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# CLINICAL LEGAL EDUCATION: THE CASE AGAINST SEPARATISM

FRANK W. MUNGER\*

## I. INTRODUCTION

CLINICAL LEGAL EDUCATION FACES A SERIOUS CRISIS precipitated by the dwindling of external sources of funding. As clinics<sup>1</sup> are forced to increasingly rely on law school administrations for their support, they will reap a legacy of problems in the relationship between clinical and traditional classroom faculty. As viewed by traditional teachers, the clinical movement<sup>2</sup> has been one of special interests. Clinics are expensive and dedicated to skills-training rather than fundamental intellectual development. Viewed in this framework it will be hard to justify further investment in the clinic.

At this moment of crisis it must be remembered that legal education faces a still more serious fundamental problem: the incompetency of law school graduates to practice law. The clinical movement has been, in large part, a response to this problem, and as such represents an important investment for law schools, vital to the development of legal education. For this reason, I intend to argue in this commentary that the future of the clinical movement lies in its potential contributions to the solution of the problem of incompetence, and not in the further development of clinical programs themselves.

During the past two decades clinicians have been the major source of innovation in legal education.<sup>3</sup> These innovations have been slow to enter the mainstream of legal education. Clinicians have often assumed the roles of critics, and thereby impeded their ability to share knowledge with the rest of the law school. Further, differences of opinion over the goals and methods of legal education have set clinicians in conflict with other faculty, and these differences have sharpened con-

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<sup>1</sup> Unless otherwise noted, the term "clinic" refers to an in-house clinical program.

<sup>2</sup> The term "clinical movement" refers to the efforts of all supporters of skill and client-centered instruction, whatever the form of clinic advocated.

<sup>3</sup> For a well-known review of education developments and issues see H. L. PACKER & T. EHRlich, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972). Of particular interest is Appendix A of this work, the "Carrington Report," which assesses the strengths and weaknesses of various new teaching developments, chief among them being clinical legal education. See generally Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L. REV. 695; Stevens, *Legal Education: Historical Perspectives*, reprinted in CLEPR, *CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT* (1973).

flicts over issues such as funding, tenure slots, and recognition of the value of clinical scholarship.

The basic criticisms of legal education which underlie the clinical movement are valid, but they cannot be remedied by the mere presence of clinics as they are currently constructed, while the bulk of legal education is conducted by methods which undermine and isolate clinical education. The future of clinical education lies in the ability of clinicians to overcome the barriers which have prevented clinics from working in conjunction with traditional courses to solve the problem of undertraining. Clinicians must demonstrate the value of clinical philosophy and method through the development of a unified curriculum which will increase the competency of law school graduates.

In this article I attempt to support my conclusion that the future of clinical education lies in its contributions to the classroom, rather than in its function as an independent source of training. This last phase of the clinical movement is the most important, and will constitute the greatest contribution of clinicians to legal education. I will argue that the concerns of clinicians have stimulated the soundest recent thinking about improvements in legal education, and that, therefore, clinics should be used to develop innovations in teaching which can be applied to the traditional classroom. If my arguments are valid, then it follows that the separatist tendency of clinicians is misguided.

## II. LEGAL REALISM AND THE CLINICAL MOVEMENT

The contemporary clinical movement originated in the broad philosophical school known as legal realism.<sup>4</sup> Legal realism was comprised of practical and ethical components.<sup>5</sup> In its practical aspect, legal realism was based on a powerful insight—that it is a myth to presume that when judges apply the same law to similar sets of facts they make consistent decisions.<sup>6</sup> The presumption ignores the behavioral complexities of legal institutions and the decision-making process. Realists noted that rules themselves almost never determine the outcome of decisions.<sup>7</sup> Instead the application of the rules, and even the interpretation of facts, are determined by a methodology in which the preparation of the lawyers, the behavior of parties and witnesses in the courtroom, the ideological sympathies of the judge, and the resources of the litigants

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<sup>4</sup> For a helpful introduction to some of the principal contributions made by the legal realists see Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974).

<sup>5</sup> See Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

<sup>6</sup> See J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1942) [hereinafter cited as J. FRANK].

<sup>7</sup> See generally Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin—A Critique*, 29 CLEV. ST. L. REV. 279 (1980).

contribute to the ultimate result. While realists observe that the influences on judicial decisions produce structured bias, for example the wealthy had a far better chance of succeeding in litigation than the poor, they never systematically explored these biases as an ethical problem.<sup>8</sup> Instead, the ethical concerns of these philosophers focused on professionalism, and on training competent lawyers by increasing their understanding of the practice of law.<sup>9</sup>

The realists state that the behavioral complexity of real legal institutions contrasts sharply with the simplistic model of rule application taught in law schools.<sup>10</sup> In his famous plea for a "clinical lawyer-school" Jerome Frank argued that all legal rules, even those which are substantive in content, are procedural in effect and dictate certain lawyering strategies which increase the likelihood of victory.<sup>11</sup> He compared teaching legal rules under the Langdell case method, where there is no practical instruction, to a trip to a city in which the ultimate destination has been left off the ticket.<sup>12</sup> Instead, he argued, legal education consists almost entirely of "detours" which bring the student no closer to the goal of legal competence. The solution which Frank and others proposed was to supplement classroom instruction with exposure to the live legal process—the uncertainty of jury verdicts, the ambiguity of facts presented by conflicting witnesses, the difficulty in building a case through investigation, the human qualities of advocates and judges, and the non-courtroom phases of lawyering.<sup>13</sup>

The call of Frank and others for clinical training was ahead of its time. Indeed, the ambiguity of Frank's proposal may have increased skepticism for it is not certain whether he sought to have clinical instruction supplement a core of doctrinal training or whether he wished to restructure legal education thoroughly. Since Frank stressed the intellectual development which in-depth knowledge of legal institutions would make possible, it is likely that he had more in mind than giving students separate training in practical skills.<sup>14</sup> However, given this as his goal, he failed to develop a program with specific intellectual

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<sup>8</sup> See Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20 (1980).

<sup>9</sup> Llewellyn, *supra* note 5.

<sup>10</sup> J. FRANK, *supra* note 6; Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

<sup>11</sup> Frank, *id.* at 919.

<sup>12</sup> "On the itinerary of most university law schools," Frank observed, "you'll find no mention of a trip, not even of a side trip, to the courthouse or to real every day lawyerdom." J. FRANK, *supra* note 6, at 231.

<sup>13</sup> See J. FRANK, *supra* note 6; Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. (1947); Frank, *Why Not a Clinical Lawyer-School?*, *supra* note 10; Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945).

<sup>14</sup> Frank, *supra* note 10, at 923.

goals and teaching methods to overcome the complexities attendant to the sweeping changes he sought.

Lacking such a program, legal realism has passed into what has been called "the ordinary religion of the law school classroom."<sup>15</sup> Today law teachers convey and law students absorb a strong current of legal realism in the form of a general skepticism: an atheoretical approach and a belief that the biases in the justice system are inevitable and not the lawyer's concern. These policies were not advocated by Frank, and they contribute to the extreme value-relativism at the core of traditional legal education. Thus, realism has not produced a quest for better ways to teach law students to be more competent lawyers.

The clinical movement of the 1960's<sup>16</sup> was in large part a reaction to the structured bias that had been ingrained in the delivery of legal services and ignored by the realists.<sup>17</sup> The movement for more service-oriented training stressed the ethical commitment of the profession to the public, and attracted teachers who were dedicated to the service of indigents and to law reform. Where Jerome Frank was philosophical, these new teachers were ethical and ideological. While Frank wanted students to have a broader intellectual training, the new clinical movement sought to imbue students with new professional standards and a commitment to serve the community.

The early stages of the clinical movement were highlighted by new and promising methods of instruction,<sup>18</sup> and were very successful. Clinics provided not only the reality-grounded instruction called for by Frank, but also permitted students to obtain the essential client contact they needed. The success of these innovations has had deep implications in the relationship between clinics and their sponsoring law schools. While skills instruction can be viewed as a supplement to the core subjects taught in the classroom, the emphasis in clinical programs on ethics, clients and community service sets them apart because it presents a different standard for gauging the success of professional training. As a clinic achieves more visibility through its popularity with students, litigation and non-Socratic teaching, and practical legal activities, these differences in standards will become more pronounced.

Three separate criticisms of traditional legal education have tended

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<sup>15</sup> Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247 (1978).

<sup>16</sup> Spring, *Realism Revisited: Clinical Education and Conflict of Goals in Legal Education*, 13 WASHBURN L.J. 421 (1974); Grossman, *supra* note 4.

<sup>17</sup> Grossman, *supra* note 4, at 173.

<sup>18</sup> Representative contributions include simulation techniques, videotaped instructional materials, and a variety of problem-oriented classroom teaching methods. See, e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); M. MELTSNER & P.G. SCHRAG, *TOWARD SIMULATION IN LEGAL EDUCATION* (1979).

to merge in the clinical movement. All three originated from the social consciousness which developed out of the crisis of the 1960's and 1970's. The first criticism is that traditional teaching methods deemphasize professional ethics which reflects a systematic failure to recognize the need for better distribution of legal services.<sup>19</sup> The second critique, often voiced by law students, is that there is a lack of "relevance" in legal education. Finally, the Socratic method itself is blamed for creating stress and misdirecting the energies of law students toward competition, pointless classroom debating, and artificial standards of scholarship.<sup>20</sup> The clinic represented an alternative to which critics of the traditional method reverted. Thus, as the clinical movement achieved its successes and earned a permanent place in the curriculum of many law schools, it generated friction within law schools for it was perceived as being in diametric opposition to the traditional methods of teaching. This legacy of friction has contributed to the relative isolation of clinics and their faculty and to the limited impact which clinics have had on legal education in general.

### III. THE ISOLATION OF THE CLINIC

In the course of rapid growth, clinics have become separated from the main stream of legal education. Clinical faculty are viewed as a special interest group having little in common with the rest of the law school faculty, and even more disturbing, clinical faculties themselves have come to espouse the separatist role.<sup>21</sup> Clinicians are often isolated by virtue of the location of their offices, their workload, and the nature of their work, but they also do less than they might to close the gap between the clinic and the rest of the curriculum. Students also distinguish between clinical offerings and the rest of their school's courses. Joining the clinic is not recognized as a form of legal scholarship and as a result, unless students are strongly motivated, they may be ambivalent towards actively participating in the clinic. Each of these three sources of separation has played an important role in isolating the clinics at many law schools.

The rest of the law school may view the clinic as a composite of courses for students with special interests.<sup>22</sup> It is perceived as offering a

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<sup>19</sup> Grossman, *supra* note 4, at 173.

<sup>20</sup> Rickson, *Faculty Control and the Structure of Student Competition*, 25 J. LEGAL EDUC. 47 (1973); Silver, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968).

<sup>21</sup> While the atmosphere is very good at some law schools, I feel quite confident about the validity of this and other generalizations I make for most clinical programs and most clinical faculties.

<sup>22</sup> The closest the clinic comes to serving a recognized general interest of the entire law school may be through having its staff teach a required ethics course or an introduction to law practice course.

supplemental form of instruction which drains on law school resources to a degree out of proportion to the number of students it serves and the importance of the work it performs. The clinic may also be considered as involving non-intellectual activities which do not merit the same concern given the more serious intellectual work of the law school. Hence, not only are resources grudgingly provided to the clinic, but credit for clinical work, faculty status for its staff, and general appreciation of the intellectual caliber of work performed therein have been difficult to achieve.

Since classroom faculty usually are unwilling to participate in the clinic's activities, the gap between teaching in the law school and instructing in the clinic is often exaggerated by both sides. Little effort is made by law schools to integrate clinical studies into the curriculum as an overlapping and alternative method of instructing students in many of the same skills being taught elsewhere, or to invite comparison as an alternative method of instruction. Because there is little outside communication with the clinic, issues involving its staff or curriculum are likely to be treated as administrative concerns rather than as problems for faculty discussion.<sup>23</sup>

Students often sense that the clinic has an uncertain educational status. Clinical experience is usually not highly regarded by most employers. Its work products are not recognized as scholarship, and the activities performed therein are not thought of as intellectual. Additionally, clinics may be viewed as a refuge for the more ideologically motivated students who are seriously considering a legal aid or public interest practice upon graduation. This gives the clinic the appearance that it is only appropriate for students entering certain types of specialized practice. These tendencies accentuate the separation of the clinical program by undermining its constituency in the student body.

Finally, the attitudes directed at clinical teachers may be the most bleak of all. A clinical teacher enters his position not as a colleague of other faculty members but as a person from another discipline.<sup>24</sup> The goals of the clinic, its methods of instruction, and the standards by which its students are evaluated are not perceived as an extension of the common educational enterprise but as related to a distinct peripheral activity taking place within the law school. Clinicians are deemed to be

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<sup>23</sup> Law school faculties have not been greatly disturbed by the three criticisms mentioned. See notes 19-20 *supra* and accompanying text. In response to the criticism that legal education offers insufficient attention to professional responsibility, law schools have offered a course in the Code of Professional Responsibility. The criticism that the Socratic method is psychologically damaging has been met with disbelief. The response to the demand for skills instruction has been the continuing belief that skills training is peripheral to legal education. For further discussion, see note 41 *infra* and accompanying text. There is a great silent consensus behind these judgments evidenced as much by the lack of discussion of them as by the temper of the direct responses which have been made.

<sup>24</sup> See generally Tyler and Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693 (1980) [hereinafter cited as Tyler and Catz].

providing supplementary instruction and are made to feel that they do not share the important educational responsibilities entrusted to other faculty members.<sup>25</sup>

The gulf that separates clinics from the remainder of the law school is reflected in the difficulties encountered in attempting to expand, upgrade and stabilize themselves. While attitudes toward clinical programs vary greatly from school to school, clinics remain marginal offerings at most institutions, reaching only a fraction of the student body. Further, in-house clinical instruction in comparison with conventional forms of teaching is relatively expensive.<sup>26</sup> This expense, exacerbated by the withdrawal of external sources of funding, will tend to keep existing programs small. Absent new external sources of funds, clinics have reached a no-growth stage.

The problem, however, does not lie in the small size of clinical programs, but in their isolation. The preceding discussion of the sources of this separation clearly implies that the situation will not improve as a result of any affirmative action taken by law school administrations. Rather, the future of the clinical movement depends on clinicians themselves being able to establish a role for clinics in a law school curriculum which, for the foreseeable future, will rely on methods of instruction suitable for large classes taught by classroom teachers. The clinical movement's strength is in its ability to address the criticisms of the traditional methods of instruction through the development of methods of instruction which can be employed outside as well as inside the clinic.

#### IV. ENDING THE ISOLATION: THE CLINIC AS A TEACHING LABORATORY

In recent years clinicians have become preoccupied with improving their status in the legal community.<sup>27</sup> With good reason the goals of

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<sup>25</sup> See Cahn, *Clinical Legal Education from a Systems Perspective*, 29 CLEV. ST. L. REV. 451 (1980). The grievances of clinical faculty culminate in the fight for tenure and salary. See Tyler and Catz, *supra* note 24. The fact that there is still resistance to equal pay for clinicians and to offering tenure on the same terms to clinical and non-clinical faculty demonstrates that law schools have not yet accepted the value of clinical legal education. Until clinicians are properly valued for what they offer to the rest of the law school faculty and to students, such discrimination will continue. See AALS SECTION ON CLINICAL LEGAL EDUCATION, NEWSLETTER 3 (June, 1980).

<sup>26</sup> The alternative to the expansion of expansive in-house clinical programs is the "farm out" approach in which students serve as interns in a law practice conducted outside the law school. For example, students may serve as paralegals in a local district attorney's office or in a public defender program. In my view, except for in-house requirements which may accompany the internship, this form of "clinic" involves all of the problems of learning on your own without adequate preparation. My conclusion is that "farm out" clinics do not advance clinical legal education and do not reflect the goals I advocate in this commentary.

<sup>27</sup> These concerns were a major reason for forming a section on clinical legal education within the American Association of Law Schools.



clinicians have been structured around expanding their base in the law school, upgrading the quality of their instruction and facilities, and increasing their security and salary as faculty members. Yet in focusing too closely on the problems of the clinics themselves, the great potential influence of the clinical movement on legal education has been overlooked.

Clinics represent the only phase of legal education where students are exposed to law practice in the full sense. Other courses offered by the law school should lead up to that experience, and therefore, should be judged by their contribution to practice-readiness.<sup>28</sup> As Jerome Frank foresaw, the complexities encountered in live cases, including initial client contacts, counseling, pleadings and oral arguments, provide rich experience from which clinicians may determine what students must learn to practice law effectively. The results of the clinicians' experience can be used to guide other faculty members in this same respect. A decade of observation and refinement of clinical teaching has yielded rational and efficient methods for training students in lawyering skills. The great task of clinicians at this juncture is to return to the broad critique of legal education, communicate what they know as modifications of goals already reflected in the standard curriculum, and demonstrate the effectiveness of new methods of instruction in the conventional classroom setting.

#### A. *Setting Goals for Legal Education*

Until recently, none of the criticisms of traditional legal education<sup>29</sup> demanded more than supplementation of the traditional curriculum with skills training or merely suggested that the core instruction in intellectual skills was defective. Yet, a much more powerful critique of traditional legal education is implicit in these criticisms. As the experience of clinicians has grown, evidence of the relationship between the shortcomings of the traditional system and the incompetence of law school graduates has accumulated. Thus, the focus of clinicians has shifted back to the competence of law school graduates.

The work of Gary Bellow has turned the attention of clinicians and practitioners alike to professional competency issues.<sup>30</sup> In his examina-

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<sup>28</sup> While the value of a legal education should be judged by practice readiness, I support measurement which credits the value of a foundation for further learning and not just superficial familiarity with routines of the law office. See, e.g., Cort and Sammons, *Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980).

<sup>29</sup> See notes 19-20 *supra*.

<sup>30</sup> It is unlikely that there is a clinician in this country who is not familiar with the work of Gary Bellow. Bellow, as a teacher, a trainer of clinical teachers, and a theoretician of legal education, has given substance as well as leadership to what has been a clinical movement with little intellectual force. Readers familiar with

tion of the legal services practice, Bellow argues that many young attorneys do not understand the functions of a lawyer and do not have a grasp of the standards of competent practice.<sup>31</sup> This strongly suggests that their intellectual training is defective, as argued by the legal realists and clinicians. Simultaneously, Bellow has begun the work of applying the accumulated knowledge of clinicians concerning professional training to the problem of refining the goals of the core curriculum and upgrading methods of instruction.<sup>32</sup>

Bellow's seminal article on the problems of young legal services lawyers is actually a broad statement about the incompetence of law school graduates. His criticism is equally applicable to attorneys in most entry level positions. Bellow presents a compelling description of the manner in which standards of professional competence are molded for young lawyers. Since young attorneys are seldom encouraged to develop their own standards or the critical reflection necessary to apply them, their level of practice is usually determined by the pressure to accommodate the needs of other attorneys, impatient judges, and the unspoken community standards of practice.<sup>33</sup> In a legal services setting the effect of this pressure has been to maximize the volume of cases taken while providing less than adequate client service.<sup>34</sup>

Bellow's examination of the causes of the difficulties experienced by young lawyers in legal services demonstrates that law schools fail at what they claim to do best, training students to "think like lawyers." They fall short not only because students are not taught common practice skills, but chiefly because the intellectual training received provides neither an adequate description of lawyering nor any standards of what a lawyer does for a client.<sup>35</sup> Thus, the law graduate may "think like a lawyer" to the satisfaction of his law teachers, but not know how to elicit information from a client, determine what a client's priorities are, or effectively convey legal theories to a client to allow him to decide among alternative courses of action. Further, the graduate himself may not know how to choose among alternative courses of action, never having had to consider more than an extremely narrow range of options in law school. The problem is not merely a lack of articulation skills, but

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his work will recognize my central thesis as one inspired by the implications of Bellow's writings. See Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NAT'L LEGAL AID & DEFENDERS A. BRIEFCASE 106 (1977).

<sup>31</sup> *Id.*

<sup>32</sup> G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: CLINICAL INSTRUCTION IN ADVOCACY* (1978). See also Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, reprinted in CLEPR, *CLINICAL EDUCATION FOR THE LAW STUDENT* 21 (1973).

<sup>33</sup> Bellow, *supra* note 30, at 117.

<sup>34</sup> *Id.* at 109.

<sup>35</sup> *Id.* at 118.

rather the absence of an understanding of what is entailed in being a lawyer.

Bellow observed that the net effect of such inadequate preparation among legal services lawyers was *pro forma* consultation with clients about alternative courses of action.<sup>36</sup> Clients who failed to present to their attorney facts falling within a narrow range of familiar situations deemed to warrant litigation were routinely put off with some less adequate solution. The pressures on the lawyer, his own priorities and his comfort or lack of comfort with particular alternatives determined the outcome of the consultation. Whatever training the law graduate had received in legal doctrines and analysis seemed inadequate to help the young attorney make decisions for clients under these circumstances.

Bellow's view of the shortcomings of professional training casts a new light on the criticisms of traditional legal education. The concern generated by the present system's lack of emphasis on professional responsibility and skills training, and its use of the Socratic method, must now be viewed as central to the problems of legal education. The lack of instruction in ethics has been met by teaching a little of it in each course, and more recently, by studying the Code of Professional Responsibility<sup>37</sup> in a separate, required course.<sup>38</sup> But these courses have presented ethics as merely issues which arise now and then, to place a lawyer's license in jeopardy, and have failed to impart the notion that ethics are simply a reflection of meaningful standards for professional competence. Viewed in the latter manner, ethics cannot be separated from the simple decision to litigate or not to litigate considered in the most basic case method exercises. A lawyer counseling a client about the decision to go to court or settle must not only know his own capacities as a trial lawyer, but must also know how his capacity for litigation influences his presentation of the alternatives to his client. He must be able to critically reflect on his own behavior and to set objective professional standards for his counseling. Further, he must be able to interpret the information provided him, as well as the client's preferred outcomes, in the context of a framework of abstract legal concepts which may have meaning for lawyers, but little or different meanings for clients. He must resolve the question of whose meanings, values, and goals prevail in applying precepts to evaluate alternative options. Hence, in light of the Bellow critique, the concern over the

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<sup>36</sup> *Id.* at 110.

<sup>37</sup> ABA, CODE OF PROFESSIONAL RESPONSIBILITY (1978).

<sup>38</sup> Thode & Smedley, *An Evaluation of the Pervasive Approach to Education for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365 (1969). For a more recent proposal for a pervasive approach more compatible with the views advocated in this article see Watson, *The Current Status of Lawyer Professionals: Some Implications for Legal Education*, 24 L. QUADRANGLE NOTES 17, 20 (1980).

system's failure to emphasize ethics is one regarding the effectiveness of the case method itself.<sup>39</sup>

Similarly, Bellow's analysis incorporates the criticism that legal education fails to train graduates in practical skills such as interviewing, counseling and negotiating. Defenders of the traditional system have often replied to this criticism by asserting that law schools are not mere trade schools, and thus must stress intellectual skills over mechanical and practical tasks which can be learned later.<sup>40</sup> This response relies on a meaningless distinction between intellectual training and training in other skills.<sup>41</sup>

The chief intellectual function taught by most classroom instruction is the application of legal doctrine to facts. But the manner in which this intellectual process is taught stresses rapid and defensive formation of a "theory of a case" on known facts. Students are not educated to inquire about facts, a process which requires greater openness to the meanings, emotions, and purposes of other speakers than is required for oral argument—the model for most classroom communication.<sup>42</sup> Law stu-

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<sup>39</sup> This view is developed at some length in BELLOW & MOULTON, *supra* note 32.

<sup>40</sup> Frank's view of the role of the law school was similar, but at times his discussion of clinical training floated ambiguously between intellectual preparation and practical training. See Frank, *Why Not A Clinical Lawyer-School?*, *supra* note 10, at 923. Frank insisted that the "lawyer-school" was not to be a mere "trade-school" but would provide "visual demonstration of the possible values of rich and well-rounded culture in the practice of law." *Id.*

<sup>41</sup> In an early conference paper on this point John Ferren, now a judge on the District of Columbia Court of Appeals, argued the distinction is meaningless:

No useful line can be drawn, for example, between client counseling as a skill (which may suggest mere manipulation) and deeper understanding of the client as a human being who behaves and will react to the law and official discretion in particular ways because of his background and present situation.

Ferren, *Goals, Models and Prospects for Clinical Legal Education*, quoted in Grossman, *supra* note 4, at 191. One application of this insight appears in the humanistic approach to clinical instruction. See D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). The force of this response is not that skills also require thought, but the lack of distinction between the intellectual component of legal education, such as "legal analysis," and activity of being a lawyer manifested in skills.

<sup>42</sup> Openness to client communication may be the single most important casualty of the present methods of instruction. In the appellate advocacy model of communication, legal terms are assumed by an advocate to have a settled core-meaning and penumbra of peripheral meanings. The core represents authority; the periphery represents relatively untested principle, an area of higher risk. While ambiguities of doctrine are explored in the classroom they are revealed only to be side-stepped and exploited. The same model does not work in communication with clients. The advocate resolves ambiguities in his own frame of reference and attempts to persuade others to accept it. However, to understand a client, the ambiguities of communication must first be resolved in the clients frame of reference. See A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

dents are not prepared to explore problems and solutions far outside a doctrinal frame of reference, even though much of a lawyer's intellectual effort is so directed.<sup>43</sup> It has been suggested that the chief intellectual function of the attorney is not rule-application at all.<sup>44</sup> Whether this is true or not, the law student finds that the application of legal precepts requires the discovery and use of information which he has not been taught to seek or use.

The complexity of real fact patterns often appears to overwhelm students confronted with actual cases for the first time. Clinicians have observed that students who have mastered substantive law in the classroom may be at a loss to apply it in the clinical setting.<sup>45</sup> The difficulty experienced by the student is rarely due to the complexity of the fact pattern. Instead, students are overwhelmed by the multiple options available to them and the unfamiliar factors which they must take into account. Students have no model for sequencing steps in the handling of a case or for integrating facts, law, personal doubts, client pressures and values. The very concept of a "theory of the case" falls apart at this stage because the classroom model of lawyering presents so few of the necessary considerations for the handling of actual cases.

Finally, the criticism that the socratic method generates destructive competition and restricts open inquiry was never taken very seriously by the majority of law school teachers. The critics stressed the non-humanitarian consequences of the method, but most law teachers attributed the bitterness engendered by the method to "free floating anxiety."<sup>46</sup> More perceptive critics have argued that the major flaw of the classroom method lies in its failure to help students handle ambiguity.<sup>47</sup> By forcing public scrutiny of answers to ambiguous and complex questions at an early stage of training, the socratic dialogue becomes a

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<sup>43</sup> For example, contract drafting requires great craft but may require little doctrine. See Cavers, *The Common Markets Draft Conflicts on Obligation*, 48 S. CAL. L. REV. 603 (1975). Negotiating a settlement may also require skill and some doctrine, but doctrine evaluated in ways not taught to law students. See H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* (1977).

<sup>44</sup> See Macarcky, *Lawyers and Consumer Protection Law*, 14 L. & SOC'Y REV. 114 (1979).

<sup>45</sup> This dilemma in legal education seems inescapable so long as we remain tied to traditional appellate case methods of instruction and the narrow intellectual preparation which seems inevitably to flow from them.

<sup>46</sup> Boyer and Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 258 (1974). For rebuttal of the critics, see Taylor, *Law School Stress and the "Deformation Professionelle"*, 27 J. LEGAL EDUC. 251 (1975).

<sup>47</sup> Goldstein, *THE UNFULFILLED PROMISE OF LEGAL EDUCATION*, reprinted in *LAW IN A CHANGING AMERICA* 159 (G. Hazzard Jr. ed. 1968); Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. SOC. ACT. 1 (1970).

lesson in how to take refuge in precedents, platitudes, and clever argument. Nothing learned this way provides a standard for judging the best answer from a *client's* perspective since all consequences are measured in win or lose terms from a judge's or opposing counsel's point of view.<sup>48</sup>

If legal education is to progress beyond these narrow and insufficient models of professional function, the goals of classroom instruction must change. The classroom must become a place where greater ambiguity and a greater variety of lawyer functions can be discussed and analyzed. Above all the classroom must be a place where standards of professional competence begin to take on concreteness and students learn to assess and improve their own performance. The following constitute some new goals of classroom instruction consistent with this view.

First, legal analysis must be considered in the context of a broader range of skills in first year and core courses. Second, the emphasis on "thinking like a lawyer" must be shifted from memorizing doctrines to setting competent objectives, choosing the best alternative, and learning from unexpected outcomes. Third, exploration of legal doctrines and professional competence must be mixed with a discussion of personal evaluations concerning the impact of alternative decisions on both the lawyer and the client, drawing into consideration individual and ethical consequences. These new goals do not imply that legal doctrines, analysis of legal rules or advocacy are unimportant. All remain crucial. They should, however, share their central position with more important goals which will require modification of the way doctrine and legal analysis are taught. The exclusive focus on the analysis of rules must be integrated with a course of instruction in the fundamentals of professional role and function.

### B. *New Method of Instruction*

Lawyers are in a better position to improve the quality of legal education than at any time in the past. While criticism of law school teaching has never been lacking, critics have often failed to suggest persuasive alternatives which promise better training. Clinicians are in a position to address specific deficiencies of classroom teaching with methods of instruction which have been successful in the clinic. But there is a limitation on the lessons which can be absorbed from clinical instruction.

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<sup>48</sup> See note 42 *supra*.

The positivist thesis concerning core and peripheral meanings is developed in H. HART, *THE CONCEPT OF LAW*, Chapter VII (1961). His statement of the thesis in 1958 led to the well known Hart-Fuller debate concerning the meaning of legal concepts and the role of values in interpretation. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Since it is probable that large classes will remain the standard, teaching methods designed for seminar-sized classes and intensive teacher-student contact for all students are not a realistic answer to the problems of legal education. Improving legal instruction means either modifying the case method as it is presently used, or finding a substitute adaptable to large-class teaching.

As used by most law school teachers, the case method conveys a grossly inadequate model of professional function. By stressing oral advocacy based on appellate case records, it misdirects attention from the development of critical intellectual skills and standards. Yet even Frank was ambivalent about discarding the case method altogether. The valuable core of the case method—having students and teachers role play using actual case materials—is not at all in conflict with the objective of developing in students an adequate understanding of professional function. Both the incredibly narrow selection of case material, and the inadequate preparation of most professors for teaching any aspect of the practitioner's role, have kept the method from being an adaptive framework capable of assimilating more sophisticated models of legal practice or conveying the varied environments of actual professional decision-making. Frank's problem with the traditional method was that, as used, students learned all there was to learn in a short period of time.<sup>49</sup> Frank respected its emphasis on intellectual development and legal analysis.<sup>50</sup> Used more imaginatively, some form of the "case method" could convey much of Frank's agenda for having students encounter the realities of the courtroom and could also be used to explore standards of competence for a broad range of professional activities.<sup>51</sup>

Three considerations should guide the adaptation of clinical teaching methods to the objectives described above. First, doctrinal instruction must be absorbed into, not separated from, training aimed at developing professional competence. Knowledge of doctrine is part of "thinking like a lawyer" and must be competently handled at the same time that other factors are being considered. Far less doctrine may be taught than is now imparted, but students must leave law school able to use legal rules to construct arguments.<sup>52</sup>

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<sup>49</sup> J. FRANK, COURTS ON TRIAL, *supra* note 6, at 237.

<sup>50</sup> *Id.*

<sup>51</sup> While there have been efforts to employ the case method more creatively, they have been too tentative because the authors lacked specific goals for professional instruction. Starting from Bellow's goals of developing a capacity for critical reflection, particular modifications of the case method follow.

<sup>52</sup> The doctrine which is lost due to the introduction of other teaching materials and new objectives can be taught in a variety of ways without harming a student's intellectual preparation. While lecturing seems anathema to law teachers, a certain amount of straight lecturing should give students basic con-

Second, the materials employed in the classroom must be more diversified. The ability to foster an attorney-client relationship, determine the nature of a client's problems, give advice and take action can only be acquired to the degree of sophistication of the settings in which the skill is learned. Transcripts of client interviews, documents, pleadings and depositions can be used in the standard casebook course with little cost and trouble. Instructors might, however, be required to exert greater effort in reorienting classroom teaching to provide a coherent concept of professional function using this broad range of materials. At somewhat greater expense, students can be exposed to the ambiguities of live interactions by in-class demonstrations or video-taped performances. These materials make possible student and teacher participation as client, witness, negotiator, law office counsellor, opposing trial counsel, as well as appellate advocate or judge.

Third, a substantial part of the misdirection of students arises from the part that teachers themselves assume. Challenging students one by one with questions over which the teacher alone has control is not similar to any life-like professional interaction, except perhaps oral argument. The stress on challenge, control, contention and competition with the teacher produces a very narrow and unrealistic standard of professional competence; even judges do not explore problems at oral argument in the manner employed by most classroom teachers.<sup>53</sup> Students should not be forced merely to imitate the teacher's skills as a debater, but should be required to focus explicitly on the professional function or role under discussion. This necessitates that the teacher's methods as scholar and as an authority in charge of the classroom be distinct from the professional role and methods being explored by the class.

Students must be aware that they are seeking standards applicable to specific lawyering tasks. Consequently, the teacher should make the professional problem under consideration explicit, and should make his own role-modeling or others' role-modeling the subject of criticism.<sup>54</sup> A teacher who performs as he would have students perform, by role playing an oral argument or interviewing a client, is adding another dimension to his instruction. He demonstrates how a competent attorney faces uncertainty, error, ethical choices, new facts, client preferences or

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cepts and a context for applying them without weakening the training in method. Further, doctrine can be taught through programmed instruction and through research assignments.

<sup>53</sup> I am not suggesting that this kind of question and answer method is not useful *at all*, but there are many other means of conducting class which are better suited to some of the goals of instruction.

<sup>54</sup> The failure to make this modification in the method of instruction and to appreciate the importance of what it conveys has led many teachers to abandon the so-called "problem approach" to instruction.



disagreement, and other aspects of "thinking like a lawyer" which normally are not demonstrated in the classic question and answer exchange between teacher and student.

Modification of teaching methods to meet these objectives would require less use of standard casebooks and greater use of materials and methods of instruction familiar to clinical faculty. For years clinical instructors have used edited transcripts, videotapes and in-class demonstrations as the basis for instruction. Teaching materials are now available which incorporate this clinical approach.<sup>56</sup> In preparing these materials clinicians have attempted to avoid encroaching on the domain of the substantive law courses, but in fact, many materials on the "lawyering process", "non-adversarial legal process", or negotiation and counseling teach students legal analysis and extend their ability to use rules and legal doctrine under a variety of situations. Thus, there are clinically-derived teaching materials which, with little effort, could be adapted for use in first year courses. The incorporation of these materials combined with the suggested role playing by teachers and students would extend the range and depth of such courses and increase the law student's knowledge and understanding of competent law practice.<sup>56</sup>

In the future, clinicians should seriously consider producing fully integrated materials based on both the case method law and modes of instruction used in clinics. For example, it would be possible to compile a course on the law of torts which contained components on interviewing plaintiffs and witnesses, investigating a tort claim, drafting pleadings, civil procedure, oral argument and professional responsibility, which still offered sufficient discussion of major appellate cases and current lines of tort jurisprudence.<sup>57</sup> Most of the knowledge necessary to

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<sup>56</sup> See note 18 *supra*.

<sup>56</sup> In the absence of materials which fully integrate the case method with clinical objectives and teaching methods, obvious opportunities already exist at many law schools for taking a step in this direction. Many law schools offer a legal methods course in the first year to teach legal research, legal writing and oral argument. They are taught by adjuncts, instructor-level temporary faculty, or even students. These courses are often loosely conceived and are seldom closely related to the main thrust of the first year of law school. The first year legal methods course could be exploited to begin teaching a fuller view of the professional's role. For example, if these courses were linked with one of the doctrinal courses, they could explore practice problems and techniques appropriate to that particular area. In turn, problems of professional practice developed in the legal method seminars could be drawn into the large substantive law class to help bridge the gap between, for example, contract doctrine and drafting, counseling a client with a contract problem and professional responsibility. See Brewer & Lahey, *Development and Shortcomings of First Year Legal Skills Courses: Progress at Osgoode Hall*, 14 OSGOODE HALL L.J. 61 (1976).

<sup>57</sup> Some of these instructions might arise through coordinating the contents of a civil procedure course taught at the same time as a course on torts, or by focus-

compile such a course is already present in the well run law school clinic. The brightest future for clinics lies in incorporating new forms of the case method and other teaching methods into other law school courses.

### C. *Answers to Objections to Adopting Clinical Methodology*

While clinical methods of teaching have much to offer legal education, several objections to the introduction of these proposed modifications can be anticipated. First, it will be argued that reducing the number of appellate cases taught in a class weakens the theoretical core which all lawyering requires. In response, it should be noted that the theoretical core has little meaning in the abstract and may represent significant miseducation. The students' attention is diverted to the analysis of abstract concepts and away from the difficult problems of judgment which face the lawyer attempting to apply the law for his client's benefit. Second, it may be argued that additional materials to enrich the classroom discussion have already been introduced by many teachers and casebooks. While these efforts are commendable, they do not go far enough. It takes more than the introduction of these enriching materials to refocus legal education on the competence of lawyers. Third, since the problem approach adopted by some casebooks is often described as complex and difficult to teach, objections may arise that the new method proposed will not be any more successful.<sup>58</sup> Teachers require more experience to properly use the problem approach. Often their expectations are the same as they would be if students were using a more conventional casebook—that students will master doctrine—while the implicit objectives of the method are quite different. Thus, the tacit judgment-building objectives are both misunderstood by the teachers and usually not reflected in their final examinations.

The most intense objection to the suggested reorientation may be the issue of academic freedom. Training competent lawyers requires a more coordinated approach to instruction within the law school and requires that the success of instruction be judged by new standards. I believe strongly enough in the failure of the current methods of training lawyers to propose that law schools have a responsibility to oversee the content of the courses they offer. Law schools must require that students be trained so as to maximize their chances of becoming compe-

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ing the first year legal research and writing course on problems connected with the torts course. The current lack of coordination among these courses means that students in first year courses concentrate solely on doctrine, and practical lawyering is thereby ignored.

<sup>58</sup> For a thorough consideration of a recent casebook adopting a problem approach, see Klare, Book Review, 54 N.Y.U. L. REV. 876 (1979) (KNAPP, PROBLEMS IN CONTRACT LAW).

tent practitioners. Unfortunately, law schools are unlikely to judge the quality of instruction by the content of the courses offered or the materials used. Ironically, the existing academic freedom is exercised largely within a range determined by a few casebook publishers. My argument, therefore, is directed to clinical faculty, urging them to enlist the aid of publishers of casebooks in producing sound alternative materials and teaching manuals.

#### V. THE ARGUMENT FOR PROFESSIONALISM IN LAW SCHOOL TEACHING

The incompetence of many law school graduates entering practice should be enough to motivate changes in the educational system. Yet law schools are not concerned about the entry level competence of the bulk of their graduates. The apparent lack of concern underscores the extent to which it has become accepted practice to prepare all law students as if they were destined to enter practice as an associate in a prestigious law firm or as a judicial clerk. In other words, at best, law schools prepare graduates for an apprenticeship where the "law" learned in the classroom is amended and transformed by practical experience. Consequently, law students seek positions offering an apprenticeship, for they are unprepared to exercise independent judgment about most problems arising in practice. Law schools are sheltered from criticism because they are satisfying the needs of the most prestigious consumers of legal services. In fact, law schools regularly assess their status in terms of the elite law firm positions and judicial clerkships held by their recent graduates.

If there is a justification for preparing all students to serve only a small fraction of the potential market for legal services, it must be that whatever is good training for those who will administer to the highest status clients must also be good for others. There is no basis for such a conclusion, and no excuse for orienting legal education in a way which so heavily skews job preferences toward one particular model of practice and, inevitably, toward the class of clients which finances that form of practice.

Delivery of legal services should be a prime concern of the legal profession, not just a concern of the practicing bar. The public is the ultimate consumer of what law schools produce, yet better distribution of legal services to members of the public is not a concern of law school faculties — if one judges them by the way students are trained. While it is the responsibility of law schools to provide education and the responsibility of graduates to use it, the method by which lawyers are trained affects the quality and availability of legal services to different parts of the community. Moreover, so little thought, scholarship, and classroom time is directed to the distribution of legal services that few graduates would be able to describe the social or ethical dimensions of the problem, and fewer still would rank it among the leading issues raised in the course of his legal training.

It is time for law schools to accept their professional responsibility of providing the kind of services a licensed monopoly owes to the public. Legal delivery is a matter of turning out competent attorneys, not apprentices whose intellectual faculties have been peripherally trained in library and narrow debating skills. Accepting the pluralism of the legal delivery system, law schools are not doing what they can to promote service to all potential consumers. The core legal training which law schools provide must change, and the objective of that change should be to graduate students competent in the exercise of professional judgment independent of apprenticeships or intensive supervision in entry level positions. Law graduates would at least have greater freedom to choose career lines which lack an apprenticeship. Further, law schools would cease to become feeders to a narrow range of elite career lines and would cease treating other models of professional practice as second best.

In choosing to make these changes, law schools will be creating and adhering to standards of professionalism consistent with the ethical commitments of the profession as a whole. Clinicians have led the way in voicing these concerns. While law schools are not likely to agree with the full ideological commitment of many clinical faculty, once competence is accepted as the measure of successful legal education, law schools must accept responsibility for the direct impact of entry level competence of graduates on the distribution and quality of legal services.

## VI. CONCLUSION

Since the beginning of the clinical movement in the mid-1960's, clinicians have been among the leaders in promoting training in professional skills and ethical responsibilities. The criticisms which clinicians have voiced concerning the more traditional forms of training reflect a single serious shortcoming: the failure of legal education to produce competent entry level practitioners. Law school graduates are not equipped to make the practical or ethical choices required to accept responsibility for a client's affairs. The criticism has intensified considerably in the last few years, and as a result it is easier to see how the core training in legal analysis, usually assumed to be the strength of case method, is largely to blame for this shortcoming.

I have argued that the clinical movement has constituted a vanguard, slowly enlarging the criticism and developing alternative goals and methods of instruction left unfinished by the legal realists. In my view, clinicians must now turn their attention to producing course materials which combine more effective methods of developing competence in a broad range of lawyering tasks with instruction in doctrine and legal analysis. Clinicians are in a position to introduce effective innovative techniques derived from their own experience. Moreover, this task pro-

vides the most important reason for continuing to fight for the existence and improvement of clinics.

Far from being another special interest group in the curriculum, clinics are teaching laboratories where faculty are able to assess fitness for law practice and the effectiveness of a student's legal training. Further, they provide an opportunity to experiment with new methods of instruction in both seminar-sized and larger classes. Clinics should have continuing input to the rest of the curriculum. Ideally all faculty should have an opportunity to use the clinic as a teaching laboratory and to learn about the effectiveness of the training which they are providing by observing students perform under practice conditions.

The future of the clinician lies in becoming part of the mainstream of legal education in ways other than expanding the clinic. Clinical faculty must show that what they have learned has broad application in teaching core curriculum courses. Clinics are still viewed as representing goals which are secondary or supplemental to those of the mainstream of legal education. Until clinicians demonstrate to the contrary, clinics will not receive the respect they should have as teaching laboratories. Clinicians may be on the verge of this breakthrough. By offering better methods of training lawyers, the clinical movement has an important role to play in improving legal education.