow, supra note 13, at 387-88.

To perform a role, it is necessary to learn the defining characteristics of the role — the opportunities it creates, the restraints it imposes, the varieties and significance of informal behavior, and the abilities necessary to perform the role. To solve a problem the student must identify and analyze it, and consider and evaluate possible responses to it. She must plan action and execute. Throughout, the student must interact with those who are involved, and consider the relationship between legal analysis, communication, setting, and interpersonal dynamics.

There are many implications of role performance for teaching and learning.

> The central feature of the clinical method is its conscious use, both conceptually and operationally, of the dynamics of role adjustment . . . [and these] dynamics of role adjustment create a reservoir of new meanings and associations . . . [which] necessarily combine to produce "new knowledge" at different levels of awareness, complexity, particularity, and immediacy.[23]

The ways in which new legal knowledge is understood after it has been used by a student is only partially explained by the fact that it is better remembered. Concepts about negotiation, insights about patterns of argumentation, and theories of relevance or materiality "feel different" after they have been used at a bargaining table, in a motion argument or during an evidentiary hearing. In ways that are only beginning to be understood, the clinical method as a more active process of learning adds a deeper dimension to the way in which ideas are learned and assimilated.[24]

The notion of role performance or role adjustment includes a sense of obligation which motivates students in a profound way. Students asked to perform unfamiliar tasks in an unfamiliar environment experience a "need to know." The desire to cope with anxiety produced by unfamiliarity, to make sense of the experience, and to receive positive reinforcement create a high level of motivation. It is this dynamic which explains two common occurrences: on the positive side, it is often reported that second and third year students, otherwise described as disinterested and apathetic, come to life with intensity and energy in their clinical activities. Less positively, as Bellow points out, this dynamic explains the relatively uncritical adjustment students make to prevailing patterns of client service, even when such patterns conflict with models of preparation and representation developed in law school classes.[25]

2. *The Interaction of Performance and Pedagogy*

The third element of the clinical method is the tension that arises from

23. Id. at 380. Amsterdam, supra note 21, at 3-4.
24. Bellow, supra note 13, at 380-82.
25. Id. at 381-83.

the interaction of the first two elements. To some extent student experience, without more, involves the acquisition of knowledge; but within clinical experience are tensions which create possibilities for enhanced learning.[26] These tensions — relating to self-consciousness, responsibility, and perceived status — result from an interaction of pedagogy and role adjustment.[27]

The methodological demand for self-consciousness in all that the student does, potentially conflicts with the demands of student performance. The student is asked to be an observer of her own thought processes and actual behavior in the system in which she is participating. At the same time, the student must perform. The student confronted with a thoroughly new situation must make some sense of it and take action on behalf of resolving a real client's real legal problem. The pressures of having to cope result in a narrowed field of vision at odds with a more expansive perspective compatible with observation and reflection.

Faced with attempting to reconcile reflectiveness and performance, students initially experience a kind of "decompetency" in which they are unable to perform particular tasks.[28] They become insistent that the clinical teacher provide them with more information and more explicit directions. If the teacher complies, students will eagerly abandon their efforts of conceptualization and reflection and uncritically accept the instructions. Their notions of competency will be defined at this formative point by the views of others. In the best clinical settings, where practice standards are the subject of regular attention and the object of continual improvement, this may not be a problem. But to the extent this process models practice settings where service levels are minimally competent or less, there is reason for great concern.

Inexperienced lawyers, confronted with unfamiliar situations, imitate and adopt prevailing practice standards. They do so without the ability to make an independent judgment about the quality of the prevailing norms. These same lawyers lack the critical ability to evaluate and then improve their per-

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26. Id. at 386.

"There is no doubt that some learning occurs from any experience. But the ability to generalize from experience and to improve performance on future occasions is not learned by most people unless they articulate why they are taking certain actions and reflect upon the effect of their actions." Kreiling, Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision, 40 Md. L. Rev. 284, 286 n.8 (1981) [hereinafter "Kreiling"] and citing Bolman, Learning and Lawyering: An Approach to Education for Legal Practice, in Advances in Experiential Social Processes 111, 113-14 (C. Cooper & C. Alderfer eds. 1978).

27. These tensions can be a source of learning or,

> they can reach an intensity that is dysfunctional, or can exist in sufficient imbalance to alter the learning possibilities that are envisioned . . . . It is important, however, to see the conflicts . . . as positive features of the educational process, to be guided and nurtured, as well as limited and controlled . . . . [T]he tensions between the general and concrete, autonomy and control, professional status and student status, while extremely difficult to manage, are fundamental to its [the clinical method's] immediacy, its motivational directions, and its cognitive and emotional framework.

Bellow, supra note 13, at 393-94.

28. See Kreiling, supra note 26, at 287.

formance. Their comfort levels will increase as their familiarity with the way things are done grows. Unfortunately, the same cannot often be said of their professional skill. It is thus essential that clinical education prefigure the practice conflict inherent in performance and self-consciousness, provide a setting in which students can understand what they are experiencing, and begin to resolve the conflict such that skill *and* comfort are increased.

A similar conflict arises in allocating responsibility for the learning process between teacher and student. Role performance is often highly random and unstructured. From the student perspective, it is those very qualities which provide much of the intensity and importance. It is up to the student to organize and order; the outcome is the student's responsibility. To the extent the activity is planned in advance and then controlled, it loses much of its impact. Yet, faculty intervention is often required to correct student mistakes in order to avoid harm to client interests. In order to generalize the student experience, there is a need for faculty to structure what would otherwise be a spontaneous series of experiences. This circumscription is in tension with student autonomy, yet both enhance learning.[29]

The pedagogical-performance tension expresses itself in a third way. Many students in clinical programs (as many students in law school generally) experience high levels of impatience and dissatisfaction with their long years in school getting ready for real life — "by a continual deferral of their present selves to the image of some future possibilities."[30] Role performance offers the opportunity for a different perception and status. In performing specific legal tasks, students experience feelings of responsibility to others, independence, competency, immediacy, and contribution as members of a professional community. When there is faculty intervention, it emphasizes the student's status as student. This produces tension and student reaction. "Exacerbated by the length of time law students have already been in school, it is an expression of a more pervasive desire to sever the teacher-student relationship entirely and any association with 'academic' life."[31] This expression often takes the form of anti-intellectualism: students starkly dichotomize real life versus the academic, practice versus theory, action versus ideas.

These tensions — relating to self-consciousness, autonomy, and perceived status — are the outcomes of role adjustment and pedagogy and are central to the basic dynamics of clinical teaching. The tensions can be important sources of learning themselves. They provide the descriptive link between the elements of the clinical method and its possibilities and promise.

B. The Promise of the Clinical Method

The clinical method is important for its potential to compensate for deficiencies in the existing patterns of legal education. Student concerns for rele-

29. Bellow, supra note 13, at 390-92.
30. Id. at 392.
31. Id. at 393.

vancy are responded to by introducing them to law practice while still in law school. In addition to forging links between school and practice, clinical education opposes the separation of theory and practice, procedure and substance, and practical choice and the exercise of reflective judgment.

For the majority of law students, what is learned in law school is not directly relevant to the work they will be doing soon. It may even be the case that much of what they learn will diminish the likelihood that they will do their jobs well. There are at least four features of the existing patterns in legal education that raise serious problems for prospective lawyers in practice settings like those confronted by an overwhelming number of law students.[32]

First, legal education focuses only on a narrow range of substantive knowledge and skills. It is expected that lawyers will learn everything else in practice, the costs being absorbed by employers, clients, or the lawyers themselves. When the practice setting has limited resources, providing the lengthy training and gradual introduction of responsibility that is necessary to a young lawyer's education becomes prohibitively expensive.

Second, the marked separation of schooling and practice means that there are very few lawyers who do both well. Practitioners often have difficulty teaching other than by example and few teachers have sufficient practice experience to teach about practicing law. The result is that new practitioners are not likely to be taught by people with the skill and experience necessary to help them effectively confront inevitable learning problems.

Third, law practice requires a high tolerance for conflict and uncertainty, and the ability to make judgments under considerable stress.[33] It is not at all clear that those qualities are produced by keeping future lawyers in relatively passive student roles, in large classes, with professors who teach in an authoritarian manner. Such students, left to learn on their own from experience, are unnecessarily vulnerable to poor practice habits.

Fourth, maintaining a realistic, but optimistic sense of what lawyers can

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32. See Rutgers School of Law-Camden's Office of Law Placement, Memorandum of Placement, Statistics for the Class of 1981 app. F (March 8, 1982) (app. F). Of 229 students reporting their employment status, 7 were employed in corporate legal positions, 15 were employed by firms of 11 to 25 attorneys, 9 by firms of 26 to 50 attorneys, and 6 with firms of over 50 attorneys. Thus, a total of only 37 students went to placements that could even colorably be called "big firm" placements. A dramatically larger number went to public-sector, institutional, and private practice settings where our unspoken assumptions about the availability of structured training programs and intensive supervision may simply not be true. It is my assumption that this career pattern is duplicated at large numbers of law schools. It can be said with confidence that we know very little about the career patterns of our graduates.

33. Facts may be unavailable, obscured, disputed, or distorted. The law may be unclear, or in flux. The goals of other persons — clients, adversaries, and decision-makers, to name a few — may be cloudy or may conflict with those of the lawyer. The lawyers may be caught in a bind between two or more conflicting ethical values, or between an ethical value and a very important practical goal. Choice of the best strategy may require him to estimate and weigh probabilities. The lawyer rarely feels that he has enough time in which to do the most thorough job that he could.

Meltsner & Schrag, Report From a CLEPR Colony, 76 Colum. L. Rev. 581, 584 (1976).

accomplish requires some larger understanding of the legal system, the profession, and the nature of our political society. Legal education with its lack of structure and sequence after the first year, its tendency to differentiate subject matter only on doctrinal lines, and its emphasis on analysis (breaking down) rather than synthesis (connection) makes it more difficult for students to gain this sort of larger understanding. The curriculum does not create the necessary confidence or skill in many new practitioners to solve problems which require broad systemic understanding.

It should be clear that the clinical method "implies a relationship between theory and practice very different from that which dominates both law teaching and professional work."[34] It challenges prevailing definitions of legal theory. Law has traditionally subscribed to an extremely narrow notion of theory — a notion that equates theoretical speculation with doctrinal elaboration.[35] This Langdellian formulation "did not include any of the modes of analysis and exploration of philosophy, social theory, linguistics or aesthetics, despite their fundamental importance to understanding the phenomena of law in modern society."[36] Even as this definition was criticized, it was supplemented by the theory-practice distinction.[37] Clinical education, like Hercules, is confronted by a two-headed hydra:[38] an extremely constrained definition of theory, and a conception of theory separate from and in opposition to practice. By contrast, clinical education rejects both the dichotomy and the constrained vision. Instead, "[i]t assumes that the immediate and the remote, the concrete and the general are intertwined and can only be understood in human experiences of such."[39]

The clinical method is integrative in other ways as well. It is concerned and encourages students to be concerned with larger units than are typically reflected in law school organization and experience. It refuses to treat as differentiated subjects procedure and substance,[40] rules and policy, law and other

34. Bellow, supra note 13, at 394.

35. This formulation originated with Langdell and his effort to portray law as science. Case analysis was the basic skill of lawyering and the base upon which legal science was built. Theoretical speculation and professional training, thus, were of the same whole: understanding the appellate case.

36. Bellow, supra note 13, at 398.

37. I think Gary Bellow is absolutely correct in identifying interest in a differentiated bar as an expression of the theory-practice distinction. Bellow, supra note 13, at 412 n.42. See Reed, Present Day Law Schools in the United States and Canada, The Carnegie Foundation for the Advancement of Teaching Bulletin, Number 21 (1978).

38. In Greek mythology, the hydra slain by Hercules had nine heads. When any one of the serpent's heads was cut off, it was replaced by two others.

39. Bellow, supra note 13, at 394.

40. Robert Condlin provides a helpful example which suggests the integrative potential of the clinical method:

> For example, a substantive course in criminal law, taught from the Model Penal Code, dissects in detail the logic, wisdom, clarity, and elegance of the Code's doctrinal categories. But the experience of representing a defendant under such a statutory scheme might suggest other questions: for example, does the proliferation of offenses under such a rationalist code increase the likelihood that defendants will plead guilty? For a

allied disciplines, the cognitive and the affective.[41] In traditional legal education,

> [n]ever are . . . the legal order and the functioning of human beings within it brought back into any totality, any sense of the whole. We even celebrate the arbitrariness of our subject matter divisions by organizing them with no sense of progression or connection. Indeed, we tell our students that they may, after the first year, take any of them, in any order, with any omissions.[42]

If learning involves "the continual reconstruction of knowledge in light of new experience," then we should be more concerned with what we consider necessary foundation, how it relates to what else is taught (what progression), and in what form, setting, and intensity it should be offered.[43]

Conventional law school pedagogy fails to prepare students for confronting choice and exercising professional judgment.[44] In typical fact-rule

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> discussion of why this might be unacceptable as a matter of policy, see Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3, 9 (1978). To answer this question, one would need more information than is available in law school classrooms about how defendants make decisions regarding pleas. See Sudnow, Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office, 12 Soc. Prob. 255 (1965). This data is virtually unavoidable in the clinical practice. . . . Many such issues arise when one looks at the manner in which humans implement rule frameworks.

Condlin, supra note 19, at 227 n.10.

41. In clinical programs, students become involved in all levels of learning; the cognitive or intellectual, the affective or emotional, and performance or "doing." The terminology is taken from Benjamin Bloom and others. They have developed a taxonomy divided into these three categories or "domains" to articulate all educational objectives. The cognitive "deals with the increasingly complex sorts of understandings and analytical processes. The second, the affective or feeling domain, deals with values, attitudes, and beliefs. The third, the psychomotor or performance domain, deals with complex patterns . . . such as lawyering activities." Kreiling, supra note 26, at 287 n.10, citing Taxonomy of Educational Objectives, Handbook 1: Cognitive Domain (B. Bloom ed. 1977); D. Krathwohl, Taxonomy of Educational Objectives, Handbook 2: The Affective Domain (1964); A. Harrow, A Taxonomy of the Psychomotor Domain (1979).

42. Bellow, supra note 13, at 395-96.

43. Id. at 400.

44. Robert Keeton posits that law schools' professional mission is to provide the necessary educational preparation for competence. He suggests that we think about the elements of competence for practice as falling into two broad categories — knowledge and skills. Each of these categories may be further divided.

> [I]t is useful to distinguish knowledge of doctrine from knowledge of theory and to distinguish skills of understanding (including the skills of legal analysis) from skills of application such as interviewing, counseling, negotiating, drafting, and persuading. These four categories — knowledge of theory, knowledge of doctrine, skills of understanding, and skills of application — may be viewed as a continuum moving from a strong orientation toward theory on the one hand to a strong orientation toward practical application on the other.

Keeton, Teaching and Testing for Competence in Law Schools, 40 Md. L. Rev. 203, 204 (1981). As Keeton points out, traditional law teaching and learning is usually limited to but a portion of the continuum: knowledge of doctrine and skills of legal analysis. Yet, once in practice, lawyers who aspire to competence, must bring into play the full range of knowledge and skill in

hypotheticals, the formulations are "far too over-simplified [highly structured, predigested fact situations], which ignore the enormous complexity of fact inquiry and rule choice in real practice contexts. Often, there is not even hypothetical resolution of the problem by the teacher. The student's sense of factual relevance and appreciation of factual nuance may, contrary to our claims, be considerably blunted by the experience.[45] In a clinical setting, students must apply ideas to problems: they must deliberate (imagine alternatives, consider options, rehearse consequences), they must decide, and they are implicated in the choices they make. In short, they must live with the consequences.

II

VISIONS, PROPOSALS, AND OPERATIONAL CONCERNS

Legal education would be very different — far richer in educational opportunity and professional promise — if we were to take clinical education seriously. The following proposals include the recruitment of a teaching and lawyering faculty; the goals and content of a variety of new educational activities; a program of faculty development in pedagogy, scholarship, and practice; and a call for actual client representation within the context of a community law practice, based at the law school, which would serve as a primary practice experience for students.

Even though an overwhelming number of American law schools have established clinical programs, integration of these programs into the traditional law school curriculum has been exceedingly rare.

> Often, the result is a clinical program attached to, but not really part of the law school — the "proverbial" orphan child. The hiring of untenured supervisors, with little or no job security, and the segregation of clinical activities and facilities from the regular law school curriculum, gave rise to a new *modus vivendi*. Clinical education [has been] given money and support to operate, and the academic curriculum [has been] left unmolested by clinical contaminants — in short, separate and unequal.[46]

The greatest potential of clinical education, however, lies in its contribution to the traditional curriculum, and not as an independent source of training. Consequently, we must aspire to a curriculum whose clinical parts are truly integrated and equal.[47]

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confronting choice and exercising judgment. Clinical education, in contrast, requires students to experience this full continuum of knowledge and skill.

45. Bellow, supra note 13, at 400.

46. Hardaway, Student Representation of Indigent Defendants and the Sixth Amendment: On A Collision Course?, 29 Clev. St. L. Rev. 449, 508 (1980). (citations omitted).

47. Guidelines for Clinical Legal Education: Report of the AALS-ABA Committee 58-59 (1980) [hereinafter "Guidelines"]. Guideline III suggests three additional reasons for treating clinical legal studies as part of the total curriculum. "First, clinical legal studies consider legal problems and processes which build upon the traditional curriculum." Id. at 58. "Second, to

A. Integration: A Teaching and Lawyering Faculty

In the summer of 1981, an American Bar Association subcommittee was appointed to study the possibility of tenure for clinical teachers. The subcommittee's response was § 405(e), a proposal which required a standard of "substantially equivalent status" for clinical teachers.[48] The subcommittee suggested that the new standard could be satisfied by including clinical teachers in the conventional tenure granting process, creating a second, independent tenure granting route (which would presumably consider different, more clinically related criteria), or negotiation of long-term contracts.

According to one member of the subcommittee, § 405(e) was designed to provide law schools flexibility while encouraging them to upgrade the status of those involved in their clinical programs. "There was considerable fear that if we [the subcommittee members] were to require real equivalency, the response of the schools would not be to improve their treatment of clinical people; rather, they would get rid of them in wholesale fashion. We wanted to avoid this sort of blood bath."[49]

Section 405(e) was adopted by the full Accreditation Committee in July 1982. On August 7, 1984, the ABA House of Delegates approved § 405(e). The adoption followed a "spirited debate" about whether law schools "shall" or "should" accord clinical teachers "a form of security of position reasonably similar to tenure . . . ."[50] The "aspirational rather than mandatory terms," strongly supported by the AALS and the Section of Legal Education, were those included in the final adopted provision.

The § 405(e) standard is of immediate concern to schools with existing programs and particularly those with sizeable programs and staff — staff with various status, employment arrangements, experience, and academic credentials. Georgetown University Law Center is a perfect example. In recent years, there have been approximately eleven full-time and nine part-time teachers involved in clinical activities.[51] The diversity of the eleven courses they taught to some 240 students was exceeded only by the range of their employment profiles. For example, their status ranged from full tenured professor to non-renewable six month contract.[52] In anticipation of the adoption of § 405(e), Georgetown adopted very detailed policies and standards addressing status and tenure. New York University Law School has, similarly,

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make informed choices about the allocation of faculty and financial resources requires a coordinated evaluation of contributions made by all components of the law school curriculum." Id. at 59. "Third, the failure to consider clinical legal studies in the context of the overall curriculum leads to a second-class status for clinical legal studies." Id.

48. Report of the ABA Special Subcommittee of the Accreditation Committee to Study Access to Tenure by Clinical Teachers (Mar. 24, 1982).

49. Id.

50. Report of Dean Norman Redlich of the New York University Law School 2-4 (Sept. 13, 1984).

51. Memorandum from Clinic Committee to Faculty Affairs Committee of the Georgetown University Law Center 2 (Feb. 20, 1981).

52. Id. at 26-27.

adopted such a plan. The NYU law faculty has decided to create a separate tenure track for clinical teachers. Judging from comments at both formal meetings and informal gatherings, current clinical teachers overwhelmingly prefer the approach of § 405(e) — that is, to be evaluated by different criteria from those employed in the conventional tenure granting process. Clinical teachers believe they will never be able to satisfy traditional scholarship requirements. Only time will tell, but I believe that § 405(e) disserves clinical education. To the extent clinical teachers agree to be treated differently in important areas, such as faculty status, so, too, will they remain "separate and unequal." They will fail to gain full status for themselves; more importantly, clinical education will remain relegated to the periphery of legal education.

While the development of clinical education within the traditional curriculum is an evolutionary process, some minimal steps are necessary to foster this development. To start, there must be a teaching and lawyering faculty of at least four full-time members. Integration would be best served if these four teachers came from the current faculty. Ideally, at one time or another, all faculty should have involvement in clinical aspects of the curriculum. In contrast to upper level courses or seminars where faculty interest is given great deference, clinical participation should be considered as basic a curricular responsibility as the required first year courses are at most law schools. Faculty members should be involved with clinical activities for periods of time ranging from nine to twenty-four months. An involvement of at least nine months is necessary because of the time required to gain proficiency in both practice responsibilities and educational methodology.

For members of current faculties to move into clinical teaching, it is necessary to create an incentive structure to compensate them for the added demands of their clinical participation. On the average, clinical teachers report working fifty to sixty hours weekly. This work schedule does not include time for scholarship, consulting, or other activities normally undertaken by faculty members in addition to their conventional teaching responsibilities. In recognition of these demands, faculty members involved in the clinical program for a period of nine months or more should receive an award of increased teaching credits above and beyond satisfaction of their entire teaching responsibilities for the period of their clinical involvement. These "extra" credits would then be available to lighten the teaching load of the faculty member subsequent to her clinical involvement. With a lighter teaching load that faculty member should be able to pursue some of the activities normally undertaken but deferred because of clinical responsibilities.[53]

53. The award of future teaching credit should be weighted so as to promote involvement for 12 months or more. Involvement in the clinical program for one year would entitle a faculty member to a subsequent semester without teaching responsibilities; involvement for a period of two years would entitle a faculty member to a full year without teaching responsibilities. Because these teaching credits are awarded in recognition of a faculty member's fulfilling responsibilities above and beyond those normally fulfilled, these credits should in no way influence a faculty member's normal entitlement to leave and sabbatical.

Discussions concerning hiring and tenure policies for clinical teachers reveal two fears. The first fear is that in order to fill clinical positions, it will be necessary to hire "inferior candidates." To the narrow extent that "inferiority" suggests a failure to conform with customary academic credentials, this fear is valid. But in the face of low pay (lower than even prevailing academic salaries), oppressive work schedules (50 to 60 hours weekly for 48 to 50 weeks per year), second class status, and little possibility of future advancement or security, which have been the operative conditions of most clinical positions, is it surprising that the applicant pool does not meet our highest expectations? With equality and integration, high standards for appointment and promotion can be maintained because an attractive pool of applicants will be available.

A second complaint or fear is that clinical teachers who achieve tenure will abandon clinical teaching for other "regular" areas of the curriculum which afford a more attractive lifestyle. Overwhelmingly, the response to this fear has been to deny clinical teachers opportunities for tenure rather than to relieve the oppressive conditions of pay, workload, status, and lack of security which drive teachers away from clinical education.

A faculty member originally hired for clinical teaching might, over time, come to have different interests. This is not something to be feared; on the contrary, new interests are an indication of intellectual curiosity and growth. Just as it is believed to be a serious mistake to force a faculty member to teach a course against her wishes, such coercion directed at a faculty member involved in clinical activities also would be unwise.

But then, the critics would assert, "we would be left with a clinical program and no interested faculty." An incentive structure such as I have proposed is likely to attract faculty not presently involved in clinical education. And, so, just as equality and integration will afford an applicant pool which will meet traditional standards; equality and integration will result in faculty members firmly committed to careers in clinical teaching and practice.[54]

54. If we take seriously the equality and integration of clinical activities, we must be attentive to questions beyond those of faculty availability and status. Both symbolic and practical meaning attach to how clinical activities are governed. The following recommendations deserve at least brief mention. Too often, contrary decisions have been made by law schools to the detriment of the educational impact of their clinical efforts.

I propose that clinical activities be governed in the first instance by a committee of at least three members of the faculty. Members of this committee should be appointed or elected for fixed, staggered terms. A staggered term arrangement will permit both continuity and "new blood." At least one member should be chosen from those faculty who have made a long-term commitment to clinical teaching (4 to 5 years), one who has made a short-term commitment (9 to 24 months), and one who is uninvolved in clinical teaching. In this way, the governing body would have a direct interest not only in the content of clinical activities, but also in their usefulness to and impact on the educational program of the entire law school. What is important is that faculty members included be those who are, in fact, doing the teaching, supervising, lawyering, as well as those who identify their interests in very different ways.

The temptation is to create a director-type position vested with considerable authority for administration and policy — one able to make decisions unilaterally and, thus, with little visibility. While this might insure, at least initially, pro-clinic decisions, it would, over time, contribute to separatism of clinical activities. Even at risk of unfavorable decisions, I would prefer a

B. Educational Content

1. Objectives

The development of clinical education is significant in terms of a transfer learning paradigm. It is an opportunity for law school teachers to close the distance between theory and practice, and an opportunity for students to test what they have learned in specific situations. Medicine, social work, education, and clinical psychology have found it effective to mix abstract classroom learning with concrete performance of services for clients or patients. If a student does not understand material when presented, the

> probability is low that insight will occur later in practice. High transfer learning and good original learning are not independent events; the former depend on the latter. . . . [I]nstructional programs which encourage and allow students to participate more actively in the process of learning bring together the major factors that improve the quality of learning.[55]

Evaluation is also a necessary condition for learning. A student needs to know if her reactions, interpretations, decisions, and conclusions are generally correct. Informing students about their performance should not be postponed because, as far as learning is concerned, evaluation is most important during the course of studying, decision-making, and problem solving. The final course grade comes too late and is too imprecise to influence the progress of learning — other than possibly by its incentive to do better next semester.

Thus, on a theoretical level, clinical education and these proposals seek to influence predominant forms of legal education in favor of a learning model that involves greater student activity, responsibility and judgment; application of theoretical insight; and regular and immediate evaluation.

More concretely, there are at least five objectives which can be accomplished in the clinical education of law students.

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model that will maximize faculty involvement. Faculty members should participate in the full range of decisions that will have to be made: what kinds of legal work should be accepted or, as a second example, the details of student supervision and evaluation. Equally, curricular decisions affecting clinical courses and hiring and promotion should be the responsibility of the same bodies that perform this role for the law school generally.

As a final matter, during the first year of operation, law schools should commit the time and energy of one additional faculty member as a facilitator. Of necessity, to realistically understand what is transpiring, this person will have to participate, at least to a limited extent, in the teaching and supervising and lawyering life of the emerging clinical activities.

Even once the clinic is firmly established, it is both predictable and understandable that those intimately involved would have a tendency to be inward-turning. The facilitator must be able to resist this inward-turning tendency. She must be constantly alert for possibilities to forge links between clinical activities and the rest of the curriculum. The facilitator should spend considerable time reporting to the rest of the law school community, identifying opportunities for involvement, and recruiting specific members of the faculty to participate in the clinical activities.

55. Erickson, Learning Theory and the Law School Classroom, 6 CLEPR Newsletter, Oct. 1973, at 5.

1. To expose students to, and increase their understanding of, the law in operation.

This objective underscores the importance of understanding what lawyers actually do and how the legal system actually works.[56]

2. "[T]o expose students to the demands, constraints, and methods of thinking in role and to explore the impact of role on [the resulting behavior.]"[57]

This would include an examination of the social arrangements and dominant norms of legal practice.

3. To provide professional skills instruction.

This is not the most important use or objective of the clinical method (despite claims to the contrary by both supporters and detractors), but it is not unimportant either.

Anthony Amsterdam has suggested what seems to be the proper emphasis:

> It is not necessary or possible for the law schools to turn out accomplished trial lawyers, counselors, or negotiators. But it is possible and desirable to get the students past the kind of first-level errors that are so disruptive of performance and so unnerving to the performer that they cannot even serve as a valuable learning experience in the school of hard knocks. By giving students the opportu-

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56. Amsterdam, supra note 21, at 9. Amsterdam provides two helpful examples. Students would focus on:

> [t]he ways in which the application of legal rules and principles to particular situations is affected by the dynamics of the processes through which those rules are applied — for example, the ways in which various rules of "substantial performance" in the law of contract remedies are likely to affect the behavior of contractors once those rules have been translated through the dynamics of negotiation and counseling that are likely to attend contract disputes. [And equally,] [t]he ways in which legal rules and institutions themselves are shaped by the same dynamics — for example, the ways in which certain demands of criminal trial strategy and aspects of the interaction between a trial lawyer, expert witness, and jury tend to frame the issues presented to appellate courts in insanity cases, and thereby to mold the substantial law of criminal responsibility.

Id. See also J. Charn & G. Bellow, Memorandum to The Michelman Committee, Harvard Law School, app. A at 1 & n.2, (Oct. 13, 1981) [hereinafter "Practicing Law Center Proposal"]. Included in this Memorandum is a footnote that bears repeating:

> For example, in every field of law, there are processes which nullify laws, rules and policies, as well as unstated norms and practices (the unofficial system) which create alternative policies and mandates. In every transaction — between lawyer and client, client and others, lawyer and lawyer, there are relationships which further shape and influence outcomes. Many of these transactions become sufficiently patterned to take on a law-like quality themselves. In our view, the so-called gap between law in the books and law-in-action of sociological independence is grossly misleading. The differences are differences in kind rather than degree and much too complex to be captured by such a linear concept.

Id., app. A at 1 n.2.

57. Amsterdam, supra note 21, at 5.

> nity to commit these first-level errors in law school, and by giving them the opportunity and assistance which only an educational institution can provide to reflect upon the errors and develop some initial insight into their causes and possible cures, clinical courses can aim to graduate lawyers capable of making educationally productive second-level errors and learn from them in practice . . . . This requires sufficient instruction and experience with a minimal core of practice information and skill, in the basic techniques of such skills as interviewing, counseling, negotiation, informal advocacy, and courtroom advocacy. . . .[58]

> 4. To increase students' capacity to cope critically with the demands of practice while learning from their experiences throughout their professional careers.

It is neither possible to graduate fully competent lawyers nor to anticipate the development of professional careers that will usually span thirty to forty years. It is possible, however, by studying student performance in an educational setting, to increase students' capacities to teach themselves in new situations and to resist simply imitating or adopting prevailing practices and norms. It is particularly important to expose students to the "demands, constraints, and methods of analyzing and dealing with unstructured situations, in which the issues have *not* been pre-identified"[59]—formless situations, situations with multiple variables, situations where the facts are unknown, developing, in the lawyer's control, or beyond the lawyer's control. These constructed situations are often the most demanding part of a lawyer's work; yet nothing law students experience in traditional curricula prepares them for this crucial type of "analytic thinking."[60]

> 5. To offer students an opportunity to observe and experience different areas of practice so that they may make more informed career choices.[61]

By virtue of their clinical experience, students are able to make more informed choices about the type of practice they wish to enter and the type of lawyers they wish to be. The structure and content of the curriculum, together with the actual numbers and kinds of opportunities available to students, should expand rather than channel students' career choices. Unfortunately, the first job accepted by graduates is indicative of what, for many, becomes an irreversible career pattern. The opportunity to diversify their experience prior to making such decisions is to the students' lifelong advantage.

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58. Id. at 13.

59. Id. at 6-7 (emphasis supplied).

60. Id.

61. Practicing Law Center Proposal, supra note 56, app. A at 4.

2. First and Second Year Involvement

Courses using clinical pedagogy, like other courses in the curriculum, have traditionally been self-contained. The typical sequence which requires students to wait until their third year for intense, highly structured clinical involvement, followed by a first year of actual practice which is completely dissimilar, is unwise. Jerome Frank was correct; clinical work comes too late in a law student's career.[62]

Instead, students should engage in a core clinical experience in their second year. There are two reasons for this — the first is based on the needs and opportunities of the beginning student; the second responds to the situation of a student in her last year of law school, shortly before entering practice.

An introductory clinical experience for first-year students and an intense experience for second-year students would offer certain educational advantages. Such education is particularly responsive to the deficiencies of the present curriculum which compartmentalizes and separates subject areas. The barriers between courses, and their obscured common features, in the first-year curriculum diminishes "student acquisition of insights that depend upon the recognition of course commonality; material learned in this manner tends to remain unintegrated with parallel knowledge acquired in other areas."[63] A supervised clinical component could supply the "integrative reconciliation" to provide an educational bridge between related courses.[64]

There is another shortcoming especially true of the first-year curriculum:

> [it] de-emphas[izes] fact investigation and the lawyer's role in formulating the facts. The appellate casebook in which the facts are already established conveys a message that the process of gathering facts and assembling them into legally significant statements is a mechanical if not unimportant task. A clinical component in which the student is presented with a fact package that is not predigested into legally operational categories calls for the application of lawyering skills and integrative capacities that can only add to the learning experience that the casebook method intends but cannot achieve.[65]

A related point is that clinical education presents the possibility of a variety of learning techniques. Students who do not adapt well to one technique will not be foreclosed from academic achievements and accolades. Additionally, law faculties will be able to compare presently employed teaching and learning methods with alternative ones.

At an early, formative stage of a student's professionalization, clinical education can do much to break down the notion that school has little or

62. Frank, A Plea for Lawyer-Schools, 56 Yale L. J. 1303, 1344 n.104 (1947).

63. Brickman, Clinical Work in the First and Second Year of Law School, 6 CLEPR Newsletter, Dec. 1973, at 3.

64. Id.

65. Id. 3-4.

nothing to do with practice. Instead, education could be viewed as part of a continuum of career-long learning to improve skill, judgment, and service.

Several law schools provide students with some exposure to clinical activities in the first year. CUNY at Queens College and Antioch Law School provide students extensive exposure to clinical activities in the first year. University of Southern California, Hofstra, and Northwestern have used clinic cases as a source of problems for first-year writing programs. Boston University, Pace, and U.C.L.A. use first-year writing programs to introduce students to pleadings and opinion letters. The University of Hawaii, Catholic University, and University of Vermont offer first-year courses which combine an introduction to lawyering process with legal research and writing. The University of New Mexico divides its first-year class into faculty-supervised sections of 18 to 20 students for simulated lawyering experiences modeled upon an actual case, while the University of Iowa offers a first-semester course dealing with ethics, interviewing, investigation, and negotiation. For several years, Harvard has offered a very popular first-year course in federal litigation. Stanford and New York University are currently experimenting with alternative first-year programs which feature a year-long integrated approach to simulated lawyering experiences.

Other schools utilize the clinical experience of upper class students for the benefit of beginning students. The University of Michigan, for example, has experimented with pairing students in civil procedure with upper level clinical students. The regular clinical students retain responsibility for the assigned civil cases but first-year students participate to the extent practical at each stage, including the filing of papers, preparation of motions and briefs, and interviewing of witnesses.[66] Yale students, in large numbers, begin their clinical experience in the second semester of law school, with second- and third-year students responsible for supervising them. "The experienced students pass on the 'tribal lore' of the program, edit first drafts of complaints and memoranda and assist in research and interviewing."[67] The faculty's ability to supervise is enhanced by the use of these advanced students as "senior assistants."[68]

Students with clinical experiences such as these in the first or second year will be more effective learners during the rest of law school. As they approach the diversity of upper-level offerings, such students will be more self-conscious about the way they learn, have a more integrated cognitive picture, and, thus, be better able to identify what information they need and want to learn in behalf of their own competency. Furthermore, because many students go to practice settings which immediately confront them with pressures to produce and conform, clinical programs can provide them with a transitional experi-

66. Id. 7-13. See Guidelines, supra note 47, at 60-61.

67. Wizner & Curtis, Here's What We Do: Some Notes About Clinical Legal Education, 29 Clev. St. L. Rev. 673, 682 (1980).

68. Id.

ence—an opportunity to exercise their fledgling powers of professional judgment.

3. *Academic Programs*[69]

Although fieldwork alone can be educational, students gain much more by having a formal context in which to understand their experience. Classroom participation is intended to develop such a cognitive structure for student experiences. "This cognitive framework enables them more readily to perceive the relevance of the experiences they are having and to fit each of these experiences into a conception of the overall process, rather than see them as a series of isolated or unrelated events."[70] Practical legal work can be discussed and analyzed in a traditional classroom setting, just as appellate cases are. Discussion of specific elements of a legal problem and analogy to similar legal areas provide a link between actual practice and legal theory.[71]

Students' clinical experiences should be "focused in some way through a course, research, or independent study project under the guidance and direction of a member of the faculty. What courses would actually be taught and what projects undertaken . . . would depend on the interests of faculty and students at any particular time."[72] The range of possibilities is very large, but the following two items comprise the minimum curriculum which should be offered by a lawyering faculty.

a. Introduction to the Lawyering Process

This would be a two-semester course offered to first-year students on a voluntary basis. Employing a mix of simulated problems and live cases, it would include exposure to and mastery of those subjects now included as part of existing first year research and writing courses or moot court programs. It would also include an introduction to interviewing, fact investigation, discovery, structuring the case,[73] and counseling, as well as issues of professional responsibility. Coordination with other first-year courses, particularly civil procedure, would be essential.

In addition to class presentation, students would be afforded observation experience and an opportunity to actually perform certain limited lawyering tasks. For example, a first-year student might observe a client interview by a second- or third-year student and then, after discussion with the student-lawyer and supervisor, perform a defined research task which might include drafting a complaint or a motion accompanied by a memorandum of law. The first-year student would participate in strategy conferences of the case and

69. Barnhizer, supra note 14, at 83.

70. Bellow & Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy xxiii (1978) [hereinafter "Lawyering Process"].

71. Practicing Law Center Proposal, supra note 56, at 18.

72. "Structuring the case," refers to the process by which the lawyer evaluates the possible theories and known facts in order to devise a comprehensive litigation strategy.

73. Brickman, supra note 63, at 6.

would observe the use of the research in counseling, discovery, negotiation, argument, or trial.[74] Substantial supervision would be required throughout this process. By offering a different approach to research and writing, moot court, and professional responsibility, such a course would be an experiment from which law faculties could learn to improve other parts of the curriculum.

b. Clinical Practice

This full-year program would consist of four interrelated and mandatory components. Primarily intended for second-year students, it would also be available to third-year students on a space-available basis. While participating, students would take one additional course of their choosing each semester.

(i) Lawyering Process

This course would offer a systematic examination of the experience of being a lawyer: the learning of a professional role, the actual demands of a "law job," and the particular tasks and skills such as interviewing, counseling, negotiation, and trial practice. The course would focus on these tasks as they arise in typical civil and criminal cases, relying heavily on role playing, case presentations, and other devices, as well as introducing theoretical concepts and models to help students reflect on and generalize from their experience during the year.

(ii) Legal Problems of the Poor

Students would inquire critically into the policies and premises that underlie "poverty law." The course would look particularly at landlord-tenant doctrine, recent consumer protection legislation, the welfare and social security system, regulation of family relations, and the enforcement of various status offenses and other criminal statutes. These topics would be studied from the perspective of their impact on the poor, and the ways they pertain to race, class, and caste in American society. Substantive law would be emphasized as well as policy issues. This course would include, at the beginning of each semester, periods of intensive analysis of doctrine and rules. During these periods, students would meet for several hours each day for discussion and problem work.

(iii) Supervised Client Representation

Under the supervision of the lawyering faculty, students would work a minimum of 25 hours per week on civil and criminal matters for clients. Initially, students would assist staff. As students progress, they would assume more direct and independent responsibility for casework. During the program, students would interview and advise clients on a wide variety of topics, take

74. National Institute for Trial Advocacy, Announcement of National Session (1983).

depositions, write briefs, represent clients at all stages of administrative hearings, and conduct court trials. Where appropriate, students might participate in jury trials and appellate argument. Supervised practice would include regular review and assessment of the student's and others' casework. This supervision would include review of written work and, if available, audio and video recordings of actual student performance.

(iv) Trial Practice Workshop

In January, students would participate in a three-week trial practice workshop based on the workshop held by National Institute for Trial Advocacy (NITA). NITA uses team-teaching as the principal method of instruction:

> Ordinarily, a teaching team . . . includes an experienced trial judge, one or more experienced trial lawyers, a team leader (usually a law professor) experienced in teaching advocacy, and a teaching assistant. The team leader and teaching assistant for each section serve throughout the program. . . . In most class sessions, students perform as trial counsel in some phase of trial or preparation for trial. Often, members of the teaching team give demonstration performances as well as constructive criticism of student performances.

This phase of clinical practice should come at a time when students have the understanding and the experience to benefit from an intensive period of work on advocacy skills. By January students should not be so naively impressed with mechanical proficiency that they fail to understand that there are larger dimensions to the measuring of performance. As students assume increased responsibility in the spring semester, they will be able to build upon the workshop and improve their trial skills. Like the potential impact of "Introduction to the Lawyering Process" on the teaching of research and writing, moot court, and professional responsibility, the workshop would provide a forum for discussion, experimentation, and improvement in the teaching of trial advocacy in the rest of the curriculum.

c. Courses and Seminars

At the initiative of any faculty member, and depending upon student interest, a clinical component could be added to any existing or new course or seminar. Conversations with faculty about undertaking clinical course activities reveal that there are two frequent hesitations. The first is the identification of cases. The procedures used to interview prospective clients as part of clinical representation will identify cases far broader in scope than those accepted for actual representation.

The second is the unavailability of the resources required to undertake actual legal work. With the guarantee that pleadings would be quickly typed and copied, that experienced litigators would participate as co-counsel, that it

would be possible to withdraw from a case at the semester's end without harm to client interests, a number of faculty would come forward with proposals and the curriculum would be enhanced by a rich variety of new offerings.

It is easy to imagine students involved with clients and cases in bankruptcy, constitutional litigation, criminal procedure, employment discrimination, family law, housing and urban development, and tax penalties, to name but a few current courses that could acquire a clinical component. As part of the curricular commitment to professional responsibility, experimental two or three-credit components for courses on the legal profession could be developed.[75] In any of the practice areas identified, "a program of . . . clinical work could be developed in which case-handling, research, brief-writing and appellate argument, institutional monitoring, community education or group representation could be used to draw students deeply into the doctrinal and policy issues in a field."[76]

When constructing such new courses, a number of format questions arise. Must all students in the course or seminar participate in the clinical component? How much additional credit should be awarded to students and faculty for such participation? Should there be pre- or co-requisites? Individual faculty members should resolve those questions when planning their course or seminar. Curriculum committees should, in turn, consider their choices through the same deliberative process they accord any other course proposal. Over time guidelines for courses with clinical components could be formalized; however, until schools have the experiences upon which to base such guidelines, proposal-by-proposal consideration seems preferable.

d. Other Options

Students may be content with the existing course offerings, they may choose to prepare a "farm out" proposal,[77] or they may desire to fashion a

75. Clinical work might extend for part or all of a semester and could be focused on ethical issues arising in the representation of clients or on professional issues relating to the structure and practices of the bar and its obligations and efforts to meet the legal needs of large numbers of people.

Practicing Law Center Proposal, supra note 56, at 20. Students might participate in the following:

(i) intake and limited assistance to clients (with students required to keep journals on the ethical issues encountered); (ii) co-counseling with students involved in representing clients (the primary role here, in addition to assisting in the cases, would be to spot and counsel on ethical issues); (iii) functioning as part of [an] ethics committee to write opinions or give advice on issues that arise; (iv) participating in a self help or community education program to examine issues relating to mass provision of service (unauthorized practice, advertising and solicitation issues; referrals and relations with the fee for service bar); (v) writing case studies of practice activities and ethical behavior of opposing private and public agency counsel. Id. at 21.

76. Id. at 21.

77. Any second- or third-year student should be allowed to pursue a one-semester "farm out" experience, pursuant to the following conditions. Students interested in such an experience must prepare a proposal and find a faculty sponsor. The proposal should include details about the proposed placement: the supervisor, the work to be performed, the time to be spent, and a

third-year program suited to their individual learning needs and goals. A student might wish to undertake a research and writing project on an aspect of clinical practice or a doctrinal, policy, or professional issue raised in one of the clinical courses. Or a student might, with additional clinical practice, wish to concentrate upon an aspect of lawyering — either one to which the student had been only minimally exposed or one which the student had mastered. Or a student might wish to serve as a teaching assistant, improving her grasp of substantive content and clinical pedagogy by working with less experienced students.

On behalf of third-year students who wish to devise an otherwise unavailable clinical learning experience, the faculty governing committee for clinical activities should be empowered to entertain and approve student proposals.

4. Grading

In addition to the usual and varied forms of evaluation students receive in clinical activities, they would receive a grade. All components of clinical activities should be graded in accordance with the grading system used for the rest of the curriculum. Distinctions in grading between clinical and traditional courses would only contribute to a second-class status for clinical work, in the minds of both faculty and students.

Whether clinical courses should apply traditional hierarchical grades has generated considerable debate. Proponents of hierarchical grading have maintained that such grading is necessary to enforce high educational standards. Opponents have argued that students do not produce comparable work and that evaluation standards are difficult to devise and apply, particularly where close working relationships develop between teacher and student.[78] Student sentiment on this issue is difficult to gauge or predict.

When the choice of giving letter grades is contrasted with the frequently suggested pass-fail alternative, the question is argued and resolved more often on personal preference than educational effectiveness. This has inhibited meaningful discussion and experimentation with alternative forms. The one notable exception is the work of the Competency-Based Task Force formed at the Antioch School of Law in 1974.

The Task Force had as its immediate objective the development of

description of the activities the student will undertake in order to increase understanding of the experience and encourage her reflection and generalization about it. These activities may include readings, planned meetings with the faculty sponsor, a journal or other writing, or participation in a related course or seminar. The faculty sponsor and student will agree upon an appropriate award of credit.

Final approval of student proposals should be the responsibility of the law school committee which is usually charged with oversight responsibilities for such matters as course and independent research approval. If student proposals received by such a committee suggested interest in particular subject areas, they would be a valuable curriculum planning device and a very real way for faculty to respond to the intellectual desires of the student body.

78. See Bander, A Case Against Grades in Clinical Education, Council on Legal Education for Professional Responsibility 5 (May 1974).

concepts, definitions, methods and instruments for evaluating lawyering competency for application to Antioch's clinical legal education program . . . . The model of lawyering competency that finally emerged was based on lawyering functions . . . . For example, a major function of lawyers is communicating, either orally or in writing . . . . The model encompasses six such major competencies:

1. Oral Competency
2. Written Competency
3. Legal Analysis Competency
4. Problem-Solving Competency
5. Professional Responsibility Competency
6. Practice Management Competency[79]

Edgar Cahn has suggested building upon the Task Force's effort to describe the ingredients of competency and instituting competency requirements as an essential part of graduation requirements. "These could include production of a portfolio of satisfactory work products, research papers, or examinations to demonstrate minimal proficiency in fundamental lawyering competencies together with evidence of advanced proficiency in some specialized lawyering skills."[80]

C. Faculty Development

Originally, the appeal to law faculties to institute the clinical method was framed in terms of service and obligations to the public interest. Subsequently, proponents used an educational rationale; nevertheless, the chasm remains. Neither service nor educational improvement as clinical goals, nor the veiled threats of professional groups and licensing agencies have provided sufficient motivation for law faculties to develop a meaningful interest in clinical education. Finally, and belatedly, we have come to understand that clinical integration can provide real faculty incentives: there are possibilities for teaching, research, and practice.

1. Pedagogical Development

The presence of colleagues who are both teaching and lawyering, backed by the necessary resources to conduct litigation and the opportunity to work closely with other members of the faculty, could stimulate the development of new practice-based courses and enhance teaching skills. Any faculty member interested in experimenting with practice-based instruction would have a way to do so, and, because of on-going client representation, suitable cases would be easy to locate. Experienced clinical teachers would assist in supervising stu-

79. Cort & Sammons, The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies, 29 Clev. St. L. Rev. 397, 405-06 (1980).

80. Cahn, Clinical Legal Education from a Systems Perspective, 29 Clev. St. L. Rev. 451, 473 (1980).

dent-lawyers in their work, and skilled litigators would honor commitments to clients even after students and the initiating faculty were no longer involved. The teaching and lawyering faculty would be a source of information, advice, and technical help about clinical teaching, adapting clinical techniques to the needs of the interested faculty member, and working to increase teaching effectiveness.

2. Scholarship

Similar new possibilities exist for research by members of the faculty. Even if faculty are critical of the "dominant tradition of academic legal scholarship with its emphasis on doctrine and appellate decisions," we are in many ways held captive.[81] If we wish to study and analyze legal doctrines and institutions against a broader historical or theoretical background, we are often confronted with very different research traditions and styles of discourse. If we wish to contribute to the emerging literature exploring the relationship between "law on the books" and "law in action," we face difficult problems identifying the contours of our inquiry and developing the appropriate "data base."

Clinical activities of the sort I have proposed can contribute to such scholarly efforts. Clinical activities can bring "students, teachers, scholars, and practitioners together in a setting in which teaching, practice and research will be closely integrated and focused on the problems of . . . a specific community."[82] Activities "will thus provide an unusual and promising opportunity to study law in a concrete setting, [and] to relate the understanding of legal norms to the understanding of social problems . . . ."[83] Faculty could undertake empirical work as part of client representation or pursue more general reflections about programs and policies. Clinical activities could serve as a laboratory to study various institutional approaches designed to deliver legal services to low and moderate income people, including alternative methods of dispute resolution. Clinical faculty could study how the legal system, government bureaucracies, and private markets interact in such areas as health care or housing.[84] Or, as a fourth example, faculty could study lawyer roles and responsibilities, the self-conception of the profession, and the regulation of the bar.

81. See Llewellyn, A Realistic Jurisprudence — The Next Step, 30 Colum. L. Rev. 431 (1930). For the continuing power in legal scholarship of the "doctrinal tradition," see Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 Law & Soc. Rev. 9 (1975).

82. G. Bellow, J. Kettleson, M. Lipsky & W. Simon, The Legal Services Institute: A Proposal 72 (unpublished submission to the Legal Services Corporation) (Mar. 16, 1978) (on file at N.Y.U. Rev. of L. & Soc. Change) [hereinafter "Legal Services Institute Proposal"].

83. Id.

84. See E. Bartholet, Memorandum to the Michelman Committee 1 (Nov. 23, 1984) (proposal for Practicing Law Center at Harvard Law School) [hereinafter "Memorandum to the Michelman Committee"].

3. Practice

Any member of the faculty would have the opportunity to practice or assist in practice. For faculty who have not practiced before,

> this is an excellent opportunity to gain exposure to aspects of professional life not always available in a career line that moves from law school to a clerkship in [sic] teaching. For others, further practice experience can enlarge teaching insights, and assist the faculty member in his or her own research in a particular field.[85]

For those once active in practice, but consumed in recent years by teaching and research, clinical work is a way to regain lost mastery without a sharp break from their institutional roles. For faculty members involved in *pro bono* work, clinical work is a means by which to involve students in their activities.[86] Faculty members who want to undertake *pro bono* work, but are deterred by logistical constraints or by practicing on their own, may consider clinical work an attractive alternative.

Among the most appealing aspects of teaching is freedom — the minimal accountability to others — which contrasts sharply with practice. But this freedom is also the source of the sense of isolation that many of us feel. Usually, we work alone. We rarely experience the accomplishment and exhilaration that can come from working closely with others on a common project. Clinical activities create enhanced opportunities for those of us interested in collaboration and collegiality in our teaching, research, practice, and, more generally, in our professional lives.

D. Service

I have left for last this discussion of service as a reason and goal of clinical education. I have done so with mixed feelings. For me, service to clients, more than any other single reason, explains my interest in and commitment to clinical education. It also explains what I find animating about law generally. But I do understand that these notions are not widely shared. When faced with admittedly difficult decisions about how to allocate our limited institutional and personal resources, an appeal to service alone will not carry the day. Others, far more articulate and persuasive than I, have tried and failed. Service, however, is the essential ingredient of all that I have proposed — essential in the form of role performance as a methodological matter, essential as the fire that breathes life into all of these activities.

1. Poverty and the Unrepresented

The dominant orientation of clinical activities and, in particular, of client representation and casework should be an attention to the legal problems of those who are unrepresented and under-represented. Some clinical programs

85. Practicing Law Center Proposal, supra note 56, at 25-26.
86. Memorandum to the Michelman Committee, supra note 84, at 2.

try to understand and respond to the ways that wealth, class, status, race, and sex influence, and in turn are influenced by, legal institutions and practices. At present, most of us are institutionally and professionally disassociated from and uninvolved in the problems of poverty and gross injustice so graphically evident on the very borders of many of our law schools.

Law schools must assume responsibility for this kind of legal work. Even if the majority of our students go on to professional lives entirely unrelated to the lives of the poor and unrepresented, we should, at the very least, impart to them an informed sense of what the legal system looks like to many Americans.[87] "[I]f ignorance breeds intolerance, our teaching may be a potent antidote."[88]

Our obligations take on special meaning at a time when the federal government is gutting the provision of legal services to the poor.

> [I]t would seem . . . an extremely unfortunate lesson in "professional responsibility" to our students . . . to fail, at this time, to do what . . . all lawyers should be doing — namely to help deal creatively and constructively with the general problem of access to legal services, and the particular crisis caused by Reagan's cut-backs in legal and other services.[89]

There have been proposals for a formal alliance between the Legal Services Corporation and law schools. Such proposals are potentially attractive to law schools as a way to fund clinical activities. Such proposals are advocated as a way to maintain former service levels in the face of shrinking Legal Services appropriations.

Many law schools have previously funded their clinical programs from "soft money" sources, i.e., governmental programs and foundations, which are no longer available. Reflecting the second-class status of clinical education, some law schools have refused to accept the financial responsiblity for clinical costs when these other funding sources have become unavailable. Or when faced with budget cuts of their own, law schools often decide that clinical activities are expendable.

In current form these proposals should be strenuously opposed. They are motivated by a desire to obfuscate and not a desire to assure the continuation of legal services for the poor.

Since assuming office, the Reagan administration has consistently proposed no funding for the Legal Services Corporation. This is but one of many indications of opposition to quality legal services for the poor. Just as these proposals ill-serve the low-income so, too, would they seriously compromise

87. C. Edley, Jr. Memorandum to the Michelman Committee 3 (Nov. 3, 1981) ("Clinical Instruction in Conjunction with Coursework—An Apprenticeship Approach").

88. Id.

89. E. Bartholet, Memorandum to the Michelman Committee (Nov. 4, 1981) ("Thoughts on Models for a Practicing Law Center and Other Models for a Clinical Program at H[arvard] L[aw] S[chool]").

the educational purpose of clinical efforts. Clinical programs would be literally swamped by clients and cases.

2. The Nature of the Legal Practice

I propose the establishment of community law offices committed to an aggressive and systematic style of advocacy. These offices should bring to Legal Services practice a style and quality of lawyering typically available only to affluent clients. The model of practice should be one that both responds to individual clients and attempts to link cases in ways that address the problems that most disadvantage the poor community.

In their proposal to the Legal Services Corporation for funding of the Legal Services Institute, Jeanne Charn, Gary Bellow, and their co-authors have articulated an insightful and powerful strategy for the representation of poor people.[90] This strategy has the potential to enhance the impact of such representation and to create very special educational opportunities.

The gap between law-in-practice and law-on-the-books is well documented. Less clear, until the Legal Services Institute, was the way Legal Services work unconsciously replicated this gap by treating individual and test cases separately. "Service undertaken without a systemic orientation tends to become routinized and reactive. Reform efforts that are not closely tied to client and community concerns, even if they change rules, may not, over time, alter practices."[91] The Institute's proposed alternative was a strategy of law enforcement: "to focus representation — to cluster so-called routine cases — on particular practices or institutions."[92] In states where advocacy has produced favorable law, "there is a real potential for using limited legal services resources to help clients realize entitlements, remedies and protections that are already formally in place."[93]

There should be a preliminary commitment of law office resources to a limited number of cases in one or two areas. Experience with these initial cases will provide a basis for reviewing and revising initial assessments. The key is to "handle enough cases raising similar issues to create a real and continuous pressure on the practices and institutions the office wishes to change."[94]

> The potential of this perspective lies in the fact that (i) many illegal and exploitative practices are the product of cost calculations

90. Legal Services Institute Proposal, supra note 82.
91. Id. at 5.
92. Id. at 6.
93. Id.
94. Id. at 11.
Class actions are not central to this approach, though in some instances they would appropriately frame issues and grievances for resolution in court. In other instances, however, combining the complaints of large numbers of people in a single suit might decrease the flexibility, responsiveness and change potential of a litigation strategy.
Id. at 11 n.11.

> that are changed when a large number of complainants begin to pursue their grievances; (ii) successes in pressing such claims legitimize and strengthen the willingness of others to come forward to press related claims; and (iii) such a process develops group support and public interest in monitoring (enforcing) reformed practices and seeking further change."[95]

Individuals should be represented but so should groups. While there should not be a large docket of complex federal or class action litigation, services ranging from one-time counseling or referral to representation in extended litigation should be provided. In response to faculty initiative and interest, law offices should be prepared to respond with needed litigation support, whether it be secretarial assistance or the involvement of co-counsel. Adversarial litigation should not be emphasized to the exclusion of other legal services and other means of solving disputes.

Pamphlets, client newsletters, and self-help information should be distributed and the formation of pro se clinics should be encouraged. A group of twenty to twenty-five clients would meet two to four times, in group meetings, with a legal advisor from the staff and possibly a representative of an appropriate community organization. Clients would be encouraged to share their stories and give each other advice. A legal advisor would explain court process.

Form answers, other pleadings, and self-help materials would be made available and clients would be given assistance, as needed, in completing appropriate court papers. Activities of this sort are attractive not only because they enhance the availability of legal services, but also because they provide numerous opportunities for student involvement and learning.

3. *Clients*

Most clients should be low- and moderate-income persons. They would receive service at no cost or at reduced fees on a sliding scale based upon income.[96] A possible guideline for eligibility might be the income levels now used to qualify for reduced fees by bar association lawyer referral services. Alternatively, income guidelines for continued occupancy of public housing could be employed.[97]

There are several advantages to the eligibility of the near-poor as well as

95. Id. at 6 (footnote omitted). With the above, I mean simply to describe what should be the emphasis of the legal work. I offer this neither as a complete picture nor as a suggestion of limitations.

96. Preliminary research suggests that in many states a non-profit organization providing legal services may collect reduced or contingent fees. The details should be carefully considered and implemented including advance consultation with local and state bar associations and the state supreme court. Initially, client representation should be limited to the lowest-income clients eligible for full services as measured by the prevailing standards of the local Legal Services Corporation program.

97. Practicing Law Center Proposal, supra note 56, at 9 n.5. These were the client eligibility guidelines proposed for the Practicing Law Center at Harvard Law School.

the poor. By avoiding sharp distinctions between these two groups, law school law offices are more likely to be viewed as a legal resource for the community generally, rather than as available only to an arbitrarily defined group. This is important to the extent that such offices wish to offer services to, and become involved with, various groups and associations (e.g., a neighborhood group seeking to improve the condition of housing, a group of Spanish-speaking parents concerned that bilingual education is unavailable in public schools, a mental health agency whose patients have recurring legal problems). "Educationally, students would deal with a broader range of people and problems and would be encouraged to look hard at the impact of law and legal institutions on clients from different social strata."[98] Practically, even small fees from moderate income clients might contribute, over time, to funding.[99]

4. Quality of Practice

An overriding educational goal of student involvement is to learn how to provide quality legal service; in fact, "student education will be deficient in material respects unless the legal services attain at least a high (minimum) level of quality. . . ."[100] This interdependence renders it critical that methods be adopted to accurately and continuously assess the quality of representation being provided.

Lawyers and students must be encouraged "to articulate the implicit standards and attitudes they are bringing to the[ir] work and to systematically examine the ways cases are being handled."[101] There are a number of approaches with which the lawyering faculty might experiment as part of an effort to identify practice protocols:

(a) Systematic review of case files;
(b) case presentations (similar to post-mortems in medicine);
(c) regularly circulating case files within the office;
(d) pairing lawyers in handling cases;
(e) regular in-office testing of staff, on skills and information;
(f) surveying clients to assess their reactions to the service;
(g) review of office practices by outside consultants and expert lawyers from the community.[102]

In addition to these devices for "self-scrutiny," experienced lawyers should be regularly involved in the handling of day-to-day cases; this is an essential step in establishing and enforcing quality practice standards. Also, all of those with client and case responsibilities should agree to accept some

98. Id. at 10-11.
99. Id. at 11.
100. Ferren, Goals, Models and Prospects for Clinical-Legal Education, Clinical Education and the Law School of the Future 94, 111 (E. Kitch ed. 1970).
101. Bellow, Turning Solutions into Problems: The Legal Aid Experience, NLADA Briefcase 106, 120 (August 1977) [hereinafter "Turning Solutions into Problems"].
102. Id.

direction in the way they handle cases. Clinical activities should not be administered hierarchically, but neither should the administration be strictly collaborative; lawyers should not be permitted virtually total discretion in handling their caseloads. The lawyering faculty should develop a system of weighing cases and determining appropriate caseloads based upon the experience, knowledge, and skill of individual advocates.[103] "[T]he importance of individual judgment in legal work notwithstanding; it is essential that lawyers . . . accept some limits on their freedom to practice law 'as they choose'."[104]

The teaching and lawyering faculty will have a number of responsibilities:

(a) teaching and co-teaching various courses;
(b) providing high-quality clinical supervision and instruction to participating students (including the development of materials);
(c) maintaining sufficient volume and diversity of casework and practice activities so as to permit selection suitable to individual course and student needs;[105]
(d) co-counseling with faculty who become involved in practice as a component of a course or seminar;
(e) collaboration with faculty in course development, research, and other matters;
(f) carrying out the various administrative tasks necessary to the entire project.[106]

These various and demanding functions represent a program beyond the capabilities of four faculty teachers and lawyers — particularly if the issue of quality is taken seriously. The experiences of current law school clinical programs and Legal Services programs show that casehandling can be standardized and specialized. In such a setting effectiveness can be maintained and costs minimized if relatively large numbers of paralegals are employed (some of whom function as independent advocates, others of whom assist attorneys in their work). Experience shows that one attorney and one paralegal can supervise the work of between 15 and 25 students.[107] An agenda of activities as I have

103. See Legal Services Institute Proposal, supra note 82, at 26-32 for a detailed description of a case weighting system.

104. Turning Solutions into Problems, supra note 101, at 120.

105. See Practicing Law Center Proposal, supra note 56, at 12-13. Caseloads would necessarily exceed those cases actually being worked on by students. It would be necessary to develop legal work in anticipation of future courses and projects. Additionally, legal work begun for educational purposes but not completed by the end of the semester will require continuing involvement. Faculty and students must be able to withdraw from practice at planned times and in predictable ways without jeopardizing client interests. A system must be devised that will be capable of seeing cases through to conclusion.

106. In reference to all of the above functions, see id. at 12-13.

107. Id. at 14. "This will, of course, depend on the nature and extent of the fieldwork involved. For example, if students were engaged in sharply contested litigation, ratios of more than one attorney and one paralegal would be required, since this is the most lawyer intensive work." Id.

proposed would require, on an ongoing basis, an advocacy staff of at least four attorneys and four paralegals, along with necessary administrative and clerical support.

None of these suggestions will automatically guarantee quality service and quality education. "Several have been tried and have been more or less successful in given programs and communities. What they all have in common is the belief that there must be real attempts . . .[to be] accountable" to the students we seek to educate and the clients we seek to serve.[108]

5. Supervision

The challenge of supervision to the responsible teacher is to successfully judge whether the particular student can do what the situation requires. In making this judgment the teacher, must weigh the student's preparation, ability, prior experiences, and the complexity of the task.

> In some situations, the student may be able to conduct the examination of a witness but not the whole trial; in others, the student may be able to undertake the whole proceeding. In some situations the gravity of the consequences of the proceeding may be such as to require the student to assist rather than function as the lead attorney . . . . Some situations are so complex that while the student could handle the various aspects independently, when integrated, as in a complex trial, the responsibility is usually too much for the student to handle.[109]

A guideline cannot be more precise.

What follows is a description of what students might do as part of their involvement and what supervision it might entail. To begin, there must be a relatively structured casework assignment plan. Initially students should have no direct responsibility for casework and should assist faculty and paralegals. All student work should be reviewed by an experienced member of the staff. As each student learns and demonstrates competence, she should be given increased responsibility and opportunities for independent judgment. During most of the academic year, students will be expected to take on the major responsibility for intake with the assistance of back-up attorneys. In their role as intake workers, students will be expected to perform the interviews of clients, to provide appropriate advice in advice-only situations, to refer clients to outside agencies, to take cases when approved by their supervisor, and to refer cases internally.

Intake provides students with a number of important learning opportunities. First, since an average intake day might consist of as many as eight to ten clients, each student (if two are assigned each day) will see five clients. Over a period of two to three months they will see anywhere from 20 to 35 clients.

108. Turning Solutions into Problems, supra note 101, at 120.
109. Guidelines, supra note 47, at 85.

This gives students a broad understanding of the community. Second, intake provides an opportunity for students to become skilled at interviewing, follow-through, and organization. Even the smallest amount of advice-giving to a client will require the student to complete the appropriate forms and disposition sheets. A monitoring system used to check on intake helps and requires students to organize their work. Finally, because clients present a wide range of problems and because students must conduct investigation into the clients' problems even in advice-only situations, students are exposed to most of the areas of the law with which clients are confronted.

In general, students will take responsibility for cases in the existing caseload. Some cases may come from current intake but a student should never take a case from intake without prior supervisor agreement. Students' capabilities to handle cases vary. Therefore, the number of cases each student will handle will depend on the student's capacity, as best determined by the student and the supervisor as well as the complexity of the cases.

Early in a student's experience, the student and her supervisor will select one or more cases from the supervisor's caseload on which the student will act as a participant-observer. This will insure that each student will have the opportunity to observe her supervisor perform various advocacy functions. Through careful case selection, the student should have the opportunity to observe and discuss the supervisor's handling of most or all of the following:

- conduct initial client interview;
- draft opening memorandum;
- plan and execute fact investigation;
- plan for legal research and preparation of memorandum or brief;
- conduct witness interview;
- draft affirmative and/or responsive pleading;
- plan and execute formal written discovery;
- plan and execute deposition;
- draft and argue appropriate pre-trial motions;
- plan and conduct negotiation;
- plan and conduct trial or administrative hearing;
- prepare post-hearing motions and memorandum;
- prepare and perfect appeal.

The second phase of this experience involves the supervisor observing the student perform as many of these functions as possible. Obviously, there is not enough time for close supervision and discussion of each step of each case. The student and supervisor will select one or more cases for closer and more detailed observation and evaluation.

In addition to these particular and individualized experiences, there will be numerous opportunities to be involved in case planning and review through the operation of work groups and the various projects in which students are involved. Students should expect to have regular access to their supervisor, to

other advocates on the staff, and to peers for working out the day-to-day problems they will confront in providing legal advice to clients.

Supervisors and students will meet individually on a regularly scheduled basis. Some students may want to work together on cases with one taking the prime responsibility, the other secondary responsibility, and both knowing about all cases. There are opportunities to learn more in such a system. If such an arrangement is made, both students will meet with the supervising attorney. For each meeting there should be an agenda of files and topics; before the meeting, the student will give the files to the attorney to read and review.

Work-groups should meet at least weekly, and while not all work-group meetings will be the same, they will often meet in something similar to the medical model of grand rounds. One or two students will present a case to teach a strategy or point of substantive law or procedural law or, ideally, all of these. Before the meeting the presenters will give their fellow students a memorandum describing the case, the points at which decisions were made (or decided by inaction), the options, the strategy choices, the choice made, and the underlying reasoning.

Students will be responsible for keeping files current, complete, and clear as well as timesheets and any other appropriate administrative documents. This is necessary so that supervisory sessions, work-groups, and meetings can be efficient and effective learning experiences for all involved. For all sessions, students have important obligations and will be expected to prepare thoroughly.

CONCLUSION

I have tried to make the case that these integrated proposals represent the bare minimum — if we take seriously the goal of educational excellence in behalf of professional competency. One likely response to these proposals is that we should be less ambitious and undertake more limited activities. But, to view these proposals as luxuries, or as a series of options from which to pick and choose, would be to misapprehend the truly troubling state of contemporary legal education and, more broadly, the relationship of legal education to the legal profession and its place in American society.

I hope that law schools will endorse a variety of clinical activities integrated throughout the curriculum, and that this endorsement will come from a coalition interested in the educational program it proposes. Such a program provides opportunities for our own development as teachers, scholars, and lawyers, and the opportunities to express our commitment to service in behalf of others. Each of us will be attracted to these rationales and goals for different reasons, but I believe we can build a constituency of support by understanding that we can and must pursue all three simultaneously.

In the spirit of action described by Holmes: "The final test . . . is battle in some form . . . . It is one thing to utter a happy phrase from a protected

cloister; another to think under fire — to think for action upon which great interests depend . . . . The great problems are questions of here and now . . . ."[110]

110. Holmes, The Test is Battle, in The Mind and Faith of Justice Holmes 37, 39 (M. Lerner ed. 1943).