BRINGING THE CLINIC INTO THE 21ST CENTURY

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Emerging in the 1960’s, the clinical legal education movement promoted an important dual mission – the training of law students in practical client advocacy and the service of under and un-served communities. These laudable goals spawned a movement of great significance for legal education. At its peak the clinical movement can point to hundreds of clinics in law schools across the world, specially appointed clinical faculty, a law review and the development of a voluminous literature on clinical teaching methodology.

However in the last 10 years student interest, funding and scholarly attention to the legal clinics has faded. This article argues that this is in part due to the mission and ideology of the law school clinics remaining “stuck” in a conception of social justice lawyering that is heavily dependent on rights-based strategies and traditional, hierarchical conceptions of the lawyer/client relationship. While reflecting the same stasis that affects the wider law school curriculum, this disconnect from the needs of contemporary clients as well as an increasingly pluralist model of legal services has unique implications for the legal clinics.

Faisant son apparition dans les années ’60, le mouvement d’éducation juridique en clinique promouvait une double mission importante – la formation d’étudiants et d’étudiantes en droit à la pratique de défense de clients et le service aux communautés non ou mal desservies. Ces objectifs louables ont donné naissance à un mouvement de grande importance pour l’éducation juridique. À son apogée, le mouvement clinique peut se vanter de centaines de cliniques au sein de facultés de droit à travers le monde, de la nomination spéciale de professeurs cliniques, d’une revue de droit, et du développement d’une littérature volumineuse sur la méthodologie de l’enseignement en clinique.

Toutefois, au cours des dix dernières années, l’intérêt étudiant, le financement et l’attention savante envers les cliniques juridiques se sont affaiblis. Cet article soutient que ceci est dû en partie au fait que la mission et l’idéologie des cliniques des facultés de droit demeurent «prises» dans une conception de la pratique du droit en vue de la justice sociale qui dépend en grande partie sur des stratégies fondées sur les droits de la personne et sur des conceptions traditionnelles hiérarchiques de la relation avocat-client. Tout en reflétant le même état statique qui affecte le programme des facultés de droit en général, cette déconnexion des besoins de clients contemporains ainsi qu’un modèle de services

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I. INTRODUCTION

A hallmark of the clinical legal education movement, firmly established in American law schools in the 1970s and 80s, was the clarity of its mission and vision for both law schools and communities. The early clinics were motivated by an ethos of public service and a desire to bring access to justice to underserved and marginalised groups within the community. In the process, students would acquire important practical skills, and they would be radicalised by their exposure to real clients with real-life problems, typically those who are neglected and excluded by the legal system and mainstream legal services.

This was a highly motivating mission and one which inspired many law students and teachers as the number of clinics grew exponentially during the 1970’s, significantly as a result of the funding of the Ford Foundation in the United States.¹ Practitioners rejoined the academy in order to work in emerging clinics and supervise law students. Specialist clinics focusing on (for example) immigration law, consumer law, juvenile justice or criminal appeals sprang up. Academics began to develop a literature that argued that the law clinic could be a vehicle for transformation for both clients and law students. A whole new sector of legal education developed under the auspices of clinical programs. International conferences on clinical teaching were held, and eventually (in 1994) a specialist journal – The Clinical Law Review – was established to provide a home for the literature that had been filling the volumes of the Journal of Legal Education for the previous 15 years. Specialist clinical faculty were appointed at some schools, albeit on terms generally less privileged in terms of opportunities for research and writing than their academic colleagues.

By 1978, almost every US law school offered a clinical program.² At its peak, the clinical movement could point to the establishment of hundreds of clinics in U.S. law schools. Perhaps as important was a significant shift towards the teaching of practical skills in the United Kingdom, Australia and New Zealand, that owed a great deal to the North American clinical movement and the heightened attention being paid to practical lawyering knowledge.³ Skills teaching was seen

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¹ The Ford Foundation provided the initial funding for numerous legal clinics, primarily in the United States but also in Africa, India, and Eastern Europe. Funding was administered by the Council on Legal Education for Professional Responsibility [CLEPR], which distributed $10 million to US law schools to establish legal clinics between 1967 to 1979. The title of the council underscores the clear commitment of the clinical movement to social justice – the motivation was to enhance access to justice and encourage the practice of public interest law. See www.fordfound.org


³ The development of classroom based skills education in law in these countries was clearly associated with the legal clinic movement in the U.S., although the teaching and learning model adopted in these jurisdictions tended to be more diverse. Skills based courses at the law school sought to teach students the tools that they would use in practice and use role play and simulations in the absence of live clients. See for example A. Boone, M. Jeeves & J. MacFarlane,
as an effective answer to demands for competency that were gathering pace in these countries during the 1980s and 90s, and this approach — drawing heavily on the pedagogy of clinical education as a means of legal training - was exemplified in influential reports such as the MacCrate Report in the US, and the Marre Report in the U.K. In 1987, I completed my doctorate on the role of clinical legal education in U.K. law schools, the first U.K. doctoral thesis on this topic.

Looking back at the literature of the 1980’s and 90’s — until I sat down to write this paper, I had not revisited this literature in many years - two things strike me forcefully. One is that despite the robust tone of so many of the articles, books, and training materials developed during this time, tensions were already emerging. They are illustrated by arguments over the appropriate “status” of clinical faculty alongside other professors, the physical separation of the clinics from the law school, debates over how far the law school should be providing education in practical skills, and general scepticism over the development of a theoretical foundation for practical skills. These discussions were not resolved and continue to play out today.

A second and perhaps even clearer theme is the unabashed ideological tone of much of the writing emanating from so-called “live client” clinics. Law school clinics were widely regarded as an expression of the same desire for social justice and change that motivated the civil rights movement in the US, and was also affected by a sense of crisis in public ethics following the embarrassing revelations of Watergate. One classic article of this era described law students as “Gideon’s Army,” foot soldiers in the struggle for social justice. This (perhaps seductive) clarity and the optimism of the early clinical movement were genuinely inspirational. It certainly inspired me, and across the Atlantic, it was inspiring my future friend and colleague Rose Voyvodic.


7 For example, there are still relatively few law schools that appoint clinical faculty on the same terms and conditions as ‘regular’ teaching faculty. One exception is Hamline University Law School in Minneapolis. Far more common is a differentiated system with less favourable terms for clinical faculty (this is the approach taken at my own law school, the University of Windsor). This history has resulted in many clinical professors being unable to maintain research and writing interests, as well as manage their clinical workload and teaching expectations, and ultimately leaving the academy. The debate over the bifurcation of theory/practice also continues with many academics still confirmed in their view that practical skills have no place in the law school and that practice has no sound theoretical basis.


However over the last 10 years, student interest, funding, and scholarly attention to the legal clinics has started to fade. We can speculate about many possible reasons for this. One is a drop in funding. Perhaps another is that after 30 years, legal clinics just do not seem so innovative and exciting anymore. Both are likely factors in the decline in activity and overall enthusiasm for law school clinics – relatively few new clinics have opened in the last 10 years and law school hiring seems focused elsewhere. At the same time, a cadre of dedicated staff lawyers and law professors remain and continue to advocate for the transformative potential of the clinic.

In this paper, I shall argue that if the legal clinics are to keep pace with the changing environment of legal services, and continue to capture the imagination of law students and funders, there needs to be a re-evaluation and modernisation of how we think about both the service, and the educational, goals of the law clinic. To a significant extent, the legal clinics are stuck in the same time warp as legal education. Neither the law school curriculum nor the clinics are paying sufficient attention to what is changing about disputing systems, both public and private, or what we have learned over the last 30 years about the limits of rights-based strategies in advancing social justice agendas. In addition, neither the law school nor the clinic has fully recognised the changing dynamic of the lawyer-client relationship, which is the consequence of the decline in professional deference in our contemporary, Internet-driven public culture. The law schools have done little to adjust their teaching programs to the fact that only 1.8% of civil matters now reach trial,\(^\text{10}\) nor to respond to the huge increase in the numbers of pro se litigants we now see in the family and civil courts, many of whom express the belief that they can handle their cases as well or better than their lawyers whom they see as remote technicians.\(^\text{11}\)

In order to remain relevant and vital in their dual mission of legal education and justice-promoting client service, the law school clinics need to examine how far these older ideologies of the lawyer role – which can be summarised as a default to rights, and an assumption that the lawyer is ‘in charge’ in the professional relationship - still drive their decision-making and sense of worth. The challenge for the clinics is to be willing to reevaluate how, in this new environment, they can fulfill their dual mission of education and service most effectively and with the greatest potential for transformation. In order to bring law school clinics into the 21\(^{\text{st}}\) century, we need to revisit some of the sacred beliefs that drive both the law school curriculum and the operation of the legal clinics.


II. WHAT IS WRONG WITH LEGAL EDUCATION

The real source of the problem with our clinics, I believe, lies in the dominant ideology of learning in law school. The reliance upon legal rights strategies and outdated notions of the lawyer and client relationship derive from, and are sustained by, a highly rationalist and formalist model of knowledge and learning still perpetuated in legal education. This paradigm of law is both intellectually unsustainable, and practically out of step, with 21st century lawyering. I have written about legal education at length elsewhere. For the purposes of this paper I shall highlight some problems with the way in which we present ‘law’ as an area of intellectual and professional activity to students in law school, and explain why I believe these lead to the outmoded and often inappropriate approach to legal practice and client services offered in the legal clinics.

Historically, legal education has emphasised – and to a significant extent, continues to do so - a techno-rationalist model of knowledge that assumes that law can be taught and learned as the quasi-scientific pursuit of objective truth. Techno-rationalism is the application of a rationalist epistemology to the learning of practical skills and knowledge, and it is characterised by the promotion of rules and principles over practice-derived knowledge (experience) and intuition. The object of techno-rationalism is to elevate propositional knowledge over an understanding of context, individual needs, and social dynamics, and the assumption is that the ultimate goal is the identification of truth (so-called) and moral rightness, rather than problem-solving. This framing of the phenomenon of law is highly congruent with the didactic style of instruction and formal right/wrong assessment model which is characteristic of law school.

Law is not the only elite professional discipline to succumb to a rationalist epistemology in framing its ‘core’ knowledge and principles. A rationalist model

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elevates the status of the professional who has access to special knowledge and therefore must ‘know best’ in advising his clients. This approach has many implications for the way in which the professional relationship is understood by novice professionals, whether they are lawyers or architects or doctors or others. Moreover, a rationalist approach has historically dominated the university sector where undergraduate legal education takes place. This epistemology was a foundation for the status of the university and its place in society. Feminist scholars, among others, have long argued that the rationalist approach is pervasive throughout academe. Their work highlights the way in which rationalism privileges those who already have power to establish the central ‘truths’ and ‘universal’ principles of a discipline or profession. There is a seductive appeal, of course, to conceiving of any professional knowledge as certain, immutable, and universal.

In many disciplines and professions, the dominance of a rationalist model of knowledge has been replaced, or at least mitigated, by alternate theories of knowledge that emphasise context, culture, personal experience, and critique. Most areas of professional education and training now teach skills and ethical sensibilities in response to demand for professionals who can solve problems, as well as recite the ‘givens’ of their disciple. Professional education in most disciplines intentionally cultivates individual reflection, critical thinking and inter-personal skills, correctly assuming that few professional problems admit of a single ‘right’ answer. For example, medical and health education has been transformed over this period, with the introduction of problem-based learning in many medical schools and the emphasis on patient care and the development of relationships.

Law schools have simply not kept up. In fact, the gap between what law school teaches and the realities of legal practice is extraordinary – it is difficult to find any legal practitioner who believes that their legal education equipped them for practice. The staple diet of the law school curriculum continues to be the trans-

14 For a classic exposition, see John Henry Newman, originally published as The Idea of a University 1854. As Newman eloquently describes it, the university is “… the place where the professor becomes eloquent, and is a missionary and a preacher, displaying his science in its most complete and most winning form, pouring it forth with the zeal of enthusiasm, and lighting up his own love of it in the breasts of his hearers. It is the place where the catechist makes good his ground as he goes, treading in the truth day by day into the ready memory, and wedging and tightening it into the expanding reason.” John Henry Newman University Subjects, Biblio Bazaar 2008, p12


17 Over 15 years of empirical research, I have often questioned lawyers about the adequacy and appropriateness of their legal education. See for example Julie Macfarlane & John Manwaring,
mission of so-called legal facts, taught primarily via appellate decisions, whereby students come to believe that they can identify ‘right’ answers and can ‘win’ cases by finding an irrefutable legal argument or fact. There are many problems with the tendency of legal education to adopt and promote a techno-rationalist epistemology. First, preferring propositional knowledge over lived experience is an intellectually impoverished and distressingly narrow view of law and its impact. It promotes an objectivist epistemology which has been widely discredited, first by legal realism18 and now by feminist legal scholars19 and many other critical scholars.20 Objectivism assumes that knowledge (in this case, knowledge of law and of the impact of law) can be certain and objective and reflects a universal and homogenous human experience. While we know that in practice legal principles inevitably develop and change, in a rationalist method – propagated by passive information transmission in the form of doctrinal lectures and the regurgitation of rules in the assessment of learning - there is a tendency to elevate the status of legal concepts to singular ‘truths.’ For example, rather than understanding that evolving principles of law such as ‘harm’ or ‘injury’ provide a general framework allowing for some consistency in decision-making, and constantly re-understood through the lens of both personal experience and context, objectivist epistemology assumes that these are descriptions of universal human experiences of ‘harm’ and ‘injury’ – thereby confusing the tools of justice (general legal principles) with the substance of justice.

This account of law stands in sharp contrast to contemporary ones which see law as drawing meaning only from its application to the lives of people and legal entities, having differential impacts on different actors, and characterised by its contextual fluidity.21 A genuine intellectual understanding of law is embedded

in its practical applications; law always draws its meaning from the context in which it is applied.\textsuperscript{22} When law students learn about the law as a simple hierarchical principle setting system, taught via didactic instruction in appellate precedents, they often conflate the theory with the practice. This account of law as objective and certain contributes to the elitism of law school. It encourages the sense among law students that they are privy to a magical knowledge that is able to offer the best solution to all, or almost all, human problems. The assumptions inherent in this misconception of law continue into practice. It fosters the belief that lawyers are the ultimate technicians or ‘fixers’ of their clients’ problems.

A related problem with the epistemology of techno-rationalism is its insistence on the separation of what one thinks from what one feels. A so-called logical and scientific method gives no space – and affords no credibility – to intuition and any type of personal, value-based response to an idea, a situation, or an individual. A rationalist epistemology places propositional knowledge (for example cases and legal theories) first in a hierarchy of knowledge, and locates other types of learning – such as the personal ethical development of the learner – much further down the hierarchy. The teaching and assessment methods of law school communicate to students (via the “hidden curriculum”\textsuperscript{23}) that they should focus on propositional knowledge and eliminate intuitive or ethical reactions from the scope of their professional behaviours – that they are being hired to make the best possible legal argument on behalf of their client, not to assess the worthiness of their cause or to form a personal relationship with them. This ignores the reality that lawyers always have some type of value-based reaction to a client and to the clients’ case, which is better surfaced in order that its impact can be understood rather than ignored.\textsuperscript{24} Many lawyers now say that the absence of any value alignment between their personal beliefs and their professional lives is driving them out of the profession, or at minimum making them unhappy and dissatisfied with their chosen career.\textsuperscript{25}

The failure to think about the actual interaction of lawyer and client in this way is symptomatic of other ways in which legal education ignores the realities of what it means to practise law, and leads to a further consequence of technorationalism on the law curriculum. It is striking to me that clients are virtually ignored in law school discourse (‘the invisible client’). Nowhere in the core curriculum (property, tort, contract and so on) do we ask students to consider how they would negotiate an outcome to a client’s problem – despite the fact that

\textsuperscript{22} Macfarlane, “Look before you leap,” \textit{supra} note 12, at 294-297.
\textsuperscript{25} In my study of collaborative law, I came across many family lawyers who talked about the importance of aligning their personal values with the values they promoted in their practice (e.g. non-adversarial). See Julie Macfarlane, \textit{The Emerging Phenomenon of Collaborative Family Law (CFL): a Qualitative Study of CFL Cases}, online: Family, Children and Youth Section, Department of Justice, Canada <canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1> at 17-19.
this is how more than 98% of cases will actually resolve. On the rare occasions that clients are alluded to, they are usually described as inconvenient obstacles to advancing important legal arguments - for example when they become overly emotional or irrational. There is no exploration of any type of lawyer/client relationship other than a formal hierarchy in which the lawyer is indisputably ‘in charge,’ and no consideration of the type of relationship a lawyer might have with a client where they work together on the resolution of the problem. Outside elective client interviewing courses, students do not learn about - in fact they are never even asked to think about - how they might relate to a client who is distressed, irrational, incoherent, angry, loquacious, withdrawn, victimised, other than fully able - or simply anxious. The clients’ goals and needs (where they do not neatly fit a legal framing of the problem) are not examined in law school hypotheticals, and students are rarely if ever asked to consider what they might be. There is no discussion of how client goals and lawyer goals might diverge, and what to do in such cases. While classroom discussion of decided cases will often propose some critique, including acknowledging factors that the court did not take into account or sufficiently weigh, this discussion does not consider what the parties in this conflict were really fighting over, whether this outcome met those needs, what they wanted in order to settle their dispute, and whether and how a lawyer might achieve a good result for them short of adjudication - is rarely heard.

Instead the focus is on technical rights-based advice-giving in a sterile context, devoid of emotion and characters – in short, techno-rationalism. The message to law students is that knowing the caselaw and when to apply and when to distinguish which decision is what counts for ‘real’ lawyering. In contrast any other discussion – of clients, of personal values and feelings, of alternatives to litigation - is put down (in an echo of the rationalists’ attack on postmodernism) as not ‘real’ lawyering but ‘touchy-feely.’ But what is ‘real’ here?

III. THE TRANSITION FROM THE CLASSROOM TO THE CLINIC

Clinical legal education has the potential to do better in confronting the challenges of principle and practice than traditional legal education. Working in the clinic almost inevitably leads students to question the primacy of rights-based strategies relying on appellate caselaw, and reveals the gap between the way they have thought about law in the classroom and the way law works in practice. In the clinic students are dealing with real people and their problems, often marginalised and vulnerable individuals, and if they are listening to what their clients say they want and need they will come quickly to realise that law is rarely a panacea. Law is a strategy for relieving the harshness of their lives and asserting entitlements, but those entitlements are never automatic and often thwarted by factors that have little to do with appellate jurisprudence – for example, how far the client co-operates in researching their case, delays in the justice system, or simply the ability of the client to get to the clinic in the first place (no car? no bus fare?). Not all clients want to bring their case to court. Some may want remedies that the courts cannot or are unlikely to provide – for example, reinstatement in a job, or a change in an organization’s policy that will benefit the client, or
perhaps an apology or an acknowledgement. Others may be disappointed to realise that even once they have obtained a favourable judgment, compliance is not automatic – a judgment for a civil debt or monetary compensation may need follow-up steps for enforcement.

If they are lucky, working in the clinic will also demonstrate to the law student the potential of law in critical, precedent-setting cases, which use the power of law to affect change. They may be able to change their clients’ circumstances of their clients’ lives for the better, whether by adjudication or (more often) by negotiation. These cases will teach them that litigation strategies are sometimes the only way to get the other side’s attention, and that critical entitlements are sometimes only accessible this way. Clinic students also come to recognise that they have feelings about their clients and their cases, and these are sometimes positive – raising the challenge of over-identification with, or over-investment in their client’s case – and sometimes negative – raising questions of personal engagement and effectiveness. They will also have intuitive reactions to people and issues and problems which will sometimes be useful supplements to their professional knowledge, and sometimes less helpful. In these and many other ways, students in the legal clinic will experience the nuance and subtleties that factor into the practical application of any doctrine, whether legal, medical, financial or other.

At the same time, clinic students will come to appreciate that the ways they have hitherto thought about law and its applications are simplistic and incomplete. They will realise this the first time they sit down with a client whose problem does not have a clear legal remedy; or when the client tells them they do not want to sue or go to court; or when the other side tells them that everything their client has claimed is without foundation; or when they find themselves talking to their client about the economic, health and other social problems which compound their legal issues. They may be frustrated to find that the neat world of client-free intellectual analysis that worked for them in final examinations seems to miss the mark in the clinic. They have absorbed the idea that ‘real’ law and ‘real’ lawyering is the stuff of appellate argument – and now they are faced with the reality that ‘real’ client service is far more complex and less neat and tidy than this. What they have been accustomed to looking down on from a great intellectual height – the irrational and unpredictable entity called ‘the client’ - is now the centre of what they do. As one senior lawyer once put it to me “When you practice long enough, you understand there are some brilliant legal arguments that are not worth making.” Of course, a similar transition occurs for young lawyer associates who have not been exposed to live clients before, as they are quickly disabused of the idea of law as the scientific and dispassionate application of rules to facts.27

26 Julie Macfarlane and Michaela Keet, Learning from Experience: An Evaluation of the Saskatchewan Queen’s Bench Mediation Program (Regina: Saskatchewan Justice, April 2003) at 28.
27 See e.g., the repeated comments made in a series of focus groups (held in Windsor, Ottawa, Toronto, and Thunder Bay) conducted by the author and Professor John Manwaring for the Law Society of Upper Canada in a “Skills Audit” (2004) of Ontario lawyers (on file with the author).
But for clinic students who spend time simultaneously in the clinic and the classroom, the contrast between their learning at law school and in the real world of practice is especially disorienting. Some aspects of awkward transition from classroom to clinic are inevitable – as students move from writing to doing, from imagining clients to meeting them, from thinking theoretically to thinking more practically. It is a transition that needs careful management and supervision and should be discussed openly with students. However standards of mentoring and supervision vary widely in legal clinics, with at least some adopting the unhelpful but widely pervasive professional maxim of ‘sink or swim’ for new students. Many clinic lawyers themselves teach law school courses and subscribe either consciously or more likely unconsciously to the techno-rationalist approach; the regrettable practice of hiring clinicians on temporary contracts (as well as their perceived lower status among students) makes it unlikely that they will significantly challenge law school norms in their own teaching. So staff lawyers and clinicians may often find themselves straddling these two worlds as well.

The net result is that most students who find themselves in the clinic understand that they are in a new world of learning but often receive little guidance on how to make that transition, and still less on dealing with the flawed assumptions that they have brought with them into the clinic. Unlike new lawyers, they are not spending 100% of their time in this environment and have to continue to balance their new experiences with a continued commitment to the methodology of law as taught in the classroom. They will rely to a significant extent on what they already know about law and assume to be appropriate professional behaviour. Absent intensive transition supervision, the practice of many legal clinics unconsciously reflects and extends the misconception of law as techno-rationalism promoted by legal education. In the next section I shall highlight three ways in which this affects the operation of the clinics and its impact on both students and their clients.

IV. HOW THE CLINIC REFLECTS THE MISCONCEPTIONS OF LEGAL EDUCATION

A. Social justice

There is a mutually sustaining relationship between the history of the clinics in advancing rights via test case litigation, and a (techno-rationalist) view of law as the answer to social problems and individual needs in which clients are seen as vehicles for law reform. Certainly many important entitlements have been achieved using this approach, which have in turn enabled innumerable others to benefit. Recall the early image of law clinic students as Gideon’s army marching to defeat poverty and prejudice using a single tool - a commitment to rights-based advocacy. In the 1960s and early 1970s, many basic entitlements were as yet un-established, there was widespread discrimination against people of colour in housing and employment, and a growing social awareness of the relationship among poverty, oppression, and criminal behaviour. This focus on entitlements, and a confrontational approach to using the courts to wrest rights for clients, appeared in the 1960s to be the only credible strategy for the original clinics’ clients to adopt. Moreover it allowed law students to use the knowledge they
were learning in law school in the most direct way – by filing law suits on behalf of or in defence of vulnerable and marginalised clients.

However the juxtaposition of the law school’s techno-rationalism with the law clinics’ energy for litigation has created a set of practice norms in the clinic which, far from challenging students’ assumptions of law as a panacea, have reinforced them. Blind faith in the power of litigation to effect social change has been challenged by many activists - for example by Harvard Law professor Derrick Bell who has repeatedly drawn attention to the permanence of racism despite efforts – and some successes – with litigation to affect the legal position of blacks in America.\textsuperscript{28} Litigation enables the recognition of important principles, but rarely changes hearts and minds. Enabling social justice within any one community – whether addressing chronic unemployment in declining manufacturing centres, fighting poverty and despair on aboriginal reservations, or challenging discrimination against new immigrants in major centres – requires solutions that work and are accepted in that community. Favourable court rulings – for example, protecting pension rights or upholding discrimination claims - play a part, but these are never a complete fix. Negotiation and dialogue are always critical, whether this is to develop policy or to address individual problems – with a landlord, a spouse or other family member, an employer, or a co-worker.

Working for social justice and equality now takes on many different forms, including community and group organizing, individual and group rights assertions, partisan negotiation and conflict resolution, and lobbying for law reform and policy alternatives. Over the past 30 years social change has emerged from the collective efforts of grassroots movements, political protest and pressure, electoral campaigns, the expansion of single issue organizations and interest groups – and carefully chosen test cases. There are many different roles that lawyers, and the legal clinics, can play in advancing these various strategies, both on behalf of individual clients and in relation to systemic issues.

However, the legal profession and the law schools have remained relatively isolated from this larger debate over the diversification of strategies to promote social justice, and the commitment of lawyers as a professional group to a universal (that is, not differentiated by culture or context) conception of rights and the appropriateness of rights-based approaches continues undiminished. In my book \textit{The New Lawyer: How Settlement is Transforming the Practice of Law},\textsuperscript{29} I call this “the default to rights.” This approach assumes a relentlessly normative view of conflict, in which one side is right and the other is wrong, and in which therefore there must always be a winner and a loser. Focusing on rights raises the stakes for disputants by offering only two possible outcomes: winning or losing. Since a 100\% loss must be avoided at all costs, lawyers must act in a highly adversarial manner – so the logic goes – and especially if the case is a weak one, and if the client is powerless or vulnerable, in order to minimise this possibility. Law students working in the clinic carry with them the strong sense that this is the singular role and the exclusive purview of lawyers. In fact, this looks like an

\textsuperscript{28} Derrick Bell, \textit{Faces at the Bottom of the Well: The Permanence of Racism} (New York: Basic Books, 1992). Following the election of the first African-American President of the United States, Bell’s conviction that real change requires new laws but much more, rings true once again.

\textsuperscript{29} Macfarlane, \textit{The New Lawyer}, supra note 17.
extremely limited understanding of the potential roles that might be played by lawyers working for social justice – and it is also highly impractical, since it risks a 100% loss which disproportionately penalises and victimises vulnerable clinic clients. Instead clinic clients both desire and deserve the creative combination of a range of options, including litigation (this is sometimes the only way to get the other side’s attention), and including negotiation and dialogue, community-building, lobbying, intelligent use of available processes and procedures, and an overall commitment to practical problem-solving.

As Professor Bell and others have pointed out, a strategy that defaults to rights is often at odds with the needs of personal clients for pragmatic solutions and value for money. Lawyers are not associated in the public mind with conflict resolution – for example, the types of strategies listed at the end of the last paragraph - instead they are associated with conflict escalation. Many clients readily understand that the practical solution they need and desire is not achievable via the formality of court process, where their story is fitted into a set of abstract principles, and the arguments made are often disconnected from their reality. They may need to talk to the person or the institution denying them a benefit – they may need a relationship (with a landlord, an employer, a co-parent, a co-tenant, service provider) to survive this conflict, and cannot afford to deal with the harm to the relationship caused by litigation, whether lost or won. The problem is that given free rein to engage in legal actions law clinic students distort their clients’ needs into a mandate for litigation, even where this is wholly inappropriate (for example, where there is almost no legal argument worth making, where litigation involves suing other members of the same family, or where a rapid solution is required and a rights-based strategy will take months to roll out).30

Reliance on adversarial behaviours advancing ‘real’ lawyering is an ethos intellectually sustained by the winner/loser analysis of legal education and often implicitly, if not explicitly, encouraged in the clinic. It is possible of course to utilise rights strategies highly effectively without being adversarial – just as it is possible to represent a clients’ interests effectively without relying exclusively on rights arguments – but there is an assumed and acculturated relationship between the use of rights strategies and adversarial behaviours, especially among students and young lawyers who often believe that this is how they ‘should’ behave. This is not to say that clinic students should abandon the application of rights-based analysis and strategies to their clinic files –they should always consider this in evaluating every case. But in the larger world of practice in the 21st century, a default to rights is an assumption increasingly under challenge. In many cases, wise and transparent bargaining -- with a keen appreciation of the legal parameters -- towards finding the best possible settlement is a better strategy and may more directly address clients’ needs, both legal and non-legal. Where rights-talk has become an ideology rather than a strategy, it is difficult for many lawyers -- and especially clinic students with less practical experience -- to draw this important distinction.

B. The lawyer/client relationship

Another way in which the clinic perpetuates the outmoded model of lawyer-

30 Examples from my own experience of working with clinic students on files brought to mediation.
ing taught in the law school is by adopting the assumption that by the dint of her superior technical knowledge (even after just a few weeks of Contracts), the lawyer is always ‘in charge.’ Although decision-making always rests, in theory, with the client it is often more a matter of the lawyer telling the client what he or she should do, acting in the belief that the dominance of rights-based considerations disempowers the client and disregards much of the information the client might rely upon in making their own judgment about how or whether to proceed with any particular course of action. Lawyers do not usually ask their clients what they need and how they can help them – instead they tell them what is best for them.

Neatly obscured by the façade of ‘taking instructions,’ the ethos of lawyer-in-charge begins in law school with the so-called ‘invisible client’ who is presented as an intrusion into effective legal decision-making. In the clinic, the real client may press his emotions and anxieties and anger upon the student lawyer, but the instinct of her training is to suppress these concerns and press ahead with what she considers to an effective litigation strategy. Her assumption is that a rights-based answer will resolve any emotional dynamic.

In The New Lawyer I argue that the profession has in fact little choice but to refashion the basis of the lawyer/client relationship – their clients are already Doing this for them. The clients of the 21st century are far less deferential to professional advisors and far more focused on obtaining their own information (often via the Internet) and ensuring value-for-money than prior generations. People struggling with conflict do not need to be confronted with yet another system – now, the legal system – which tells them that someone else knows how better to solve their problem, disregards their own strengths and abilities, and tells them instead that they need help.’ Sharing power with clients quickly becomes more than just rhetoric as legal practice moves away from a default to rights. In a disputing landscape where there are more and more opportunities for client participation, being on the same page as your client means more time spent on substantive discussions and not just giving advice. Where there are more and more practical choices for conflict resolution, informed choice, and decision-making by clients is a threshold responsibility for all lawyers.

In order to make this evaluation, the student lawyer needs to understand the clients’ priorities and other so-called ‘non-legal’ information, that is, information other than what is ‘legally relevant’ to making the case. The lawyer and client together cannot evaluate the best course without examining a broader range of concerns and problems that may press on the client, whether these relate to financial issues, relationship priorities, an impact on cultural and social identity (for example a need to “cover” a particular identity, such as sexuality), or some other issue. The lawyer needs to understand possible motivations for settling, including the maintenance of future business relationships, social and familial relationships, seeking closure, and needing to feel that one acted fairly. Once information other than technical legal expertise becomes important, the relationship between lawyer and client becomes less of a hierarchy based on

31 Macfarlane, The New Lawyer, supra note 17, 129-150.
technical knowledge and more a working partnership to which both lawyer and client must contribute.  

Clinic students are rarely trained to listen to their clients’ priorities and alternatives; they are instead trained to choose a course of action that offers them the most formal practice (i.e. rights-based) and which they can make the facts fit.  

In contrast, knowing how and when to advise a client whether or not to settle is never taught or discussed in law school and yet it is a big part of what lawyers spend their time doing – and no less clinic lawyers. The same problem is apparent when offers of settlement are proposed. Many clinic students consult with their supervising lawyer as to whether or not an offer is acceptable, and in the process forget to consult with their client. They sometimes seem unclear that the ultimate decision-maker is the client, and not their supervisor.  

The student is often preoccupied with whether they got the ‘best possible deal’ for the sake of their own credibility (another hangover from law school where everything is a competition), rather than assessing how far they have met their clients’ needs and interests.

C. Ethical behaviours and personal values

As this last example illustrates, the legal clinic offers a terrific opportunity for students to learn about ethical and value aligned behaviour, beyond simply memorising the local jurisdictional rules of professional conduct. Instead, the clinic operates within an adversarial ethos focused on rights-based lawyering which can be summarised as, ‘get the best deal you can, any way you can, so long as it is just within the rules.’ This ethos reprises the ‘make it fit’ game that allows for facts to be bent to legal theories, however extraordinary, as long as some sort of rights-based argument can emerge, except that now the game is played in relation to the lawyer’s professional behaviour. The chance to seriously reflect on a range of ethical choices is frequently swept away on the assumption that the only goal is to win. Students are frequently told that the means justifies the end. The competitive spirit of the clinic (this is still school, and there are still grades to be fought over) discourages students from voicing disquiet about a file or a strategy, perpetuating the approach of big firm practice.

I argued above that law school promotes the myth that personal values and feelings are irrelevant to the lawyer’s task, flying in the face of evidence that lawyers are increasingly alienated from the practice of law by a sense of value misalignment between their own values and their practice, and the vast and accumulating body of literature that demonstrates that effective professions have “theories of action” about ethical choices, based on practice and experience, and not simply “espoused theories.” To counter these assumptions, the legal clinics need to explicitly give permission to students to reflect on their own experiences and their personal reactions, and also to express any disquiet they might have,

33 Macfarlane, The New Lawyer, supra note 17, c. 6, see especially 157-159.

34 The construction of “stock stories” that can be used to advance a legal theory is described by Lynn Mather & Barbara Yngvesson, “Language, Audience, and the Transformation of Disputes” (1980-1981) 15 Law and Society 775.

35 Again, this example is taken from my own experiences with clinic students where a settlement is being negotiated.

whether about their own work or the work of an opposing lawyer on the file, or where they might feel uncomfortable about a clients goals or simply uncomfortable about that client. The legal clinic needs to structure a time and place for students to explore with one another and with their supervisors, what this reflection might mean for their work on both this case and for their future practice.

I know that this work is being done by some clinic lawyers, and Rose immediately comes to mind – her commitment to the internal ethical sensibilities of her students was an extraordinary and defining feature of her practice. However this type of critical and self-critical reflection is not part of the mainstream of clinical supervision, and individual clinicians who are committed to this work do it on their own time, using their own formats and processes, and without institutional support and credibility (including the absence of any assessment of student ethical choices or capacity for reflection). There are so many lost opportunities for learning, overshadowed by the assumption of law school that ethics revolve around securing one’s clients legal goals by zealous advocacy, wherein the end justifies the means.

V. CHANGE

Much of what I have said already point towards change – for example, reducing reliance on rights-based strategies, enhancing negotiation and mediation advocacy skills training for clinic students, challenging the lawyer-in-charge model and promoting a partnership model of lawyer/client relations, and making ethical choices and challenges explicit. I have also argued that much of what needs to change is rooted in the fundamental premises of legal education and without change in these, it is hard to see how much can be different in the clinics. However, that does not mean that the clinics cannot do anything about what I have identified as outdated and inappropriate practice norms. In conclusion I want to propose that every legal clinic ask itself the following questions and pay careful attention to the answers.

1. What is the clinic’s policy – and what are its assumptions or practice habits - regarding litigation and settlement – and how does this affect both the broader culture, and decision-making on individual files?

I would encourage legal clinics\textsuperscript{37} to reassess and revalue the impact of the default to rights on their procedures and policies, both as a matter of ideology/conviction and as a matter of practice. Most clinics now work with mandatory mediation schemes in civil and tribunal structures. Many civil cases are case managed and go to mandatory settlement conferences. Either side may propose negotiation. Are clinic students prepared to advocate effectively for their clients in these fora and contexts? Are they intellectually and practically ready for the challenges of strong advocacy as a conflict resolver and a consensus-builder? Do

\textsuperscript{37} This paper is directed at the work of the law school clinics. However I believe that these questions are relevant for all legal clinics, including those freestanding in the community, to ask themselves. Their origins and mission means that they too are affected by the ideology of rights-focus and lawyer paternalism that I argue is outdated and needs a thorough re-evaluation.
they understand that the cases that are ripe for negotiation and resolution are not simply those that look hopeless or involve difficult clients whom they wish to spend less time with – rather they are the (many) cases in which the remedy the client seeks is not available to them via adjudication, or where there is the possibility of a good negotiated outcome, or where counsel on the other side is open to negotiation and has a reputation for fairness, or simply when the client says, ‘please help me to make a deal.’ Do intake interviews routinely include the types of non-legal information which is critical to making judicious choices about negotiation strategy and considering early settlement? Clinic students need to be trained to be intentional, planned, creative, and effective negotiators, and not fall by default into the adversarial traps of hiding their cards, not talking to the other side, or at best simply faxing over ‘our best offer.’ The clients of our legal clinics deserve and need our best service in this regard, and not simply a single track litigation strategy.\(^\text{38}\)

2. How are clinic students invited to reflect on their personal ethical choices and dilemmas?

The clinic offers a safe environment for students to begin to think about the type of lawyer they want to be. What types of behaviour and style they want to characterise their practice – what is the best of themselves that they can offer to clients? Structured reflection on ethical issues – including personal qualms and uncertainties - needs to be explicitly built into a supervision format in order to overcome the assumption that it is ‘weak’ to talk about ‘personal’ matters. Do the students in your clinic understand that this type of reflection is critical to effective client service and personal value alignment? I would encourage clinics to think about how they can use training and supervision to heighten students’ awareness that almost every choice and decision they make has some implications for ethical practice, whether or not it explicitly implicates a “rule” of professional conduct, because it engages their moral judgment. Clinical supervision of students can and should place these issues at the forefront of their consciousness. Staff lawyers should be recruited in part for a willingness to discuss and explore these issues with students, and not just to perpetuate the status quo where so many concerns are suppressed and go unspoken.

3. How far is the lawyer-in-charge ethos perpetuated or challenged in your clinic?

It is critical for clinics to step away from the pervasive narratives of lawyer paternalism and client inferiority that characterise legal education and much of legal practice. In this regard I believe that the clinics can and must take the lead in convincing the law schools to reject these outmoded concepts. Clinics can claim the expertise of their practice world to educate academics about the changing nature of the lawyer/client relationship, personal and corporate/insti-

\(^{38}\) Just 40 of the 200 ABA approved US law schools offer ‘ADR Clinics.’ Almost all 200 offer some form of more traditional litigation-focused clinical program. See online: University of Oregon <http://adr.uoregon.edu/aba> for a Directory.
tutional. Clinic students should be encouraged to develop working partnerships with their clients, thereby developing a model for their future legal practice. The clarity of the lawyer-in-charge paradigm with its set hierarchies and boundaries was undoubtedly easier for novice lawyers to handle, and students may find it difficult to fashion a partnership where their skills are so new - but in a clinic that is committed to developing modern lawyer/client relationships, mistakes should be expected, knowing that they may be addressed by careful supervision.

VI. CONCLUSION

Real change in the clinic requires a significant loosening of our commitment to some of the key tenets of legal education, including the continuing influence of techno-rationalism, a belief that personal values are irrelevant to professional practice, that clients are an unwelcome distraction from the technical and moral leadership role of the lawyer, and that litigation is 'real' lawyering and negotiation is for wimps. History suggests that changes in legal education generally follow, rather than lead, changes in practice. But as we stand at the beginning of the 21st century, changes in legal practice are now evident and widespread, and they are increasing in momentum and impact. The work of the profession is no longer epitomised by trial advocacy but by negotiation, conflict resolution advocacy, and astute advice on process options and choices. The pace and scale of this change is widely acknowledged by lawyers and judges in North America, and contention now focuses on the implications and appropriate response of the profession to such change, not whether it is happening.

The clinics have an opportunity to take the lead on these issues, and at the same time to maintain their critical commitment to social justice. On many practical levels they need the law schools to move forward with them. However, the exceptional people who work in law school clinics have the ability and the capacity to begin this re-assessment and to move the mission of the clinics closer to the reality of their clients’ lives and as well as to the emerging form of 21st century legal services.

In contrast to the single track adjudicative model, legal services in the 21st century are pluralistic and multi-faceted, and must constantly respond to changing client needs if they are to continue to be relevant to the consumers of legal services. The law school clinics are no different. Their clients too deserve to be provided with a rich range of legal options and strategies by skilled and effective advocates. This will fulfill the promise of the clinics that inspired us so much 30 years ago, and ensure that their legacy as vehicles for learning, client service, and social change is not squandered.

39 Despite this, only nine of a total of 200 ABA approved US law schools require law students to take a mandatory course on dispute resolution. See the searchable Directory of ABA Law Schools at ibid. In Canada, some schools (for example, the University of Ottawa and the University of Saskatchewan) are beginning to require mandatory ‘bridge’ courses in ADR but none requires a semester-long ADR course as part of its program.