

## WALKING THE CLINICAL TIGHTROPE: BETWEEN TEACHING AND DOING

STEPHEN WIZNER\*

The University of Maryland School of Law has made a truly remarkable commitment to clinical legal education. The purpose of this conversation is, first, to acknowledge and describe tensions that are inherent in our dual roles as teachers and legal services providers, and, second, to think about the role that law school clinical programs can play in expanding access to justice for unprivileged and underserved clients and communities. Although these remarks are given in celebration of thirty years of clinical legal education at the University of Maryland, we are also here to talk about the role that law school clinics can and should play in expanding access to justice.

I think it appropriate, therefore, that we cast a critical eye on what we do as clinical teachers, who we are, what we have become, and whether we need to reconsider our professional role. In that spirit, I would like to express some skepticism about what we have come to accept as progress in clinical legal education. In particular, I want to question whether our three decade long professional advancement from “supervising attorney” to “clinical professor” has caused us to move too far away from teaching *through* doing to teaching *about* doing. Have we, in our struggle to become accepted as members of law school faculties, compromised our identities as advocates for the poor and unprivileged, as fighters for social justice? Have we sacrificed supervised student representation of disadvantaged clients in favor of clinical pedagogy: classroom teaching, simulation, skills training, journal writing and guided reflection? Have we diminished the client representation aspect of our work, supervising students representing real clients, and replaced a significant part of it not only with clinical pedagogy, but also with writing for publication, non-clinical teaching, law school committee work and other professorial activities? Are we and the students we teach doing as much as we could, as much as we should, to help alleviate the shortage of legal services for low-income clients? What is or might be our impact on the access to justice problem?

Those who developed clinics a little more than thirty years ago, and those who funded them, saw a large, unmet need for legal

---

\* William O. Douglas Professor of Law and Supervising Attorney, Yale Law School. A.B., Dartmouth College; J.D., University of Chicago.

representation for the poor, in both criminal and civil cases. They also noted a lack of significant involvement of law schools generally in the rights revolution sweeping the courts and communities of America. Many of the lawyers who started building and teaching in clinics were lawyers who had worked in legal aid and public defender offices, and for civil rights and other public interest organizations. It is not surprising, therefore, that clinics began at many law schools primarily as programs to enable law students to provide free legal services to the poor, under the supervision of practicing attorneys. However, from the outset tensions emerged between the public service goals of the first generation of clinical teachers and those who fund them, on the one hand, and the academic concerns of law school faculties on the other. The faculties, to the extent that they were not openly hostile to the introduction of experiential learning into the curriculum were more concerned with what they viewed as the educational value of clinical programs than they were with the newly hired supervising attorneys' legal services and social justice motivations.

When I was a legal services lawyer in the 1960s, I had law students working in my neighborhood legal services offices on the Lower East Side of New York, mostly as volunteers, a couple for credit. Their role was to assist me and the other lawyers in our program by performing legal research, memo writing and fact investigation. My biggest adjustment when I became a supervising attorney in a law school clinical program was in changing my relationship to the students with whom I was working. Rather than having students help me with my cases, I had to learn to hand over responsibility to them and help them with their cases. In order to define my role, I had to become a teacher. I had to learn to teach students how to relate to clients and handle their cases, to supervise them as they did so, and to help them learn from that experience. But as the students learned and became more competent, I soon realized that having a crew of clinic students enabled me, through them, to represent more clients and handle more cases than I did as a legal services lawyer, and to take on complex litigation that I could not handle well on my own. Over time, as I gradually transitioned from supervising attorney to clinical professor, I found myself spending time teaching classes, writing articles, serving on committees, attending conferences like this one, and increasingly less time in direct supervision of students representing clients.

When I began clinical teaching in 1970, I was supervising twenty-five students, and that's what I did. I didn't teach classes, I

didn't go to faculty meetings, I didn't sit on committees. I spent hours and days accompanying students to courts, administrative agencies, prisons, mental hospitals, government offices and other practice venues, and the rest of the time brainstorming with students about their cases, reviewing and editing pleadings, motions, legal memos and correspondence, mooting students to prepare them for court appearances, and preparing students for negotiations and trials. While I continue to do all of those things today, I find myself supervising fewer students, representing fewer clients, handling fewer cases, and spending time I used to devote to those activities in classroom teaching, clinical and non-clinical, and other professorial activities.

As I reflect on what has happened to me professionally since becoming a law school clinical teacher, I realize that I spend a lot of my time in my working day doing things that I did not do when I was a legal services lawyer, assisted by law students. I teach substantive law and practice. I teach about systems and institutions. I spend hours with students individually and in groups, in classes, supervisions and less formal conversations, helping them understand what they are seeing in the real world, helping them recognize, acknowledge and deal with their feelings about their clients and their clients' legal problems, talking with them about case selection, analysis of client problems, ethical issues, and how to deal with clients and adversaries effectively. I spend time mooting students in preparation for court appearances, administrative hearings, negotiations and other client representational activities, and reading and editing their written work on behalf of clients. All of these time-consuming activities are what define me as a clinical teacher.

The tension between teaching and doing has existed from the moment three decades ago when law schools were induced by William Pincus, backed by Ford Foundation money, to include clinical programs as an adjunct to the academic curriculum. When I began clinical teaching in 1970, some early programs were already employing simulations, videotaping of student "performances" (such as client interviewing), journal writing, and other modes of clinical pedagogy to teach lawyering skills and to facilitate critical reflection. Those of us who did not employ these forms of pedagogy argued that they were unnecessary and that students learned best from actual representation of clients. The debate that began then among clinicians has continued to the present day. How law students can best learn from experience is what the debate is about. Whether students can learn what they need to learn about lawyering through the supervised

representation of real clients alone, or whether that kind of experiential learning needs to be prepared for and supplemented by skills training through simulation and aids to critical reflection such as journals and classroom instruction.

I think that everyone at this conference shares the basic belief that, as a democratic society, we must strive to make legal services available to the poor in both criminal and civil cases. We also agree that the primary obligation to provide legal services to the poor resides with the government and, to a lesser extent, with the bar, not with law schools. Nevertheless, most of us also believe that law schools have some obligation to contribute to the solution of the crisis in access to justice, and, therefore, the clients that law school clinics should assist should be individuals and communities that are underserved, or those who have particular difficulty obtaining lawyers because of the nature of their legal problems. And this is not only because law schools have a public service obligation to the underserved in their communities. Students learn a great deal by providing supervised legal representation to low-income clients, not only about law and its application to the legal problems of real people, but also about social and economic conditions in the society and the potential of law to address the problems that these conditions generate.

As clinicians, we believe that most of what law students should learn from us is learned most effectively experientially, by students acting in role, under appropriate instruction and supervision, as lawyers for disadvantaged clients. And so the question we need to ask ourselves is this: Can we represent more clients and handle more cases, spend less time on clinical pedagogy, and still ensure that clients are well represented and that students learn what they need to learn? We need to ask ourselves this question because the time that we devote to teaching about doing is time that we and our students do not spend in the direct provision of legal services to clients. Can we teach through doing if we do not first or simultaneously teach about doing?

Even though we call our program at Yale Law School a legal services organization—and we are the largest provider of legal services to low-income clients in New Haven—it is clear to all of us on the clinical faculty that, were we to devote full time to serving as supervising attorneys, we could accept more students into our program, represent more clients, and handle more cases. This makes it appropriate to ask ourselves whether we are doing all that we should be doing to help alleviate the shortage of legal assistance to the poor

people of New Haven, consistent with our duty to provide appropriate instruction and supervision to our students.

Years ago, during the “dark days” of the Reagan administration— they don’t seem quite so dark these days—Reagan’s Attorney General, Edward Meese, who was no friend of legal services for the poor, proposed that federal funding for legal services be diverted to law schools as a way of reducing or eliminating federally funded legal services programs and backup centers. Many law school clinicians joined their legal services colleagues in opposing this move, arguing that law school clinical programs should not be taking poor peoples’ legal services funds away from legal services programs. Those of us who opposed taking legal services money away from legal services programs for the support of law school clinics maintained that law schools should be financing clinical programs, not taking money away from poor peoples’ lawyers, and that, in any event, clinical programs were, by design, inefficient deliverers of legal services, since so much of what goes on in clinics is teaching. In order to use clients’ cases for teaching, we argued, clinicians had to handle smaller caseloads and spend time with students examining, preparing, reflecting, and in other ways using clients’ cases as teaching texts.

Nevertheless, some law schools did apply for and receive federal legal services dollars to support their clinical programs. Gary Bellow<sup>1</sup> was one of those who did apply. He received, as I recall, a \$500,000 grant to support Harvard’s Jamaica Plain Legal Services Center. Bellow’s decision to apply for and accept a substantial amount of federal legal services funding to support the Harvard clinical program was, and continues to be, controversial. However, in all fairness to Gary, who was a true visionary and a major force in both legal services and clinical legal education, the center that he founded has been a significant provider of legal services to low-income clients in Boston.

The controversy surrounding the Harvard program concerns not only the acceptance of federal legal services funding in the beginning, but the design of the program itself. Supervising attorneys in the Harvard program have never traveled the path from supervising attorney to clinical professor. The Harvard supervising attorneys have no faculty status, other than the quasi-faculty title of “clinical instructor,” and no job security. Their full-time job is supervising students handling cases for clients. They are not expected to teach

---

1. The late Gary Bellow was Professor of Law, founder, and former faculty director of Harvard Law School’s Clinical Programs.

classes, write articles, or participate in any of the institutional activities engaged in by members of the faculty. The clinical faculty, Gary Bellow, until his untimely death, and Charles Ogletree, who directs the Harvard Criminal Justice Institute, do the teaching. Harvard Law School, a school with more than 1500 J.D. students, today has only one clinical faculty member: Charles Ogletree. But it also has more than thirty supervising attorneys in its various clinical programs.

Harvard Law School provides a lot of legal services to low-income clients, more than any other law school that I know of. Harvard has chosen, for whatever reason, to construct its clinical program as a legal services program, and all of the supervision is performed by staff attorneys. It has created as efficient a legal services delivery program as possible, using law students to do most of the legal work. In so doing, however, Harvard has avoided or evaded the educational and political winds that have swept through most law schools, primarily from the A.A.L.S. and the A.B.A., which have resulted in the movement of clinical legal education from an adjunct role outside the regular curriculum, to the more established, accepted and central role that it now plays in legal education. By having only two clinical faculty members—one since Gary died—Harvard has been able to hire a large number of staff attorneys at considerably lower salaries than those paid to the members of the law school faculty. Staff attorneys don't function on an academic calendar, they don't receive academic leaves, they don't enjoy the other perquisites of law professors. They supervise students representing clients. If you want to maximize the amount of clients that you represent in a clinical program, that's how you do it.

I think we need to examine and reflect on the tradeoffs between law schools, which have an integrated faculty in which clinicians enjoy all of the perquisites, and all of the academic and institutional responsibilities of non-clinical faculty, and a program in which all of the case supervision is provided by staff attorneys. I think we need to evaluate these tradeoffs in terms of meeting the law school's obligation to address the access to justice problem, its educational obligations to its students, and the role and status of clinical teachers in the institution. It may well be that teaching and institutional citizenship responsibilities of clinical professors, including non-clinical teaching, committee work and writing, the educational focus of clinical courses, and the many other claims on the time of clinical teachers, make it unrealistic to expect law school clinics to play a significant role in addressing the access to justice problem. Perhaps

the best contribution that law schools can make, as Jane Aiken has argued so forcefully in her writing,<sup>2</sup> is to sensitize students to social justice issues through exposure to actual victims of social injustice, and to inculcate in students the professional value of service to the unprivileged.

But I wonder whether we law school clinicians, and I include myself in this critique, should not be striking a better balance between teaching and doing. I think we need to think about returning to the root notion of experiential learning. It seems to me that too many clinics overemphasize learning from teaching, at the expense of learning from doing, and that the core of our teaching—the doing—needs to be putting students in role, representing real clients under supervision, even if that means deemphasizing fictional simulation exercises and other forms of artificial skills training and classroom instruction. I have come to believe that unless we design our clinics to immerse students in the delivery of legal services to clients, we teach them too little about legal services work, we underexpose them to the real world of low-income clients, and we fail to meet the law school's obligation to make a meaningful contribution to addressing the access to justice problem.

So, this is my point, which I believe is both an ethical and a moral one, although it may not be an educational one. Law school clinicians need to emphasize the primacy of the social justice objectives of clinical legal education by providing legal assistance to unprivileged and underserved clients in communities through supervised law student representation. Everything else we do should be seen as secondary and, to the extent possible, should support the primary objectives. When we employ simulation, it should be in the form of mooting students for actual representational events on behalf of real clients. When we write, it should be writing that will advance the project, that will assist students with their representation of clients, assist clinical teachers in their clinical teaching, explain to the non-clinical world what we are doing in order to gain support for our work, and use the unique knowledge we gain from practice to propose and advocate reforms in the law. When we teach non-clinical courses, the courses should relate to and support our clinical teaching. This means that we should teach trial advocacy, legal ethics and evidence, but not torts or contracts. When we engage in activities of institutional citizenship, such as serving on faculty committees, we should consider

---

2. See Jane H. Aiken, *Walking the Clinical Tightrope: Embracing the Role of Teacher*, 4 U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 267 (2004).

those activities as opportunities for encouraging our law schools to commit financial and intellectual resources to addressing the misdistribution of legal services through support of clinical programs, and teaching, research and writing directed towards the amelioration of the crisis in access to justice. And when we engage in bar activities, we should try to activate the bar to assist in our social justice mission. Providing and facilitating access to justice for unprivileged and underserved clients and communities should be the focus of both our teaching and our doing. Only then can we claim to have achieved an appropriate balance on the tightrope between teaching and doing.

There are many inefficiencies built into the design of most law school clinics that result in limiting the numbers of clients represented and cases handled by clinic faculty and students. I do not mean to suggest that all of this should be abandoned. But I do wonder whether we do not spend too much time—our time and our students' time—on pedagogy not directly related to the handling of individual clients' cases. I wonder whether we do not devote too much time to fictional simulations and skills training, when the lessons we seek to teach through these methods could be taught equally as well and more realistically by devoting that time to the preparation and handling of actual cases for real clients. I wonder whether students and clinical teachers devote time to student journals and to engaging in guided reflection, such as the type that Jane has been describing so beautifully, about how students and clients experience their personal interactions, at the expense of actually representing clients and handling cases. I wonder whether law school clinics could not increase the provision of legal services that they provide to low-income clients and communities without impairing, and perhaps even enhancing, students' educational experience. I wonder whether law school clinics should not increase students' learning through doing, and decrease the time and effort we devote to teaching them about doing.