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A PLEA FOR CLINICAL LAW

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Many people across Canada are becoming increasingly aware of a wind of change beginning to sweep through Canadian Law Schools. The change referred to here is concerned with the increased social activism of law students, particularly in relation to student legal aid and clinical law programmes. Most law schools in Canada today have some system of legal aid, either as an accredited course of the law school, or on a voluntary basis, usually with both student and faculty participation.

For the purpose of this article, the expression "clinical law" will hereinafter be used in relation to legal aid and the provision of legal services for indigent persons. Mr. William Pincus has given a working definition of clinical law which is appropriate for the purposes of this article. It is as follows:

> For it to be what it should be, clinical legal education should be faculty supervised experience by law students for credit in doing lawyer's work; and at least for the foreseeable future, it should have a public service focus.[1]

It is fully realized that clinical law may take many forms and is not tied to legal aid programmes. In this connection a brief perusal of the proceedings of the Asheville Conference of the National Council on Legal Clinics shows the diversity of clinical law programming in the United States[2] and since the Asheville conference, many other forms of clinical education have arisen with varying degrees of success.

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[1] Pincus, W., The Lawyer's Professional Responsibility (1969), 22 J. of Legal Ed. 1, at p. 18.

[2] Council on Education in Professional Responsibility. Proceedings of the Asheville Conference of Law School Deans on Education for Professional Responsibility, Asheville, North Carolina, Sept. 10th-12th, 1965.

Clinical law (legal aid) programmes, in the context of contemporary Canadian society, are worth evaluating on their own merits. A recent article by the former Minister of Justice, the Hon. John N. Turner, alludes to the fact that most litigation is settled at the lower court level.[3] In addition, the surveys and statistics available from Ontario[4] and, to a lesser extent, pilot studies carried out in other provinces,[5] would tend to show that the vast majority of these cases in the lower courts do not have the benefit of legal counsel at any stage of the proceedings. Given the fact that there is a high degree of poverty in Canada[6] and the corollary that many people could not afford to pay for a lawyer, it has become apparent that there is a vast area of unmet legal need. Against this background it can clearly be seen that students, by the vehicle of clinical law (legal aid) progammes, can fulfill a much desired social need. In addition, however, it is desirable that students be educated in fulfilling the needs of poor people vis à vis the legal system. As will be explained below, it is not sufficient to merely establish a clinic and facilitate student involvement with the poor. Students have to acquire special skills in dealing with poor people in rather the same manner as they have to acquire special skills when acting for other interests such as, for example, corporations.[7] The point is that any clinical law programme has two essential aspects:

(a) public service and professional responsibility, and
(b) education of students to fulfill that public service role.

I. *The Educational Aspect of Clinical Law.*

As long ago as 1908 legal clinics were established. Harvard and Minnesota, for example, had legal aid clinics functioning at the time of the first World War. One early writer on the subject noted that the University of Copenhagen had been utilizing law students in a legal aid clinic in 1907.[8] Perhaps the most outstanding of these early attempts at clinical education of law students was the University of Minnesota Law School legal aid clinic which was opened in 1913.[9]

Foremost among the early proponents of the legal clinic as a teaching device were such eminent authorities in their respective

[3] Turner, J. N. Hon., Justice for the Poor: the Courts, the Poor, and the Administration of Justice (1970), 12 Can. J. Corr. 1.
[4] Ontario. Joint Committee on Legal Aid. Report (1965).
[5] Nova Scotia. Committee for the Study of Legal Aid in Nova Scotia (1971); Lowry, D. R., Social Justice Through Law (2nd ed., 1971).
[6] Economic Council of Canada, Fifth Annual Review (1968), p. 110.
[7] Wexler, S., Practicing Law for Poor People (1970), 79 Yale L. J 1049.
[8] Rowe, W. V., Legal Clinics and Better Training Lawyers—A Necessity (1917), 11 Ill. L. Rev. 591.
[9] Morgan, E. M., The Legal Clinic (1917), 4 Am. L.S. Rev. 255; Cherry, W. H., The Legal Clinic (1917), 4 Am. L.S. Rev. 624.

fields as Professor E. M. Morgan[10] and Judge Jerome Frank.[11] When advocating the extensive use of clinical education Frank was characteristically scathing in his denunciation of the prevailing pedagogical mores of American law schools. I shall dwell upon the thinking of Frank because, despite his lack of restraint, it does seem that most later and less vituperous commentators either rely heavily on Frank or arrive at similar conclusions, but usually fail to state their argument with the high degree of clarity which was, *inter alia,* the hallmark of Frank's writings in this field.

The kernel of Frank's thesis was that law schools relied far too heavily on the case method, or case system, of teaching. Most law schools today use a variety of teaching methods,[12] but Frank, and many other realists, were concerned at the apparent over-reliance by law teachers upon appellate decisions and the lack of emphasis on the trial stage.[13] Although Llewellyn saw the value of the case method,[14] he was highly critical of the abuse of this system by many educators:

> . . . the intensive work of case teaching—accompanied by the intricacies of our general case law system—leads to unique specialization among our law instructors: and a specialist, especially one who is a teacher, loves his baby, thinks his darling more important than any other darling, works at his gospel, and argues, fights, even sometimes intrigues for more hours per semester to spread the Perfect Word. Case teaching *in the upper years* is thus a vicious instrument for producing unplanned concentration of good teachers' minds on propagating, at all costs, tiny, mostly unimportant, intricacies of narrow, positive doctrine in case-class and by the case method—because that is the only method that remotely excuses such procedure for any teaching at all except the training of prospective specialists in some narrow field. . . .
>
> It is so pleasant to work over and try to inculcate in class the whole of one's results in such a field. Still, it is *not* good doctrine that what *is fun for the law professor is good for the country.*[15]

The realists contended that the exclusive use of upper court opinions by educators gave to the student a distorted view of law. With some justification, they pointed out that reliance on upper court opinions meant that students were, in fact, seeing merely a small part of a case. To use one of Frank's analogies:

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[10] *Op. cit., ibid.*

[11] Frank, Jerome, Why Not a Clinical Lawyer-School? (1933), 81 U. Pa. L. Rev. 907; A Plea for Lawyer-Schools (1947), 56 Yale L.J. 1305; Both Ends Against the Middle (1951), 100 U. Pa. L. Rev. 20.

[12] Read, H. E., Aims and Practices of University Education in the Faculty of Law at Dalhousie (1964), 1 Can. Leg. Studies 3.

[13] For a precis of Frank's thinking in this regard see Frank, J., Courts on Trial (1969), Chs 15 and 16.

[14] Llewellyn, K. N., The Place of Skills in Legal Education (1945), 45 Col. L. Rev. 345, at p. 354.

[15] Llewellyn, K. N., Jurisprudence: Realism in Theory and Practice (1962), p. 383, italics mine.

> . . . who would learn golf from a golf instructor, contenting himself with sitting in the locker room analyzing newspaper accounts of important golf matches that have been played by someone else several years before?[16]

To Frank, the art and practice of law were so much more than an analysis of upper court judicial decisions. Frank placed greater emphasis upon the actual trial, the uncertain nature of facts, the faulty memory of witnesses and the interaction of the judicial process with such variables as prejudice or open-mindedness in judges, judicial impatience, alertness, fatigue and conscientiousness. He also appreciated the importance of such skills as negotiation, which tend to be under-played at law school. It is clear that he believed that if such factors were communicated to students, then there would be much less reliance on *stare decisis* in law schools.[17] As he was quick to point out, not only was a judicial opinion *ex-post-facto,* but further, it was merely what was termed "a censored exposition", written by the judge of that which had induced him to arrive at a decision which he had already reached![18] Frank's solution to this dilemma was quite simple. The case method would be retained and strengthened by inserting extraneous materials in case books whilst the whole law school would become a "sublimated law office"[19] with law professors who would teach and practise with the assistance of their students. As always, Frank's solution was highly unorthodox and most contentious and, therefore, tended to hide what was essentially a splendid analysis of the ills of many law schools in North America at that time.

In attacking American legal education for abusing the case method, Frank laid the blame upon the lasting influence of the founder of that system, Dean Langdell of Harvard. He saw Langdell as an office or library-lawyer rather than a trial or courtroom lawyer. He noted the brilliant but cloistered life of Langdell and the bookish nature of his approach to law. This was an anathema to Frank who carried a far greater respect for the part played by *facts* at a trial. This, when coupled with the truism that very few cases are appealed beyond the trial stage, enabled Frank to stage a frontal assault upon "library-law schools" teaching law via the almost exclusive use of case books, libraries and the classroom as being abstracted from reality. Frank's panacea of a clinical-lawyer school may seem far-fetched, but it is interesting to note that this idea has recently been revived.[20]

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[16] *Op. cit.*, footnote 13, p. 229.

[17] Frank, J., Why Not a Clinical Lawyer-School?, *op. cit.*, footnote 11, at p. 918.

[18] *Ibid.*, at p. 911.

[19] Frank, J., A Plea for Lawyer-Schools, *op. cit., ibid.*, at p. 1320.

[20] Hechinger, F. M., Law Students: A Plan to "Learn While You Defend", New York Times, May 16th, 1971.

It is undoubtedly true that in the law school of today there is still little emphasis upon fact. Notwithstanding the fact that the case method is but one method of teaching in the armoury of a modern law school, the student is not exposed to the difficult art of fact gathering and analysis. In short, students lack a high degree of fact consciousness which they must acquire in order to adequately practise their profession. Clinical law training can, to a great extent, fill this vacuum. In the legal aid setting a student quickly realizes that facts do not present themselves in an orderly and logical manner, as found in the printed pages of a case book or law report. The student has to work hard at eliciting the relevant facts before he can proceed to the second stage of applying the relevant law. In addition, the clinic illustrates to the student that "legal" compartments such as torts and contracts often overlap in practice and that law school classification often bears little resemblance to the problems of people in the live setting. The matter does not stop there as the student must then present the facts in a court and it is here, at the trial, that he will participate in the crucial process of the weighing and evaluating of facts by the court. In the words of Frank:

> The facts, then, for decisional purposes are no more than what trial judges or juries guess—what they think the facts are (or, more accurately, what they publicly say or imply they think the facts are). The "facts" consist, therefore, of the fallible subjective reactions of the trial judge or jury to the fallible reactions of the witness. Consequently, subjectivity, in two ways, inheres in trial-court fact-finding—in the subjective reactions of the witnesses, and in the subjective reactions to the witnesses of the jury or trial judge. Specific decisions frequently turn on such subjective reactions, culminating in such fallible findings of the facts. In court-houses, the legal rules are never self-operative, are always at the mercy of those findings, and often of that subjectivity.[21]

Other eminent legal educators since Frank have placed special importance upon the need to inculcate in law students a high degree of fact consciousness, but perhaps the most recent addition to this school of thought is worthy of special mention. The present Chief Justice of the United States Supreme Court, the Hon. Warren E. Burger, supported such an analysis when he stated:

> . . . the shortcoming of today's graduate lies not in a deficient knowledge of the law, but in little, if any, training in facts—the stuff of which cases are made . . . . Langdell . . . taught students to sort out, classify and analyze legal principles to be applied to *agreed* facts, but never really prepared them for raw facts and real problems.[22]

Thus it is in regard to the element of "fact" that a law school

[21] *Op. cit.*, footnote 19, at p. 1307.

[22] Burger, W. E. Hon., The Reporter of Phi Alpha Delta (Oct. 1969), p. 3.

legal aid programme can impart a highly desirable addition to the law student's education.

Of genuine concern to law teachers today, whenever the argument for practical training is mooted, is that law schools with high analytical academic standards may be transformed into mere "trade-schools". Although this concern is understandable, it is submitted that such a view is only tenable if it is assumed that it is impossible to balance abstract legal education with practical clinical training. As Twining has indicated, practical training can complement and supplement law school curricula without destroying the quest for abstract perfectionism.[23] Indeed, why should not a law school strive to satisfy both needs?

Directly related to this point is the fact that abstract theory is very often dull and it is a sound pedagogical rule that "learning by doing" is a valid method of learning:

> Montessori discovered that to teach half-witted children arithmetic became easy if they were given practical activities, interesting to them, in which adding, subtracting and multiplying were necessary aids to the desired specific achievements. They learned by "doing". If that method is good for half-wits, why not for law students (who are presumably whole-wits)?[24]

The skeptic may at once deduce that it does not necessarily follow that Montessori's valid method of learning can be successfully incorporated into the university. It is at this point that one must turn to the experience of university medical schools, since they have quite happily used clinical education for many years. In terms of modern medical education it would be unthinkable for doctors to graduate without ever having interviewed, examined, diagnosed and treated patients under the supervision of faculty. Medical students do not merely rely on textbooks, case histories and classroom work. Whilst the analogy can be taken too far, proponents of clinical law have drawn sustenance from the medical school experience and noted the superiority of medical education:

> In medical schools, "case histories" are used for instruction. But they are far more complete than the alleged case books used in law schools. *It is absurd that we should continue to call an Upper Court opinion a case.* It is at most an adjunct to the final step in a case (*i.e.* an essay published by an Upper Court in justification of its decision).[25]

It is clear that both law and medicine are applied sciences and it is not so far removed from the legal process to realize that, although a doctor does not have to argue within an adversary system with another doctor, a rather similar process takes place within

[23] Twining, W. L., Pericles and the Plumber (1967), 83 L.Q. Rev. 396.
[24] *Op. cit.*, footnote 19, at p. 1317.
[25] *Op. cit.*, footnote 17, at p. 916.

his own mind when reasoning what the appropriate diagnosis should be in a particular case. This is to say, that the adversary method is, in reality, a reasoning process necessary when a rule is to be applied to particular facts.

Interestingly enough, Chief Justice Burger once again relied heavily upon the analogy between law schools and medical schools in a recent speech. The Chief Justice was of the opinion that lawyers, judges and law professors would be most disturbed if, in encountering a medical malpractice suit, it was shown that a young doctor had commenced to practise shortly after leaving medical school without ever assisting in operations or making a diagnosis. The Chief Justice went on to say:

> . . . yet today in a vast number of court rooms good cases are being bungled by inadequately trained lawyers and needy people suffer because lawyers are licensed with very few exceptions without the slightest inquiry into capacity to perform the practical functions of a counsellor or an advocate.[26]

Some Canadian law teachers are of the opinion that the essential difference between Canadian and American legal education is that in Canada there is a post-graduation period of apprenticeship which, therefore, negates the necessity for clinical education in law school. It is submitted that this is merely academic escapism. It must be recalled that the emergence of law schools in North America was largely due to the fact that apprenticeship training was inadequate.[27] Indeed, some educators see clinical law training as,

> . . . a return to fundamentals by taking into the law school the best elements of the apprenticeship system.[28]

It must also be noted that clinical training in the law school has one major advantage over post-graduate apprenticeship, as such training is conducted in the more rarefied atmosphere of a law school with its propensity for tolerance and abstract perfectionism whereas the tempo, pressures and conditions of modern practice often make it extremely difficult for a busy practitioner to honour his duty to train his apprentice in the practice of law.[29] It is often argued that the "sink-or-swim" or "pick-it-up" approach which often passes for training during the period of apprenticeship has been demonstrated to be adequate. With the growing complexity of our legal system it is becoming increasingly evident that the law office is inappropriate to impart the basic skills. It is conceded that some of the better law firms have good induction programmes,

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[26] *Op. cit.*, footnote 22.
[27] *Op. cit.*, footnote 1, at p. 17.
[28] Bradway, J. S., Legal Aid Clinics in Less Thickly Populated Communities (1932), 30 Mich. L. Rev. 905, at p. 921.
[29] Frank, J., Both Ends Against the Middle, *op. cit.*, footnote 11, at p. 31.

but it cannot be forgotten that most lawyers do not start in the better firms. As one writer put it:

> . . . members of the bench and bar lack the time and the ability to impart the fundamental, critical and juristic skills that are the special dispensation of the academician.[30]

Such arguments do not stop there, however, as it is also argued that bar admission courses can and do impart the basic skills acquired in a clinical law programme. It is clear that many placed their faith in bar admission courses in that it was hoped that such a training would rectify any gaps left in a lawyer's education after law school. It is felt, however, that bar admission courses have not yet lived up to this ideal. In any case, Frank dealt with this argument in his usual devastating fashion:

> . . . in other words, the idea is this: have law students spend three long years being mis-educated—*i.e.*, receiving incorrect impressions of how courts and lawyers conduct themselves—and then have the students spend another postgraduate year unlearning those false impressions. Langdell's ghost still controls these Professors.[31]

It may be asserted the bar admission courses usually deal with practice and procedure in what may be termed a substantive fashion with lectures and classroom work conducted in rather the same manner as in law schools. The practical experience gained in such courses seems to be minimal.[32] In clinical law, however, the emphasis is on the person to person encounter and the acquisition of practical skills, under supervision, is the primary objective. Shaw, in an interesting analysis of bar admissions courses, acknowledged the fact that clinical law could, indeed, be extremely useful:

> A knowledge of human nature and of the best method of handling clients can only be gained by actual contact. In law offices, however, contact with clients is necessarily and properly the sole prerogative of the employer, not the apprentice. Unless, therefore, the law office has a considerable volume of court work, which will involve meetings with witnesses, whether friendly or hostile, and direct contact with solicitors on the other side, in which work it may be possible to share, it may safely be said that the student or apprentice obtains no experience of that personal aspect of his profession which is at least as important as any other aspect. [33]

Shaw's argument, when coupled with the lack of uniformity in law office training, is of great importance when contrasting bar admis-

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[30] Andersen, J. J., Gideon: A Challenging Opportunity for School and Bar (1964), 9 Vill. L. Rev. 619.

[31] *Op. cit.*, footnote 19, at p. 1304.

[32] Roberts, M., Beware: Equity in Ontario Legal Education is Dead (March 1971), 3 Ansul (No. 3).

[33] Shaw, Sinclair, Practical Training for Law Students: The Apprentice System or Legal Aid Clinics (1937), 15 Can. Bar Rev. 361, at p. 362; see also Fairbairn, L. S., Legal Aid Clinics for Ontario Law Schools (1965), 3 Osgoode Hall L.J. 316.

sion courses allied to apprenticeship training against law school clinical programmes.

It is fitting to note that support for clinical law training in law schools comes from no less a body than the special committee of the Conference of the Governing Bodies of the Legal Profession in Canada. The *Report* of that body stated:

> We think that there can be no substitute for the knowledge that a student acquires from dealing with real problems, and with living people, and from observing a lawyer in actual practice. However, we must acknowledge the fact that the busy lawyer just does not have enough time to devote to teaching students, and something should be done to transfer at least part of that responsibility to the law schools.[34]

It has been argued by some that as most law schools use moot courts and trial practice courses, then clinical law is unnecessary. Professor Morgan was probably the first scholar to analyse moot courts from a comparative standpoint.[35] He noted that the practice court is both unsatisfactory and difficult to manage and that even when equipment and adequate faculty time is available, the subject matter for real litigation is lacking. Morgan then went to the "core" of the issue when he alluded to the difficulty involved in producing facts in such practice courts and concluded:

> There is almost no opportunity for real cross-examination, for there are no real witnesses. The witnesses almost invariably become partisan and fail or refuse to limit their testimony to the supposed facts of the case.[36]

Morgan was of the opinion that practice courts are a worthwhile activity, even if there are significant defects, the chief of which is the lack of reality and human element. This analysis of practice courts was concluded by Morgan in this fashion:

> In an attempt to supply in a measure these deficiencies, there began at Minnesota in 1913 an experiment, which is still being conducted. In co-operation with the Associated Charities of Minneapolis, a legal aid bureau was organized.[37]

Some years later Frank also compared mock trials and real trials in the clinical setting. He noted that this "ersatz teaching" shunned real witnesses, real clients, real negotiations and real problems, but stated his position on this point, which he characterized as the

[34] Practical Training in Legal Education (1959), 2 Can. L. J. 121, at p. 125.

[35] *Op. cit.*, footnote 9, at p. 256.

[36] *Ibid.* It is in this context that the problem method of teaching must be seen. The problem method is, in my opinion, of greater value to many students than the case method, especially in second year, by which time the dialectical technique of case analysis should be mastered. The problem method lacks a sense of reality. For an excellent appraisal of the problem method see Charles, W. H., The Problem Method and Canadian Legal Education (1969), 4 U.B.C. L. Rev. 130.

[37] *Op. cit.*, footnote 9, at p. 256.

law schools' use of pseudo-realities and a resort to play-acting, with his usual clarity:

> A little of such teaching is all right, but certainly it's not enough.[38]

It is not my intention to embark upon a detailed discussion of the relative merits and demerits of the trial practice approach. Clearly, there is tremendous value in such training, but it has its limitations and it is only when these limitations are recognized that it may be seen that clinical law, in fact, supplements moot court by adding a further and highly significant dimension:

> But you cannot get away from the fact that the practice court work is artificial, and the life that is put into it by the legal clinic is the chief thing that makes me argue for the legal clinic.[39]

Not only is there a lack of reality, but there is usually an inherent weakness of such teaching which is difficult to eradicate in the classroom, namely, the lack of a sense of process. By this it is meant that students do not interview, digest facts, develop a fact consciousness and a sense of relevancy; not to mention the art of negotiation, drafting and attendant research. In short, the scope of such a programme tends to be somewhat narrow. Perhaps it is fitting to give the last word in this regard to an eminent Canadian, Mr. Justice I. C. Rand, whose opinion is both illuminating and succinct:

> The benefits of accessory devices, such as mock trials and analogous show pieces have always seemed somewhat dubious to me. There is too thick an air of make-believe about them. For a small percentage of students they may be of some value, but I doubt that all the motions of moot courts are worth the first real encounter exhibited to the young lawyer.[40]

What is apparent in the Canadian legal profession today is the lack of courtroom lawyers or trial lawyers. It is clear that the criminal trial bar in most provinces is rather small. There are probably many reasons for this, the chief of which is that criminal law work, although ostensibly of prime importance, is, in fact, rather unremunerative and often unrewarding in other ways. The experience of Ontario under its Legal Aid Plan has shown that there is a large area of practice in the lower criminal courts for which lawyers must be trained, but, in addition, it is important that law schools take the initiative in stimulating interest in this area of law. Students can be shown that this type of trial work can be interesting and, with the advent of legal aid across Canada, it will also be, to some extent remunerative. The effect of legal aid is to bring

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[38] *Op. cit.*, footnote 29, at p. 29.
[39] *Op. cit.*, footnote 9, at p. 269.
[40] Rand, I. C., Legal Education in Canada (1954), 32 Can. Bar Rev. 387, at p. 406.

many more people within the ambit of the law and it may be seen that a new "market" with new "demands" upon law schools will come into being. It is undoubtedly correct to assert that most Canadian law schools presently offer excellent instruction in business and property courses. Over the years such courses have grown in importance, as may be expected in a growing nation. It is clear that when legal aid does arrive across the nation the law schools will have to develop a similar responsiveness to the needs of the legal profession's new clientele. Clinical law courses are just one way of channelling the attention of both students and faculty into a new and, it is anticipated, expanding area. It is submitted that there are tremendous difficulties to be encountered when practising law for poor people[41] and law schools will have to face these problems sooner or later. Perhaps it would be advisable for Canadian law schools to turn their attention to the experience of American law schools in recent years and begin planning for the day when effective legal aid makes the terms "equality before the law" more than just a tired cliché.[42] Clearly law schools have a duty to turn their attention to the needs of the underprivileged and to the legal aid market, as it were, in much the same manner as they have satisfied the demand and the need for corporation lawyers and property lawyers in years past. Clinical law can make a positive contribution in this regard and, hopefully, help to satisfy even the existing demand for a criminal trial bar by stimulating students' interest and awareness of this field. A good clinical programme would go further in directly exposing students to criminal law as practised in the lower trial courts.

> The criminal law course and the criminal procedure course should give the student an understanding and awakening of the administration of criminal law, but the books alone and lecture sessions are not sufficient. The student can learn much from courtroom participation, and counsel, representing the indigent defendant, will also benefit much from effective supervised law student assistance. . . . Abuse can occur if the student is restricted to a diet of menial duties without ever receiving a challenge to his ability as a future lawyer.[43]

It is interesting to note that a recently retired judge of the United States Supreme Court has lamented the apparent disappearance of the criminal bar in the United States[44] and sees the role of

[41] *Op. cit.*, footnote 7.

[42] Taylor, E. H., Wealth, Poverty and Social Change: A Suggestion for a Balanced Curriculum (1969), 22 J. of Legal Ed. 227.

[43] Cleary, J. J., Law Students in Criminal Law Practice (1966), 16 De Paul L. Rev. 1, at p. 4.

[44] Clark, T. C., Problems of Change, [1968] Utah L. Rev. 347: "There can be no question that we have fallen down in the area of legal services to all people, regardless of their station in life. Such services are as much a matter of legal right as those specifically enumerated in our basic law, and we must provide innovation to secure them to all segments of every community. First and foremost, we must improve both the public and

student trial advocates in such a perspective. My observation of the trial bar in the Maritimes would strongly suggest that the reasoning of our American colleagues is applicable to our present state of affairs.

Some educators may be wary of the introduction of clinical law into law school, due to the fact that many already regard the law school curriculum as over-crowded and, therefore, any further additions would be burdensome. There is undoubtedly some force in this argument. We live in an age in which society is growing in complexity at an alarming pace and new courses tend to proliferate to meet the need of an expanding technological society. Recent years have seen such courses as "Computers and the Law", "Law and Technology", "Law of the Environment", "Law of Urban Affairs", and various courses in the general area of "Law and Sociology" or "Law and Social Problems", to mention only a few. Indeed, many take the view that law schools cannot continue to increase the load further than the present over-burdened curricula content. Such a view presupposes that some of our older subjects cannot be scrapped or merged as they decline in importance and, furthermore, denies the intrinsic value of an elective programme in the later stages of a law school education.

The Columbia curriculum study some years ago noted that as new subjects are added, so also there is a need to reassess and reclassify the older subjects.[45] Such changes in curricula, unfortunately, often mean the slaughtering of somebody's "sacred-cow" and the elective programme must be viewed in this light. In short, an elective programme enables a course to be added without the discomfort inevitably entailed in reassessing the curriculum of the school as a whole. It must be appreciated that the popularity of elective programmes does not replace the need to reassess and re-evaluate, nor does it diminish the importance of such an approach. Notwithstanding the need for continuous reassessment of curricula, it is clear that clinical law need not, of necessity, displace any other subject. In any case, the sterility of this argument is exposed by Dean Prosser:

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private programs for defense of indigents charged with crime. In this connection, I urge the law schools to organize defender programs that will bring the third year law student in touch with criminal law in action. Several states have now provided by legislation or court ruling that such students, when certified by the Dean acting under the direct supervision of licensed counsel, may participate in criminal cases. We must do something now, for the time is late—almost too late—to adequately develop the dedicated core necessary to preserve the art of courtroom advocacy. The tribe of trial lawyers is fast diminishing. Trial judges tell me that the lack of knowledge in trial tactics in members of the Bar is appalling. It is the duty of the law schools to correct this."

[45] Oliphant, Herman, ed., Summary of Studies in Legal Education by the Faculty of Law of Columbia University (1928), Ch. 9; see also Currie, B., The Materials of Law Study (1955), 8 J. of Legal Ed. 55.

> . . . elective courses are not the answer, since they mean merely that the student elects one course he should have rather than another course he should have; and far too many elections are made on the basis of the hour of the morning or the grade received from the Professor last year.[46]

Whether or not one agrees with this evaluation of the applicability of elective courses, it may be asserted that Dean Prosser shows himself to be in tune with the present psychology of many law students.

Given the fact that elective programmes, in one form or another, are here to stay, coupled with the fact that a clinical law course can be introduced as an addendum to most law school curricula, it becomes plain that this will not of itself overburden a law school's curriculum. This does not deny the fact that a law school syllabus needs to be reappraised on a continuing basis.[47]

Before leaving the question of curriculum balance and curriculum change, it must be realized that the problem is not necessarily one of competing courses in relation to course content, but may also be related to the manner of teaching. Frank was of the opinion that too much time was wasted at law school by the over-reliance upon the case method form of teaching.[48] Quite recently, Frank obtained an ally in Mr. Ralph Nader, the eminent consumer advocate. With the audacity of Jerome Frank, this former graduate of Harvard Law School commented upon the Harvard curriculum and stated that the case method of teaching allied to the Socratic manner was sufficient to,

> . . . transform intellectual arrogance into pedagogical systems that humbled the student into accepting its premises, levels of abstraction, and choice of subject.[49]

Mr. Nader then goes on to note that:[50]

> . . . law professors take delight in crushing egos in order to acculturate the students to what they called "legal reasoning" or "thinking like a lawyer". . . . The process is a highly sophisticated form of mind control that trades off depth of vision and factual inquiry for freedom to roam in an intellectual cage.

Whilst Nader's criticism of Harvard may, or may not, be true and may, or may not, be over-stated, it is clear that there is room for a large area of disagreement over not only curriculum content but also methodology and it is submitted that if clinical law is regarded as an experimental teaching vehicle within the law school

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[46] Prosser, W., The Ten Year Curriculum (1953), 6 J. of Legal Ed. 149, at p. 150.

[47] *Op. cit.*, footnote 42.

[48] *Op. cit.*, footnote 19, at p. 1318.

[49] Nader, R., Law Schools and Law Firms (1970), 54 Minn. L. Rev. 493.

[50] *Ibid.*, at p. 494.

curriculum, then little will be lost in the long term by the acceptance of a new approach to the teaching of law.

It may at once be appreciated that clinical law programmes go a long way to answering law students' pleas for "relevancy". Many students feel frustrated during their legal education because of what they perceive to be an over-emphasis upon abstract perfectionism. This, it is argued, tends to blunt the youthful zeal and idealism which is often the factor which initially motivated students to seek a legal career. While it is true that relevancy, for its own sake, is not an appealing argument, it may be asserted that a good clinical programme would be predicated upon the need for thorough research and preparation of cases. The application of law to fact in the live situation is often more difficult than classroom problems on the same issue. The point is that clinical law need not depress standards of analytical learning. It follows from this reasoning that clinical law, rather than detracting from the pursuit of analytical thinking, in fact adds another dimension as students are taught to *act* as well as *think*. In brief, the student continues beyond the "abstract stage" of legal reasoning to the point of arguing and applying, in concrete terms, the product of his analysis.[51] It may be added that student interest is more readily maintained when the need is apparent as in a legal aid clinical programme. As far as I can establish, no writer has as yet accused student legal aid activities of being irrelevant. Properly used, therefore, clinical law not only has an immense educational value, but it can also nurture the idealism of young people.[52]

Not only have law schools negated the idealism of some, but they have also managed to bore many students, especially in the third year of law school.[53] In commenting upon the lack of drive, effort and sustained attention of many third year students, the Harvard Law School Committee on Legal Education deduced that it was because of "the feeling that the third year is just more of the same diet offered in the second year".[54] The third year of law school has been characterized by various legal educators as "the wasted year in legal education", "the awkward year" and "the year the faculty lost the pennant".[55] It is true that in a modern Canadian law school there is not the reliance upon the case method after the first year as in the past. Many methods of instruction are

[51] *Op. cit.*, footnote 28, at p. 915.

[52] ". . . if there be one school in a unversity of which it should be said that there men learn to give practical reality, practical effectiveness, to vision and ideals, that school is the school of law. . . ." Llewellyn, K. N., *op. cit.*, footnote 14, at p. 394.

[53] Gellhorn, W., The Second and Third Years of Law Study (1964), 17 J. of Legal Ed. 1.

[54] Harvard Law School, Report of the Committee on Legal Education (1960), p. 42.

[55] *Op. cit.*, footnote 53.

used,[56] but most techniques do concern the student in searching books in the library, usually for the *ratio decidendi* judicial opinion. It might be asserted that all but the most insensitive or the pedant would, or should, get bored with such classroom work over three full years. Clinical law can provide a possible solution to the problem of third year boredom, at least for some students, and it is only by constant experimentation with third year curricula and teaching that third year *rigor mortis* will be eliminated.

One point in favour of clinical law which is often missed is that students do not have the pressures of the modern law firm to contend with. Although there are other difficulties in the legal aid setting, it is clear that productivity is not one of them. Thus students have the benefit of experiencing the "live-situation" without the pressures which usually condition their initial experiences in practice. The student will still experience ethical and practical problems, a common occurrence being that of identification with the client, and it is argued that it is probably better that such problems are resolved in the more "rarified atmosphere" of a clinical programme, coupled with the law school's higher propensity for tolerance which is better than in later practice in which the young lawyer usually has a good deal at stake and will be under pressure from many quarters.

It is also possible to assert that many students belong to a totally different environment from the people in low-income areas and it is felt that a major value in clinical law is that it may help to develop in law students a sensitivity to injustice. Such a training, coupled with the advent of creative approaches to legal services for the disadvantaged, has captured the imagination of many young lawyers in the United States.[57] A recent spate of newspaper articles in the United States has drawn the attention of many to the fact that, for the first time, Wall Street is having to compete with legal aid and public interest law activities when recruiting law graduates.[58] There is little doubt that this change in outlook is due, at least in part, to the clinical law experience gained at law school and the resultant rise in the social consciousness of many young lawyers. It is to be hoped that clinical law will have a similar effect in Canada.

As mentioned above, many legal educators see the real danger in clinical law as inculcating a trade-school approach in students and its consequential effect upon the law school. The trade school argument can be negated by the use of inter-disciplinary teaching in the legal aid setting. To draw from the experience of the Dal-

[56] *Op. cit.*, footnote 12.
[57] *Op. cit.*, footnote 49, at p. 499.
[58] Reinhold, R., New Lawyers By-Pass Wall Street, New York Times, November 19th, 1969.

housie clinical law programme, it may be seen that by using interdisciplinary teaching, the reverse will occur in that a student's horizons will be broadened. At Dalhousie a psychiatrist teaches interview technique, a technique that it is essential to develop in a student if he is to function successfully as a lawyer. Furthermore, a sociologist is used to teach the complexities of empathy and rapport. A detailed understanding of such problems of communication is necessary if a lawyer is to bridge the "alienation gap" or the "culture gap" when dealing with inarticulate and often suspicious or hostile people in low income areas. In addition, social workers, welfare administrators, judges of the lower courts, lawyers with expertise in dealing with poor people's problems, and members of the Faculty of Law are used to both analyze and inform upon matters related to law and poverty. Not only do these classes inform, but they also bring an added dimension to the teaching of law. Students see law in a new perspective. They are not only exposed to law in action, but also begin to realize that law is only one method of solving problems, and not always the best method. By exposure to the approaches of other disciplines, they begin to fully understand that law often only deals with symptoms and not the cause of socio-legal problems. The clinical law experience reveals to many for the first time that an understanding of the social sciences can not only enable a lawyer to function better as a lawyer, but also illustrates clearly the nexus of relationship between anti-social behaviour and poverty.

It may be argued that field work and empirical research would provide the student with the necessary exposure to social conditions in society. To some extent this is correct. However, a law school is not educating social workers, it is educating lawyers. It is conceded that every student of law should understand empirical research techniques and have the opportunity to undertake field work. The important point is that lawyers must go beyond that and be educated to *serve* persons in need of their services. Clinical law in the legal aid setting fulfills such a purpose.

Most educators agree that clinical law can be a useful adjunct to the curriculum of a law school.[59] The issue of full academic accreditation is still, in some circles, a highly contentious matter. I believe that the allocation of academic credit for such activities is justified on the basis of a fundamental consideration of fairness. If it is agreed that the work pursued by students in a clinical law course is as valuable from an educational point of view as traditional seminar courses, then, clearly, academic credit should be awarded. In addition, the granting of academic credit establishes to both faculty and students a firm commitment to clinical law

[59] Symposium: Legal Aid Clinics for Law Students (1954), 7 J. of Legal Ed. 204.

programmes. On a more practical plane, it may be stated that it is only by the award of credit that effective faculty supervision would unquestionably be provided. Beyond that, it is worth noting that clinical law has been found to occupy a fair amount of a student's time and it is tantamount to penalizing a student's participation in this kind of activity if credit is not awarded. In brief, clinical programmes, if they are to be implemented in the law school, must be regarded as in every way comparable to traditional law school subjects.

Many educators cherish the uniqueness of the law school as an educational experience and resent any intrusion by new, and to some extent unproven, teaching approaches. It is submitted that clinical law will not destroy the unique attributes of the law school, but will enhance the better aspects of a Canadian law school. It is submitted that law schools should develop new and imaginative curricula to meet the changing needs of society and it is fitting to apply to the profession of law teaching the now famous words of Judge Learned Hand:[60]

> The profession of the law has its fate in its own hands; it may continue to represent a larger, more varied social will by a broader, more comprehensive interpretation. The change must come from within the profession; the profession must satisfy its community by becoming itself satisfied with the community. It must assimilate society before society assimilates it. . . .

II. *The Public Service and Professional Responsibility Aspect.*

If one accepts the reasoning and analysis of the research published by the Economic Council of Canada,[61] it is evident that about one in four Canadians live at or below poverty level. In passing, it may be noted that the poverty line was drawn at a rather low income level. The high incidence of poverty within one of the most affluent nations on earth has great significance for the legal profession as, if the surveys of recent years are correct—and there is no reason to doubt them—then it is abundantly clear that an extremely large segment of Canada's population simply could not afford the services of a lawyer if ever they needed one.

In the absence of a definitive study pertaining to unmet legal need, it is only possible to speculate upon the number of people who are either deprived of access to our courts, or alternatively, when before a court, are denied equality before the law due to the fact that they are not represented by counsel. This is not to say that poor people, by definition, get a raw deal when appearing in court, but merely to take cognizance of the fact that our system is

[60] Hand, The Speech of Justice (1916); The Spirit of Liberty (Dilliard Ed., 1952), p. 13.

[61] *Op. cit.*, footnote 6.

an adversary system and if one side is represented whilst the other party is either ignorant of his rights or inarticulate then there is at least a strong probability that the administration of justice will be impeded. The Economic Council of Canada's figures, when coupled with the recent experience of the Ontario Legal Aid Plan,[62] would at least raise a strong presumption that very many people throughout Canada do not have equal opportunity in regard to the exercise of their legal rights as Canadians. The plight of the poor is exacerbated by the generally absurd and narrow approach by the Canadian courts to the concept of right to counsel contained in the Canadian Bill of Rights.[63] Thus, all Canadians have rights but only some are able to enforce them. Notwithstanding the concept of "equality before the law" enshrined in the Bill of Rights, it is apparent that some are "more equal than others" when it relates to the exercise of their rights at law. The American judicial enforcement of the right to counsel is refreshingly different.[64]

A survey conducted by the Civil Liberties class of Dalhousie Law School in the spring of 1970 sheds light upon the incidence of legal representation in lower courts.[65] To conduct this survey, law students monitored the Halifax City Magistrates Court every day during the first three months of 1970. During this period 519 cases reached the dispositional stage and the statistics reveal that only seventy persons were represented whilst 449 did not have counsel at any stage during their case.[66] It is fitting to quote, at length, the conclusions of this part of the survey:[67]

> It is obvious that the rights of an unrepresented accused are prejudiced. When the charge is read, even if they understand what they are being asked to do, many will plead guilty because "they want to get it over with". This prevents any valid legal defence from being heard. Assuming that the accused does plead not guilty, it will be very difficult for him to conduct his own defence when he is being matched against an able crown prosecutor. He will be hampered by legal jargon, a set of evidence rules, and a basic unfamiliarity with court procedure.

It may be noted that the Ontario system of Duty Counsel has done much to eradicate the problems encountered in the Halifax City Magistrates Court by providing legal advice immediately prior to

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[62] Ontario: Advisory Committee on Legal Aid, Annual Reports (1968), (1969) and (1970).

[63] S.C., 1960, c. 44. See *R.* v. *Steeves* (1964), 49 M.P.R. 227 (N.S.S.C.); *O'Connor* v. *R.* (1966), 57 D.L.R. (2d) 123; but see *R.* v. *Balageer* (1969), 1 D.L.R. (3d) 74, 66 W.W.R. 570 (Man. C.A.).

[64] *Powell* v. *Alabama* (1932), 287 U.S. 45; *Gideon* v. *Wainwright* (1963), 372 U.S. 325; *Escobedo* v. *Illinois* (1964), 378 U.S. 478; *Miranda* v. *Arizona* (1966), 384 U.S. 430; *Gault* v. *Arizona* (1967), 387 U.S. 1.

[65] Dalhousie University, Civil Liberties Survey (1970), unpublished.

[66] *Ibid.*

[67] *Ibid.*

the accused's court appearance. The Halifax experience is, however, probably typical of lower courts found outside the Province of Ontario.[68]

Professor K. B. Jobson, of Dalhousie University's Faculty of Law, undertook a survey of persons charged with "Federal Offences" in Nova Scotia Magistrates Courts during the year 1967.[69] The study disclosed that 5,300 persons were charged during the year yet only 376 were granted legal aid. It was deduced that if the suggestions contained in the Report of the Ontario Committee on Legal Aid were correct and sixty per cent of criminal cases involved indigents, then clearly there was a large area of unmet legal need.[70]

The results of aforementioned pilot surveys could probably be applied to most provinces other than Ontario and it is significant to note that Ontario has dispensed legal aid in over 400,000 cases in a few years.[71]

While the empirical evidence is fragmentary, it may be asserted that many Canadians in need of legal services do not get them. It may also be noted that for many poor people litigation begins and ends in the lower courts.[72] A recent American report starkly stated the problem:[73]

> The courts of the poor are the courts of "inferior" jurisdiction, the "people's courts". The judges in these lower courts tend to be younger, less experienced, from less prestigious law schools. The caseloads of

[68] An even more disturbing aspect of the Halifax survey is to be found under the heading "Rights and Cautions", the concluding passage is as follows:

"The Police, during this period, did not inform any accused persons of their right to retain counsel. In response to this question the answers were again 100 per cent negative. As to whether or not police informed accused persons of the availability of legal aid in Halifax our survey indicates that most policemen do not know of the legal aid system or how it works. Other policemen had a comprehensive knowledge of the legal aid system but did not communicate this to accused persons. Here, as above, the result was an unequivocal 100 per cent negative.

. . . Although the law is not clear as to whether making a phone call is a right or a privilege, how could one's right to 'retain and instruct counsel' pursuant to the Canadian Bill of Rights be exercised sans communication? We found that the use of this facility was offered to nobody. Of those persons who requested the use of a telephone approximately 50 per cent were refused this request."

[69] Jobson, K. B., Representation in Criminal Cases in Nova Scotia during 1967, unpublished.

[70] *Op. cit.*, footnote 4, p. 91. Professor Martin L. Friedland, an authority on legal aid, was recently quoted as estimating that at least sixty per cent of all persons charged with indictable criminal offences cannot afford counsel without financial assistance. Henry, P. R., Justice for Canada's Poor, Financial Post, September 12th, 1970.

[71] Critics Miss Mark, Ontario Director Says, Globe & Mail, March 3rd, 1971.

[72] *Op. cit.*, footnote 3.

[73] Report of the Task Force on Law and Law Enforcement (1970), p. 34.

> these courts tend to be the greatest. The deliberate pace of the superior courts is not for the poor; their tribunals more nearly resemble the racetrack on opening day. Cases of enormous importance to the participants are handled in an assembly-line fashion, with less than five minutes to a case.
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> Specialized "social courts"—family courts, drunk courts, juvenile courts —or specialized "legal" courts—landlord-tenant courts, small claims courts—handle the bulk of cases involving the urban poor. In the "social courts" the judges rely, too heavily if at all, on reports of probation officers, intake officers, social workers, and referees to dispose of the parties' complaints. The reports are often not available to the parties, they contain inadmissible and hearsay evidence, and their drafters cannot be cross-examined. In the "legal courts", no account at all is taken of the equities: the tenant owes rent, the debtor owes money; that is that.
>
> In these courts, parties are most often not represented by counsel; appeals are infrequent. Dispositions are commonly arrived at in such courts without a full adversary hearing.

It is my belief, based upon observation of lower courts in Nova Scotia over the past year and conversations with other legal aid lawyers in Canada, that much of this statement can be applied to lower courts in Canada.

If one accepts the proposition that there is probably a large area of unmet legal need in Canada today, then it may be appreciated that law schools can fulfill a useful role in initiating clinical education courses, not only to satisfy a demand for legal services, but also to educate lawyers in such a manner that they become attuned to the needs of the disadvantaged and develop a greater sense of public service and professional responsibility.[74] Professor Lederman, in a recent article, alluded to the fact that greater attention must be paid to the needs of the "chronic poor" and the

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[74] The Honourable John Munro, the Minister of National Health and Welfare, in a recent speech to lawyers (September 1969) questioned the prevailing sense of professional responsibility within the legal profession:

"What has gone wrong? I submit, first and foremost, that all of us here have. I suggest that the law in Canada, for many of today's lawyers, has become a sham—as well as a shame to those outside the profession. Instead of practising law to defend the weaker members of our society from exploitation, instead of conceiving of the law as a bulwark against the rule of the jungle, many of us are using law to enable the rich to get richer, and the corrupt to become more powerful.

Why? Is it because too many of us are preoccupied with the social and economic rewards—such as our fee structure which goes towards making lawyers the second highest paid occupation in Canada? Some of us seem to be deliberately seeking profit from human misery. . . .

It's about time our profession concentrated on relieving human suffering than causing it. I have met quite a number of lawyers who are extremely self-righteous about the subject of welfare and assistance to the less fortunate. They congratulate themselves for their own evident affluence, and look on people in the poverty category as therefore vastly inferior to themselves. The usual line is something about 'shiftless, lazy bums, loafing on my tax money—why doesn't someone make them get a job?'"

lower income groups and it is in this context that the public service aspect of clinical law must be seen.

> Speaking of the somewhat unbalanced distribution of professional talent, I suggest it is fair to say that lawyers have specialized too much in recent times for the benefit of too few of the interest groups in society. Private business corporations and wealthy individuals tend to be well served. . . . This imbalance has been reflected, among other places, in the educational programmes of the Canadian law schools. . . .[75]

Law schools, by immersing students in the legal aid setting, may provide a milieu in which a sensitivity to injustice is acquired. The legal aid clinic can provide a vehicle, not only for education in its strict sense of mastering basic skills, but also for direct public service, utilizing the youthful idealism and exuberance of today's student body. Whilst providing an outlet for student altruism, the law school is helping to inculcate a greater awareness of social and legal injustice which cannot fail to affect to a lesser or greater degree the value system of the participants.[76] The experiences that may be expected to occur in a legal aid clinic at least ensures that future lawyers have been exposed to people and problems which, eventually, may alter their concept of professional responsibility.[77]

It is not adequate for legal educators and practitioners to suggest that, with the advent of legal aid, those interested will gravitate to such work. This form of escapism denies the fact that it is proper to expect law schools to educate students for all strata in society and also over-estimates the effectiveness of legal aid.[78] At least in the foreseeable future very many Canadians will remain unrepresented in lower courts, and, in the words of one writer:[79]

> The greatest need for public service is in the neglected areas, and it would be unjust to ignore these in favor of other areas which may later justifiably claim the attention of clinical legal education. If clinical legal education does not *just* give its attention to these areas,

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[75] Lederman, W. R., Canadian Legal Education in the Second Half of the Twentieth Century (1971), 21 U. T. L.J. 141, at p. 145.

[76] One prominent Canadian lawyer remarked to me that "the poor, death and taxes are always with us", but went on to state that "the profession has only dealt effectively with death and taxes, perhaps at the expense of the poor".

[77] Broden, T. F., A Role for Law Schools in O.E.O's Legal Services Program (1966), 41 Notre Dame L. Rev. 898, at p. 902: "The greatest contribution of the law schools, however, in terms of service to the community may be a long-range one. If lawyers graduate from law school with a deep sense of the professional obligation to assist the indigent and of the desirability of fashioning new and ingenious techniques for doing so, no greater contribution could be desired."

[78] Nothwithstanding the fact that Ontario spent $10½ million during fiscal 1969/70, it was deemed necessary to establish a Committee to investigate why the legal needs of the "chronic" poor in regard to civil litigation were not being met. Globe & Mail, March 3rd, 1971.

[79] *Op. cit.*, footnote 1.

> who will? And if it doesn't, will legal education be carrying out its professional responsibility?

Some lawyers emphasized the value of a clinic in developing the character of law students,[80] not to mention the growth of expertise in problem-solving. It may be seen from the foregoing that one major benefit of clinical law is that it directs the attention of legal educators to the unique problems of serving the poor. It must be realized that it is extremely difficult to cross a "cultural" or "alienation gap" and immediately be of value in the legal aid office.[81] This was a major error in the reasoning behind the British and Ontario Legal Aid Plans in which practitioners are used on a part-time basis without any training in dealing with the disadvantaged, thus bringing only the skills acquired with respect to the needs of people who are not poor. It was only after exposing students and young lawyers to the problems of the poor in the live situation that it became apparent that special skills, not normally obtained either in private practice or law school, are needed. As Professor Wexler put it:[82]

> Poor people are not just like rich people without money. Poor people do not have legal problems like those of the private plaintiffs and defendants in law school casebooks. People who are not poor are like casebook people.

To some extent one might have anticipated extraordinary difficulties in dealing with the poor. Levi stated some years ago that law schools were out of touch with reality and went on to add:[83]

> The question is not to be avoided for law schools by stating that law is a set of principles dealing with justice, and a set of normative rules regulating human behaviour. The principles and rules not only regulate human conduct and values; they grow out of them. The principles gain meaning and the rules are to be judged by their effect on behaviour. To the extent that law is a behavioural science, it grows, like any other science, by asking the right questions. We cannot ask the right questions if we remain remote from what is going on.

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[80] *Op. cit.*, footnote 8, at p. 606.

[81] An understanding of the alienation of the poor influenced the United States' decision to reject the system of legal aid used in Ontario and Britain. See U.S. Senate Sub-Committee on Employment, Manpower and Poverty, Part 9, An Examination of War on Poverty (1967), p. 2916. See also Ares, C. E., Poverty, Civil Liberties and Civil Rights: A Symposium (1966), 41 N.Y.U.L. Rev. 328, at p. 346 where it was stated that: ". . . [T]he *structure* of the legal profession is middle class in its assumptions. We assume that the lawyer can sit quietly in his office awaiting the knock on the door by a client who has discovered that he has a legal problem and has found the way to the lawyer's office. . . . This assumption is not valid for the great mass of people who live in poverty in the United States. . . . The ways in which this structure can be changed open exciting and interesting prospects."

[82] *Op. cit.*, footnote 7.

[83] Levi, E. H., What Can the Law Schools Do? (1951), 18 U. of Chi. L. Rev. 746.

It is clear that after some seven years of poverty law and clinical law experience in the United States, writers such as Wexler, have gained sufficiently by their exposure and experience to begin asking pertinent questions regarding the inter-action of the lawyer and the poor. In reading Wexler's commentary on the practice of law for the poor, it becomes apparent that problems of alienation, rapport and empathy are of gigantic proportions, so much so that the traditional role of a lawyer must be seriously examined, including the role of organizing people for self-help[84] and the translation of law into comprehensible terms.[85] How else can the profession ensure that enough lawyers have the opportunity to grapple with the complexities of a poverty practice if the law schools do not provide clinical courses? It is doubtful that the type of legal education referred to can be successfully conducted without some exposure to practical lawyering in direct contact with the poor and their problems.

> Additions to the law school curriculum like "Law and the Poor" serve a useful function by making it crystal clear that the remainder of the curriculum deals with law and the rich; they do little, however, to change the law schools' treatment of legal problems, or their perception of the proper roles and concerns of a lawyer. Law schools have rarely asked questions about how the law came to be as it is. They have never concerned themselves or their students with what led a client to become involved with the law, or with what happened to him after he won or lost in court.[86]

It is evident that law students constitute a pool of highly educated, unused resources in our society. The fact is that although law students are "highly educated", they are usually "untrained" in the ways of legal practice. This unnecessary and highly artificial gap can be bridged by properly supervised student practice via the medium of clinical law. Such training will, of course, be frustrated if students are restricted to menial tasks in the legal clinic. The students' duties must be challenging and allow for creativity in much the same manner as the lawyer is stimulated in practice. In brief, it is felt that there should be nothing artificial about clinical practice and experience has shown that students do not abuse the extra responsibility thrust upon them by clinical courses.[87]

It is fair to state that in the past attention has not been given to the question of how the law school *as an institution* can serve community needs. Rather, the emphasis has been upon the individual and collective efforts of law professors and students in relation to

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[84] *Op. cit.*, footnote 7, at p. 1053.
[85] *Ibid.*, at p. 1054.
[86] *Ibid.*, at p. 1050.
[87] See, for example, Spangenberg, R. L., The Boston University Roxbury Defender Project (1965), 17 J. of Legal Ed. 311.

research. Once again Levi dealt with this particular point when he argued that:[88]

> If the law needs understanding, and if research is the way to that understanding, then the research must get at the facts. A clinic can focus attention on the difference between actual problems and the problems in the books. It can guide theory so that it arises out of cases and fits the needs of the people involved. Research, law teaching and law-making always must be, in a sense, theoretical. But as with medicine so with law, it is important that theory or criticism of theory be not far removed from the actual cases which pose the problems. A law school should have direct access to the problems. The combination of practice-training and service-giving should make it feasible for a clinic to be part of a research center.

Perhaps clinical law will provoke a reassessment of the role of a law school as an institution in a modern urban society.

One heartening point that became apparent at the Annual Convention of The Canadian Bar Association in September of 1970 was that of student interest in and enthusiasm for clinical law and legal aid work generally. In this sense Canadian law students are paralleling the activities of their American counterparts over recent years. An American educator was quoted recently as stating that:[89]

> There is no question that the students are pushing the law schools toward involvement with poverty. Some are talking about bringing the law schools into the twentieth century.

Others have noted that many American students have found that exposure to the problems of the needy has stimulated deep interest in working for poor people subsequent to graduation.[90] The attraction to poverty practice continues with the better brains attracted to the stimulating work which poverty law often provides:

> The University of Michigan Law School reports that 26 of its 1969 graduates entered Wall Street law firms as compared with an average of 75 in preceding years. Harvard Law School reported that the percentage of its graduates entering private law practice declined from 54 per cent in 1964 to 41 per cent in 1968, and an even more significant decline is expected in the next few years.[91]

It is to be hoped that this will be the trend in Canada in the near future. It is also clear that the students are doing their share, as is evidenced by the proliferation of Student Legal Aid Societies in recent years.

When dealing with the public service aspect of clinical law, it must be remembered that, notwithstanding the need for legal ser-

[88] Levi, E. H., Four Talks on Legal Education (1952), p. 24.

[89] Professor J. J. Graham of New York University, School of Law, cited in, New Breed of Lawyer Serving Poor, New York Times, August 30th, 1969.

[90] *Op. cit.*, footnote 49, at p. 494 *et seq.*

[91] *Ibid.*, at p. 499.

vices, the community served must be in favour of the use of law students. The response of the inhabitants of the low-income area of Halifax to the student-operated neighbourhood law office has been most encouraging.[92] A survey carried out by law students in March of 1970, prior to the establishment of the student legal aid office,[93] showed that eighty-one per cent of the families surveyed were prepared to accept legal advice from a law student, whilst seventy-five per cent were prepared to allow a law student to represent them in court.[94] A survey of 207 families in the same low-income area was undertaken six months later and some four months after the establishment of the student legal aid service in that locality.[95] In response to the question, "Do you approve of senior law students offering free legal aid in deserving cases in a store-front office?", exactly ninety per cent replied that they did approve of the students' service. It is clear that the survey disclosed, albeit from a small random sample, that law students are acceptable to the vast majority of the people questioned and, furthermore, the students' "popularity" with the poor was, seemingly, on the rise. It is not an over-statement to say that the community response and reaction to Dalhousie law students has been almost entirely favourable.

It is interesting to note that the Government of Nova Scotia has also commented favourably upon the use of law students in the legal aid clinic. On a recent visit to the student legal aid service in Halifax, Premier Gerald A. Regan stated that if he were a law student again, he would be involved in the neighbourhood legal aid programme:[96]

> I think there is much to be said for the approach of a young, enthusiastic law student to the problems confronting our poor. . . and I am extremely impressed with what has been happening here. . . .[97]

In moving an amendment to the Barristers and Solicitors Act to improve the position of students before courts, both the Attorney General and the Minister of Public Welfare praised the public service and dedication of the law students.[98] The Minister of Pub-

[92] In the first year of operation, ending May 31st, 1971, over 1,300 cases were handled by Dalhousie law students of which in excess of 300 involved court appearances. In addition, several thousand telephone inquiries were dealt with.

[93] The service uses the title "Dalhousie Legal Aid Service".

[94] Dalhousie Law School, Student Legal Aid Service Survey (March 1970), unpublished.

[95] Dalhousie Legal Aid Service, Survey of Selected Low-Income Areas in Halifax (October 1970), unpublished.

[96] Conrad, D., Premier Backs Storefront Service: Students Give Legal Aid, Montreal Star, February 24th, 1971.

[97] *Ibid.*

[98] Bill 79, An Act to Amend the Barristers and Solicitors Act, 1971, N.S. Assembly Debates, March 3rd, 1971, p. 1693. Other provinces permit student practice. See s. 74, Ontario Regulations 257/69 under authority of The Legal Aid Act, S.O., 1966, c. 80.

lic Welfare, the Honourable Allan Sullivan, Q.C., was quick to point out some of the attributes of the Dalhousie clinical programme:[99]

> With regard to this particular Bill, I think that this Bill is indeed a progressive step, and I have had an opportunity on two occasions to visit the clinic being run by the Dalhousie Law Students. I have also had the opportunity to participate in two seminars with these students, and I think there is a significance in allowing them to do this that perhaps can be missed. It has been, I think, recent experience in the Law School that the tendency of law graduates is to move to the larger centres, and in particular into the bigger law firms and they are lost to the smaller communities, in particular, lost to Nova Scotia. I think that when these students come in contact with people, and the very real problems that people have, they develop a new attitude, an attitude which I never had an opportunity to develop when I was in Law School, because I was always dealing in the abstract rather than in the real. I have seen in these students the development of a very fine social conscience and an honest desire to work on behalf of the less privileged people and I think that the effect of this Amendment will be to put more young lawyers into positions where they are really needed by the public of this Province.

The recent *Report* of the Attorney General's Committee on Legal Aid in Nova Scotia[100] commented favourably upon the use of law students in the legal aid setting:[101]

> The experience of the Dalhousie Legal Aid Service illustrates the valuable and varied contribution which can be made by senior law students. While one must devise a Legal Aid system which is dependent for its success upon the availability of qualified practitioners, there is no doubt that law students under proper circumstances and with adequate supervision can be an integral part of a scheme.

In its summary of recommendations, the Committee concluded that:[102]

> The active participation of Law Students and Law Schools should be sought and encouraged.

Thus student involvement in clinical law brings about a meeting of student idealism and social need. Clinical law utilizes a pool of highly educated unused resources that our society can ill afford to neglect. The benefit to the community is obvious and the response of the community seems to be encouraging.[103] The high degree of student interest in such courses has been apparent for some time. What law schools must do is to retain the initiative by developing

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[99] *Ibid.*, at p. 1696.
[100] *Op. cit.*, footnote 5.
[101] *Ibid.*, at p. 34.
[102] *Ibid.*, at p. 62.
[103] It is to be hoped that the legal aid clinic will capitalize upon student idealism whilst consciously endeavouring not to inculcate paternalism. See Carlin, J, and Howard, J., Legal Representation and Class Justice (1964), 12 U.C.L.A. L. Rev. 381. at p. 413 *et seq.*

a curriculum which will be helpful, stimulating and challenging whilst giving to the student the maximum amount of scope for self-development. Out of this the student will, in the short term, develop his expertise as a lawyer and his interest in the disadvantaged. The emergence of a socially conscious law graduate is thus facilitated. Hopefully, this graduate will have much to contribute to the long-term interests of the legal profession as he will be better able to serve *all* levels of society and probably have a more enlightened sense of professional responsibility. A by-product of clinical law will be that some of the best young minds will be turned, at least for a time, in the direction of the poor and this could augur well for future law school research programmes. Not only will research be less abstract but, possibly, more thought will be directed to the problems of law reform for the needy.[104]

The benefit to the law school is that not only is its curriculum strengthened by an innovative educational vehicle, but also its reputation and standing in the community it purports to serve will be enhanced. The stimulation of students in the third year will also have a beneficial effect upon the life of the law school, as will the student and faculty awareness of the needs of a large segment of society. In this context one is mindful of the now famous maxim:[105]

> Law loses its power and abdicates to ordering function when it loses touch with the dynamics of social life.

Having stated that clinical law presents an excellent opportunity in providing young lawyers with practical training, it must be recalled that some educators will be apprehensive of the spectre of students, relatively untrained, appearing in court. It would be preferable to have a large number of experienced lawyers available to the poor, but this has not come to pass. In addition, if students are adequately supervised, then the prospect of poor performances in court will largely be eliminated. The manner and extent of supervision cannot be subjected to a rigid formula, but it is fitting to recall the comment of Henry Ford:[106]

> . . . the school of experience is the best school there is, but its graduates are too old to go to work.

[104] Miller, C. H., Use of Law Students in Legal Services Programs for the Poor (1969), 37 Tenn. L. Rev. 35, at p. 37: "The student has a great opportunity to observe the law in practice and to evaluate it as it relates to individuals or segments of society. Not necessarily how it looks on paper, or perhaps what the legislature intended. They see it in the every day market place as it relates to people and particularly the segment of the society that we refer to as the poor; those who cannot afford the services of a lawyer because of poverty. Remedial case law, and legislative reform is the result of this participation."

[105] Jones, H. W., The Creative Power and Function of Law in Historical Perspective (1963), 17 Vanderbilt L. Rev. 135, at p. 140.

[106] *Op. cit.*, footnote 53, at p. 13.

Somewhat earlier Coke reached a similar conclusion:[107]

> No man can be a compleat lawyer by university of knowledge without experience in particular Cases, nor by bare experience without universality of knowledge; he must be both speculative and active, for the science of laws, I assure you, must joyn hands with experience.

Some writers have warned against "tokenism" or half-hearted approaches by law schools[108] and this is of particular importance when it is realized that the activities of students might lead to political and other external pressures to curtail the scope of the legal clinic.[109]

Few would argue against the value to the student, law school and society of the public service component of clinical law. It is also apparent that the "War on Poverty" in the United States helped to stimulate and then facilitate student involvement with the poor. The Asheville Conference of Law School Deans in 1965 served to focus attention upon law school involvement in law and poverty, including clinical law.[110] There then followed a few hectic years of experimentation in the United States and it fell to the Chicago Conference in 1969 to provide an assessment and evaluation of the progress made.[111] Unfortunately, the Chicago Conference did not provide the perspective that might have been expected.

Rather than looking into the matter of the law school of the future, as the title implied, the Conference looked back, as it were, to the role of law students in court and seemed to view clinical law almost exclusively from that angle. Having failed to outline just what the law school of the future should be, the Conference then proceeded to question the role of clinical law in the school of the future! Not only were the terms of reference suspect, but the concept of clinical law under discussion was dated.

In the foreword to the Conference *Report,* Professor Kitch conducts a curious attack upon "Neo-Realism" to which clinical law is, presumably, linked.[112] It is not possible to embark here upon a review of the conference papers, except to note that the Chicago Conference was not a goal-oriented, functional analysis of legal education. Neither the primary nor secondary goals of legal education in the law school of the future were identified. Indeed, the reas-

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[107] Coke, Edward, Book of Entries, Preface (1614), cited by Spangenberg, *op. cit.,* footnote 87.

[108] *Op. cit.,* footnote 77, at p. 901.

[109] Ferren, J. M., The Teaching Mission of the Legal Aid Clinic, [1969] Ariz. St. L.J. 37, at p. 51. See also *Trister* v. *University of Mississippi* (1969), 420 F. 2d 499.

[110] *Op. cit.,* footnote 2.

[111] Kitch, E. W. (Ed.), Clinical Education and the Law School of the Future, Law Students in Court, University of Chicago Conference Series, No. 20 (1970).

[112] *Ibid.,* at p. 9 *et seq.*

sessment of the law school as an institution in contemporary society was not forthcoming.

It is significant to note that perhaps the most meaningful contribution to the debate came from the student participants,[113] although Mr. J. M. Ferren of Harvard seemed to be the only teacher to address himself to what should have been the theme of the Conference, namely, the "Goals, Models and Prospects for Clinical-Legal Education".[114] The paper entitled the "Report of the Student Participants" opened with the following passage:[115]

> While the faculty and administrators participating in the Conference addressed themselves almost without exception to the discussion of the question of whether clinical education in the law school was a useful undertaking, students present had *crossed that threshold and were ready to consider the question how clinical experience could be improved, expanded and tied in even more closely with both classroom learning and society.*

The brief student report, the submission of Mr. Ferren and an interesting submission by two medical men regarding clinical teaching in medicine[116] are by far the better contributions reported.

Lest the reader be left with the impression that the Chicago Conference signified an important stage in the continuing development of clinical law, it must be remembered that whilst the Conference acted as a kind of catalyst for opponents of clinical law, others were developing new and more creative concepts of legal education. Stanford University, under Dean Bayless Manning, had developed a third year "extern programme" in which final year students receive six months course credit for work in probation agencies, judges chambers and a public interest law firm.[117]

Notwithstanding the fact that the University of Detroit Law School had planned its entire curriculum around urban legal problems some time ago,[118] one of the most significant innovations in clinical law was unveiled only recently. In May of this year a plan was announced that would establish North America's first clinical-lawyer school in the fall of 1972.[119] Apparently, Antioch College has agreed to join the Urban Law Institute of Washington in establishing a law school predicated on the clinical method of learning. The stated aims of the new clinical law school are:

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[113] *Ibid.*, at p. 29.
[114] *Ibid.*, at p. 94.
[115] *Ibid.*, at p. 29, italics mine.
[116] *Ibid.*, at p. 77.
[117] Other exciting Stanford Curriculum innovations include a two year degree programme for those seeking an extra-legal career, and a variety of inter-disciplinary programmes. See Stanford's Dean Steps Down, Time Magazine, October 5th, 1970.
[118] *Op. cit.*, footnote 77, at p. 903.
[119] *Op. cit.*, footnote 20.

1. Curriculum development drawing on field work and research.
2. Lawyer training, with greater stress on the acquisition of basic skills through effective legal presentation.
3. Client services, by providing lawyers as counsel to community groups, locally and nationally, as an aid to the poor, a laboratory in which to develop techniques and curriculum materials.[120]

Thus it seems that, at long last, Jerome Frank's dream of a clinical-lawyer school has come true.[121]

Canada has also developed in the past year. In at least six of the provinces, law students are now actively engaged in legal aid clinics and there are very few law schools that do not facilitate practical student involvement with the poor in one form or another. The Department of National Health and Welfare in March of this year gave substantial grants to three Canadian law school legal clinics to enable them to continue and develop legal aid work.[122] Significantly, the federal government seems anxious to study student legal aid clinics in order to be better able to assess the type of service and legal aid delivery system most attuned to the needs of the poor.[123]

Although recent events are encouraging, proponents of clinical law still have a long way to go in convincing legal educators and practitioners of the value to the profession, law schools and society of this form of educational experience. It is to be hoped that the difficulties to be encountered will be met and mastered with the same hard work and enthusiasm which has typified action in this field to date. If nothing else, perhaps this article will serve to stimulate more thought and writing in the field of clinical law in Canada.[124]

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[120] *Ibid.*

[121] *Op. cit.*, footnote 19.

[122] Dalhousie University, Nova Scotia; York University, Osgoode Hall Law School, Ontario; University of Saskatchewan.

[123] Correspondence between the Honourable John Munro, Minister of National Health and Welfare, and myself, March 1971.

[124] Dalhousie Legal Aid Service recently compiled a select bibliography of materials in the field of clinical law. Tragically, the bibliography reveals a paucity of Canadian material. The bibliography is available, from me, on request.