



1980

Prefatory Remark

Rose Elizabeth Bird

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Legal Education Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Rose Elizabeth Bird, *Prefatory Remark*, 29 Clev. St. L. Rev. 356 (1980)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol29/iss3/7>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

ROSE ELIZABETH BIRD*

CLINICAL EDUCATION HAS BEEN THE STEPCHILD of legal education for a long time.¹ However, its increased acceptance in recent years has been most heartening. This positive trend could not be more timely, for the legal profession is coming under increasing scrutiny from both inside and outside its own ranks. If legal education is to retain its relevance, a clinical component is essential. The law students, the law schools, the profession, and the public can only benefit from its growth and development.

The remarks that follow are drawn in part from my own experience as a clinical teacher at Stanford Law School. Clinical education presents a unique opportunity for the law schools of this country to teach legal process and professional responsibility while satisfying the desires of their student bodies for relevancy and for training in the skills and techniques of trial advocacy. If it had not been for the financial support of the Ford Foundation through the Council on Legal Education for Professional Responsibility, Inc., and the demand by law students for more relevancy in the law school curriculum, there would have been little development in clinical education. The historical roots for the resistance to clinical courses by law school faculties give some insight into what is basically wrong with much of legal education today.

The law school as it presently exists was shaped in large part by the

*Chief Justice of California.

¹ For some early discussions of the role of clinical education in the law school setting see Anderson and Kornblum, *Clinical Legal Education: A Growing Reform*, 57 A.B.A.J. 591 (1971); Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307 (1965); Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952); Cantrall, *Practical Skills Can and Must Be Taught in Law Schools*, 6 J. LEGAL EDUC. 316 (1954); Clad, *The Gap in Legal Education: A Proposed Bridge*, 41 A.B.A.J. 45 (1955); Cutler, *Inadequate Law School Training: A Plan to Give Students Actual Practice*, 37 A.B.A.J. 203 (1951); Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Gardner, *Why Not a Clinical Lawyer-School?—Some Reflections*, 82 U. PA. L. REV. 785 (1934); Gorman, *Proposal for Reform of Legal Education*, 119 U. PA. L. REV. 845 (1971); Griswold, *Legal Education: Extent to Which "Know-How" in Practice Should be Taught in Law Schools*, 6 J. LEGAL EDUC. 324 (1954); Henderson, *Wherein Do the Law Schools Fail to Prepare a Law Student for Practice*, 9 AM. L. SCH. REV. 1178 (1941); Johnson, *A Lay View of Legal Education*, 43 COLUM. L. REV. 462 (1943); Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); McClain, *Legal Education: Extent to Which "Know-How" in Practice Should be Taught in Law Schools*, 6 J. LEGAL EDUC. 302 (1953-54); Nutting, *The Emerging Lawyer and Legal Education*, 16 AM. U. L. REV. 1 (1966); Pound, *The University and the Legal Profession*, 7 OHIO ST. L.J. 3 (1940); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OREGON L. REV. 57 (1970).

philosophy of Christopher Columbus Langdell, who was Dean of the Harvard Law School in the late nineteenth century.² He instituted the case method approach which viewed the law as a science which could be taught by an analysis of legal rules and doctrines in appellate case law. This was the beginning of the "academic" approach to the study of law. The case method was a response to a general dissatisfaction with the apprenticeship system whereby the aspiring young lawyer worked in a law office under the supervision of an experienced attorney to gain proficiency in the law before he or she began to practice independently.

From the beginning, the universities looked upon the apprenticeship system and the practicing lawyer, who controlled the apprenticeship system, as rivals.³ The development of the case method with its emphasis on doctrine and substantive law gave to the academicians the weapon they needed to downgrade the legal profession as it was practiced. Early in this century, the movement toward the academic training of young lawyers took hold, and the requirements for bar examinations were changed to allow the substitution of university law training for apprenticeship.⁴ The law schools came to reflect more and more a kind of elitism which began to grow into a disrespect for the practitioner and the competitive apprenticeship system. It was but a brief step to the complete elimination of the apprenticeship system.

The "gap" which is always being "bridged" when the student enters practice after graduation from law school and the passage of the bar, finds its roots in this original enmity based essentially on early competition.⁵ The divorcement of scholarship from the practice of law was one of the most unfortunate aspects of the development of law schools in the United States.⁶

Law schools have suffered, in part, because many teachers have had little or no knowledge of the real world of the practitioner other than what they were able to glean from decisional law. Many professors have feared development of clinical programs because one always fears most that which one knows least. Under the "publish or perish" syndrome, teaching became a secondary function in the law schools and students considered a necessary evil. As a result, law schools often became a refuge for individuals with little interest in either the practice or teaching of the law.

² See A. SUTHERLAND, *THE LAW AT HARVARD* 162 (1967).

³ *Id.* at 174.

⁴ See J. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in 5 *PERSPECTIVES IN AMERICAN HISTORY* (Fleming & Baily eds. 1971).

⁵ Kocourek, *A Gap in Law School Training and a Way to Bridge It*, 5 *AM. L. SCH. REV.* 334 (1924); Stephenson, *More on Bridging the Gap*, 7 *J. LEGAL EDUC.* 259 (1954-55).

⁶ See Stevens, *Aging Mistress: The Law School in America*, in *CHANGE IN HIGHER EDUCATION* 32 (1970).

By contrast, the clinical approach to legal education not only brings with it a revolution in the methodology of teaching, but it also requires a change in the type of person who is selected to teach these courses. The Council on Legal Education for Professional Responsibility, Inc., in a newsletter published in the early 1970's, noted that most of the individuals who teach these courses are a "different breed of cat."⁷ They were found to be younger (median date of birth was 1940), and to have been teaching only a short period of time (median time was only two years). Most had had no teaching experience prior to accepting their instructoral roles (fully 81.9 percent), and most, if not all, had practiced prior to coming to their law school. Few came directly from law school and clerking into teaching, the traditional route to success in academe.

Given the historical perspective outlined above, it is not surprising that clinical education has met so much resistance. However, the public and the profession demand change. As early as 1921, it was recognized that the law schools were not fulfilling their promise. "The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly."⁸ The present Chief Justice of the United States Supreme Court has also spoken on the subject.⁹ In his appraisal of the shortcomings of the profession, he has not spared the law schools.

A second cause of inadequate advocacy derives from certain aspects of law school education. Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquettes as things basic to the lawyer's function. With few exceptions, law schools also fail to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy.¹⁰

Clinical education is not a "shibboleth" nor a panacea for the problems that are evident in our institutions and our society. However, little is going to be done about them if the law schools turn away and continue with "traditional" education. If the goal of legal education is to train students to "think like lawyers," that is, to approach problems rationally and to think logically, then many methods should be utilized to attain that goal. A brief description of "conventional legal education" strongly suggests that what currently passes for legal education leaves much to be desired.

⁷ A Preliminary Profile of Clinical Law Teachers, 6 COUNCIL ON LEG. EDUC. FOR PROFESSIONAL RESPONSIBILITY NEWSLETTER, No. 3 (Nov. 1973).

⁸ Reed, *Training for the Public Profession of the Law*, 15 CARNEGIE FND'N. ADVANCEMENT TEACHING BULL. 281 (1921).

⁹ Burger, *The Special Skills of Advocacy*, 42 FORDHAM L. REV. 227 (1973).

¹⁰ *Id.* at 4-5.

[C]onventional legal education consists of (1) relatively large classes that engage in analyzing "cases" (usually the opinions of appellate courts) by the Socratic method (the teacher asking questions, the students answering); (2) seminars on topics removed from those treated in large classes and utilizing a diversity of materials; and (3) independent research, mainly on or for the law review.¹¹

A properly planned and supervised clinical program can be as rigorous as the more traditional approach to learning substantive law and doctrine. It does not suffer from the serious limitation of the traditional method since students not only learn doctrine but they also learn how to weigh and analyze facts. As one critic has pointed out, "the modern law schools do a superb job in teaching *law* as distinguished from practice which is so much concerned with gathering, analyzing, marshalling, interpreting and presenting *facts*."¹² Most clinical teachers have experienced the problem of the bright student who has been trained to deal with doctrine and principles in a tight and logical manner. However, when he or she approaches a problem where he or she must select and analyze the important facts and determine the relevant doctrine, he or she has a great deal of difficulty. He or she is a product of a system whose view of the law is limited to doctrinal considerations.

Clinical education is not simply a substitute for the first year of practice, nor it is an escape from the "rigors" of intellectual pursuit,¹³ nor is it just a process of teaching "how to" and practical skills. Students should come away from a close scrutiny of the legal system as it actually works with new insights as to what the law ought to be and what is wrong with the current system. Students learn to analyze the multiple and complex goals of the participants within the system, to identify the methods used, and to understand the resolution of the conflicts and inconsistencies. The students' experience also enriches the faculty by bringing to their attention new and untapped areas of legal research.

One of the most important aspects of a clinical program is the development of a feeling of professional responsibility by the students for their clients, the courts and society. At a time when the ethical stan-

¹¹ H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 38 (1972) [hereinafter cited as PACKER & EHRLICH].

¹² Burger, *A Sick Profession*, 27 *FED. B. J.* 228 (1968) (emphasis added). See also Weinstein, *The Teaching of Fact Skills in Courses Presently in the Curriculum*, 7 *J. LEGAL EDUC.* 463 (1954).

¹³ Dean Abraham S. Goldstein of Yale Law School recognized one important contribution of clinical education to the rest of the curriculum:

It has seemed to me in the past that clinical education is most effective when it takes students who are turned off in a variety of ways and makes concrete for them a lot of very abstract things. And for many of

dards of lawyers are being intensely questioned, it is vital that lawyers-to-be learn to take responsibility for their actions through firsthand exposure to the ethical problems which a practicing attorney faces daily.

Thanks to the enactment of student practice acts in numerous states, many students are able to get actual courtroom experience under the supervision of their clinical teachers. In court, the students are forced to make conscious choices, view the results, and analyze the success or failure of their decision. One truly begins to learn professional responsibility when one learns first to accept responsibility for one's own acts.

Young lawyers who have had the benefit of a clinical program know that when they take the oath of office and embark on their legal careers, they will not be learning the practice of law at the expense of their clients. By assuming responsibility for teaching competence in the practice of law, law schools with clinical classes demonstrate graphically to their students the meaning of professional responsibility.

The legal profession is unusual in that it does not as yet require actual practice under licensed, competent and experienced supervisors before independent work may be undertaken. Clinical education can begin to remedy this deficiency. Students will benefit by more intensive preparation and a better understanding of the ethical and intellectual mandates of their profession. Clients will benefit by more effective representation. Law schools will benefit by turning out students better fitted to pursue the profession they have chosen. The legal profession will benefit by the infusion of an increasingly mature and responsible group of young lawyers into the system. Finally, our society will benefit by being able to repose confidence in attorneys who better comprehend their roles and who fully appreciate the responsibilities that come with the privilege of practicing law.

The past few years have augured well for the future of clinical legal education. With the ongoing support of organizations such as the Council on Legal Education for Professional Responsibility and with the visibility and encouragement provided by symposia such as this, the outlook for more clinical courses in this country's law schools is certainly promising. It is only in this way that the historical gap between legal theory and practice finally can be bridged.

them it turns them back into the academic exercise in a very, very effective way.

PACKER & EHRLICH, *supra* note 11, at 41.