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Clinical Education in the Seventies: An Appraisal of the Decade

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PRESENTATION TO THE CLINICAL SECTION OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

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I

The 1970s was the decade of the clinic. In the early years clinical courses were few in number and marginal to the law school curriculum. Traditional faculty opinion was suspicious or negative, resources were patched together from "soft" sources, and people who directed these programs worked in obscurity and alone. Ten years later almost every law school has a clinical program, and many schools have several. Funding comes from general law school revenues, traditional faculty opinion is accepting, and sometimes enthusiastic, and clinical teachers are treated as full members of the faculty (i.e., they are eligible for tenure, are tenured in some instances, and are paid equivalently to traditional faculty). While all is far from rosy—there are exceptions to each of the above statements—at the organizational level the clinical education movement has been immensely successful.

This success has not been without costs, however, and it is one of those costs I would like to discuss today. In our zeal to establish ourselves physically and financially we have neglected the intellectual dimension of our work. We have not developed a theory that allows us to criticize, in a fundamental way, the existing arrangements and procedures of law practice and legal instruction (including clinical legal instruction). We have allowed our potentially important contributions to these fields to become mechanical and technical, and to remain at the level of "methodology." Even at this level, our lack of a critical perspective has caused us to replicate many objectionable practices to which our movement was a reformative response. We have lost sight of our roots, our objectives, and our potential, and we do this at our peril.

I shall develop these themes by describing the thesis of my recent article "The Moral Failure of Clinical Legal Education,"[1] and elaborating on my

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1. Robert J. Condlin, The Moral Failure of Clinical Legal Education, *in* The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, ed. David Luban (Totowa: N.J.: Rowman & Allenheld, 1983).

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proposals for reform. While I criticize particular characteristics of clinical teaching, I am not critical of clinical education itself, and I do not suggest that the idea has failed. Just the opposite: I consider clinical education to be an effective method of instruction, particularly for the teaching of ethics. But I also believe that many existing clinical programs are often ineffective and sometimes harmful. It is the present reality and not the potential of clinical instruction that I discuss.

My thesis is this: Clinical teachers—in the way that we instruct—teach students to manipulate and dominate others as a matter of habit. We teach these processes not as part of a larger set of communicative practices that include ways to cooperate and share power with others or in the context of a moral or political theory, but as a complete repertoire of interactional skills. In addition, we teach these habits un-self-consciously, and thus have no methods for becoming aware of their presence or controlling their operation. Evidence for these conclusions comes from transcripts of supervisory meetings between clinical teachers and students; I discuss that evidence in an earlier article.[2]

II

The patterns that I have discovered in clinical instruction are these: We compete with students over the authorship of ideas and the solution to problems; we conceal our ends and strategies for achieving them; we attribute incorrect meanings to ambiguous statements by students, and evaluate those attributed meanings (and the students) negatively; we argue for preferences subliminally, indirectly, and sometimes hyperbolically; we suppress strong feeling, even when relevant to solving the problem at hand; and when necessary, we use our authority unilaterally to cut off discussion and suppress the investigation of differences of opinion. In effect, with the aid of subtle manipulative techniques, we take advantage of the power that the law school social structure places in our hands to impose our views on students, or at least compel students to act as if our views had been imposed. Most important, we do these things pervasively, seemingly as a matter of habit, without regard to their necessity or appropriateness.

These practices reflect a kind of instrumental world view that speaks more loudly about what we believe than our rhetorical protestations to the contrary. In this view, relationships are competitive, choices are strategic, questions are technical, and little room is provided for explicit consideration of politics or morality. Success in teaching seems to consist in having students follow our lead, in solving problems within our frames of reference (which may well differ from teacher to teacher).

These practices would be of little consequence, and might even be helpful, if we did no more than teach about adversarial technique. But one of our important functions, one we can perform more effectively than traditional legal instructors, is teaching about ethics. We can help students analyze real ethical dilemmas and cultivate habits of behaving consistently with those analytical resolutions. Yet the instructional practices I have just described

2. Robert J. Condlin, Socrates's New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction, 40 Md. L. Rev. 223 (1981).

are often destructive of ethical reasoning. The essential nature of reasoning about ethics is that it tries to universalize. It appeals to norms that apply to all people in all situations. An ethical actor looks at questions from the perspective of others' as well as his own.

In this dialogue, actual or imaginary, participants make explicit their ends and the means for achieving them. They evaluate ambiguities, inconsistencies, contradictions, illogicalities, and the like in one another's statements, and pursue this process until an uncoerced and rational consensus is reached, a consensus that is not principally or unknowingly a product of ideology, rhetoric, status, power, or particular political arrangements. Participants in ethical dialogue also are self-critical. They turn the standards they apply to the outside world—and for clinical teachers that would mean the standards we apply to traditional law teachers and lawyers—back on themselves, and with equal enthusiasm. In short, ethical dialogue tries to arrive at a critical, rational consensus about the legitimacy of ends and the relationship of means to ends. This kind of dialogue contrasts sharply with the dialogue that I have seen in clinical supervision.[3]

III

The reasons for our instructional practices are difficult to specify. For the most part we are critical of manipulation and domination when they appear in traditional legal education and law practice. In fact, much clinical literature discusses, in different ways, the harmful effects of these very practices. It is paradoxical, therefore, that we would simultaneously use and criticize the same practices.

This happens, I suggest, because of three characteristics we possess as a group. First, we do not have a sophisticated understanding of domination and manipulation. Thus, we do not recognize these processes in all of their manifestations, particularly their more subtle forms. We see them in certain standard places where they are generally reputed to exist (e.g., traditional law classrooms), or in their more graphic variations (e.g., the belligerent or overbearing lawyer), but because we understand the processess in rough ways, we are not good at identifying unfamiliar strains.[4]

3. Our manipulative communication practices undermine our teaching in that our students may view these practices as models and attempt to emulate them in relationships with clients. The relationship between lawyer and client is similar in relevant respects to the relationship between teacher and student. The major difference, of course, is that in law practice the student (as lawyer) is the teacher. Thus, it is reasonable for students to behave toward clients as they perceive their teachers to have behaved toward them. Even if the transferrence of clinical communication practices is not so direct, if instead, students simply imitate our style to protect themselves in conversations with us, such imitation develops habits, and habits can easily develop into values. If this happens, clinical communication practices would be transferred into law practice by a more circuitous but just as certain a route.

4. As evidence of this point compare the most popular clinical treatment of domination and manipulation, the book on interviewing and counseling by David A. Binder & Susan C. Price, Legal Interviewing and Counseling (St. Paul, Minn.: West Publishing Co., 1977), with the treatment of the same topic by Robert Burt, Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations (New York: Free Press, 1979). The differences in theoretical sophistication are monumental. I recognize that these books are different with different objectives. But for most clinical teachers Binder & Price represents the limit of their psychological understanding of domination and manipulation.

Second, for all of our advocacy about critical self-reflection, we are not critically self-reflective. Rarely do we write critically about ourselves and the patterns that appear in our teaching and practice. Moreover, if we tried, our theories of instruction and lawyering would be of little help, as they contain few conceptual categories that facilitate self-criticism.

Third, we do not have research methodologies that produce data about our teaching in such detail and with such clarity that our manipulative patterns cannot be missed. The absence of this data cuts us off from one more source of self-knowledge, and we remain ignorant of our teaching practices and their effect on our students.

IV

How could these characteristics develop? Four explanations occur to me. First, clinical teaching is structured so as to prevent the development of critical theory, research methodologies, and self-knowledge. Most of our time is spent working on cases, and little is left for intellectual investigation. This is not so much an explanation, however, as a symptom. The design of a world in which there is little opportunity to develop critical insight is *prima facie* suspect, and must itself be justified.

The second explanation is the widely held traditional law teacher belief that clinical teachers have nothing of interest to say about the operation of the legal system. This view is based on two facts: As a group, clinicians did not do as well in law school as traditional faculty, and clinicians do not write. This view is obviously not true about those clinical teachers who have something to say and have said it in articles that compare favorably with traditional scholarship. (The size of this group is debatable, but it is a real group nonetheless.) But more important, the "nothing to say" view is self-serving and question begging. It assumes that the intellectual standards of traditional legal instruction are the proper standards for determining the worth of intellectual activity. The question that is begged—whether the intellectual activity in clinical teaching is less sophisticated—must be debated, and its answer cannot be assumed, either way. That debate has yet to occur. (To the extent that the "nothing to say" view is true in particular instances, it says nothing about clinical education in general. There are traditional law teachers who have nothing to say, yet no one would conclude from this that their fields are intellectually bankrupt. The argument makes a leap from particular cases in one class to a different general class, and the leap is unwarranted.)

There is an important message, nonetheless, in the "nothing to say" view. By failing to write about our work, we reinforce the belief that we have nothing to say. Traditional law teachers logically assume that a person with insights into the legal system will share those views, and that a failure to do so is evidence of the lack of insight. The "nothing to say" view may be wrong, but it is not unreasonable.

The third explanation for our instructional practices is that the teaching of adversarial skills gets carried away. Among other things, clinical work teaches students to compete against others on a client's behalf. Because real client interests are at stake, teaching about competition takes priority over

teaching about collaboration. In a semester, fewer interests are sacrificed if a student competes aggressively, even if against both an adversary and a client, than if he cooperates with both.

Preferably, of course, students should learn to compete against adversaries and cooperate with clients. But that is often not an option. Learning to compete and to cooperate are each involved and difficult processes, which consist in the development of habit as much as the understanding of ideas. Habits take time to develop and a semester is rarely long enough. When we begin the semester (understandably) teaching about adversarial skills, therefore, often an indirect effect is that we leave insufficient time to study cooperative skills. It is like having three points to make in an oral argument, and getting only to the first, because the court took longer to digest the argument than one had expected.

The final reason to explain clinical instructional practices is a form of role confusion. Most of us conceive of our role as that of practicing law jointly with students. Together with students we try to achieve client ends. We describe and demonstrate appropriate ways of performing typical lawyer tasks, and criticize student attempts to implement our suggestions and emulate our behaviors. This is perfectly adequate as a conception of practicing law, and as a conception of training students in technical lawyer skills. But as a conception of teaching about law practice, it is missing a critical perspective. In teaching we have an obligation to do more than pass on received technical wisdom, even at levels of excellence. We must also criticize that wisdom for its ideological properties, and the ways in which it contributes to justice or the lack of justice in particular cases.

This critique should be substantive as well as procedural. We should be concerned with the ways in which existing distributions of resources, race, class, and sex influence outcome in litigation as much as we are with the influence of lawyer skill. Teaching about technical excellence at manipulating existing procedural schemes condemns our politics to a *status quo* conservatism.

Our failure to have a critical perspective is a serious concern. Critique is a special obligation of a legal academic. We are given time and resources to step back from standard ways of doing things and conceive of alternative approaches that have some greater claim to justice. More than marginal technical alterations (devising a better list of questions for the litany at the beginning of a deposition, for example), we are encouraged to produce fundamental reconceptualizations of law practice.[5] Instead, we have catalogued the characteristics of excellent law practice and made marginal and to a large extent *ad hoc* criticisms. But we have not looked at those practices in

5. Such critique is perhaps illustrated by Roger Fisher and William Ury's new book on negotiation, Getting to Yes: Negotiating Agreement without Giving In (Boston: Houghton-Mifflin, 1981). In this book Fisher suggests that positional bargaining and zero-sum competition are outmoded concepts with with to explain or conduct legal negotiation. This may be a radical idea. If Fisher is right, he will change most of what is now taken for granted in bargaining analysis. It is too soon to say whether he will succeed but Fisher has identified a new and potentially illuminating conception of legal bargaining, and made important strides in giving substance to this conception.

fundamentally new ways, or from the perspective of critical political or philosophical theory.

Our failure to take a critical view not only isolates us from our best traditional colleagues but also guarantees that clinical instruction will die out. One can teach about a subject for only so long without amending, rewriting, or repudiating one's initial ideas. At some point ideas become commonplace. When this happens to an individual that person no longer has anything of interest to say. When it happens to an entire field of study the field dies.

Clinical teacher role confusion has other consequences. One is that clinical education, as a curriculum reform movement, is seen as a political phenomenon. We approach the question of whether clinical courses should be added to the curriculum as lawyers, not academics. We talk in terms of battle plans, alliances, appointments, and tenure. Convincing our schools to offer clinical courses is seen as roughly akin to winning elections. We organize constituencies, lobby undecided voters, and seek out economic and political leverage. It is no wonder that we have sometimes been described as anti-intellectual.

It is sad that we discuss our work this way, in terms of organizational politics rather than intellectual breakthroughs. Clinical education is important for the new and interesting ideas about the legal system that its distinctive empirical vantage point, theory, and reformative perspective make possible. If all of these benefits were not present, clinical education should not become part of legal education, even if we could win the organizational battles over tenure.

Another consequence of role confusion is that we misinterpret traditional teacher emphasis on the importance of scholarship. We view the questions of whether and what to write as strategic. We ask, is writing the best way to get tenure?, and if so, what topics will please traditional law faculty critics? Should we write about substantive doctrine?, or take the riskier course of trying to identify and flesh out a distinctively clinical agenda?

Again, I suggest that this is the wrong way to put these questions. One does not write about what is likely to please others; one writes about what one has to say that is important and interesting. I do not minimize strategic concerns. I believe, with Woody Allen, that "when the lion and lamb lie down together, the lamb doesn't get much sleep." But we have gone beyond ordinary strategic concern. We have a fixation with the strategy of scholarship which dulls our critical faculties and, in an ironic way, increases the likelihood that we will lose the strategic battles that seem to mean so much.

Finally, perhaps the most important consequence of our role confusion is that it prevents us from being intellectual. Rarely do we seem to understand simply to understand, or have the "rush" that comes from crafting "something true and truly put . . . doing something very well that is very hard to do at all."[6] One effect, albeit instrumental, is that we may not entertain the far-out ideas that tomorrow become paradigms. But more

6. Arthur A. Leff, Afterword, 90 Yale L.J. 1296 (1981).

important, we may signal to our traditional colleagues that we do not share with them the genuine pleasure of thinking, a pleasure that as much as any other factor is the payoff in law teaching.

V

My suggestions for reform for the most part are corollaries of what I have already said. First, as William Simon suggests, we need a phenomenology of law practice.[7] We must report in a more detailed way than we have thus far about the day-to-day practice of law. For example, we do not know how negotiation typically proceeds. We know personally what negotiation is like, but no literature describes for a person who has never been involved—or for a practicing attorney interested in a more general view—the look and the feel of the process, in its multiple variations, from moment to moment, statement to statement, and sensation to sensation. As a result, we have produced no material for the analysis of legal negotiation which could be used by thinkers in related disciplines.[8] Engulfed in day-to-day legal practice, we are in a special position to produce this phenomenology. The early Meltsner and Schrag articles[9] present a good beginning phenomenology of clinical law learning, but law practice, not law learning, is ultimately our subject.

My second suggestion is that we need to improve our empirical methods. Principally, we need to find ways to collect data with substantial claims to objectivity. The limited literature providing accounts of clinical practice has little if any discussion of the methods used to produce these accounts. The problems of how context, social structure and observer intention, memory, assumption, and expectation influence observation are rarely considered. A reader continually asks, why should I believe that this is how events occurred? Until we use better methods, there is little reason for other academics to take our "empirical" research seriously.

My third suggestion is that we need to develop a critical tradition. We should turn the standards we have used to evaluate traditional legal education and law practice back on ourselves, and with even more energy. In the development of clinical education, this is the next logical step. We have fought for and won teaching facilities, course credit, manageable teacher-student ratios. Our foot is well inside the door. Now what do we have to say? More self-criticism would give us better answers to that question.

7. William Simon, Home Psychologicus: Notes on a New Legal Formalism, 32 Stan. L. Rev. 487 (1980).

8. A recent example in which such data would have been helpful in Melvin Eisenberg's article in the Harvard Law Review on rule invocation and reasoned elaboration in negotiation, Private Ordering through Negotiation: Dispute Settling and Rulemaking, 89 Harv. L. Rev. 637 (1976). Eisenberg's analysis is superb, but for his data he had to draw on anthropological studies of primitive and Asian cultures. How much more useful the article could have been had it been grounded in data about our own legal system.

9. Michael Meltsner & Philip G. Schrag, Report from a CLEPR Colony, 76 Colum. L. Rev. 581 (1976); Scenes from a Clinic, 127 U. Pa. L. Rev. 1 (1978).

In addition, our common view about effective educational reform requires self-criticism. If we are not to become new educational oppressors, not simply to wear Socrates' new clothes, we must show that we can slip past the shoals on which traditional education has foundered. Describing those shoals is one step, and we have done this in our critique of traditional legal education, but demonstrating that we are free of the characteristics which cause foundering is another. That remains to be done.

Moreover, our reputation with traditional colleagues requires that we be more self-critical. We are looked upon with suspicion in major part because we are intellectually monolithic. We do not criticize one another, we assert that everything we have tried has worked, and we believe that clinical instruction is the best format for all legal learning. Such positions are *prima facie* suspect. Traditional teachers react to us the way we react to law-and-economics enthusiasts when they claim that all common law can be explained by the concept of efficiency. They know our views are overdrawn, but also that we have potentially important things to say. They hope that we will mature, and are willing to wait to find out.

There are obstacles, however, to the establishment of a critical clinical tradition. Many of us have no interest in self-criticism. For example, Simon's exceptional piece about the inadequacies of clinical theory[10] has produced only private sniping, and no public response from clinical teachers. My own efforts have caused some to accuse me, angrily, of "aiding and abetting the enemies of clinical legal education," and others to call for a moratorium on criticism of clinical instruction. These critics acknowledge that clinical instruction has deficiencies, but insist that the phenomenon is a weak sister within law schools and needs to be free of criticism if it is to have room to grow. My own view is that nothing ever grows by being reinforced constantly in its weaknesses.[11]

My final suggestion is that we need to become more self-aware. Rather than espouse self-awareness, we must identify and drive out the rationalizations we use to hide from our weaknesses. These rationalizations take many forms (e.g., seeing our relationship with traditional colleagues as a "beleaguered us" versus a "menacing them," viewing the issue of clinical instruction as technical and our obligation as that of passing on a repertoire of instrumental techniques, and the like) but as much as any systemic feature of law school, they block our future development. We must ferret out each one and put them all to rest.

10. Simon, *supra* note 7.

11. Much critical work needs to be done. Examination of three recent legal symposia (the Symposium of Legal Scholarship, 90 Yale L.J. 5 [1981]; the Symposium on Dispute Processing and Civil Litigation, 15 Law & Soc'y Rev. nos. 3 & 4 [1981]; and the Symposium on Clinical Education and Legal Profession, 29 Clev. St. L. Rev. nos. 3 & 4 [1980]) shows how un-self-critical, untheoretical, and unempirical our writing is in comparison with that of our traditional colleagues, though I do not necessarily hold up their work as a model. We ought to be working on a more sophisticated critical literature, not resting content on the insights we have identified so far.

VI

Having been unrelentingly unpleasant for long enough, I shall conclude on an opposite note. For all of its difficulties, clinical education still lives (this was not inevitable), and there is considerable reason to be hopeful about its future. Each year brings an increasing amount of interesting clinical work and more is possible. There are exceptions to each criticism that I have made, and in some areas, clinical thinking is among the most interesting of the profession. If the insights and energies of more of the seven hundred plus clinical teachers could be enlisted in this effort, the future of clinical instruction would be bright indeed.