

TEACHING AND DOING: THE ROLE OF LAW SCHOOL CLINICS IN ENHANCING ACCESS TO JUSTICE

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“Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.”¹

Deborah Rhode has provided a compelling critique of law schools for their failure to embrace a justice mission and inculcate in students the professional value of providing pro bono service to the poor. Her analysis assumes the basic belief that we as a society must strive to make legal assistance available to the poor in both criminal and civil cases, and that law schools have been complicit in the pervasive denial to the poor of access to justice.²

The primary obligation to provide legal services to the poor resides with the government, and to a lesser extent, with the legal profession, not with law schools. Nevertheless, law schools do have some obligation to contribute to the solution of the crisis in access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems.³

Clinical legal education has been focusing on legal services for the underserved and on the justice mission of law schools for years. Those who built clinics a little more than three decades ago and those who funded them saw, like Rhode, a large, unmet need for legal

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1. Deborah L. Rhode, *Access to Justice* 193 (2004).

2. *Id.* at 19.

3. This obligation is expressed throughout *Sec. L. Educ. & Admissions to the Bar, ABA, Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992).

representation for the poor in both criminal and civil cases.⁴ They also observed the lack of practical involvement of the law schools in the rights revolution sweeping the courts and communities of America.⁵ One of the primary reasons for having a clinic was to engage a law school more directly in providing that representation.⁶ Much has happened in clinical education since those early days, but little has improved in the provision of legal services to the poor. This Essay revisits the issue of the role that law school clinics can, and should play, in expanding access to justice. To do so we need to cast a critical eye on what we do, who we are, what we have become, and whether we need to rediscover, redefine, and reimagine our professional role as law school clinical teachers.

Thirty years ago a hardy band of public defenders and legal services attorneys stormed the academy.⁷ Many of the lawyers who started building and teaching in clinics at that time were lawyers who had worked in legal aid and public defender programs and in civil rights and other public interest advocacy programs.⁸ 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 or to bring important impact litigation, under the supervision of practicing attorneys. An important by-product of that service was an increased awareness on the part of law students of the needs of the poor and oppressed. Clinics were about skills training, providing service, influencing policy, and developing future legal aid and civil rights lawyers. Some of us felt like kids in a candy shop; a public interest law firm funded by a law school with ready workers providing important client services.

4. See Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 *Tenn. L. Rev.* 939 (1997).

5. See, e.g., Robert C. Cumbow, *Educating the 21st Century Lawyer*, 32 *Idaho L. Rev.* 407 (1996); Anita Weinberg & Carol Harding, *Interdisciplinary Teaching and Collaboration in Higher Education: A Concept Whose Time Has Come*, 14 *Wash. U. J.L. & Pol'y* 15 (2004).

6. See generally Gary Bellow, *On Talking Tough to Each Other: Comments on Conclin*, 33 *J. Legal Educ.* 619 (1983); Robert J. Conclin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 *J. Legal Educ.* 604 (1983).

7. In 1959, the Ford Foundation founded the National Legal Aid and Defender Association ("NLADA"), which established a National Council on Law Clinics. Ford Found. Grantees and the Pursuit of Justice, available at http://www.fordfound.org/publications/recent_articles/docs/lawgrantees.pdf (last visited Oct. 17, 2004). In 1968, the Ford Foundation gave \$12 million over ten years to incorporate clinical education as part of the curriculum of law schools. J.P. "Sandy" Ogilvy, *History of Clinical Legal Education*, at <http://www.aals.org/nlt2004/ogilvy.pdf> (last visited Oct. 17, 2004). The Council on Legal Education for Professional Responsibility ("CLEPR") was founded in 1968 with Ford money. *Id.* From 1969-1973 CLEPR provided over 100 grants to law schools for clinical education. *Id.*

8. For a history of legal services from the viewpoint of a clinician, see Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 *Md. J. Contemp. Legal Issues* 381 (1994).

The development of law school clinics did not come about without resistance and internal conflict. From the outset tensions emerged between the public service goals of the first generation of clinical teachers and their funders, on the one hand, and the academic values of law school faculties on the other.⁹ The faculties, to the extent they were not openly hostile to the introduction of experiential learning into the curriculum, as many were, were more concerned with the educational value of clinical programs than with the newly hired supervising attorneys' legal services and social justice motivations.

Clinicians were a different breed from their law professor counterparts. They were often housed in different spaces, not allowed to participate in faculty governance, and offered no job security. Indeed, many, if not most, clinicians had to raise funds to ensure their own job continuation.¹⁰ Funding was scarce for these programs and law schools struggled to find soft money to fund their clinical programs. Inevitably, the effort to secure funding created conflicts within the clinical community. During the Reagan Administration, Attorney General Edward Meese, proposed that federal funding for legal services be diverted to law schools as a way of reducing or eliminating what was viewed as the social activism and left-wing agendas of some federally-funded legal services programs and back-up centers.¹¹ Many law school clinicians joined their legal services colleagues in opposing this move, arguing that law school clinical programs as teaching programs were, by design, inefficient and should not be taking poor people's legal services funds away from the more efficient legal services programs.¹² Those of us who opposed taking legal services money away from legal services programs in order to support law school clinics argued that law schools should be financing clinical programs, especially because so much of what goes on in clinics involves teaching.¹³ In order to use clients' cases for teaching, we had to take smaller caseloads and spend more time examining, preparing, reflecting, and in other ways using clients' cases as teaching "texts."

9. See generally Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education As Methodology*, in *Clinical Education for the Law Student* 374 (Council on Legal Educ. Prof'l Dev. ed., 1973).

10. This is still the case in many law schools. See Peter Joy, *ABA Site Visits: Everything You Ever Wanted to Know*, at <http://www.cleaweb.org/aba/index.html> (last visited Oct. 17, 2004) (identifying status issues of clinicians as one of the areas to evaluate when conducting an ABA site inspection); see also Daphne Eviatar, *Clinical Anxiety, Rebellious Lawyers Are Shaking Up Law School*, *Legal Aff.*, Nov./Dec., 2002, at 37.

11. For an insightful analysis of the impact of funding cuts and restrictions on legal services, see Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 *Fordham Urb. L.J.* 831 (1998).

12. See Trubek, *supra* note 8, at 383, 388.

13. *Id.* at 386-87.

Nevertheless, some law schools did apply for and receive federal legal services dollars to support their clinical programs.¹⁴ Gary 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.¹⁵ However, in all fairness to Bellow, who was a true visionary and major force in both legal services and clinical legal education, the Legal Services Center that he founded in the Jamaica Plain neighborhood of Boston has been a major provider of legal services to low-income clients, and has given opportunities to hundreds of law students to engage in supervised legal services work for low-income clients.¹⁶

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.¹⁷ Supervising attorneys in the Harvard program have never traveled the path from "supervising attorney" to "clinical professor." Their full-time job is supervising students handling cases for clients. They are not expected to teach classes, write articles, or participate in any of the institutional activities engaged in by members of the faculty. The faculty—Gary Bellow until his untimely death, and Charles Ogletree, who directs the Harvard Criminal Justice Institute—do all of the "teaching." Harvard Law School, a school with more than 1500 J.D. students, today has only one clinical faculty member, Charles Ogletree.¹⁸ But it also has many more supervising attorneys in its various clinical programs.¹⁹

Harvard Law School provides a lot of legal services to low-income clients, far more than any other law school.²⁰ 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 (who have been given the quasi-faculty title of "clinical instructors").²¹ It has created as efficient a legal services delivery program as possible using law students to do much of the work.²² In so doing, Harvard has

14. See, e.g., *Trister v. Univ. of Miss.*, 420 F.2d 499, 500-01 (5th Cir. 1969); *Blaze*, *supra* note 4, at 952-53, 959 (recounting the history of law clinics at the University of Tennessee); *Trubek*, *supra* note 8, at 386 (explaining the Legal Services Corporation's special program to fund law clinic programs).

15. See Harvard Law Sch., *The Hale and Dorr Legal Services: Center History*, at <http://www.law.harvard.edu/academics/clinical/lsc/history.htm> (last visited Oct. 17, 2004) [hereinafter *Hale and Dorr*].

16. *Id.*

17. The controversy is not unique to Harvard. See *Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 508, 512-13 (1992).

18. Harvard Law Sch., *Harvard's Clinical Faculty*, at <http://www.law.harvard.edu/academics/clinical/clinics.htm> (last visited Oct. 17, 2004) [hereinafter *Harvard's Clinical Faculty*].

19. *Id.*

20. See *Hale and Dorr*, *supra* note 15.

21. *Id.*

22. See *id.*

avoided, or evaded, the educational and political winds that have swept through most law schools, primarily from the Association of American Law Schools (“AALS”) and the American Bar Association, which have resulted in the movement of clinical legal education from an adjunct role outside of the regular curriculum, to the much more established and accepted role that clinics now play in legal education.

By having only two clinical faculty members—one since Gary Bellow died—Harvard is able to hire a large number of staff attorneys at considerably lower salaries than those paid to members of the law school faculty.²³ Staff attorneys do not function on an academic calendar, do not receive academic leaves, and do not enjoy the other perquisites of law professors.²⁴ They supervise students representing clients.²⁵ Harvard has embraced the provision of legal services to the poor as the central focus of its clinical legal education program and the primary way to meet the law school’s obligation to address the maldistribution of legal services.²⁶

Most clinicians today would not say that they are primarily in the business of providing legal services to the poor as is done in the Harvard program.²⁷ Thirty years have aged us. Thirty years have brought us new challenges, such as being hired through the AALS “meat market,”²⁸ meeting publication requirements, feeling pressure (and sometimes a guilty desire?) to teach nonclinical courses. We are on committees, we go to conferences to talk about our work, we publish, we over-commit—we try to do it all. Within the clinical community there are tensions that our increased assimilation into the traditional law school world has created for us. Our aspiration for faculty status may have made us develop clinics driven by faculty interests as much as, or even rather than, community need. The more integrated into the traditional law school we become, the more these pressures arise. The fact that we have the possibility of job security (and good salaries) means that we do not have the steady turn over of young, energetic lawyers who can be connected to the communities

23. See Harvard’s Clinical Faculty, *supra* note 18.

24. A description of staff attorneys’ duties are included in Hale and Dorr, *supra* note 15.

25. *Id.*

26. See *id.*

27. See, e.g., Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 Fordham L. Rev. 1879, 1918 (1999); Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 Hastings L.J. 1187, 1188 (1992).

28. See Am. Ass’n of Law Schs. Faculty Recruitment Servs., at <http://www.aals.org/FRS/index.html> (last visited Oct. 27, 2004) (describing the process by which persons seeking entry-level teaching positions apply through a central hiring conference overseen by the AALS). This hiring conference is colloquially known as the “meat market.”

we seek to serve. Our age alone, and the demands of family and academic life, make retreating from direct client contact enticing. The nine month academic calendar poses its own challenges: We plan clinics that allow time to respond to all of these pressures (reduced case loads, reduced faculty/student ratios, lots of simulation, hiring fellows or staff attorneys to do the case handling, choosing cases that allow for writing), not because there is a need in the community.

It seems appropriate to express some skepticism about what we have come to accept as “progress” in clinical legal education. A discussion of clinicians on the tenure track (by both clinical and nonclinical faculty) often leads to a discussion of the problem of “drift,” that is, the problem that over time the person hired to be a clinician will gradually move away from the clinic in order to teach nonclinical courses. Perhaps we need to engage in a larger discussion about whether clinical education, itself, has drifted. In particular, in our three-decade professional advancement from “supervising attorney” to “clinical professor,” have we not moved too far away from teaching through doing to teaching about doing? Have we caused the justice mission of clinical education to take a back seat to professional advancement? Are we being succeeded by a new breed of clinicians with limited practice experience and expanded academic ambitions? Are we beginning to look more like the law professors we knew in law school than the legal aid attorneys we think of as comrades? 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, simulations, skills training, journal writing, and guided reflection? Have we also replaced a significant part of it not only with clinical pedagogy, but also with writing for publication, nonclinical 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? These tensions, unless resolved, have the potential of diluting the already meager contribution that clinical legal education makes to alleviating the crisis in access to justice.

Deborah Rhode has raised, once again, the challenge for law schools to do better in socializing law students to make “access to justice a more central social priority.”²⁹ At base, that requires us to evaluate the efficacy of our teaching methods. As law clinics have begun to look more like traditional law courses, there has emerged a genuine debate among clinicians about how law students can best

29. Rhode, *supra* note 1, at 193.

learn from experience.³⁰ It is about whether students can only truly learn what they need to learn about lawyering through the supervised representation of real clients, or whether that kind of experiential learning needs to be prepared for, supplemented, and can even be replaced by skills training through simulation, and aids to critical reflection such as journals and classroom instruction.³¹ In essence, we are walking a tightrope and constantly having to deal with the tension between teaching and doing.

When Steve Wizner, co-author of this Essay, was a legal services lawyer in the 1960s, he had law students working in his neighborhood legal services office, mostly as volunteers, and a few for credit. Their role was to assist him and the other lawyers in the program by performing legal research, memo writing, and fact investigation. His biggest adjustment when he became a supervising attorney in a law school clinical program in 1970 was to change his relationship to the law students with whom he was working. Rather than they helping him with his cases, he had to learn to hand over responsibility for representing clients to them, and to provide assistance to them on their cases. In order to accomplish this redefinition of his role, he had to learn to teach students how to relate to clients and to handle their cases, to supervise them as they did so, and to help them learn from that experience.

Steve found that it was not enough simply to provide students the opportunity to experience the real world through the representation of low-income clients. As a clinical teacher he needed to sensitize his students to what they were seeing, guide them to a deeper understanding of their clients' lives and their relationship to the social, economic, and political forces that affected their lives, and help students develop a critical consciousness imbued with a concern for social justice.³²

As the students learned and became more competent, he soon realized that having a crew of clinic students enabled him, through them, to represent more clients and handle more cases than he could as a legal services lawyer, and to take on complex litigation that he could not handle well on his own. Nevertheless, he found that he was spending more time teaching students than he had when he first started out as a clinical instructor.

Over time, as he gradually transitioned from "supervising attorney" to "clinical professor," he found himself spending time teaching classes, writing articles, serving on committees, attending conferences, and increasingly less time in direct supervision of students

30. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 Clin. L. Rev. 1 (2000).

31. See Boswell, *supra* note 27.

32. Stephen Wizner, *Beyond Skills Training*, 7 Clin. L. Rev. 327, 338-39 (2001) (discussing the role that clinics can play in teaching a concern for social justice).

representing clients. In the beginning he supervised twenty (or more) students. He 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 memoranda, and correspondence, mooting students to prepare them for court appearances, and preparing students for negotiations and trials. While he continues to do all of these things today, he finds himself supervising fewer students, representing fewer clients, handling fewer cases, and spending time that he used to devote to those activities in the classroom teaching clinical and nonclinical courses, writing, and other “professorial” activities.

Jane Aiken, also a co-author of this Essay, was a community organizer in Washington, D.C. before entering law school and saw the law as merely another tool to bring to efforts to serve poor communities. She began her career in law not as a legal services attorney, but rather back in D.C. as a clinical teacher working in the community. The provision of legal services was deeply tied to the educational mission and the pedagogical method of “learning from experience.” It was in that work that Jane watched her students become empowered, much like the community members she had worked with to form tenant unions and shelters in her days as an organizer.

In her clinical teaching Jane sought not only to provide service but also to organize and inspire students to work for justice when they left the academy. In those early days, the clinic responded to whatever need arose in the community. The need drove case selection, and everyone (students and faculty alike) was expected to get up to speed on the law as quickly and efficiently as possible. Class discussions were all about legal strategy. The students were the staff—bodies to do the work. Her job as the clinical teacher was to identify the greatest underserved need in the community, design training materials to ensure that the students could provide competent representation, participate in legislative and policy drafting, bring strategic class actions, and identify ways to leverage the prestige of the university through her relationships with judges. As the tenure decision loomed, however, pressures to write and to teach nonclinical courses diverted Jane’s energy, took away from the creativity and comprehensiveness of the legal services work she was doing, and shifted her focus toward teaching and writing.

As we reflect on what has happened to us professionally since becoming law school clinical teachers, we realize that we spend a lot of time in our working day doing things that we would not do if we were legal services lawyers assisted by law students. We teach substantive law and practice. We teach about systems and institutions. We 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; and talking about case selection, analysis of client problems, ethical issues, and how to deal with clients and adversaries effectively. We spend time mooted 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 us as clinical teachers.

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. These include classes, supervision, skills-training, simulations, journal writing (and reading), guided reflection, and other explicitly pedagogical activities. It may well be that the teaching and institutional citizenship responsibilities of clinical professors (including nonclinical teaching, committee work, and writing), the educational focus of clinical courses, and the many other claims on the time of clinical teachers and clinic students, make it unrealistic to expect law schools to play a significant role in addressing the access to justice problem. Perhaps the best contribution that law schools can make is to sensitize students to social justice issues through limited exposure to actual victims of social injustice, and to inculcate in students the professional value of service to the underprivileged. But how much is that an abdication of our social responsibility? How much is self-deception? Should not law school clinicians be striking a better balance between teaching and doing? Do we need to think about returning to the root notion of experiential learning? Are we overemphasizing learning from teaching at the expense of learning from doing? Should not the core of our teaching be the doing, putting students in role representing real clients under supervision? Should we be de-emphasizing fictional simulation exercises and other forms of artificial skills training, and classroom instruction? Do we spend too much time—our time and our students’ time—on pedagogy not directly related to the real cases we are handling?³³

We wonder why we devote time to fictional simulations and skills training, when the lessons we seek to teach through these methods might be taught equally as well, and certainly more realistically, by devoting that time to the preparation and handling of actual cases for real clients. We wonder whether students and clinical teachers devote

33. See, e.g., James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 *Fordham L. Rev.* 2377, 2387 (1999). Professor Moliterno asks some of the same questions asked here: “Is there an inherent conflict between the educational and the service missions of clinics? Can clinicians teach legal practice and, simultaneously, be the practice about which they teach . . . ?” *Id.* at 2378.

time to student journals and to engaging in guided reflection about how students and clients experience their personal interactions, at the expense of actually representing clients and handling cases. We wonder whether law school clinics could not increase the provision of legal services they provide to low-income clients and communities without impairing, and perhaps even enhancing, students' educational experience. We wonder whether law school clinics should not increase students' learning through doing, and decrease the time and effort they devote to learning about doing.

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, underexpose them to the real world of low-income clients, miss opportunities to engage students in seeking fundamental change through class actions, and thus fail to meet the law school's obligation to make a meaningful contribution to addressing the access to justice problem.

One solution to this problem might be to return to our roots, to think of clinical legal education programs primarily as legal services providers. Providing and facilitating access to justice for unprivileged and underserved clients and communities would be the primary focus of both our teaching and our doing. This would require law school clinicians to re-focus their efforts on the provision of legal assistance to unprivileged and underserved clients and communities through supervised law student representation. Everything else that clinicians did would be seen as a secondary objective, and, to the extent possible, would support the primary objective. When they employed simulation, to the extent possible it would be in the form of mooted students for actual representational events on behalf of real clients. When clinicians wrote, it would be writing that was intended to advance the project, that is, to assist students in their representation of clients, assist teachers in their clinical teaching, explain to the nonclinical world what clinical programs are doing in order to gain support for the work, use their unique knowledge gained from practice to propose and advocate reforms in the law, and analyze the relationship—and tension—between advocacy for clients and social policy.

Under this approach, when clinicians teach nonclinical courses, the courses should relate to and support the clinical teaching. This means that clinicians should teach Trial Advocacy, Evidence, and Professional Responsibility, but not Torts or Contracts. When they engage in activities of institutional citizenship, such as serving on faculty committees, they should consider them as opportunities for encouraging their law schools to commit financial and intellectual resources to addressing the maldistribution of legal services through support of clinical programs, and teaching, research, and writing

directed toward the amelioration of the crisis in access to justice.³⁴ When clinicians engage in bar activities, clinicians should encourage the bar to assist in carrying out the social justice mission of clinical legal education.

An alternative solution might be to abandon any pretense of the law school clinics as legal services providers.³⁵ In this view of clinical legal education, it is not about providing more legal services to underserved clients or using the academy to bring legal action seeking systemic change. That is important—but far less important than it was twenty or thirty years ago. It is not that clinicians are forsaking their roots as they are transformed into academics. Rather, the goals have changed since those early days—and maybe these goals have changed for positive reasons, not because of the pressures to become “academics.”³⁶ Why should clients serve as guinea pigs for students who, if permitted to take primary responsibility, may provide inferior legal services?³⁷ What is the virtue of treating clients as fodder for voyeuristic analysis? Why require clients to establish new attorney/client relationships with different students, semester-to-semester? Does not this semester-to-semester approach hinder the development of an effective strategy in impact cases? Perhaps clinical education is just another teaching vehicle. This vehicle relies on doing as its pedagogical method, but doing can be quite limited and still allow for the kind of learning that clinicians hope to impart.³⁸ If clinics take on too many cases, they risk students becoming overwhelmed, lost, and disinclined to do these cases in their practices later. It may also reinforce students’ cultural stereotypes about the poor that go unchallenged because of caseload pressures. We may leave our students with the notion that they are powerless to make change as lawyers as they encounter, day after day, case after case, poor people ignored, or mistreated, by the legal system. On the other hand, as we become more integrated into the law school and more effective as teachers, we can embrace that role, we can write and reflect more about issues important to the community.³⁹ We can communicate that providing legal services to the underserved is important because clinical courses are on the same footing as nonclinical courses. We

34. See Boswell, *supra* note 27, at 1192.

35. See Ralph S. Tyler & Robert S. Catz, *The Contradictions of Clinical Legal Education*, 29 Clev. St. L. Rev. 693, 709 (1980).

36. See Linda F. Smith, *Why Clinical Programs Should Embrace Civic Engagements, Service Learning and Community Based Research*, 10 Clin. L. Rev. 723 (2004).

37. *But see* Steven Zeidman, *Sacrificial Lambs or Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 Brook. L. Rev. 853 (1996).

38. See Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 Hastings L.J. 1159 (1992).

39. See Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 Tenn. L. Rev. 989 (1997).

can encourage participation in clinics in our nonclinical classes. Indeed, instead of only teaching traditional skills and values courses, we could strive to teach courses in which we are likely to reach the least clinically inclined students.

As we look toward the future, how do we choose between these two very different paths? The key, we believe, is not to choose. We must resist those pressures that make teaching and doing mutually exclusive or we will lose the soul of clinical education. It is through doing that students open themselves to the real learning about social justice. It is through teaching that we help our students appreciate the broader lessons about power and privilege, about their role in bringing about or inhibiting social justice. It is the sense of responsibility that they feel, the fear, the vulnerability when representing real clients, that inspires students to strive to be effective lawyers with excellent skills.⁴⁰ Unlike in simulations, in real cases things can be unpredictable, things can go wrong, and those wrongs can have real-life consequences when the client is a human being, not a fictional party in a simulation. Unlike second chairing, having direct responsibility for cases means that students must establish independent relationships with clients, must think ahead, and must shoulder the responsibility for the choices they make. We cannot afford to lose those lessons by taking the real clients out of the mix.⁴¹ At the same time, we cannot assume that those lessons will be learned from that intense experience alone. We need to be there when our students make that connection, because it is then that we can help them reflect on the experience and hone their skills and examine their values. It is a trade-off we should be willing to tolerate. It is not enough to provide students the experience.⁴² We

40. See Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 Harv. C.R.-C.L. L. Rev. 1 (1993).

41. We recognize that not all law school clinics are organized as legal services or public defender projects, where students provide supervised legal representation to individual clients. Clinics that do impact, social change, and law reform litigation; international human rights clinics and some environmental clinics that collaborate with nongovernmental organizations which set the advocacy agenda; and legislative advocacy clinics, do not have "clients" in the sense in which we use that term in this Essay. Nevertheless, the intended beneficiaries of their advocacy do constitute "client" populations on whose behalf these clinics do their legal work. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 Yale J. Int'l L. 505 (2003). These clinics can be an effective way to enhance access to justice for the poor by employing the legal system on behalf of large numbers of low-income individuals. The risk of this type of clinic, however, is that it is lawyer-driven (or nongovernmental organization-driven) rather than client-driven, and therefore may convey to students the wrong message about the correct motivation for doing the work, which is to use the legal system to struggle for social justice for the poor, not to empower lawyers to determine in the abstract what is in the public interest.

42. We do not mean to deny the value to students of the experience of being exposed to clients and to what lawyers do to address clients' legal problems. Certainly students learn from the experience itself, even from simply observing, and even more from participating, whether assisting lawyers or doing the work themselves

need to help them reflect on that experience, to learn the larger lessons. We do not want our students just to learn how to handle a domestic violence case; we want them to reflect on how the justice system responds, or fails to respond, to domestic violence. We want them to understand that being hit is only one of many issues in our clients' lives. We want them to think about the use of violence as a means of control. In fact, if we don't encourage them to reflect, we may reinforce the very structure that has led to the violence. We do not just want our students to draft effective deposition questions in their class action. We want them to reflect on how individual acts and attitudes result in policies, procedures, and behaviors that offend the Constitution. This kind of guided reflection and supervision takes skill: teaching skill. It is not what we expect of legal service attorneys. It is expected of law professors.

If we simply expose our students to injustice without addressing it explicitly, we are complicit in their desensitization, and fail in carrying out our responsibilities as teachers. We may even become a part of the problem because it is not possible to be a neutral observer of injustice. We want to leave our students with the sense that they can make change. If we are going to do that, we necessarily will be handling fewer cases. Steve Wizner says that we need to "nurture students' capacity for moral indignation at injustice in the world."⁴³ That takes time and it takes skill—not lawyering skill but teaching skill. And, as Jane Aiken stresses:

If all I can do . . . is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and, at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.⁴⁴

Finding the synthesis between teaching and doing is not without significant challenges.⁴⁵ We still have to look at ourselves and answer the question, are we doing this because it is more convenient for us or because it is effective? In our clinics, are we serving clients or are they serving us? Have we chosen cases that will maximize our students' learning? Have we built into our schedules sufficient time to reflect with each student personally? Have we honed our teaching skills so

under the supervision of lawyers. Our point is that experience alone is not enough to assure that students learn all that they should learn from the experience, and to inculcate in them the professional value of public service and the professional responsibility to assist those who are not able to afford legal representation.

43. Wizner, *supra* note 32, at 330.

44. Jane Harris Aiken, *Striving to "Teach Justice, Fairness, and Morality,"* 4 Clin. L. Rev. 1, 6 n.10 (1997).

45. See, e.g., Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1987).

as to bring the justice mission into our clinical teaching? Are we making the best use of our privileged positions in the academy to challenge practices that the practicing bar is not in a position to do? Are we filling gaps where public funding has failed clients? Are we bringing our newfound status as law professors to the decision making table in public policy? Are we creating scholarship that redefines the idea of justice?⁴⁶ When we look ahead to the next three decades of clinical legal education, where do we see ourselves going and are we satisfied with that?

Clinical education today creates opportunities for law students to recognize the injustices in society and in the legal system, to appreciate the role they can play in challenging social injustice and in reforming the legal system, to make society and the legal system more just, and to inspire them to do just that. If we do that well, clinical legal education will have an even greater impact on promoting social justice than if we handle more cases. And to do that, we must all be both effective teachers *and* effective doers.

Deborah Rhode has asked us to take a hard look at the law schools' failure to promote access to justice as a value for their graduates.⁴⁷ Clinical education has not delivered the magic that would transform law schools into breeding grounds for lawyers dedicated to justice. As we look toward the future, a future that forebodes increasing disparity between rich and poor and diminishing numbers of lawyers advocating on behalf of the poor and oppressed, access to justice becomes more necessary but also more elusive. Law schools will not be the answer to this problem. However, within the law school, it is the clinics that offer the most promise. We have become more sophisticated in our understanding of what it takes to produce social justice practitioners. We have learned that it requires both doing *and* teaching, and that the teaching is no less important than the doing. This is because, just as teaching divorced from doing fails to expose students to the realities of individual and social injustice in society, so too, doing without teaching risks training students in the skills of lawyering without inculcating in them the professional values of public service and the pursuit of justice for the unprivileged.

The balance between teaching and doing has shifted during the three decades since the birth of modern clinical education. In many contemporary law school clinical programs students are representing fewer clients, and spending more time engaging in forms of clinical

46. See Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 Clev. St. L. Rev. 469 (1992); Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 Geo. Wash. L. Rev. 272 (1984).

47. Rhode, *supra* note 1, at 19.

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pedagogy that teach them about the representation of clients.⁴⁸ To the extent that this has resulted in a lessening of the clinics' direct contribution to enhancing access to justice for the poor, there needs to be a justification beyond that of the increasing academic professionalization of the clinical professoriate.

While clinicians must maintain the focus of their teaching on the supervised representation of low-income clients by their students, they also must recognize that there is more to the project of enhancing access to justice than simply offering law students the opportunity to learn lawyering skills by representing low-income clients or collaborating in impact litigation. In order to increase the number of law school graduates who embrace a professional responsibility to assure access to justice for the poor, clinicians must strive to inculcate in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice.

48. See Stephen F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 Minn. L. Rev. 619 (1991).