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Dedicatory Address: Clinical Education in Law School

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CLINICAL EDUCATION IN LAW SCHOOL

MR. JUSTICE LEWIS F. POWELL, JR.

The most dramatic development in legal education today is growth. In the past two years six new law schools enrolled their first classes. And this is only one sign of growth, for all across the country existing institutions are expanding their facilities and enrolling more students. Total enrollment in the American Bar Association approved law schools for the 1973-74 academic year is nearly double what is was a mere ten years ago. A more telling statistic is the number of LL.B. and J.D. degrees awarded in approved law schools each year. Nearly three times as many degrees were awarded in 1973 as in 1963. Meanwhile, the number of bright young people who want to study law continues to rise. In the fall of 1973 there was not a single unfilled seat in the first year class of any of the 151 approved law schools. There is no sign of decreasing interest in access to the profession.

Not only are there more law students today than ever before, but they come from new sources. In 1963, only one in every 25 law students was a woman. Today the figure is close to one in six. Similarly, the number of students from the various minority groups has climbed from a virtually negligible representation a decade ago to the present figure of approximately 7,600. There are presently two and one-half times as many minority-group law students as there were as recently as 1969, when the first comprehensive national figures were compiled.[1]

These changes are visible and dramatic, all the more so because they are capable of quantification. For society at large they may have far-reaching consequences that we cannot now anticipate. But these changes—the expansion of law schools and the diversification of their student bodies—do not necessarily or directly challenge the accepted precepts of legal education. Professors are still teaching law and students are still learning it within

1. These statistics are derived from Ruud, *That Burgeoning Law School Enrollment is Portia*, 60 A.B.A.J. 182 (1974).

the tradition founded by Dean Christopher Columbus Langdell at Harvard Law School in 1870.

Langdell believed that the law should be taught in a school rather than in an apprentices' workshop. He established law as an academic discipline, more or less self-contained and susceptible to analysis as well as description. He discarded the treatise in favor of the casebook, and he started that venerable pedagogical device that has confounded and enlightened generations of first-year law students—the socratic dialogue.

To be sure, we have tinkered with Langdell's system in a variety of ways. What were once casebooks are now commonly entitled "Cases and Materials." They retain the traditional core of appellate decisions, but they also include statutory materials, explanatory notes, and excerpts from commentaries of all descriptions. Subjects are taught through lectures, in seminars, and in other formats that depart from rigid allegiance to the socratic model. Increasingly, the study of law also is informed by reference to other disciplines. Philosophy, economics, sociology, and psychology have all found their way into legal periodicals and, in one form or another, into the law school curriculum. But for all this, we are still building on the legacy of Langdell. The modern American law school is in some sense a monument to his memory, for as an institution it is founded on Langdell's precept that the law should be taught and learned as an academic discipline.

Today that conception is increasingly challenged by pressures greatly to expand what is called clinical legal education. There is no precise definition of that phrase, but it refers generally to learning by doing. For many years, law schools wisely have afforded some "doing" experience through the law reviews, moot courts and legal aid. Current usage of the phrase connotes much more. In its broadest reach, clinical education encompasses any sort of practical experience outside the formal structure of the law school: "In this sense, the term includes observation, either casual or systematic, of some legal or social institution (*e.g.*, prison, a hospital, a court, or an administrative agency) and participation in one of the roles within such an institution."[2] Thus, some law schools have internship programs which give participating students some sort of inside look at legislatures, administrative agencies, and other institutions, and these programs are sometimes called clinical legal education.[3]

2. H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION, 38-39 (1972).

3. Panelists, however, speak of clinical legal education as including only those learning

There are, in fact, a great variety of programs operating under the banner of clinical legal education. Such programs should be evaluated in terms of the extent to which students are exposed to the clinical experience, the extent to which their activities are supervised by a faculty member or a responsible attorney, and the extent to which the clinical experience is integrated with the academic program.[4] In none of these respects is there anything approaching uniformity among existing programs.

Student involvement in clinical activities varies from total commitment for a fixed period, say a semester, to spending a few hours each week in a legal aid office. Similarly, supervision of student activities may be close and purposeful or quite haphazard. Finally, the degree of academic integration of the various clinical programs is also disparate. In some cases the clinical program is an adjunct to an ongoing class, and the practical experience is blended with academic instruction. In other instances, however, the relationship between the clinical experience and conventional study is left largely to student imagination.

Your program here at South Carolina exemplifies the best in clinical education. You have not overemphasized it, with three to six hours out of a total of 90 hours normally being devoted to clinical courses. More importantly, there is close faculty supervision and ultimate faculty responsibility. In short, you seek to achieve that marriage of theory and practice that is the special virtue of clinical experience. As Chief Judge Kaufman of the Second Circuit phrased it, "Clinical legal education programs can provide the experience of law practice around which the law schools can weave doctrinal and theoretical material."[5]

Not all law schools have been guided as carefully as you have by Dean Foster, his predecessor Dean Figg, and your fine faculty. As so often happens with new and appealing ideas, or even with old ideas clothed in new apparel, there tends to be a pell-mell

experiences obtained in the context of a lawyer-client relationship. A student engages in clinical legal education, as narrowly defined, only when he works as a lawyer for a client who needs professional services. This is the view held by the officers of the Council on Legal Education for Professional Responsibility, Inc. (CLEPR), a philanthropic organization funded by the Ford Foundation. H. PACKER & T. EHRLICH, *supra* note 2. Most programs that satisfy this narrow definition of clinical legal education consist either predominately or entirely of legal aid to the indigent. CLEPR, SURVEY OF CLINICAL LEGAL EDUCATION, 1972-1973, xii (1973).

4. H. PACKER and T. EHRLICH, *supra* note 2, at 39-40.

5. Kaufman, *The Education of the Advocate*, CLEPR NEWSLETTER, vol. VI, no. 9 at 8 (1974).

rush to embrace them. With law school alumni calling for graduates who at least know where the courthouse is and with faculties wishing to be fashionable, there is always the danger of overreaction. It is this risk that must be kept in mind, weighing the merits of the new with the proven values of the old.

Some aspects of the emphasis on practicality in law school undoubtedly are beneficial. Others, I suggest, must be viewed with reservations. On the plus side, there is every indication that the students who participate in clinical programs enjoy them. Students characteristically enjoy a great many activities that might be awkward to include in the law school curriculum, but they do seem to derive from clinical experience a heightened enthusiasm for the study of law. Observers agree that many students who venture into clinical programs return to the classroom with a renewed sense of purpose and even an expanded appetite for the intellectual subtlety of traditional academic study.[6] The student who has spent years in the library, without opportunity to put his learning to practice, often finds in clinical education an effective antidote to that long slide into apathy that so frequently characterizes the third year of law school. Whatever the deficiencies in the conventional program that give rise to this disenchantment, clinical experience seems to have the desired therapeutic effect.

Of course, the principal claim made for clinical education is not that it enhances student receptivity to traditional academic study. Its proponents are far more ambitious than that. They argue that this is an effective means—perhaps the most effective means—for learning necessary lawyer's skills. These are the practical skills—negotiation, drafting, brief writing, and advocacy, to name the principal ones. Unlike such intellectual attainments as analytical ability and knowledge of the substantive law, these skills, so the argument runs, are not readily susceptible to classroom exposition. But they may be taught and learned in a clinical environment.[7]

With this proposition I am in qualified agreement. No doubt a well-conceived and closely supervised clinical program, such as yours at South Carolina, provides an opportunity to develop such

6. *See, e.g.*, Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L.J. 283 (1971).

7. *See* Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54 (E. Kitch ed. 1969).

skills. But it would be improvident to assume that all that passes as clinical education necessarily leads to the sound learning of practical skills. It is just as possible for students to learn bad habits as good ones and, in the case of an ill-defined and largely unsupervised clinical program, it is just as likely. In short, the claim that clinical legal education is the path to learning lawyer's skills should not be accepted uncritically.

The central issue as to clinical exposure in law school is not so much its efficacy as its purpose. The question is whether, assuming availability of the resources and expertise, we want to devote a large part of law school education to the development of practical skills. At first blush, the answer may be an emphatic "yes." What good is a law school that doesn't teach its students how to be lawyers? And why does law school demand three years of a student's life if at the end of it all he is not prepared to *do* anything with his learning.

The difficulty is that training in the practical skills cannot be accomplished without some denigration of the historic commitment of our law schools. In simplest terms this is the commitment to build in each student the intellectual foundation for a lifetime in the law. Of course, the addition of one or two clinical courses to a three-year curriculum constitutes no threat to the traditional academic program. But a full-scale attempt to teach the broad range of lawyer's skills might well cut deeply into the traditional values. This, in my view, is a prospect that should be approached with extreme caution.

The tradition begun by Langdell—the tradition of law as an academic discipline whose mysteries are revealed through rigorous doctrinal analysis of appellate cases—has dominated American law schools for a hundred years. It has not survived for so long a time because it is a particularly efficient way of teaching that catalogue of rules and exceptions that laymen characterize as the law. It is not. And it certainly does not owe its success to an ability to transform college graduates into fully qualified practitioners in three short years. Its enduring role derives from the judgment, confirmed by long experience, that it is the best means yet devised for imparting to students that capacity for structured analytical thinking that is the essence of being a lawyer.

As Edward H. Levi, President of the University of Chicago, put it: "Law schools deserve their distinction because of their dedication to the application of structured thought, with precision and persuasion, to complex human problems and transac-

tions." This capacity for analytical thought, including the ability to reason independently of the pressures and fashions of the moment, is of timeless value. It is as critical today to professional competency as it was when Langdell came on the scene in 1870.

In the shaping of curricula, we must not overlook the relevance of law school training to the broad societal role of the profession. Throughout the life of this republic—and certainly of South Carolina—lawyers have provided a major portion of the leadership in government at all levels. Indeed, one of the three branches of our government—the judicial branch—is conducted solely by lawyers. And this role of our profession is by no means limited to government itself. Lawyers tend to become community leaders. They also profoundly affect the decisions of clients who themselves may be leaders, and traditionally lawyers participate actively in the vital democratic process of shaping the judgments and decisions of their state and communities. In view of this unique public character of the legal profession, instilling a deep consciousness of the ethics and societal responsibility of lawyers must of course be blended with the capacity for structured and analytical thought.

Now, a word in closing. A national magazine recently carried an article entitled "America's Lawyers: 'A Sick Profession'?". This question—receiving gleeful attention from some of the national media—arises because of the publicized misconduct, some confessed and other alleged, of a few lawyers in high places. One implies no tolerance of such misconduct nor minimizes its grave consequences by observing that there are some 375,000 lawyers in America and by noting the injustice of branding a great profession because of the transgressions of a few.

May I say that I have lost no faith in American lawyers or in the superb training provided by our law schools. By and large, the overwhelming majority of lawyers share our inherited ethics and our long tradition of fidelity to duty and client, of courage and intellectual honesty, and of a genuine sense of professional responsibility.

Most of our young people today are idealistic. Many subordinate earning a living to public service. These are not incompatible goals, and there are many ways to combine them in one's career. Indeed, I know of no better way of serving humanity—as well as supporting oneself and family—than being a competent and responsible lawyer. In final analysis, the rule of law is the foundation of our democratic form of government. Without law

and lawyers the Bill of Rights would be meaningless rhetoric.

It has been said that lawyers constitute the bond that holds our society together. Perhaps it is more accurate to say that the rule of law and respect for its processes distinguish the free from the totalitarian societies. Certainly, the first responsibility of lawyers and the law schools that train them is to keep our society free.