

COMING OFF THE BENCH: OBSERVATIONS OF A ROOKIE CLINICIAN

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During the 30th Anniversary Dinner of the Clinical Law Program last April, Steve Wizner and Jane Aiken continued a conversation that has taken place in the academic community nearly since the inception of clinical teaching. At the risk of oversimplification, Wizner advocates making all aspects of clinical legal education secondary to the immersion of students in the delivery of legal services to clients.¹ The theory that clinical education should focus less on teaching and more on doing is one that has found great traction in the community of clinical educators.² Aiken, on the other hand, posits that time and space for reflection must be provided in law school clinics if the experiential learning that takes place is to be truly effective.³ By simply throwing students in, she suggests, we risk them feeling helpless.⁴ This position, too, has found a healthy chorus of supporters. As a relative newcomer to the field of clinical teaching, I struggle daily to find the appropriate balance between the poles. And, while I have not yet chosen a side in the debate, the idea that clinical education should be primarily an avenue for providing legal services to underserved communities raises for me troubling implications beyond the mere helplessness of students. In a world where most law school clinics maintain a clientele in the lower income brackets,⁵ I question whether emphasizing “doing” over “teaching” undercuts the overarching goal of providing skilled legal representation to underserved communities.

I broach this difficult question with two stories, the first about practice and the second about teaching. When I first entered the practice of law, I went to work for a non-profit legal services office that provided appellate representation to indigent criminal defendants.

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1. See Stephen Wizner, *Walking the Clinical Tightrope: Between Doing and Teaching*, 4 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 259 (2004).

2. David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 194–97 (2003).

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

4. *Id.* at 269.

5. Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 38 (1997).

I found the work invigorating, intellectually challenging, rich and textured. The structure of the office confirmed my notion that this was work of not just practical import, but intellectual value. Our caseloads were kept at a manageable level, giving us the time and space to reflect on broader questions of the interplay between class and race and justice. Every case was actively supervised by a senior attorney. Potential legal issues were researched and discussed at length before ever being incorporated into a pleading, and the varied implications of potential law reform questions were carefully considered before being presented to the highest court. Cases were heavily mooted prior to oral argument, and even the most senior attorneys in the office regularly vetted ideas and legal analyses. At lunch we sat together in the office's kitchen and discussed our cases, the trends in the courts, and the legal issues of the day. I believed at the time, and still firmly believe now, that as lawyers we were there not because we had nowhere else to go, but because it was the best place we could be.

When I left the office, I decided to join the state's indigent appellate defense panel. The nominal amount of money paid was hardly motivation to do the work. Rather, it was my desire to maintain a connection to the rich intellectual community of appellate practice that prompted my application. During my initial interview for admission, however, my interviewer repeatedly pressed me about why I wanted to do work she characterized as beneath me. "Your credentials indicate that you're smarter than this," she whispered conspiratorially. It was a blatant decoupling of intellectual rigor and legal service to the poor, one that I often heard repeated in the years to come.

When I entered the academy, I naively assumed that students would understand intuitively that close attention to intellectual pursuits is part and parcel of quality legal representation—no matter what the financial circumstances of your client. I thought back to my own years as a law student, and assumed that my students too would have an innocent belief in principles of fairness and equality; a belief that the law is a social equalizer that can, and should, be used to promote justice; a belief that work for or on behalf of the poor may be different in kind, but not in degree, from other types of practice. I was wrong.

In the fall of my second year of teaching, I sat with my students discussing their employment goals following graduation. Most were planning to join corporate law firms. Knowing that they faced six-figure debt upon graduation, I was not surprised by their career choices. I assumed they were nothing more than cold calculations of

dollars and cents. What I heard from the students though was something more unfortunate. Almost to a person, the response was that as long as you were dedicated, anyone could do the work of a non-profit, indeed most of them had—as students for clinical credit. But, now it was time to become serious about their careers. It was time to pursue something more challenging. I believe that if we value what we do, clinical faculty must actively combat this attitude—one that divorces intellectual acumen from the provision of legal services to the poor.

Without, at this point, making any further judgment, I offer the observation that the academy places a high premium on analytic intelligence.⁶ Prior to the 1970s, law school training focused almost exclusively upon case analysis and the development of legal theory. After the advent of clinical programs, “stand-up” faculty continued to enjoy a perceived position of primacy in the academic pecking order. Even today, the narrow range of intelligence embraced in large-section classes echoes and reinforces the notion that *analysis* of the law requires skill, care and practice. To the extent that students don’t come to law school already embracing that bias, they are quickly indoctrinated. Logical and analytical intelligence is identified early on as the most valuable asset a law student can possess. Law reviews and journals, and the near constant emphasis on high grades in traditional courses all reinforce the message that the academic exercise of learning about the law is a superior pursuit.

In contrast, a significant percentage of the skills needed for successful lawyering are sidelined and devalued. The abilities to interview, to counsel, or to persuade, among others, are characterized as “innate,” and thus undeserving of rigorous study. The actual practice of law is trivialized as something new graduates will simply intuit. Clinicians must acknowledge this dichotomy and have a strategic appreciation for the value that the academy places upon intellectual pursuits. Any pedagogical approach to clinical education that endorses “doing,” at the expense of “teaching,” reaffirms the notion that the actual practice of law is distinct and, therefore, less valuable. This observation is troubling not because of what it means to the full acceptance of clinical faculty into the academy, but because of the ramifications it has upon the provision of legal services to the poor.

6. See Workways Forum, at <http://www.law.nyu.edu/workways>.

First, with regard to poor folks, the notion that the logical ability valued in law schools is unnecessary to legal representation is not balanced by the same competing messages students receive regarding the representation of wealthier clients. Competitive hiring practices that mimic law school measures of success, six-figure starting salaries, and a begrudging societal respect for “shrewd” big firm attorneys all act to offset the messages that law students receive about law practice as it relates to paying clients. No similar counterbalance is available for legal services-type representation.

Second, even assuming students of exceptional diligence, the necessary limitations of the human condition will require students to prioritize their course work. Thus, to the extent that students working in clinical programs operate within the current system of law school values, the representation clients receive will, in large measure, be sub-optimal. No amount of talented supervision can correct for this.

Third, to the extent that student assumptions regarding the absence of a link between analytical ability and the representation of the poor are not challenged by academically rigorous clinical programs, it is unlikely that students will choose to engage in the work in the long term. As my students told me, when it comes time to “get serious” about careers, students will turn to pursuits that are deemed valuable not only by their peers, but by the legal community at large.

Finally, when clinical teaching abandons efforts to be academically rigorous about the lessons it is teaching, it does not even provide students with skills that can be readily transferred to other areas of practice.⁷ As some academic theorists have noted, an exclusively “case-centered” approach to clinical teaching does not successfully promote the transfer of lawyering skills.⁸

In closing, therefore, I end where I began, with the question of whether focusing clinical education exclusively on “doing” leaves students with the unspoken, and no doubt unintended, message that poor and underserved communities can be represented intuitively, and thereby undermines the very goals it seeks to achieve. I haven’t yet arrived at an answer to that question with which I’m fully comfortable. For the moment though, if my above musing withstands scrutiny, I can’t help but believe that in the long run, “doing” at the expense of “teaching” is a focus we can not afford to embrace.

7. Binder & Bergman, *supra* note 2, at 199.

8. *Id.* at 202–03; Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 SAN DIEGO L. REV. 1011, 1015 (2004).