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CLINICAL REFLECTIONS: LOOKING AHEAD TOWARD THE PAST

Roger S. Haydock†

What were we planning? What were we thinking? What were we daring to do? Oh, so many questions and answers for everything, or so we surmised. Are we any wiser three decades after we thought we knew what we were doing? And, another question, who were the "we"?

The real hope in looking back is to help illuminate, a bit, the future for legal education. Recreating time past—and training students to recreate time past for clients in court and hearing rooms—is what helped propel many of us into legal academia. Predicting the future—and helping law professors predict the future—is what interests me in this article.

I. THE MISSION AND VISION

"We" were all those involved in a mission with a vision. We had somewhat different goals, and we went off in various directions, but we had a common mission:

- Helping law students become better lawyers, and

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• Making justice accessible to clients.

Our vision was similarly clear; we saw:

• Skilled lawyers successfully representing clients with disputes and in transactions, and
• Satisfied clients thanking their lawyers, win or lose (or euphorically carrying them out on their shoulders after a victory).

For those of us at law schools that embraced the notion of clinical education as just another form of pedagogy, we had the support of our colleagues, deans, and others. This was largely the experience for us who had the privilege and honor of teaching at William Mitchell College of Law. However, the experience for some other "clinical" faculty at other institutions was negative or mixed.

Being somewhat removed from these experiences, I offer some observations and maybe insights into the national development of clinical education three decades ago. The idea of criticizing the mission of "clinical" legal education might seem strange, but many did, and some still do. Here's what I recall the "opposition" whining—OK, complaining—about then and still today:

1. It's already being done: Law school already provides an excellent legal education background to prepare lawyers to represent clients.

Well, if that were true—back then, or even now—there would not have been such a clamor for more relevant, helpful legal educational learning methods. A goodly number of us graduated law school with zero training in skills, strategies, and tactics, unless you count legal writing with a twenty-minute moot court venture. I, for one, was rather proudly told that "I would learn from my mistakes in practice." True to form, I learned a lot from many of my mistakes, which had to be no small comfort to my clients. What we wanted to learn was not being taught.

2. It's not needed: Novice lawyers learn from their mentors.

True, novice lawyers could learn from watching experienced lawyers do something, but this presumed: (a) novice lawyers would have this opportunity, and (b) mentoring lawyers would explain what they were doing. Neither presumption was—or is—accurate

for the vast majority of lawyers. My law school classmates learned from their mistakes as well, even those who associated with large law firms.

3. This stuff can only be learned on the job: Law school is no place to learn how to be a lawyer.

It may have been a novel idea, but it certainly was worth the effort to bring the practice alive and kicking into the law school building and curriculum. If one were to start a law school, wouldn't it be logical and rational to offer courses in what lawyers were actually doing? That, in a nutshell, is what clinical education brought back to legal training.

4. You can't replicate the practice of law in law school, so why try?: Law school is a school and not a real place.

Yes, you cannot replicate precisely the entire practice of law in a law school curriculum. But you can practice law effectively in a law school course and permit students to learn firsthand to be a lawyer.

5. We don't have any faculty who can teach this: Our fungible faculty are real classroom teachers and not clinicians.

True, many law school faculty never practiced—and are proud of their lack of real-world experience. But professors who were ready, willing, and able to dirty their hands in the practice were available. It may well be that those who best taught clinical courses were not the best "Socratic method" teachers. But that notion is the same as saying that constitutional law professors ought not to—or cannot—teach tax law, among other courses. We all have things we know well, and other things we ought not to teach.

6. It's too expensive: Law school is not a tutoring experience—it's a vast wasteland of impersonal educational connections, at least with regard to the faculty.

Well, maybe it is too harsh for some traditional faculty, and too soft for others. Admittedly, law school education was a great bargain for institutions, and law school tuition could fund other departments in private universities. Developing intense clinical experiences with sufficient supervision does cost more than a large lecture class. The challenge was and is making it affordable, and seeking sources of funding to make it go.

7. We tried it before, and it didn't work: Law schools replaced apprenticeships to provide necessary theoretical training.

OK. This time we would blend the best of theoretical training with "practical training." No longer would it be sufficient to learn to "think like a lawyer." Now we would train students to "act and feel like a lawyer" as well.

II. THOSE WHO MADE IT ALL POSSIBLE

So, who were the "we"? There is a risk that "clinical" teachers will think they were responsible for clinical education. They were often a significant part, but many others contributed as much or more. Others can identify the names of those *who* came before. This is *what* they were, in no particular order:

They were clients, expecting better legal services. The legal profession was being recognized for what it has always been: a business as well as a profession. Clients were recognized for what they should always have been: consumers. This connection called for better service training.

They were practitioners, expecting better-trained colleagues. Many lawyers understood the need for more comprehensive, practical training. It is much better for advocates and transactional lawyers to deal with and develop relationships with successful, skilled opponents.

They were judges, demanding better advocates. It may have taken the courage of Chief Justice Warren Burger to complain about unskilled trial lawyers, and he may have had other reasons motivating him.[1] But it was clear to many judges that lawyers needed better training.

They were deans, who knew. Yes, some of the leaders of the academic world anticipated these changes and understood the need for clinical and skills training. Sure, there could have been more. But some led the way.

They were students, who expected and demanded more. A cursory glance at a law school bulletin commonly informed students that their education would be confined to a sterile

1. "[S]ome system of certification for trial advocates is an imperative and long overdue step." Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227, 227 (1973).

classroom. A year or two in law school confirmed this reality. Some students became advocates for enhanced legal training.

They were law professors, with a heart. Legal education, as well as the practice of law, is about relationships, or the development of relationships. Some law professors realized that in addition to casebooks and composed problems, it would be necessary to bring simulated and real clients into the law school.

They were the public, in a broad sense. They did not picket law schools, at least for better educational opportunities for lawyers. But overtly or inadvertently there arose concerns in some communities and in the larger society that change was needed to make law schools more helpful and relevant.

III. MISTAKES OF THE PAST AND PRECEDENT FOR THE FUTURE

Oh, the mistakes we made. Sure we make mistakes in pursuing the development of "clinical education." We had to, to learn from our mistakes. But none of them was fatal or very serious. If anything:

We separated ourselves from others in legal education. If we could not become a real law professor, we settled for becoming "less" of a professor—a clinician who did not do "real" teaching. Admittedly, some of us had to do this to find a way into the law school, but we could have sought and maybe obtained a faster merger.

We maintained separate tracts, offices, salary ranges, conferences, and viewpoints for too long. In truth, it was more intriguing and fun to be outcast or separate. But, we needed to become as essential to legal education as any other teacher; and our methods needed to be recognized as valid as any other teaching methods.

We too often settled for second-class status and recognition. The opportunity to be part of a faculty without having to go to faculty meetings; the chance of not passing "real" faculty in hallways; accepting lower salaries to be able to teach; all these and other influences made—and maybe even make—sense. But law professors ought to be law professors of equal significance and standing.

We too often talked about and disparaged "them." It seemed the right thing to do, to talk about other faculty as they talked about us. But if we had stayed above the fray and taken the higher ground, we may have felt better about ourselves and what we were doing.

After all, we were supposed to be integrating legal ethics into our classes and training. Maybe we could have practiced that better.

Fortunately, we overcame these shortcomings in many law schools, although a current survey may reveal that there are still too many law schools with these problems.

IV. PREDICTING THE IDEAL LEGAL EDUCATION WORLD

So what of the future? Here is my ideal world:

One unified full-time faculty. Designations like "clinical professors" (like "legal writing instructors") would be replaced with "professor of law." Whether one teaches in a law school res ipsa loquitor, incorporeal hereditatments, collateral estoppel, or refreshing recollection, one is a law professor. And, job security (a.k.a. tenure) ought to be the same—or not the same—for all.

Prestigious adjunct faculty. Law school faculties need a mix of full- and part-time professors. Practitioners, judges, Ph.D.s, and others can contribute directly to the curriculum.

Power/salary parity. Professors should be paid on par with other professors, as the market determines. No one clique of faculty should have more or less power than another identifiable group. Law school committee and chair assignments ought to be distributed equally.

Balanced teaching loads. It is true that full-time tenured law professors have too little accountability, too much discretion, and too few classes to teach. It may be true that "clinical" teachers have too much responsibility, too few options, and too many students. The balance to be struck is to have "traditional" law-teaching responsibilities become more like "clinical" teaching, with more class hours, more contact with students, and more time devoted to helping students learn. Those who practiced law understand the ease that comes with teaching, the lack of real anxiety, and the need for more responsibility.

Kinder, gentler relationships. If the practice of law is primarily about lawyer/client and lawyer-to-lawyer relationships, law school experiences should primarily be about relationships as well, involving:

- Law professors/students,
- Law professors/colleagues,
- Law professors/law students/clients,

And not necessarily in that order. After all, we all have the same mission and vision.