ROLL OVER SOCRATES: REFLECTION ON THE CONFERENCE ON CLINICAL LEGAL EDUCATION

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The author postulates that support for clinical legal education can be seen to proceed from two broad motivations observable in delegates to the Conference of Clinical Legal Education which he denotes as the 'socially conscious' and 'pragmatic-professional' orientations. Although the author suggests that these two philosophic positions have the potential to conflict, he notes that their adherents are united in seeking to advance the status and quality of clinical legal education in law schools. The article then describes some of the arguments and strategies put forward by each group toward this end and concludes with some observations concerning the value of clinical education for law students viewed in terms of some of the objectives of its supporters.

There was revolutionary fervour in the air at the first national Australian Conference on Clinical Legal Education. Although a common enemy could be identified, it soon became apparent that the attack was mounted from widely separated philosophical camps. Indeed, the interaction of strange bedfellows was one of the most fascinating aspects of this encounter. No one doubted, however, who should be rolled out of bed: it was our old friend Socrates, together with his method and all proponents of 'doctrine' as the essence of a decent legal education.

To their credit, the organisers apparently anticipated plural viewpoints and scheduled an initial discussion group on the topic 'Justifications for Clinical Teaching.' Before this exchange got under way, however, the threshold question of a correct definition of the 'clinical experience' was raised and debated. A strong section of the participants supported what was referred to as the 'medical model' of clinical teaching: interactions with live patients (clients) concerning real problems under professional supervision. Another group would apply the term 'clinical' to any process which involves students in 'learning by doing,' whether in a real or simulated context. Finally, some would have extended the definition broadly to any form of law teaching which connects with 'the law in action' whether or not students take any participatory role. The first two camps contained the principal protagonists for competing visions of what clinical legal education can do and should become.

On the one side were those whom I will call the 'socially conscious' revolutionaries, and on the other, participants whom I will describe as 'pragmatic-professional' radicals. For the former, the liberating effect of a clinical experience on a student's attitude toward 'the law' and its institutions is the primary good seen to be realised, while for the latter, practical initiation into the complex skills required of a successful modern lawyer is the great benefit derived from the clinical approach.

These two motivations which both support a radical departure from traditional theory-based lecture-format legal instruction are reflected in the variety of justifications proposed for the teaching clinic:
Although the motives differed, both sides seemed agreed that the clinical experience served to advance their aims. How can this be? I suggest this question is partly answered by the differing definitions of 'clinic' adopted by the participants. Those adhering to what I have termed the 'socially conscious' justifications appeared most strongly to adopt the medical model of clinical experience while those in the 'pragmatic-professional' camp seemed content with simulations. Nevertheless, each group was convinced that placing the student in something other than a passive 'consumer' role in law school was necessary to accomplish their aim.

One of the understated but inescapable themes of the Conference was the relative high cost of a clinical legal education program. Surely here one sees the corollary of the ascribed value of the clinical experience. Whether the rationale was described as 'client safety', 'student risk' or 'experiential learning' it was generally accepted by participants that a more favourable staff/student ratio, reduced student numbers, and challenging real (or realistic) documentary materials must be a part of the clinical approach, however defined. The result of such a change in the structure of teaching is not hard to guess - clinical experience was reported by students to have the following advantages:

1. 'The comraderie which grows amongst students doing Prof Prac [‘Professional Practice’ - Monash University’s clinic-based law course] is fantastic - you will never experience that feeling of belonging when you’re sitting in a Trusts or Company lecture'

2. 'It offers something removed from the hum-drum of the Faculty - a chance to get involved with people, a break - sometimes I just felt so comfortable I forgot it was even part of the degree'

3. 'It’s such a privilege to have learnt everything I’ve learnt with such a great bunch of people in such a friendly environment.'

Instructors also appear to seek a more personal and intensive relationship with students engaged in clinical courses. As described by Professor Susan Campbell in her Blueprint for a Clinical Program, the supervisor and the four students become a close-knit team and develop a unique working relationship (Campbell 1991). One of the clinical supervisors attending the Conference described his conception of the form of education in which he is involved as a process of 'dialogical empowerment' of the student where

1. 'The conduit for learning under this model is the frank and equal exchange of information, opinions and revelations which takes place between the student and the teacher . . . The relationship between the two is an equal one, based on communication and mutual trust.' (Reekie 1991).

These elements of a service-oriented clinic - a close staff-student relationship, emphasis on team work, and constant feedback to students, together result in a
learning environment vastly different from traditional classroom instruction. Clearly there is value in a personalised, interactive learning process, but what is not obvious is that the clinical setting is the only (or best) way of revolutionising law teaching methodology in line with such an ideal. What was manifest from the Conference was the recognition that favourable student assessment of and demand for such learning experiences could be a potent force in the search for new funding and the protection of existing sources.

To return to the uneasy alliance between the ‘socially-conscious’ clinicians and the ‘pragmatic-professional’ wing. Although disagreeing on the desired effect of clinical experience on students, each side was content not to let this get in the way of formulating common moves to confront (or win over) the majority of the legal academy engaged in traditional doctrinal teaching.

One such move may be described as an attempt at rapprochement entailing the recognition of a ‘theory of practice’ and the possibility of the ‘practice of theory.’ In such a vision, the reflective insights brought forth by clinical experience are integrated in an emancipatory social theory while at the same time theoretical insights (in sociology for instance) may be applied in the techniques of practice (Goldsmith 1991). Here we see the attempted legitimation of the clinic as a partner of ‘theory’ if not of ‘doctrine’.

Another move described at the Conference was directed toward a defence of the clinical experience as an opportunity to gain a more thorough understanding of ‘doctrine’ by personal observation of (if not intervention in) real events shaped or affected by law. This argument is based on the assertion that ‘traditional’ legal education may be stimulated by practical encounters with the actual working of the law and may lead to student interest in institutional or legislative reform, both accepted ‘traditional’ learning experiences. In some sense I think this way of looking at a clinical experience may be described as the case method by immersion. By putting the student in (more or less) real factual situations, and allowing him/her to watch the law play itself out, a more personal encounter with doctrine is created which may lead to a more lasting understanding.

A final move originating in the ‘pragmatic-professional’ camp is frankly responsive to the concern that law schools are not (and should be) producing successful lawyers. Concluding that the average modern practitioner is more often confronted with problems of law firm organisation, marketing, financing and staffing than difficult doctrinal issues, this group emphasises the value of clinical experience in training the lawyer to fill a productive role in the market economy. Here, simulations in interviewing, negotiating, mediating and other interpersonal skills are used to give the law student what he or she might before (or in other places) have gained from a period of articles, or indeed, a head start as an articled clerk. The goal of such an approach is a law graduate who can say with the Monash student

‘Having done a Prof Prac I am now more confident that I can approach my Articles year prepared for what will happen. I am a much greater asset to the firm than I was when they offered me Articles last year.’ (Counter-Faculty Course Description).

This justification of the clinical approach to the traditional faculty obviously requires the smooth co-operation of professional bodies and their practical training affiliates.
Another area of seeming agreement between the two camps of clinicians surfaced during discussion of the concept of 'integration' of clinical experience in the traditional curriculum. As a less radical move in advancing the legitimation of clinical teaching in the academy it was seen as a 'foot in the door' and also as possessing intrinsic value. The idea is centred around the provision of 'hands on' exercises in the context of core substantive law subjects such as criminal law and contract. One of the methods used to accomplish this goal is the integration into a course of segments involving skills training in such areas as negotiation and interviewing as a complement to more conventional instruction. These episodes may be supervised by the primary course instructor using materials and methods formulated by clinical 'experts;' alternatively classes may be periodically handed over to clinical instructors. As an initial step toward provision of some clinical experience, integration has obvious advantages in the area of cost. Nevertheless it requires a substantial investment of time and thought on the part of those responsible for creating clinical materials and ultimately depends upon securing the consent of the faculty to modifying the traditional syllabuses.

The tension existing between the two groups of adherents to a clinical approach to legal education which I have identified here can be illustrated by reference to the label itself. As worn by the 'socially-conscious' faction it conjures up an image of young interns toiling in the jungle beside Dr. Schweitzer. As applied to the 'pragmatic-professionals' the alternate dictionary meaning of 'scientifically detached; strictly objective' seems to surface. Is it a proper prescription either for medicine or law that every student should experience the leper colony? Or, on the other hand, is it an advancement of professionalism to warn the law student to 'Make every effort to minimise conflicting commitments whilst undertaking Prof Prac so that it does not become a consuming negative experience which you might come to resent.' (Counter-Faculty Course Description).

If the only result of the consciousness-raising of law students arising out of their clinical experience is an appreciation of the lack of recourse which the legal system offers to many ordinary citizens and thus a clearer view of the segments of society that are able to use (and pay for) law, coupled with a smug sense of having 'already given at the clinic', then I question the role of the clinic. Further, in my observation of the course of discussion at the Conference the 'socially conscious' camp did not seem anxious to deal with the ethical and moral issues which may arise out of the use of community legal centre (the most common form of service-oriented teaching clinics) as a 'social laboratory' in which often desperate citizens are subject to student 'experimentation'.

By the same token, if the clinic serves as the first step in the dehumanisation of lawyers in support of an obsessive 'professionalism' then again I doubt its value.

If clinical legal education is to be worthwhile there must be a resolution of the conflicts and ambiguities which I have outlined here. If the student is to come away from the clinical experience with a sharper sense of his or her responsibility as a powerful member of her community, and not merely a profit centre in the student's economy, then the lessons of the clinic will have to be continued beyond the academy. The profession must be prodded to take a more active role in the provision of legal services to all sectors of the economy and all elements of society and it must not shirk from challenging vested interests where necessary. Practice in aid of disadvantaged citizens should become a permanent feature of all legal
careers. One instructor described a valuable service provided by a student clinic as the pursuit of meritorious but 'uneconomic' claims:

'In cases such as these, particularly against institutions such as banks, finance companies and insurance companies, a combination of persistence and demonstrated knowledge of the relevant law is often sufficient to persuade the institution to accede to the claim without the need to institute proceedings, . . .' (Campbell 1991).

Can this not be described as a 'bandaid' approach to pervasive problems of illegality pursued by powerful economic actors? If such institutional behaviour is indeed widespread then surely the profession as a whole should take responsibility for counselling and maintaining lawful business practices.

Further, if there is need for improved skills among lawyers to meet ever-changing economic and technological challenges (and I concede there is) then such training should be engaged in as an enterprise separate from the mental training traditionally undertaken by the academy. It is an imposition of an unfair burden to saddle law schools with the responsibility of ensuring the profession remains profitable.

Is this too long a leap from the concerns of the Conference? I think not. The participants were dedicated and energetic and deserve a challenge equal to their dreams and abilities. Perhaps this will continue the debates that stirred the Conference or give some life to those that were in politic fashion left sleeping.

NOTES

1 Held at Sydney, October 3 and 4, 1991 and hosted by Kingsford Legal Centre in its tenth anniversary.

2 I considered the usual [sic] but decided not to insert it. The meaning is clear and the interjection seems so like the paternalism which these law students clearly enjoyed leaving behind.


4 An example of an issue bypassed is found in instructions to students at one such clinic to be firm with clients who demand to see a 'lawyer'. The answer should be "that's not how it works here."

REFERENCES


Counter-Faculty Course Description, Student publication, Faculty of Law, Monash University.