

Why not an International Journal of Clinical Legal Education?

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Introduction

Jerome Frank may have suggested the term Clinical Legal Education (CLE) first when he asked “Why Not a Clinical Lawyer School?”²; but, it was not until the New York City based Council on Legal Education for Professional Responsibility (CLEPR), funded by the Ford Foundation, took the pre-eminently active role in promoting and supporting law school-based experimentation in the 1970s and 1980s that CLE truly had an opportunity to develop. Over the past thirty plus years CLE has become more and more central to legal education, especially in the United States; innovations elsewhere have been fewer, more modest, and slower to develop, but of significance to the shifting culture of law learning, wherever they have taken place. The inception of the *Journal*³ marks an important milestone in the continuing development of CLE; for with this volume, we formally recognise that CLE is a vitally important and diverse phenomenon with a global reach.

Clinical legal education focuses on students’ learning about the practice of law and the workings of the legal systems: the how’s, what’s and why’s of them.⁴ It’s a complex and demanding educational mode that challenges students, with the support and advice of their teachers, to take decisions and pursue specified actions in client representation, with the agreement of a well-counselled client, whether real or simulated.⁵ While CLE is hardly a revolutionary project, until relatively recently, there were few legal educators or researchers interested in it or its goals and aspirations. Most lay people would expect that lawyers learn(ed) how to practise law through a combination of education, training, and reflection upon their experience, performing a legal role;

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2 Jerome Frank, “Why Not a Clinical-Lawyer School?” 81 *U.Pa.L.Rev.* 907 (1933).

3 Among the journals concerned with legal education, until now only the *Clinical Law Review*, published in the United States focuses on CLE. The *Journal of Legal Education* (US), the *Legal Education Review* (Australia),

the *Journal of Professional Legal Education* (Australia), *The Law Teacher* (UK) and the *International Journal of the Legal Profession* (UK) all publish material on clinical legal education, and related subjects.

4 Gary Bellow, “On Teaching Teachers: Some Preliminary Reflections on Clinical Education as Methodology”, *Clinical Education for the Law Student* 375 (1973).

5 The role adopted need not be the lawyer’s, though that is the most frequent.

but, virtually everywhere, whether in apprenticeship systems or programmes of practical training, at least one of those elements was and frequently is missing.

Initially, common law lawyers learned their craft from one another, through various forms of apprenticeship, frequently supported by reading, studying and learning law from books, principals or masters and, in some cases, informal and formal lectures or tutorials. The Inns of Court were prominent in the development of a learned profession in England and Wales and supplemented the on the job learning of pupil barristers. The common law, developed case by case without the benefit of previously determined general principles, was not thought to be the stuff of intellectual inquiry, though ecclesiastical and civil law were; university legal education in the common law in England and Wales is hence a modern, nineteenth century invention. When it did develop, it did not focus on legal practice in behavioural or systemic terms, but rather on an exposition of the law in its assigned fields. In its early days, the study of lawyers' professional work was largely procedural and frequently mechanical and technical in overall approach.

American legal education had given up the apprenticeship slowly but steadily, and in its place grew, year for year of apprenticeship experience⁶, academic law programs in the universities, of which Harvard's is the most well known progenitor.⁷ Christopher Columbus Langdell, its first dean, sought to make law a respectable science alongside the other disciplines of the nineteenth century academy and took law, predictably, on a largely analytical positivist path.⁸ His view of the law library, with its shelves of reported cases, as a laboratory, influenced legal education in the United States, then in Canada and later in other parts of the Commonwealth. More recently the case method has been imported into Argentina and additional places in Latin America. In Langdell's home country, the case method survived nearly a century with few changes. Real structural change in the modes of legal education depended on the late twentieth century development of clinical methodologies of education.⁹

Through Langdell's case method *rationes decidendarum* were distilled from the opinions of judges and the ability to extract and rationalise rules of law became the core skills in American legal education. Little attention was paid even to systematic training in advocacy, though the familiar moot court, and in some locales, mock trial competitions did offer some opportunities for skills learning. However, the skill sets required for interviewing, counselling/advising, negotiation, mediation, adjudication, writing, drafting, planning, problem solving, trial and appellate advocacy, and practice management have been taught directly and deliberately only since the inception of CLE. The so-called, much used and much maligned, "Socratic Method" employed in American

6 Whereas live-client clinical programs are controlled by the law schools, sometimes in partnership with others, externships now provide American law students the opportunity to work in a legal setting not controlled by the law school. Law offices, government offices, courts and tribunals are among the many settings selected for such experiences. Externs are supervised by trained staff in the work setting and participate in a law school coordinated program.

7 Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, University of North Carolina Press, Chapel Hill 1983.

8 C.C. Langdell, *Selection of Cases on the Law of*

Contracts, Little Brown and Company, Boston 1871 It is virtually unheard of to study law in North America without a casebook.

9 There are perhaps experiential learning modes that would not necessarily be considered "clinical". Problem-based learning (PBL), employed at Limburg University in Maastricht, the Netherlands, may not always require the student to adopt a professional role, but always entails some experiential, problem solving approach. It would be overly technical to exclude PBL from among the methods in the clinicians' repertoire. See eg Suzanne Kurtz, Michael Wylie and Neil Gold, "Problem-Based Learning: An Alternative Approach to Legal Education", 13 *Dalhousie Law Journal* 797 (1990).

law schools and popularised by the *Paper Chase*¹⁰ was the primary teaching methodology to support the processes of case dissection and rule extraction and rationalisation. The Langdell legacy thus left an agenda for law learning that was focussed on abstract, rational and conceptual analyses. These examinations were frequently disconnected from any concern for the impact of the decision on either the individuals involved or society as a whole. Nor oftentimes were enquiries focussed on critical, theoretical, philosophical, ethical or operational considerations. As a result, the case method in its traditional Langdellian form has been criticised widely by critics, including, clinicians, realists, legal philosophers, feminists, humanists, critical theorists and practitioners.¹¹ The provision of a compendium of critiques would be possible; yet the method has continued with a strong following.

The university teaching of the common law in England and Wales began in the eighteenth century, some six hundred years after it had been born, with the appointment of Blackstone as Oxford's first Vinerian professor of law.¹² Insofar as Blackstone was interested in concretising and clarifying the law in positivist ways, his core mission was not entirely different from Langdell's, though his aim to state the common law was a much more wide-ranging project than Langdell's legal science, which was primarily methodological (though it was pervasively important to the next century of legal study and its progeny, the modern American lawyer and much of legal scholarship). Meanwhile, as academic legal study developed in the United States, apprenticeship continued as the main method of learning law in England and the British Colonies (more recently the Commonwealth) abetted by various forms of formal tutelage, well into the latter part of the twentieth century.

Blackstone figured prominently on both sides of the Atlantic, influencing law practice, legal education and scholarship in myriad and fundamental ways. His *Commentaries*¹³ became the standard reference work for lawyers on the New World's frontiers. His expository approach became the central technique of legal authors across the common law world from his time onward: the statement of what is sometimes called "black letter" law. Neither Langdell nor Blackstone expressed a concern for lawyers' work as a subject of study; and as their influence was substantial, it was to be some time before anyone with authority suggested that the practice of law was worthy of inquiry and teaching, as such.

In the United States, where the apprenticeship was abandoned intentionally in favour of mandatory attendance at a law school, when critics suggested that legal education needed to be more practice-oriented, there was little enthusiasm for either restoring apprenticeships or for turning the law school into a place where legal practice was learned, whether through experience or otherwise. In England and Wales, and the Commonwealth, various forms of apprenticeship

10 Osborne, John J., *Paper Chase*, Houghton Mifflin, Boston 1971. The film version, produced in 1973, portrays "...the brilliant Professor Kingsfield... whose classroom's an intellectual battlefield filled with terrified students." (Review at http://mrshowbiz.go.com/reviews/mo...ews/movies/ThePaperChase_1973.html) The film was followed by a television series in 1978, making North Americans aware of an extreme example of the case method pursued through the Socratic dialogue

11 For example, Jenny Morgan, "The Socratic Method:

Silencing Co-operation", 1 *Legal Education Review* 151(1989).

12 *The Biographical History of Sir William Blackstone by a Gentleman of Lincoln's Inn*, Rothman Reprints, Hackensack NJ, 1971 at 19: S.F.C. Milsom, *The Nature of Blackstone's Achievement*, Selden Society, London, 1981; and most importantly, William Twining, *Blackstone's Tower: The English Law School*, Stevens & Sons, London, 1994.

13 W. Blackstone, *Commentaries on the Laws of England* (1st ed., 1765–69).

have continued to this day, perhaps curbing the urges of those who may have otherwise surfaced a desire for more structured learning of lawyers' work.

Curiously, the move from learning exclusively from experience to learning from books, seemed largely to occur without any significant effort to bridge the two. It may well be that lawyers were unable to conceive of their work in performance terms, referring only to the application of laws to human activity, somehow believing that a person could not **learn** how to influence processes of the legal system so that it would operate for client or societal benefit. The belief that one either has the talent and skill to perform effectively, or does not, runs deep and a resistance to the direct teaching of skills was in some places founded on this belief.

In most of the Commonwealth a law degree is followed by an apprenticeship that is supplemented by residential professional legal training of a variety of types. These programs vary in length from a few weeks to two years and focus on the practice and procedures of the various transactions lawyers undertake. In some places intending practitioners on these courses are taught a full regimen of legal skills through a variety of didactic, experiential and other methods. There are also jurisdictions that have replaced the apprenticeship with a programme of study following a law degree. The past decade and a half in particular has seen rapid change to the curriculum contents and methodologies employed on these practice courses. Some are distinctly clinical in nature, sharing with law school-based clinical programs the desire to inculcate learning strategies and methods in a reflective practitioner model.¹⁴ Others treat the contents of legal work as a series of steps and tasks surrounded by procedural law and supported by substantive law, conducted in a somewhat mechanical way. Still others extend the law school experience into the study of procedural and as yet unstudied substantive law. The development, in some countries, of a corps of professional clinical teachers either within practice courses or at the universities has led to their joining in the scholarly tradition of CLE begun in the United States.¹⁵

With the exception of the major work at the University of Wisconsin by Stuart Gullickson and his colleagues and the occasional short "bridge-the-gap" course, legal practice courses did not develop in the United States.¹⁶ Little concrete or long lasting took shape following the completion of this project. The profession, through the American Bar Association and local Bar Associations, focussed its energies on the accreditation of law schools and on the general examination of aspirants, with the support of the Conference of State Bar Examiners. The profession leaves to the candidates¹⁷ the task of readying themselves for the admission examinations, which test substantive and procedural law learning, and to a much lesser extent legal practice abilities or know how. The American Bar Association regulates the contents of and infrastructure for legal education across the country, through a periodic review process involving members of the judiciary, the practising profession and the academy. The absence of Bar led initiatives in mandated practice preparation

14 See eg Richard Neumann Jr., Donald Schon, *The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *Jo. Leg. Ed.* 401 (2000); Donald A Schon, *The Reflective Practitioner: How Professionals Think in Action*, Basic Books, New York (1983) and Donald A Schon, *Educating The Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions*, Jossey-Bass, San Francisco, (1989, 1990)

15 The recently formed Global Alliance for Justice Education (GAJE) held its first conference and teaching

workshop in Trivandrum, India, in December 1999. Formed by a group of mostly clinical teachers from around the world, GAJE seeks to extend the clinical mission for development everywhere.

16 A model Curriculum for Bridge-the-Gap Programmes, American Law Institute – American Bar Association Committee on Continuing Professional Education, Philadelphia, 1988.

17 There are many commercial providers who offer instruction in how to succeed in the Bar examinations.

created a strong impetus for support of CLE. Oddly, the absence of a vital professional presence in practice preparation led the law schools to fill the gap and to do so with a commitment to social justice, client service, scholarly learning and skilful practice.

The Civil Law tradition was different. The Civil Law's structure and organisation now mostly based on codes that derived from the great work of Napoleon's era, depended on general principles elaborately developed from Roman times, and written about by great scholars and commentators. The general view seems to have been that mastery of the Civil Law requires years of study and learning, and therefore there has been and still is little room in most jurisdictions for the practical study of legal work. One senses that the practice of Civilian law, as distinguished from the law itself which is grand, theoretical and conceptual, is seen as demanding, technical work. In the Civilian tradition of practice preparation the phase of learning to practice law comes while at work, though a system of *stagiaire* is not completely unknown; in the scheme of things very little time or effort has been placed on helping juniors learn their craft in an orderly, systematic, organised or regulated way, whether through traditional apprenticeships or otherwise.

Readers may now be thinking that CLE may appear to have its historical roots in apprenticeship. This is only partially the case; the idea that experience with mentoring is a sound teacher is at the basis of apprenticeship; but CLE goes much farther and rejects the notion that "practice makes perfect", preferring the adage that only "perfect practice makes perfect". Anyone who knows the apprenticeship system, whether by experience or description, can testify to its myriad weaknesses. Legal practitioners in their practices are preoccupied with service and their work, not education, training and mentoring. Oddly, legal practitioners do not seem to have accepted the notion that supporting the learning of others is in the best interests of their particular practices, perceiving mentoring as oriented to the interests of the junior or the public. The law office, courthouse or agency have not been organised to accommodate learning and teaching as core functions. Unlike hospitals, where research, service and education and training converge, the law office is a place of professional practice with its own ideals and goals. And so, while Jerome Frank the realist, cared deeply about what lawyers and judges do, and rightly believed one could not learn to be any kind of professional without adopting the professional's role and working through its complexities, he probably did not envision CLE as it has evolved, any more than he would have advocated the reinstating of the old apprenticeship system. Thus, CLE's real modern source is the work of CLEPR, and in the beginning, the many, mostly American, law schools that were stimulated to develop the wide variety of clinical legal education models, now prevalent there and growing world-wide. It is ironic that the first common law jurisdiction to abandon experiential learning through the abandonment of apprenticeship should have become its leader in educating profoundly, and training systematically, for legal work; we have benefited from the death of apprenticeship in American Legal Education.

CLEPR's mandate for professional responsibility had two important dimensions that were usually not present in apprenticeship models and which also tended to be absent, in large measure, from prevalent modes of legal education, including the case method.¹⁸ There is a third element in the CLEPR mandate, professional conduct, which has been consistently referred to as an important component within the apprenticeship model, but it has not always been well served there. The first

18 David R. Barnhizer, "The Clinical Method of Legal Instruction: Its Theory and Implementation," 30 *J.Leg.Ed.* 67 (1979).

dimension is comprised of the many elements of the professional obligation to provide access to justice and legal services to those unable adequately to obtain them, including the goal of understanding legal work as a complex of human, social, intellectual, and historical, informative thoughts, feelings, actions and aspirations aimed at a better, just society under law: know how with soul, conscience and dedication to the service of others. For some, CLE provided an opportunity to serve those in need and to remedy societal defects, with learning as a crucial by-product. Second is a commitment to learning through the variety of ways and means that are most likely to help the student learn from and through reflection on experience in a manner that will serve professional and personal self-directed learning for life. The clinical agenda is rich, deep, varied and constantly evolving. Its primary contents globally encompass the legal, social and justice milieu; its methodologies, depending on experience in some form, proceed from the individual learner through shared and reflective enquiry. Third, CLE requires the student to examine carefully the requirements of professional responsibility, including codes of conduct, as a direct element of the learning process and require her or him to test the viability of professional norms in the actual and personally experienced service of clients and justice.

In many places CLE has been developed in large part because of the desire among students for a meaningful, social justice oriented education that permits them to grapple with real, or realistic problems, in an effort to achieve a fair and just result and in the hope that the fabric for a democratic and just society will be fortified. The establishment of this journal is a continuing testimony to the ardour of such students, for without the work of Tessa Green and Cath Sylvester this endeavour would surely never have been undertaken.

CLE is thus not a single method or approach to learning lawyering. It knows no jurisdictional boundaries, nor is it culturally limited in its application. It may be adapted to need, environment, context, time and purpose as a complement or supplement to variety of formats for legal education. It can also stand on its own as a powerful methodology for learning. An international journal promotes the study of and reflection on CLE in a comparative or cross-jurisdictional way. Indeed, why not **the** *International Journal of Clinical Legal Education*? The time has come.

The *Journal's* founders foresee articles, discussion and news about the expanding area of CLE. And it will also provide a forum for the exchange of ideas among and between clinicians worldwide. So, in this first number of our new *Journal* there are pieces from Africa, Australia and the United States. These papers draw on the themes of clinical scholarship referred to above. Philip Iya discusses African efforts to provide both learning opportunities and service for societal reform. He paints a picture of dire need and great opportunity, as well as of tremendous efforts to meet immense challenge. Judith Dickson explores the connection between CLE's public service tradition and the requirements of professionalism in Australia today. Roy Stuckey examines educational quality questions across a range of learning outcomes to which CLE is pledged. Each of these clinicians shows the commitment, courage and perseverance that has typified the leadership of the movement: their scholarship is born of a deep and abiding desire to ensure that lawyers and law serve humanity, and not the other way around.