1980

The Contradictions of Clinical Legal Education

Ralph S. Tyler

Robert S. Catz

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Legal Education Commons, and the Legal Profession Commons

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

Recommended Citation


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.
VARIOUS AUTHORS IN THIS SYMPOSIUM MAINTAIN that many lawyers fail to provide effective representation for their clients, and that law schools are primarily responsible for this serious deficiency. The empirical evidence to support these strong criticisms can be seen daily in courtrooms and law offices across the country. The monopoly which the law schools hold on access to the profession justifies assigning to them significant blame for the dimensions of the problem, and paramount responsibility for attempting to remedy it. The authors of this commentary share these criticisms of our profession and of the institution of legal education of which we have been a part as students and teachers. We propose to examine whether and how law school clinical programs, one possible curricula response to these dual criticisms, can contribute to addressing and solving the problem of lawyer incompetence.

The central thesis of this commentary is that clinical methodology is

*Lecturer, Faculty of Law, National University of Singapore, formerly Assistant Professor of Law and Director of Clinical Legal Education, Cleveland-Marshall College of Law, Cleveland State University.

**Professor of Law, Cleveland-Marshall College of Law, Cleveland State University.

The authors wish to express their appreciation to Professor Larry Taman who gave extensive and thoughtful comments on the initial draft of this article.


sound theoretically, as it provides a necessary and vital complement to other modes of legal education, but that the exciting potential of this method will not be realized so long as law school clinical programs rely primarily on “live client” cases to teach their students. Because the live client model is used extensively in clinical programs, this commentary will assess that model of clinical education by seeking to identify the problems associated with maintaining a law office in the law school environment. Particular attention will be given to the problem of staffing clinics, as the availability and retention of qualified lawyer-teachers is the essential precondition to the success of the live client model. This discussion will center on the tension which is created by the requirement of the live client model that a clinician be both a practitioner and a teacher. This commentary will conclude by recommending that to relieve this tension, exclusive reliance on the live client model be discarded in favor of relying primarily on simulated exercises.

II. THEORY OF CLINICAL LEGAL EDUCATION

The central theory of clinical legal education is that students learn about law and lawyering by performing lawyering tasks. Clinical methodology is based on the notion that because thinking and doing are integrally related in the practice of law, both operations should be a part of a student’s academic study of law. This theory is neither new nor innovative, for it is deeply rooted in the literature of legal education, has obvious antecedents in the historical system of law office apprenticeship and shares the rationale underlying the method of education in


7 Campbell, Training Law Students Outside the Classroom, 26 J. LEGAL EDUC. 208 (1974); David, supra note 6; DeCapriles, A Report on the Inter-Professions Conference, 1 J. LEGAL EDUC. 176 (1948); Gee and Jackson, supra note 2 at 721-45; Lefever, Legal Internships, 6 J. LEGAL EDUC. 504 (1954); Pound, The University and the Legal Profession, 7 OHIO ST. L.J. 3 (1940). Some legal scholars advocate a return to this system. See Krivosha, Query: Would a Residency Program Help Improve Lawyer Competency?, 65 JUD. 6 (1981) (views of...
other disciplines. Application of the clinical method in legal education is a significant development as it may well represent the only major pedagogical reform in American legal education since Dean Langdell's introduction of the Socratic case method.

University legal education in the United States and throughout the world did not develop along the lines of the clinical model. Not until the mid-1960's, in response then to societal pressures, student demand, and educational commitment, was the innovation of Langdell's case method extended from the study of decided cases to student work on actual and undecided cases. Since the 1960's, law teachers have developed clinical courses in an effort to teach students the skills and competencies lawyers use to solve legal problems. The competencies taught in such courses include legal analysis, oral and written advocacy, problem

the Chief Justice of the Nebraska Supreme Court).

The use of hospital training in medical education is the most obvious and frequently cited example. H. PACKER & T. EHRILICH, NEW DIRECTIONS IN LEGAL EDUCATION 39 (1972); Pincus, The Clinical Component in University Professional Education, 32 OHIO ST. L.J. 283, 291 (1971).

See Wizner and Curtis, supra note 6. American legal education took first and important steps in the direction of the clinical method in the 19th century. The movement away from exclusive reliance on Blackstonian-style text books which stated "black letter" rules to Deal Langdell's innovation of the case method, which stressed study of primary materials in the form of appellate judgments, was a movement which linked law study more directly to law practice:

[T]he most startling and most fruitful of the changes introduced by Langdell was the innovation in the mode of teaching and studying the law. The lawyer bases his brief and the judge his opinion not upon treatises but upon the careful study of the reports of decided cases. Langdell maintained that the law student should pursue this same method; and that collections of cases upon different branches of the law, arranged systematically and in such order as to exhibit the growth and development of legal doctrines, should be analyzed and discussed by pupil and teacher in the classroom.


For the historical development of clinical legal education see Grossman, Clinical Legal Education: History of Diagnosis, 26 J. LEGAL EDUC. 182 (1974); Wizner and Curtis, supra note 6.


Barnhizer, supra note 9; Bellow and Johnson, Reflections on the University of Southern California Clinical System, 44. SO. CAL. L. REV. 664, 685-89 (1971); Botein, The Manhattan Bail Project: Its Impact on Criminology and the Criminal Process, 43 TEX. L. REV. 319 (1965); Catz, Reflections on the Antioch Law School Appellate Advocacy Clinic, 3 CLINICAL L. RPTR. 13 (1979); King, Training in Juvenile Delinquency Law: The St. Louis University Law School
solving, law practice management and professional responsibility. A more concrete list of the lawyering skills taught in clinical courses includes tasks such as interviewing, counselling, negotiation, investigation, legal drafting, and trial and appellate practice. The rationale for teaching these skills in law schools is that they are central to lawyering and that the skills can and should be taught systematically to students. To discharge his professional responsibility effectively, a lawyer must be competent in the use of these skills and able to recognize and disclose to his clients the limits of his expertise.

The theoretical arguments for clinical legal education have been well stated elsewhere and will not be repeated further here. With respect to the theory of clinical education, our central contention is that Langdellian case method teaching and clinical teaching are not in conflict. Properly used, each can be a successful means for achieving somewhat different and equally important purposes. Langdell's case method is well suited for teaching the rules and arguments of a case. The applied clinical case method is well suited for teaching law students to recognize and confront the ethical considerations in a given case, to analyze their implications for present and future actions, and to assume direct personal responsibility for making judgments consistent with professional standards.

---


15 See Cort and Sammons, supra note 14, at 379.

16 Barnhizer, supra note 9, at 76-79.

17 See note 6 supra.

18 See Keyes, supra note 1.

III. FROM CLINICAL THEORY TO CLINICAL PRACTICE

A. The Basic Tension

Despite numerous debates about its theoretical basis, our view is that the unresolved problem of clinical legal education is its application and practice, not its theory. When a law faculty decides to experiment with the clinical method, there are three basic models from which to choose. First, the program can use live cases with actual clients; second, it can use simulated case files and exercises; and third, it can use some combination of the two, mixing actual and simulated cases in various possible proportions. Because many, if not most, law school clinical programs depend primarily on the live client model for clinical instruction, the problems of that model will be analyzed.

In the live client model of clinical education, a law office is run in conjunction with the law school. The curriculum in this model is provided by an active law practice. The initial question, therefore, is whether law teachers are suited to performing the tasks necessary for conducting such a practice. The threshold problem is the conflict between the goals and means of advancement in the law school academic world and the demands of the practice of law.

Success in law teaching is understood generally to mean excellence in classroom presentation, research, publishing and community service. Success in the practice of law is equated with excellence in client representation as indicated by achieving clients' objectives through the use of lawyering skills. Clinical teaching requires that the attorney-teacher be committed to the goals of lawyering in a world where the governing peer pressure and operative goal structure are those of law teachers. Since law teachers are lawyers who have made a career choice not to practice law, it is logical that teachers and practicing lawyers will have different goals, and perhaps values. The decision not to practice law is itself a significant statement. The academic community measures value by a different, if no less exacting, standard than that applied to the practicing attorney. The problem for the clinical law teacher, for whom a law practice provides the basis for his teaching, is holding true to the values of a practitioner in an environment of competing, if not alien, values.

Dean Langdell's description of the qualifications of a law teacher

---


21 See Cahn, supra note 4.

22 A recent study shows that 25.7% of all present law teachers did not practice before pursuing an educational career. See Fossum, Law Professors: A Profile of the Teaching Branch of the Legal Profession, 1980 A.B.F. RESEARCH J. 501,510 (Table 4) [hereinafter cited as Fossum].
indicates how alien the legal academic world is from the world of legal practice:

What qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law. . . . 23

Dean Langdell's views may now sound somewhat exaggerated. Most contemporary law school deans would not totally discount experience in practice as a positive credential for teaching.24 Nevertheless, law schools are anxious to preserve their hard earned academic legitimacy; therefore, for the foreseeable future, the dominant values and influences in law faculties will be those of traditional, mainline, academic teachers, and not those of practice-based, lawyer teachers.25

The ideal clinical law teacher is a person with substantial successful experience as a practitioner, who not only has both the interest and the ability to teach, but who also wants to continue to practice law. The description suggests the problem—very few such idealized clinicians exist. If a person succeeds in the practice of law, he has found satisfaction in lawyering, in representing clients, and has found a way of coping with the problems and pressures which accompany practice. The likelihood of such a person being attracted to teaching is not great. If he is attracted to teaching, it is highly likely that he is motivated by a desire to do the things traditionally associated with law teaching: classroom instruction, research, scholarly writing and service to the profession. Thus, on ex-

23 Frank, supra note 6, at 908. President Eliot of Harvard was noted to have once boasted that the Harvard Law School was revolutionary because the faculty was compromised of a "body of men who have never been on the bench or at the bar." Id.

24 Yet the ABA has long held "that, on the whole, law school teaching can be most effectively done by those teachers who devote their entire time to teaching and legal scholarship." ABA, STANDARDS FOR LEGAL EDUCATION VI (1943).

25 As Gee and Jackson aptly describe, the "traditional career route for the legal scholar is from a high-ranking position in his law school class (preferably at a prestigious school and with law review experience), to a judicial clerkship and then to an assistant professorship in a law school." See Gee & Jackson, supra note 2, at 933. See also Fossum, supra note 22, at 530 (Table 14).

According to the Fossum study, twenty schools produced fifty-nine percent of all the law professors in the United States in 1975-76. The study concludes that the process that determines who will become a law professor is "elitist", and also may not be the best way to produce the lawyers needed to meet the country's varied legal needs. In order of the number of law professors they produced, the leading schools were the following: Harvard, Yale, Columbia, Michigan, Chicago, New York, Georgetown, Texas, Virginia, Berkeley, Pennsylvania, Wisconsin, Northwestern, Stanford, Iowa, Illinois, Minnesota, Cornell, Duke, and George Washington. Id. at 508-15.
amination, the notion of a clinical teacher is something of a contradiction in terms.

The depth of the contradiction is appreciated by asking why lawyers go into legal education. Admittedly, there are a variety of motivations, but a burning desire to continue to engage in the active practice of law is not one of them. While the practice of law carries with it tremendous potential rewards and satisfactions, it is very demanding work, involving the assumption of great responsibility for the well-being of one's clients, and can be physically, emotionally and intellectually taxing. The demands and satisfactions of academic legal work are quite different. A lawyer who leaves the practice to join a law faculty is motivated by a desire for a different experience, including enjoying the freedom and special opportunities of law teaching. It seems thoroughly logical and generally valid to say that a person who wants to continue to practice law will stay in practice and not go into teaching.

Because law teachers are no less susceptible to peer pressure than are people in other types of work, the method by which a clinical teacher gains the respect of his colleagues is to perform mainline academic work. The following hypothetical poses a dilemma familiar to clinicians:

In the course of an academic year, a hypothetical, conscientious, clinical law teacher will spend one hundred hours in his office talking to students individually about how to conduct an examination of a witness in preparation for various kinds of hearings. In that period of time, this conscientious teacher will have produced nothing tangible for which he will gain any academic recognition even if the result of his efforts is superb teaching and quality representation of clients. Not surprisingly, and in short order, this would-be clinician comes to understand this. He is then confronted with a choice between allocating his time doing things which are academically valued, such as publishable writing, or devoting himself to the inexhaustible time demands of clinical teaching and law practice. The latter choice is against his self-interest in terms of advancement and promotion in the academic world in which he now lives as it is contrary to what is valued in that world.

The simplest answer to this dilemma is to conclude that the clinical law teacher was hired to teach using the clinical method, and that he should continue to do so even if doing it well is against his self-interest. To expect that very many people are going to act against their self-interest and the values of their peers for any significant period of time ignores fundamental and largely universal traits of human nature.

---

26 Leleiko, supra note 20, at 161-65.
B. Implications of the Tension: Faculty Movement

1. Intra-Faculty Transfers

A predictable consequence of this basic tension is that the tenure of most clinical law teachers as clinicians is short, with the clinician being reincarnated either as a member of the classroom-teaching faculty or as a practicing lawyer who has left legal education. Clinical education has provided an alternative means of entry to law school faculties for persons who might not have otherwise gained admission. There "back door" entrants often do not possess the traditional law faculty credentials such as law review membership, judicial clerkship, and perhaps brief service in a prestigious law firm. This observation is not meant to suggest that those one-time clinicians who have entered faculties through this alternative route are not as qualified as those who came in with more conventional credentials. What is suggested, however, is that these "back door" entrants probably would have been denied admission based upon the traditional criteria and, therefore, would not have become members of law school faculties. The justification for barring admission to legal academe of those not holding the traditional credentials would be that the absence of such credentials indicates, in Langdell's phrase, lack of "experience in learning law," that is, the person was not suitable for academic legal work.

This "back door" phenomenon is consistent with the thesis that lawyers motivated to join law school faculties do not do so because they want to practice law, but rather because they want the life of teaching in the traditional sense. From the standpoint of realizing the potential of clinical education, the problem is that there are few people who actually want to be clinicians. There are, however, people willing to be clinicians because they want to join law school faculties and who perceive clinical education as a means to that end.

---

27 See Appendix A infra at 713.
28 See Fossum, supra note 22, at 509.
29 See Gee and Jackson, supra note 2, at 933. See generally Boyer and Cramton, American Legal Education: An Agenda for Research and Reform, 59 CORNELL L. REV. 221 (1974).
31 The sharp difference between what people want to do and what they are willing to do can be observed at the annual recruitment meeting of the Association of American Law Schools. There, anxious job seekers list clinical education as an area of teaching interest seemingly as a means of securing interviews because they know it is an area in which teaching positions are more often available due to high-turnover and expansion. Once these presumed clinicians are in the interview room, their commitment to clinical education can be tested by asking them their teaching preference between clinical teaching and classroom teaching. The authors ran this informal test with a random and limited sample of persons interviewed at the December, 1979 recruitment session. The results were not encour-
One possible solution to this problem of clinicians exiting the clinic to join the "regular" faculty is to restrict intra-faculty mobility from clinic to classroom. The rationale for such a restriction is simply that it is both fair and reasonable to expect an individual hired to do clinical teaching to fulfill the role he was hired to perform. This degree of internal discipline operates in other academic disciplines. For example, a professor hired to teach English literature cannot announce an interest in teaching German and expect to be taken seriously. Despite the pristine simplicity of the rationale for such a system of controlling mobility, it is difficult to imagine it working effectively in most law schools in the United States. Law schools tend to be run on a theory of academic laissez-faire which is supported by two closely related myths: 1) that law teachers are academic generalists and 2) that all academic activities have equal worth. These two myths support a well-entrenched structure of decanal decision-making and professional expectation. Because this system of academic freedom operates for the law school classroom teacher, equality of treatment dictates that it should also operate for the clinician.

2. The Frustrated Practitioner

Many one-time clinicians, who do not assume a role on the traditional faculty, leave legal education entirely. While the subsequent career patterns of these individuals are more difficult to follow than those who graduate from clinic to classroom, one would expect that most of those who leave legal education return to the practice of law. This movement indicates that there is a significant problem in retaining a lawyer's interest in teaching basic legal skills through the use of rather simple cases. By definition, cases appropriate for law students in which they can ethically assume major responsibility for the representation of the client are relatively routine. There is an inverse relationship between a case's complexity and its suitability as a vehicle for clinical education: the greater the case's complexity the less actual responsibility for it can be taken by a student. A corresponding increase in complexity may make the case of greater interest to the experienced faculty supervisor, aging for the future of clinical education. Without exception, the candidates' clear and expressed preference was classroom teaching over clinic. These same candidates were willing to accept positions in the clinic only as a means of obtaining a faculty appointment otherwise unavailable to them. The effectiveness, longevity and commitment of such persons as clinical teachers is highly questionable.

32 See Appendix A (Table 1), infra at 713.

33 A complex case is one involving an extensive fact pattern, significant pre-trial work over a protracted period, including discovery and legal research on procedural and substantial matters raising novel legal issues, leading to a trial and perhaps an appeal.
but render it less suitable for instructional purposes.

The dimensions of this particular dilemma are appreciated by reference back to the first qualification of a clinical teacher, namely, some depth of experience as a lawyer. A lawyer's intellectual growth comes from change and challenge in his practice, not stagnation and repetition. Most cases handled by law school clinical programs do not offer much intellectual challenge. From the standpoint of educating students, the presumed raison d'être of clinical education, that is how it should be. Routine cases may well, and indeed should, present challenging educational opportunities which the faculty supervisor can pursue with the student. That possible source of intellectual stimulation brings the matter full circle and back to the initial proposition: the motivation to join a law school is an interest in teaching and scholarship, not practice.

C. Other Problems

There are other factors which operate on the clinical supervisor to make alternatives to clinical work appear highly desirable. These include the pressures of practice without the intellectual or financial reward, the administrative responsibilities of running a law office which frequently include fund-raising to sustain the program, lower pay than academic colleagues, and a sense that one's career advancement is not keeping pace with that of one's contemporaries. Some of these problems, such as salary inequities and career advancement, can be remedied rather easily if law schools decide to treat clinicians the same as their classroom counterparts. Some of the other problems, such as the pressures of an unrewarding law practice and burdensome administrative responsibilities, are inherent in the live client model. These

---

34 An example from our shared experience as clinical supervisors illustrates this rule of inverse relationship. In one instance, our clinic represented the plaintiff in a federal civil rights action against a municipal police officer. The legal theories of liability and damages were fairly straightforward, but factually the case was complicated. Predictably, the case did not come to trial before a jury until more than a year after the complaint had been filed, and months after discovery had been conducted. The students who had participated in the initial witness interviews and the taking of depositions had graduated, an entirely new group of students was in the office at the time of the trial, and yet another totally different group arrived in time to assist with the brief on appeal. Under these circumstances, all of which will occur in a case of even modest complexity, it is unrealistic to talk about a student having primary responsibility for the case. For the student's benefit, the answer to this problem is to select cases for their educational value, not their legal merit or complexity. For a description of a "faculty-litigator" clinical model organized around significant complex law reform litigation, see Meltsner, Clinical Education at Columbia: The Columbia Legal Assistance Resource, 24 J. LEGAL EDUC. 237 (1972).

35 See notes 20-26 supra and accompanying text.

36 Barnhizer, supra note 20, at 1033-34, 1034 n.17.
tensions will persist so long as clinical programs rely primarily on that model as the method of instruction.\textsuperscript{37}

What does this line of argument suggest about the problems of continuity in staffing clinical programs? It projects the need to identify clearly the forces which draw people into clinical legal education and then drive them out. The assumption made throughout this analysis is that high turnover of clinical teachers is a sign of weakness in clinical programs. Turnover does have the positive consequence of bringing new people with fresh ideas into a program, but the negative impacts of the continual loss of experienced clinical teachers substantially exceed the creative benefits gained from new staff. This continuous process of renewal is actually an enforced effort to rediscover, if not reinvent, the "wheel" of clinical education. This process is inefficient and educationally counterproductive because the program loses the experiential learning of the teacher. If this view is correct, lack of continuity is an objective measure of the failure of clinical programs, and accordingly an immediate goal of most clinical programs should be to establish stability and continuity in their teaching staffs. This goal will not be achieved without resolving the contradictions in the role and motivations of the clinical teacher.

In addition to the staffing problem, there are other reasons why law schools are not well suited to being in the legal delivery-system business. One reason is that the periods of high activity of live cases involving real people as clients, opposing parties, opposing counsel and judges do not correspond to the artificial constraints of the academic calendar. For thoroughly legitimate strategic and other reasons, cases may lie dormant during the academic term when students are available and in need of work, and then spring to life during examination or vacation periods. The pattern of work on cases cannot be controlled to assure that each student has experiences which raise a sufficient set of problems to satisfy the clinical program’s educational objectives for that student.\textsuperscript{38}

A further reason why law schools are not well-suited to being in the law business is the absence in law schools of the necessary support service infra-structure and financial resources to conduct an active law practice. While law schools have typewriters and typists and copy machines and operators, these always scarce resources tend to be allocated to facilitate the production of traditional academic legal work. In its rawest form, the value conflict between academic teachers and

\textsuperscript{37} The implementations of clinical standards by law schools may contribute towards ameliorating some of the problems we have identified. See e.g., AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980).

\textsuperscript{38} Not unlike their clinical instructors, clinical students are caught at times in a conflict between their academic obligations to other courses and their
clinicians manifests itself in a lively debate over whether on a particular day scarce secretarial resources should be used to type a draft of a brief for court or a draft of an article for a journal. The dominant institutional bias of legal education favors the article over the brief.

Another dimension of this resource problem is that it costs a substantial amount of money to carry on a law practice and the clients of clinics are usually financially needy persons who do not have the funds to pay their case-related expenses. Funds are needed for depositions, expert witnesses, subpoena fees, and in some jurisdictions, filing fees. Law school budgets are tight and likely to become increasingly so. The kind of money needed to handle competently a caseload, particularly a litigation-oriented caseload, has not been allocated by most law schools in the past and there is little reason to believe sufficient funds will be budgeted for such purposes in the future. The reason for the lack of funds is that law schools are unwilling or unable to commit themselves to pay whatever is required to assure that the cases of indigent clients are handled at the high level of competency demanded by the Code of Professional Responsibility. That commitment would be a very expensive one. The usual compromise has been for law school clinics to assume the representation of poor people and then not have the funds to prepare the cases properly. The result of this "compromise" is often to demonstrate to students how not to handle a case, rather than showing them legal practice at its best.

A number of law schools in the United States have sought to solve some of the problems of the live client model by placing clinical program students in law offices outside the law school. Students have been placed in the offices of legal aid branches, public defenders and prosecutors. The greatest disadvantage of this approach is that it

ethical obligations to clients and cases. Court calendars have no respect for law school class schedules. To take a common example, suppose a student has a court hearing with a client on Tuesday morning and a continuance is either not possible or not in the client's interest. Suppose further that the student has an examination on Tuesday afternoon and a continuance of the examination is similarly unavailable. Should the student spend Monday afternoon and evening preparing for the hearing or studying for the examination? The academic law teacher would be expected to answer the question one way and the clinician the opposite way. An unsatisfactory resolution of this dilemma is to relieve the student of the conflict by having the clinical instructor conduct the court hearing. Quite clearly, that approach defeats the purpose of having a clinical program.

39 See Munger, supra note 1.

40 ABA, CODE OF PROFESSIONAL RESPONSIBILITY (1977).

41 For an example of a "farm-out clinic" at the University of Miami see Panel Discussion, supra note 14, at 616-21 (presentation of Professor Anderson) See also Campbell, Training Law Students Outside the Classroom, 26 J. LEGAL EDUC. 208 (1974) (decribing Northeastern University's "cooperative education" program);
transfers the teaching responsibility from a member of the law faculty
to a practitioner who is not a professional teacher and perhaps does not
have the time, interest or inclination to teach. "Farm-out clinics" sit
apart from the primary academic work of the law school. The symbolism
of separation which places teaching responsibility on persons outside
the faculty, who have no long-term commitment to the law school, is not
lost on students. Often, the message received is that clinical work is dif-
f erent from and perhaps less important than work in school with
members of the faculty.\(^\text{42}\) Thus, the primary goal of clinical education, to
have students see the relationship between the study of law and the ap-
lication of that study, is defeated because the clinical program is barely
visible within the life of the law school.

This critique of the live client model of clinical education should
make it clear that this application of the methodology will not work. The
reasons why it does not and will not succeed are there to be seen in
the career patterns of one-time clinicians, the budgets of most law
schools, and in the motivations of individuals entering legal education.
Our position is that minor tinkering will not resolve these deep and
ultimately fatal considerations in this model of clinical education.

IV. A PROPOSED RESOLUTION

A resolution of these contradictions should preserve the essence of
clinical education while attempting to solve the identified problems.
The essence of clinical education is the active participation and
involvement of law students in the performance of lawyering tasks. It
is through such active participation, as distinguished from the rather
passive role assumed by students in the classroom, that a student is
forced to integrate concepts, make decisions, articulate and defend
positions, and see the law as more a process than a set of rules. This
essential character should be preserved and its place in the scheme of
legal education expanded, as it is an important complement to other
methods of teaching.

However, active participation does not require primary reliance on
actual cases. The client-service aspects of these problems can be solved
by getting law schools out of the practice of law while continuing to do
clinical teaching. The issues, skills, and methods of instruction which
clinical education seeks to incorporate into legal education can be ac-
complished through well-designed simulations. Carefully drawn exer-
cises can raise virtually any problem of lawyering and provide the

\(^{42}\) H. PACKER & T. EHRLICH, supra note 8, at 37.
material for analysis and use of the skills involved. Simulated cases can effectively raise problems of issue identification, legal analysis, preparation of documents, decision-making, negotiation and advocacy.

While it may be true that simulated cases raise the central problems of lawyering in a less genuine fashion than do real cases, such a point is trivial if there are few, if any, law teachers willing to teach for any extended period using actual cases. It is of little consequence that live cases are in some respects better teaching vehicles than simulated cases if the teachers to use these so-called better materials do not exist. Simulated materials provide a manageable form through which clinicians can teach about lawyering and the problems of case development without incurring the substantial costs associated with the responsibility of running a law office.

There are certain educational advantages in using simulations instead of live cases. With simulations the teacher can determine the educational objectives to be achieved and then build these objectives into particular moot exercises. In addition to the more familiar trial advocacy exercises, a clinical teacher can develop simulations to give students systematic instruction in planning and strategizing the solution of a legal problem. The central skills of legal problem solving and systematic planning can be taught through exercises which emphasize questions such as "what is the goal of the lawsuit" and "why are you calling this witness." These exercises could also be used to teach how to examine this witness and what questions to ask once a reasoned decision is made to initiate a lawsuit.

There are, however, genuine losses incurred by teaching through simulation rather than through the use of actual cases. The losses include the experience of direct client contact, responsibility for the resolution of spontaneous actual problems of professional ethics, and exposure to the intractable awkwardness of the judicial system. To appreciate the substantiality of these losses one need only assume the perspective of a consumer. As consumers of medical services, most people are grateful that the standard medical curriculum includes patient contact prior to graduation from medical school. The absence in legal education of comparable contact with clients is an important loss.

Given the described limitations of law teachers as active teacher-practitioners, how might these losses be minimized? Supplementing a core clinical curriculum of simulations with an extremely small, discrete and well-selected caseload should be sufficient to obtain most of the benefits of having students exposed to real cases without creating the problems which come with a large caseload. To have

---

43 See Panel Discussion, supra note 14.

44 A small caseload would be three to five cases per supervising attorney.
such a small caseload, a clinical program cannot hold itself out to the world as a comprehensive client-service office. These few cases should be obtained by direct and well-controlled referrals from agencies and courts.

For the past two years, for example, the clinical program at Cleveland State University has been representing petitioners in federal court post-conviction cases. These cases have come to the clinic by appointment from the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit. Under the terms of the arrangement with both courts, before making a referral the court screens the case to make a threshold determination that it has some merit. Then, prior to a clinic attorney being formally appointed, the clinic staff reviews the pleadings and record to decide whether to accept it. Students are directly included in this process by requiring them to develop a statement of the facts and law of the case, focusing the legal issues, evaluating their merit, and identifying potential problems. This memorandum is the device used by the faculty and students to decide whether to accept the case. The case selection exercise not only is a necessary corollary to limiting the clinic’s docket, but also exposes the student to the important lawyering skill of case evaluation.

Obtaining cases by closely regulated referral limits their number and improves their quality as vehicles for clinical teaching. A law school clinical teacher is better suited to operate successfully with an active caseload of about five cases, raising substantial legal issues rather than complex factual ones, and supplemented by a set of simulated problems, than he is to operate with an active caseload of fifty or more live cases. No doubt some will argue that this method of acquiring cases is artificial and likely to obtain real cases as far from reality as the simulated ones. That argument misses the central purpose of clinical education: The goal is not to replicate reality with all its problems, but to educate. Given this goal, a teacher is not only allowed but required to choose selectively the materials from which he will teach so as to maximize the learning potential of the limited amount of time available. Furthermore, the substantial distractions of competently handling a large caseload can interfere with the performance of the teaching function, which is the faculty member’s primary academic responsibility.

The resolution of the contradictions of clinical education will be found by asking again the bedrock question: What is the purpose of clinical education in the overall plan of legal education? Answering that ques-

45 See Appendix, Clinical Summaries, 29 CLEV. ST. L. REV. 746 (1980).
found by asking the bedrock question: What is the purpose of clinical education in the overall plan of legal education? Answering that question in the negative, the purpose is not to serve as many clients as possible or to produce accomplished lawyers. While both of those goals are worthwhile, the first is not the responsibility of legal education, nor is it within the capacity of most clinics, and plainly the second cannot be accomplished by a brief and somewhat superficial exposure to a few cases in the final year or so of a student's formal legal education. Becoming an accomplished lawyer is life's work. At best, a student's law school work in the classroom and in a clinical program is a start in the direction of becoming an accomplished lawyer.

The appropriate and limited goal of clinical education is to teach a set of professional attitudes about law, lawyers and lawyering. These attitudes include a perspective on how law is made, the central place of facts in the development of law, how lawyers influence legal development, and how and where lawyering skills should be applied. Students should emerge from a clinical experience with an appreciation of the range and complexities of the skills involved in being an effective attorney. This statement of goals for clinical education reads like a statement of goals for legal education, and that is as it should be. Clinical education is not a goal or an end in itself, but a method of instruction which can contribute to the achievement of the underlying goals of legal education.

V. CONCLUSION

The question of whether there is a need to "clinicize" legal education should be answered in the affirmative. The need for substantial change in legal education is suggested by the wide-spread criticisms of the profession's competence and integrity. These are among the greatest problems confronting the legal profession, and law faculties must respond to them by appropriately altering the curriculum which will be used to train the next generation of lawyers. The thoughtful use of clinical methodology is the most effective way to remedy these problems.

Legal education is not the sole cause of the large and costly problem of lawyer incompetence, but it is a contributing cause and the law schools must accept responsibility for that portion of the problem which they are capable of solving. Failure to do so will result eventually in persons other than legal educators mapping the future of legal education.\(^4\) Law schools and law teachers will not long be able to convince the public or the judiciary that all fault lies elsewhere and that major change is not required in legal academe.

Clinical education will start to find its place within the soon-to-be

\(^4\) See, e.g., IND. S. C. R. 13 (V)(C) which imposes requirements for law students desiring to sit for the Indiana Bar exam. This rule was promulgated by
changed world of legal education when it is recognized that what law teachers are good at doing and what they want to do is teach, not practice law. Decisions about the future of clinical education should be made to capitalize on this interest in teaching. Educationally effective clinics will remain an impossible dream if they are viewed as analogous to the much and rightly admired teaching hospital. The history of law school clinics indicates that this analogy is misleading for there is a total lack of evidence that any clinicians are willing to staff the "teaching law firm" on any basis resembling permanency.

The theoretical premises underlying the claims for individualized and direct contact between law student and legal problems are valid. The question is how best to provide this contact. The proposal here is to preserve the essence of clinical education while moving away from primary reliance on the client-service model. The costs and constraints of that model are too great, the faculty-attorney turnover rate too high, and the benefits of the model too attenuated. The same educational needs may be met through methods which do not carry these same high costs and which maximize the interest of clinicians in teaching.

The use of simulation has not been explored adequately in legal education. Simulated exercises can be written which raise problems of
issue identification, development of a problem solving strategy, negotiation, as well as the more familiar problems of trial and appellate advocacy. The raw material for writing such exercises is available in the previously handled and current case files of every clinical program. The loss of reality and client contact which accompanies the use of simulated material can be minimized by supplementing the core curriculum of simulations with a very small and carefully selected case-load.
Appendix A

A Statistical Profile of Clinical Law Teachers, 1968-80

The objective of this study was to track the vocational histories of clinical instructors. The primary purpose of the research was to determine whether clinical teachers continue to pursue clinical teaching, seek a non-clinical academic career, or pursue some other career outside legal education. The careers of three hundred clinicians, randomly selected, were examined for the period 1968 to 1980. The study found that a significant portion of this study group did not actively pursue their original career—clinical instruction—but instead chose to teach other subjects at law schools or left legal education entirely.

The study was conducted by examining the AALS, DIRECTORY OF LAW TEACHERS starting with the 1968 to 1972 editions. The names listed under the subject heading "clinical teaching," whether they represented persons actively teaching in the clinic or not, were followed through subsequent volumes of the directory concluding with the 1979-80 edition.

Once data was compiled concerning the subsequent activities of the participants in the study, the names were put into a group to match their status as of 1980. The first group included all instructors who were teaching other subjects at a law school and were no longer actively teaching by the clinical method. This group also included those teachers who, though no longer actively teaching in a legal clinic, still desired to be identified with clinical teaching. The second group comprised those teachers who were not listed in the directory and were presumed to have left teaching to pursue other careers. The third group included those persons who were actively teaching by the clinical method. The fourth group was made up of those clinicians who went on to teach other subjects and then left teaching altogether.

The overall average tenure for those teachers actively involved in clinical teaching was approximately five (5) years. Excluding Group III, however, the average for the remaining groups, which constituted over seventy percent (70%) of the total, was approximately three (3) years. A substantial portion of the teachers studied—almost forty percent (40%)—no longer actively taught in a legal clinic and went on to teach other subjects in the law school. Combining Group II with Group IV, approximately thirty-two percent (32%) left the teaching profession altogether. The remaining twenty-nine percent (29%) were actually involved in clinical teaching as of the 1979-80 school year. Of those doing clinical teaching during the 1979-80 academic year, the overwhelming majority had continuously taught in a legal clinic from the time they first entered the study period until the present. Interestingly, Group I(A) (see Table II) and Group III, a little over fifty-two percent (52%) (158 out
of 300) of those studied, still associate with clinical teaching in some manner.

Biographical material listed in the directory was also obtained on each member included in the study. Although there were insufficient resources to obtain a composite background sketch for each group, several observations can be made. First, the subject of clinical teaching or legal clinics was a recent development in law school curriculum in 1968. Many schools had not, as yet, developed any clinical program. The teachers who worked in the program in those first years seemed, on the whole, to be older than present clinicians with much more experience either in practicing law or in teaching. The teachers in those first years also seemed to have worked in similar programs outside the law school. In contrast, the present clinician appears to have less overall experience. Many have only recently graduated and been admitted to the bar shortly before they began clinical teaching.

One final observation bears mentioning. Eighty-four (84) members of the study received some type of law degree from an Ivy League institution, principally Harvard, Yale and Columbia. Looking at each group separately, Group I has thirty-six percent (36%) of its members graduating from the Ivy League while Group II had a similar percentage. Group III had twenty-five percent (25%) of its members and Group IV had twenty-six percent (26%) of its members receiving degrees from these schools. Interestingly, more than half of the total number of all persons graduating from those schools in the sample studied were categorized in Group I—those who left clinical education to pursue a more traditional academic career. Overall, seventy-one percent (71%) of the three hundred clinical teachers included in our study left clinical teaching altogether.
TABLE I

<table>
<thead>
<tr>
<th>CLASS</th>
<th>NUMBER</th>
<th>PERCENTAGE OF TOTAL</th>
<th>AVERAGE YEARS SPENT TEACHING CLINIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>GROUP I</td>
<td>118</td>
<td>39.3%</td>
<td>3.4 yrs.</td>
</tr>
<tr>
<td>GROUP II</td>
<td>68</td>
<td>22.7</td>
<td>3.6</td>
</tr>
<tr>
<td>GROUP III</td>
<td>87</td>
<td>29</td>
<td>8.6</td>
</tr>
<tr>
<td>GROUP IV</td>
<td>27</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>TOTALS</td>
<td>300</td>
<td>100%</td>
<td>4.4 yrs.</td>
</tr>
</tbody>
</table>

GROUP I - Left teaching clinic and went on to teach other subjects.
GROUP II - Left teaching clinic and left teaching altogether (no longer listed in the Directory).
GROUP III - Those who were actively teaching clinic as of 1979-1980 school year.
GROUP IV - Went on to teach other subjects and then left teaching altogether.

TABLE II

BREAKDOWN OF GROUPS I AND III

<table>
<thead>
<tr>
<th>CLASS</th>
<th>NUMBER</th>
<th>PERCENTAGE OF THE MAIN GROUP</th>
<th>PERCENT OF THE WHOLE</th>
<th>AVERAGE YRS. SPENT TEACHING CLINIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>GROUP II(A)</td>
<td>71</td>
<td>60%</td>
<td>23.7%</td>
<td>3.7 yrs.</td>
</tr>
<tr>
<td>GROUP III(A)</td>
<td>62</td>
<td>77%</td>
<td>20.6%</td>
<td>9.4</td>
</tr>
<tr>
<td>TOTALS</td>
<td>133</td>
<td>64.9%</td>
<td>44.3%</td>
<td>6.4 yrs.</td>
</tr>
<tr>
<td>GROUP III(B)</td>
<td>25</td>
<td>23%</td>
<td>8.4%</td>
<td>7.4 yrs.</td>
</tr>
<tr>
<td></td>
<td>158</td>
<td></td>
<td>52.7%</td>
<td>6.7 yrs.</td>
</tr>
</tbody>
</table>

GROUP I(A) - Those while not actively teaching clinic wished to be associated with clinical teaching.
GROUP III(A) - Those who actively taught clinic from the time they came into the study period.
GROUP III(B) - The remaining members of Group III; they were teaching clinic as of 1979-1980 but have not taught it continuously for the study period.
### TABLE III

**BACKGROUND: WHERE GROUP MEMBERS OBTAINED A LAW DEGREE**

<table>
<thead>
<tr>
<th>GROUP</th>
<th>No. of Members Receiving Law Degree from An Ivy League School</th>
<th>No. of Members in the Group</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>GROUP I</td>
<td>43</td>
<td>118</td>
<td>36%</td>
</tr>
<tr>
<td>GROUP II</td>
<td>12</td>
<td>68</td>
<td>18</td>
</tr>
<tr>
<td>GROUP III</td>
<td>22</td>
<td>87</td>
<td>25</td>
</tr>
<tr>
<td>GROUP IV</td>
<td>7</td>
<td>27</td>
<td>26</td>
</tr>
<tr>
<td>TOTAL</td>
<td>84</td>
<td>300</td>
<td>28%</td>
</tr>
</tbody>
</table>