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Prefatory Remark

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THERE ARE THREE PRIME ROLES THE TRIAL JUDGE should play in clinical legal education: (1) to become involved with the education of the students, (2) to engage with students in a vigorous examination of the judicial process, and (3) to examine critically the educational process in the law schools and its relationship to the courts. Before exploring these roles we should take a moment to examine in general the phenomenon of student practice in clinical legal education programs.

Law schools have changed significantly in recent years and are on the brink of much greater change. Whole new fields of law have sprung up, the traditional Blackstone categories have undergone major sub-proliferation,[1] law teaching has become interdisciplinary and, in sheer volume, there is more law. Thus, law professors necessarily possess a degree of specialization unknown in the law school world of yesterday.

Clinical experience has become a part of this change. In providing substantial professional working experience for the student, law schools have ambitiously reached out, despite narrowly restricted resources, to re-embrace the practicing profession from which it fled at the turn of the century. Many law instructors have vigorously dissented to this alleged dilution of academic discipline by vocationalism.[2] The problem, however, is not one of choice between academics and vocationalism, but of appropriate relationship and juxtaposition.[3]

Forty-seven of the states have authorized law student practice,[4] and federal court student practice has been initiated in several circuits.[5] Most states and federal courts adopting rules since 1969 have borrowed heavily from the American Bar Association (ABA) model student practice rule.[6] With or without student practice authorization students may help attorneys in court, but the crucial importance of student practice is that it affords the students the opportunity to function fully as an attorney. Regardless of the practice rule, the student work in criminal cases

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[1] For example, property has splintered into at least a dozen courses such as zoning, land use control and urban renewal.

[2] *See* Griswold, *Hopes—Past and Future*, HARV. L. SCH. BULL. 36 (1970); *Cf.* Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199 (1956).

[3] Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as a Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 399 (1973).

[4] COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979, at 113 (1979).

[5] *Id.*

[6] *See* Appendix, *Student Practice Rules*, 29 CLEV. ST. L. REV. 817 (1980).

is usually limited to misdemeanor cases, and in civil actions usually consists of representation of indigents in the range of poverty law practice including welfare hearings, evictions, domestic relations matters and consumer problems.[7] Legal educators are realizing that full-time supervision whether by a faculty member or a supervising outside attorney is crucial to the goals of student practice. The ABA model standards provide a sense of the developing supervisory structure toward which most law schools are moving.[8]

The United States Supreme Court in *Argersinger v. Hamlin*[9] opined that law students could improve the administration of justice in misdemeanor cases both quantitatively and qualitatively. Associate Justice William Brennan stated "I think it is plain that law students can be expected to make a significant contribution . . . to the representation of the poor in many areas. . . ."[10] The application of *Argersinger* in the civil law processes may be as important as in the criminal.

The three roles of the trial judge in clinical education cannot be overestimated. The first role of the judge is to become involved in the education of the law student. There should be a method, according to Justice Bernard S. Meyer of the Supreme Court of New York (Ret.), by which the judge participates with the professor and student in a critique of the student's courtroom performance without overstepping the bounds of propriety.[11] Justice Meyer stated that he had given such help to beginning lawyers and was told that it was quite helpful. He believed also that is had not affected his effectiveness and impartiality.[12]

Other judges suggest that the proper role for the court is to confine its observation to style of presentation, both oral and written, and peripheral matters such as courtesy to court and counsel. Comments by the court, however, relative to trial tactics and strategy are fraught

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[7] *See generally* CLEPR, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS (2d ed. 1973) [hereinafter cited as CLEPR].

[8] *See* Appendix, *supra* note 6, at 818. Individual states may have more stringent requirements for supervisors. For instance, California requires two years of full time practice. CLEPR, *supra* note 7, at 54.

[9] 407 U.S. 25 (1972).

[10] *Id.* at 39.

[11] Justice Meyer originally expressed this view in an address to a panel meeting of the Association of American Law Schools held in New York City on December 28, 1972.

[12] In one survey of judges before whom students have practiced, sixty percent of the judges reported that they discuss a student's performance with him from time to time. Yet only one-fourth of the judges found their own work increases in cases handled by clinical students. One judge found he had less work to do, and the remaining three-fourths found that their burden did not increase in such cases. *See* Rubin, *The View from the Bench*, in CLINICAL EDUCATION FOR THE LAW STUDENT 253 (1973).

with danger for they may be contradictory to those of the trial lawyer or the faculty member.[13]

Some judges have expressed in rather strong terms their concerns about student practice. The first concern expressed is that student practitioners will constitute an unfair and undesirable source of competition for practicing lawyers. But this concern is unfounded for in most states student representation is, by rule, limited to indigents who are in no position to retain counsel. Further, in relatively minor cases, law students may well furnish better representation than members of the bar, since their enthusiasm might lead them to fight hard on what might be to a veteran attorney a dull and routine case. With the *Argersinger* case requiring the representation by counsel of anyone who might be sentenced to prison added to the requirement of *Gideon v. Wainwright*,[14] it is hard to envision enough attorneys—let alone too many—available to handle such cases. If the principle of these cases is extended to certain civil cases, even more attorneys will be required.

The second concern is that the presence of the inexperienced students in the courtroom will force judges to adopt a protective stance toward them and will impair both the orderly conduct of litigation and the judges' appearance of impartiality. United States Judge Harold Greene of the District Court for the District of Columbia answers this argument by stating:

> Suffice it to say that I do not see how a third year law student, with supervision, and having met the course requirements of Evidence, Civil and Criminal Procedure, which are prerequisites for certification under most student practice rules, differs very greatly from any other inexperienced lawyer, whether he has finished law school and passed the bar examination or not. No judge can escape from the problems of counsel of varying abilities, and certainly there is not necessarily a direct relation between experience and competence.[15]

It is contended by some judges that law students will be needlessly

[13] Another view was expressed by Shirley R. Levittan, then Judge of the Criminal Court of the City of New York:

> I see no conflict whatsoever in a judge co-opting the role of a teacher—with discretion and within the proprieties of his office. It is one of the judge's functions in a criminal court to ensure that a defendant receive a fair trial including effective and competent representation by counsel. If some judicial interposition is necessary to achieve this end, the judge should not withhold his hand. . . . For me, to offer . . . instruction as I can give is not only a duty and a responsibility, it is also a joy, a true labor of love.

Levittan, *The Clinical Program for Law Students—A View from the Bench*, in CLINICAL EDUCATION FOR THE LAW STUDENT 279 (1973).

[14] 372 U.S. 335 (1963).

[15] Greene, *Judging the Students: Judicial Attitudes of Students*, in CLINICAL EDUCATION FOR THE LAW STUDENT 271 (1973) [hereinafter cited as Greene].

contentious and will waste the court's time with frivolous arguments and motions. There is a lack of empirical evidence supporting this argument with respect to law students but a great deal of evidence that attorneys at law engage in this practice on behalf of their clients.[16] In any large volume court, particularly in cases involving the poor, the problem has far more often been the nonassertion of substantial rights than the assertion of nonexistent rights.

Another fear expressed by some is that law students' inexperience in the settlement process will lead to unnecessary trials and may ultimately harm the interests of the students' clients. There are a number of reasons why a student may be reluctant to settle a civil case or to negotiate a plea in a criminal case. They may not believe that settlement or plea bargaining is an appropriate way in general to resolve a case, may be apprehensive about facing an experienced attorney outside the watchful eye of the judge, or may simply find settlement a let down after the considerable effort of investigating and preparing the trial. But these problems can be remedied if the student practice program includes as part of its training an emphasis on settlement and plea bargaining techniques and, even more importantly, emphasizes that settlement short of trial is a legitimate tactic capable of doing justice to both parties.

Lastly, a concern is expressed by some judges that teaching students is the responsibility of the law schools, and the court should not be called upon to reform the school's function for them. This argument ignores the benefits that student practice supplies to the court, but it also implies that the courts have no responsibility or interest in the improvement of the legal system. However, as one judge stated so well, "Judges cannot shut the courthouse door to a program of manifest educational value and then later complain if the quality of attorneys practicing before them is disappointing."[17]

The second role of judges in clinical education is to engage with students in a vigorous examination of the judicial system. As Orison S. Marden, Past Chairman of the Counsel on Legal Education for Professional Responsibility Inc., so well stated:

> It is too much to expect that the new generation will recognize the flaws in our present system if they have not been exposed to its defects and deficiencies. The insides of our penal institutions, of the so-called correction system, and the criminal courts must be seen at first hand before one can appreciate why the system is not functioning as it should. The extent and nature of the legal problems of the poor will remain a mystery until the law student has worked with poor people in Legal Aid or Legal Services Offices and observed these clients and their problems at first hand. Unless this exposure occurs during school days the

[16] *See* J. GOULDEN, THE SUPERLAWYERS (1971).

[17] Greene, *supra* note 15, at 275.

> principal public problems with which lawyers should be concerned may pass unnoticed by those best equipped to lead in their solution.[18]

When students appear in court they ask "Why do you do it this way?" and "Why don't you do it another way?" questions. They also seek answers. The system must react to such questions; in searching for answers the system gradually changes and is improved.

A comprehensive reinvestigation of the question of which human disputes belong in the courts and which ones do not is long overdue.[19] There are a few scattered beginnings in developing new legal and paralegal institutions, but much more experimentation is needed. Programs to provide mediation and arbitration of disputes, bureaus to take complaints of citizens, lay advocates within the school system and welfare system, special juvenile courts run by juveniles, neighborhood advisory groups to the local prosecutor's office, community patrols to police the streets and report lawlessness by citizens and police alike, citizens advice bureaus modeled after those in England, ombudsman offices where a public official serves as watchdog and investigator of official conduct are all possibilities which may suit a particular community's needs or the needs of a particular functional area.[20] These institutions, however, are difficult to design and require the sophistication and expertise of judges to describe their functions and process so that local groups can understand and use them. The students and faculty of the law school as well as those in other disciplines in the university may add to these judicial inputs, additional perspectives and research.

The third and final role of the judge in clinical education is to examine critically the educational process in the law schools and its relationship to the courts. Benefits accrue to students, professors and judges when a course is presented jointly by a professor and judge. It can also be of great value to ask judges to participate in curriculum planning discussions and as auditors of courses given by a professor alone. I am convinced that only through the joint efforts of judges and educators will significant advances be made in the field of legal education and in the improvement of the administration of justice.

It is my firm conviction that if trial judges can accept a role as teachers of law students, as participants with students in a critical examination of the judicial system, and as constructive critics of the law school curriculum, the law "clinic" will develop as a laboratory in which professional responsibilities can be taught, professional lawyers will be produced, and true law reform will be achieved.

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[18] Marden, *CLEPR, Origins and Program*, in CLINICAL EDUCATION FOR THE LAW STUDENT 5 (1973).

[19] *See* Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 798 (1971).

[20] Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008 (1970).