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NO EASY WALK TO FREEDOM

Stephen T. Maher*

No easy walk to freedom
no easy walk to freedom
keep on walking and you will see
that's how we're going to change history.¹

I. DEDICATION

This inaugural issue of the District of Columbia Law Review is dedicated to the memory of Jean Camper Cahn. It collects various topics and viewpoints all related to the delivery of legal services to the poor. This issue's dedication is a great challenge to the authors. Few have been as thoughtful, as independent, as innovative and as influential as were Jean and Edgar Cahn during the years in which our federal legal services policy was developed.² Few scholars had such a lasting impact on the way that we have chosen to deliver legal services to our poor.³ Few educators embarked on such bold and important experiments to improve the way that we educate our law students.⁴

The Cahns have inspired many to question the status quo, to think beyond present boundaries, to create new institutions, to do whatever is necessary to solve problems that have themselves become institutionalized. This article is my attempt to honor that legacy. My focus is on clinical legal education. At one time, clinical education played an important role in the delivery of legal services to the poor. A belief in the importance of clinical education also

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1. "No Easy Walk to Freedom," written by Peter Yarrow and Margery Tabankin, performed by Peter, Paul and Mary.

2. For an overview of her role in that process see B. Garth, Neighborhood Law Firms For the Poor (1980) at 22-27.


inspired the Antioch experiment. Today, Antioch is no more, and the role of clinical education in the delivery of legal services is much diminished.

The decline in the use of the clinic in the delivery of legal services to the poor is, I believe, attributable to three factors. First, as "soft money" that supported early clinical projects became less available, those projects made greater demands on the law schools for support. The schools were hesitant to support the clinics, and in order to encourage and justify greater support, the clinics shifted their focus from service to education. Second, law students shifted their attention from helping the poor to helping themselves secure better skills and careers, and working in a legal services office or a law school clinic devoted to serving poor clients does not necessarily provide students with more opportunities for advancing their careers. Third, the externship clinic, the clinical model best suited to serving poor clients and to accommodating large numbers of law students, has lately come under serious attack by the regulators of legal education who see it as an inferior educational model. Clinicians have supported this regulatory attack because they see externship placement as a threat to the inhouse clinic, the clinical model that best serves their personal interests. These developments have made clinical education less of a force in delivering legal services to poor clients.

While I am concerned about this state of affairs, my concerns go deeper. During my five years as a clinical educator, I became convinced that clinical education had a vast untapped potential, and that the main reason that the potential of the clinic remained untapped was because it was not in my colleagues interests to tap it. In a much longer article, I describe the potential of one type of externship clinic, what I call practice supervised clinical programs, and I explain the law school and clinical politics that have kept this approach to clinical education from gaining acceptance. In this essay, I rely heavily on that article for documentation of my description of the present state of clinical education and my assertion that the practice supervised approach has the potential to improve clinical training. Here, I go beyond my earlier criticism of the status quo and general advocacy of practice supervised clinical training and I outline a strategy for freeing clinical education from the political constraints that have thus far prevented it from becoming available to many students who want clinical training.

II. INTRODUCTION

Clinicians in America have adopted a strategy for success that has doomed clinical education to failure. Clinical education may not be considered to be a failure by those who make their living teaching in the area, but it is certainly a failure to each and every student who is denied access to clinical training while in law school. Clinicians are likely to place the blame for this situation on the traditional faculty’s unwillingness to provide proper support for the clinic. While it is certainly true that the traditional faculty often fails to support the clinic, this response does not tell the whole story. I contend that clinicians themselves are largely to blame for the scarcity of clinical training that law students often experience. The approach that clinicians have chosen to use to provide law students with clinical training is both difficult and costly. That difficulty and cost have contributed to the unavailability of clinical education. Unless clinicians make significant changes in their present approach, clinical training will continue to be unavailable to many law students who want and need it.

The present approach will not necessarily be a failure for clinicians. It will probably continue to assure that some clinicians will succeed in becoming tenured members of the law school faculty. This, rather than assuring broad student access to the clinic, has been the central goal of recent clinician efforts. For years, clinicians have aspired to join the mainstream of legal education. Law schools have steadfastly resisted their advance. Clinicians have responded by attempting to make themselves essential law school personnel first, by arguing that more practical training is needed and second, by championing the inhouse clinic as the approach best suited to meet that need. Where this strategy succeeds, it creates a need for clinicians, because regular faculty have no interest in staffing the inhouse clinic. However, on the negative side, the inhouse clinic may have a debilitating effect on clinicians. When clinicians spend long hours supervising students handling relatively simple cases, the students are likely to benefit from the experience. However, the same cannot be said for the clinicians. It is unlikely that they will find the cases challenging and the time needed to provide each student with close faculty supervision may leave the clinician with little time to write and reflect about the experience. They must, instead, attend to the needs of the neverending stream of novice practitioners that flow through the clinic. Each time one gains a level of competence, he or she leaves, and is replaced by a novice.

Any creativity that survives the Sisyphean fate to which clinicians have assigned themselves is channeled into defending their tenuous and subservient
status in the law school. The centerpiece of this defense is what I call a "clinical orthodoxy." This orthodoxy declares close faculty supervision of case work to be the touchstone of clinical education. Any deviation from this orthodoxy is viewed by clinicians as a threat to the movement. Few clinicians brave the double ostracism that criticism of the prevailing orthodoxy entails: from legal education by virtue of being a clinician and from clinical education by being a threat to the movement. Few legal educators outside the clinical movement care enough to write or think seriously about the important issues that regularly confront clinicians.

Clinicians may have secured their beachhead within the law school by assuming the burden of case work and the obligation of orthodoxy they now bear, but in the process they have made the movement unable to effectively respond to its biggest challenge: making clinical education more available to students. The high cost of inhouse clinical education has been an important reason for its unavailability. Clinicians respond to concerns about unavailability by arguing that law schools should contribute more money to cover the high costs of their faculty intensive approach. Sympathetic regulators are currently engaged in attempts to enforce this strategy through the law school accreditation process. However, this attempt cannot succeed in making clinical education available to all, given the size of the resources that world need to be shifted from other law school programs to the clinic to achieve that end. Any attempt to shift resources on that scale would meet massive resistance from the traditional faculty. At best, this strategy will succeed in shifting some additional resources from traditional to clinical education and will encourage the law schools to provide their clinicians with some better job security and status.

There will be no net gain in available resources until some way is found to go outside the law school for additional resources. The foundation and government support now available for the clinic is quite limited. The greater use of community resources in clinical training has the most promise for adding additional resources to the clinic. Practice supervised programs have long relied on community resources to make those programs cost-effective. However, clinicians cannot fairly explore the clinical opportunities that community resources provide because they have a conflict of interest. Their orthodoxy and their self interest prevent them from making good use of those resources, especially the use of outsiders to provide case supervision. If faculty intensive training by members of the full-time law school faculty remains the prerequisite for educationally responsible training, the high cost of clinical
education will never be controlled. In short, clinical education, as it is currently conceived, has reached a dead end.

What is needed today is a new approach to clinical training. Years ago, when the weaknesses of apprenticeship training proved too great, the profession responded by moving legal training from the field into the university and the modern law school replaced apprenticeship as the accepted institution for training lawyers. Today, the shortcomings of the law school as an institution for training lawyers have become well known. It was thought that adding a clinic to the law school would address those shortcomings. That has not been true for the many students closed out of clinical training each year.

The time has come to re-examine our approach to legal training and to develop a new form of community-based training for law students. Not the old apprenticeship that led to the creation of law school dominated legal training, not traditional inhouse clinical education, but a new form of training that takes advantage of the opportunities provided by community placement. If a form of community-based training can be devised that is both educationally responsible and cost-effective, the impossible, offering clinical training to all law students, will become possible.

This new approach should take place during the time students are in law school, but it should not be a part of the law school, as the clinic has been. Instead, it should supplement and to some degree preempt the training now performed in the law school. Why take such training out of the law school? Not only because there are real advantages to this approach, but also because most law schools cannot be trusted to develop the new form of legal training that is needed today. The traditional faculty would not lend their support to such a radical departure from the traditional curriculum. Most faculties have already demonstrated that they have little, if any, commitment to clinical education. Clinicians are also unlikely to be of much help as long as they remain in the law school. Although clinicians have the creative ability and the experience to assist in developing this new approach, they will not bring those talents to bear to create a new form of community-based training because that would threaten their beachhead within the law school.

A new institution must be established to provide the foundation for developing, organizing and administering this new form of training. This new institution would not denounce community resources as inadequate, it would find new and different ways to take advantage of those resources and make them a part of legal training. This new institution could provide training for credit, much as law schools now do. Students could visit these institutions for a semester or two during law school, and the credits gained there could be
applied toward the students' law degrees. The approach that I endorse would thus enable students to obtain a significant portion of their legal training in the field while they are in law school.

Ideally, clinicians should leave the law school and lead this effort. Once free of academic politics, it is likely that clinicians would be able to find new ways to involve substantial numbers of practitioners in a new form of legal training. In fact, once they were outside the law school it would be in the clinicians' self interest to adopt some of the innovations that they have thus far rejected, such as practice supervision and offering both credit and pay for clinical work.

The potential of this new institution is great. Once accepted, it could not only provide clinical training for students who might otherwise go without, it could also become the foundation for a range of practitioner efforts to improve the training of law students and lawyers that has thus far often lacked the law school support and guidance. Practitioners are interested in participating in legal education. Law schools do use lawyers as adjuncts in both traditional and clinical education, but their use of practitioners is limited. Very little law school effort has been expended to inform and guide practitioner interest in ways that could lead to the development of new kinds of training programs that involve substantial practitioner participation. There is no institution today willing to accept very much practitioner input on the more fundamental questions of how new lawyers should be trained. Bar associations tend not to have the institutional structure or expertise in program design necessary to support these efforts. As a result, despite a high level of practitioner interest and enthusiasm in this area, little progress has been made in establishing alternative programs.

While regulators, as part of the American Bar Association, theoretically represent the legal profession, they have not been supportive of practitioner efforts to be involved in training law students. Instead, they have supported clinician efforts to exclude practitioners from participating in the training of law students through externship clinical programs and have opposed more grassroots efforts to impose conditional licensure and internship requirements at the state level. Some of their concerns about these programs have had substance, but regulators have been surprisingly insensitive to the possibilities that new approaches to law student training might offer, if properly revised and implemented. A new institution could bring together practitioner interest and clinician expertise. The results could be surprising.
Such an institution could also serve as the foundation for expanding the reach of clinical training beyond its traditional limits.\textsuperscript{6} Eventually, as a new field training approach is perfected, the clinic could be expanded beyond public sector clinical placements, to include work in all kinds of law firms, both public and private. A system that employed practice supervision and that offered both credit and pay for placement in many of the same offices in which law students now clerk could eventually supplant much law student clerking. This could dramatically improve the quality of pre-licensure student training. Law schools tend to ignore all off campus learning that occurs during law school. Good or bad, it is not their concern. Today paid clerkships outside the law school are an unauthorized but important part of most students' legal education. Those clerkships are of uneven quality and some provide very poor training. Nevertheless, law schools have done little to attempt to control or improve them.

The program that I propose has the potential to bring clerking within an academic program without sacrificing the benefits of employment. It could monitor and regulate student learning in the field and support that learning with readings and course work. This could not only lessen the chances of exploitation by employers, it could benefit students and employers alike, as students do a better job and enjoy a better learning experience.

While the changes I suggest may seem difficult to implement, the major obstacles to this possible future can be overcome. They are largely political in nature. None of my suggestions is beyond our ability to design and operate. For this reason, our discussion of future possibilities must begin with an analysis of our past mistakes.

\textsuperscript{6} This, of course, might require changes in the rules that now govern student practice in many states. Many of my suggestions would require significant changes in applicable rules, especially in ABA accreditation standards.
III. THE DEVELOPMENT OF RESTRAINTS

Innovative approaches can be developed to provide law students with better access to clinical training. However, clinicians, the group that should be leading this effort, have so limited their ability to propose new approaches that they can do little but argue that the law school should pump more money into the clinic. How have clinicians gotten themselves into this predicament? The answer begins with choices made many years ago.

A. Old Mistakes

From the beginning of the modern era of clinical education in the 1960s and 1970s, the clinical movement has tried to take the academy by storm. The reason for this is clear: foundation support for the clinic in those years was significant in amount but temporary in nature. The foundations supported the integration of the clinic into the law school. The strategy often employed was to create law school clinics with "soft money" and encourage law schools to take over that funding when the grant money ran out.7

Despite modest beginnings, clinicians and their patrons had big plans. They did not just hope for a small presence on the fringe of legal education. They believed that clinical education had the power to remake the law school in its own image. In typical style, William Pincus, who for years headed CLEPR, predicted:

Clinical education in the law school will exert a profound influence on legal education, probably by moving legal education close to the professional schools like medicine and social work, where the avowed

7. There is little doubt that foundation funding was specifically designed to encourage greater law school involvement in the clinical education. For example, the Council for Legal Education for Professional Responsibility (CLEPR), which was funded by the Ford Foundation and was probably the most influential proponent of clinical education of its time, insisted upon compliance with following "broad principles" that were designed to drive programs into the heart of the law school:
   (1) that credit be given;
   (2) that the clinic directors be members of the regular faculty;
   (3) that clinic courses be integrated into the regular curriculum; and
   (4) that the law school have some financial investment in the program.
purpose is to produce practitioners and to be involved in the delivery of professional services to the public.\(^8\)

This has not happened. Legal education has not become more like medical school and law schools are not more involved in the delivery of professional services to the public than they were in earlier years. In fact, the opposite of what was predicted has occurred. Clinical education has been changed by the law school. An early focus of clinical education was service to the public, especially the delivery of legal services to the poor. The focus on service gave way to a focus on education as foundation funding for clinics became more difficult to obtain and clinicians were forced to rely more heavily on schools for financial support. Today, the claim that only intensive supervision of cases by law school faculty can legitimize the educational value of supervised practice experience is the only thing that stands between many clinicians and the door.

Also, the trend in many schools has been away from a commitment to clinical education and toward the greater use of simulation training. Simulation training has some advantages over clinical training. It is less expensive than inhouse clinical training, because the school does not need to operate a law office in order to conduct simulations. Simulations can be conducted in the classroom. The fact that simulation is not real gives it some particular advantages as a skills training vehicle. Simulations present fewer practical problems. No one needs to worry about whether the student is adequately protecting the client’s interests. Student cases do not need to be covered by faculty during holidays and exam periods. The teacher, not the judge or the client, is in charge of the case. Simulations, may have fewer variables than real practice situations because variables can be controlled. Exercises designed by the teacher can be short or long, simple or complex. The teacher can not only create facts, he or she can create the controlling law as well, for example by placing the case in a fictitious jurisdiction and drafting jury instructions that reflect the law as the teacher wants to create it.

Supporters of the clinic responded to the increased popularity of simulation training by expanding their definition of clinical education to include...

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This redefinition of clinical education served the political interests of clinicians, because it included another constituency within the clinical curriculum and because simulation training was an area where many clinicians already taught or were capable of teaching. However, by agreeing to this major change in the definition of clinical education, clinicians abandoned one of the original focuses of the movement, a focus suggested by CLEPR’s name: education in professional responsibility.

The classroom is not necessarily the best place to teach professional responsibility. "Knowledge of acceptable professional norms can be achieved through the classroom; internalization cannot." Even teaching methods that include hypotheticals and simulations are not adequate to the task because, although they can place the student in the role of the decisionmaker, the decisionmaking process in which the student participates is stripped of its real-world context and hence the pull of multiple duties that make decisionmaking imperative and difficult.

In fact, simulations may send the students the wrong message in the area of professional responsibility. The student’s principal objective in the simulation is usually fairly straightforward: to get a good grade. Simulation problems often leave some fact development to the students who are playing witness roles. It is not uncommon to see students in lawyer and witness roles adding favorable details, large and small, to the witness’ testimony. This occurs even in the face of instructions that direct students not to improve their position in this manner. In fact, at times such simulations appear to be courses in the creative subordination of perjury, with each side adding facts and coaching their witnesses to testify to those added facts in order to gain the maximum advantage in the exercise. Because the simulation is just an exercise, students in simulations are more likely than students in a live client

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9. This is the position of the Guidelines for Clinical Education. The Praise of Folly, supra note 5 at 548 n. 31. For a discussion of the importance of the Guidelines in the development of regulation in this area, see id. at 611-616.
10. Anderson & Catz, supra note 4, at 745.
11. It is often necessary to permit students to make up at least some facts. Fact patterns or witness information sheets are rarely detailed enough to provide all the background information that might be elicited in an examination of the witness. What is a witness in a simulation to do when asked their address or birthdate? The answer "I don’t know" destroys credibility and the answer "Its not in the materials" breaks role. Where background facts merely help the witness develop an identity for the exercise and do not affect the outcome there is no problem. Problems occur when students use this license to manufacture facts favorable to their position.
clinic to make up facts to help their case without considering or understanding the real-world consequences of such activity.

In the live client clinic, students cannot ignore or escape the real-world consequences of their decisions. Student actions have real effects, as people go to jail or are set free, or civil relationships are reordered in important ways. Those consequences must be more carefully considered and are likely to be better understood because they are real. In the clinic, students learn to not only to make real choices but to live with the consequences of the decisions they make. Live clinical education thus not only provides training in professional skills, it provides training in what it means to be a professional.

What went wrong? Why have clinicians today strayed so far from their original focus on service to the community and education for professional responsibility? Clinicians have merely done what any group, faced with overwhelming resistance, would do. They have gradually surrendered their original commitment to these values and have tried to salvage something for themselves from their defeat. The critical error was made years ago when the clinical pioneers of the 1960s and 1970s seriously miscalculated how resistant the traditional law school faculty would be to clinical education.

B. The Self-Imposted Burden Of Case Work

Close supervision of simple, routine cases, the kind that are good for student learning, tend to have adverse effects on the faculty members that employ them. This work tends to be less challenging than a more diverse law practice would be. The heavy workload and the limited time for reflection and scholarship characteristic of many inhouse clinics lead to clinician "burnout." The situation is aggravated by the fact that many clinicians remain second-class members of their faculties if they are accorded faculty status at all. In other words, inhouse clinicians have the worst of both worlds. They experience the stress of practice without either the variety and intellectual challenge available in a regular law practice or the freedom to explore their interests through research, seminars and scholarship that is accorded the traditional faculty.

Why would someone with talent want to leave the practice for the clinic under these circumstances? This is a hard question to answer. It may be that new clinicians simply do not understand the rules of the game when they join up. However, it will not take them long to figure this out and, once they do, many clinicians try to escape from the inhouse grind by earning tenure, joining the regular faculty and becoming classroom teachers. In this way, the clinic has become a possible back door to the regular faculty for clinicians who
cannot continue to live with the burdens that clinicians have created to protect their position in the law school. Of course, many clinicians spend years at this work despite the difficulty of the task. It has been my experience that many of these clinicians carry their long experience as "line clinicians" around like a red badge of courage. This provides further support for the argument that this teaching method is not the optimal approach.

There is another burden caused by case supervision in the inhouse clinic. That is its high cost. There is no question that it is expensive to operate an inhouse clinic. First, the school must underwrite the costs of operating a law office that is not expected to pay for its own operation. Second, the close faculty supervision that has become the hallmark of the clinic is more expensive to provide than traditional law teaching. The law school typically makes greater use of large classes than other forms of graduate education. To the extent that these large classes provide a surplus, the traditional faculty, who often control the purse strings, are much more likely to spend it on providing small seminars in their areas of interest than they are to spend it on the clinic. Thus, the economics of the situation work against this form of clinical education and often assure that enrollment in the inhouse clinic will be limited, sometimes to a very small percentage of eligible students. There is no reason to expect that this will change as long as the inhouse approach continues to be the focus of clinician efforts.

C. The Obligation Of Orthodoxy

Clinicians have surrendered their freedom of thought on issues critical to the development of clinical education in order to achieve and maintain their place in the American law school. This surrender has not been widely noticed. To the extent that the law school community has taken an interest in clinical education, it has focused on the ongoing debate between clinicians and the defenders of the traditional law school approach over the need for clinical training in law school. Debate between clinicians on issues of clinical orthodoxy rarely occurs, and when it occurs, it is little tolerated in the clinical community and little noticed elsewhere. Clinical orthodoxy may not be rejected, even where the evidence suggests it should be, because challenges to that orthodoxy threaten the place of clinicians in the law school. This orthodoxy pervades the way that clinicians think, the way that legal regulators regulate and the way that both deal with challenges to what has become the accepted order.
The central tenet in the clinician’s faith is the need for close faculty supervision of case work in the clinic. To many, this seems reasonable enough. After all, law students are not yet licensed to practice law. Close case supervision provides an opportunity to protect the students from their inexperience as well as to teach them in an intensive, personal way. Problems arise when the real life consequences of this teaching method are considered. If student-faculty ratios of 8-1 or 10-1 are required for such teaching, how many students can be given this clinical training? Given the negative reaction that many law schools still have clinical education, is it reasonable to expect that such a costly approach can ever become widely accepted? From which other law school programs will the resources needed to expand clinical education be drawn? Clinicians cannot respond to such questions by suggesting a less costly, and hence more palatable, approach. Their adherence to orthodoxy prevents it. Were they to suggest an alternative approach that did not involve close faculty supervision of case work, they would risk becoming unnecessary. Thus, clinicians have not only continued to insist on the importance of case supervision, they have worked hard to see that alternative approaches, which require less faculty supervision, are labeled educationally irresponsible.

The result of adherence to this orthodoxy is that clinical education is not widely available and hence a large number of students in American law schools receive no clinical training. Clinicians, of course, take no responsibility for this natural consequence of their position. Instead, they blame the law schools for not making available the huge resources that their inhouse approach would consume if it were extended to all students. It is indeed true that law schools will not reallocate resources on the scale necessary to provide all students with inhouse clinical training. Such a change is, in most schools, politically impossible. The traditional faculty will simply not permit it. For this reason, clinicians have tried to bring outside pressures to bear. Their most powerful friends have been sympathetic regulators, and clinicians have relied heavily upon them to press this agenda in the accreditation process.\footnote{12. For a more extensive discussion of this point, see The Praise of Folly, supra note 5, at 605-640.}

A law school’s compliance with American Bar Association accreditation standards is considered during the reinspection process. A three part regulatory agenda designed to help clinicians is currently being pressed during that process. The first part is the enforcement of the regulators’ vision of Standard 306 through the accreditation process. This effort has caused schools to
modify, limit or abolish their practice supervised externships in favor of more expensive and more clinician-intensive models of clinical education, either inhouse programs or case supervised externships. In short, Standard 306 is being enforced in a way that will guarantee schools will need clinicians. The second part of the program is enforcement of Standard 405(e), which "recommends, if not requires, that clinicians be afforded a measure of job security in the form of tenure or long-term contract eligibility." This section was enacted to improve the status and job security of clinicians. The final point is the enforcement of Section 302, which calls for schools to make clinical education more available to law students. Once Standard 306 and Standard 405(e) have removed the law schools' options, the only way schools can comply with Standard 302 is to hire more permanent faculty-like clinicians.

While a few more clinician positions may be created and others may be better secured as a result of this activity, the beneficiaries of this effort are clinicians, not students who want clinical training. While clinicians may see this approach as the best way to make inhouse clinical education available to all students, that vision assumes the necessity of present restraints. That assumption is subject to challenge.

IV. THE CHALLENGE TO ORTHODOXY

It probably is true that some amount of clinical training has a secure place in law schools today. The important issue now is how available that training will be to students. Will it be available to a few students, drawn by lot, or to any student who wants it? The inhouse approach, even with all the arm-twisting that regulators can muster, will never make clinical training available to more than a small portion of the students who want and need it. Alternatives worth examining do exist. However, these alternatives are controversial because they present a serious challenge to clinical orthodoxy and hence, tend to undermine the place of the clinician in the law school.

13. This approach places students in community law offices and limits the involvement of the law school faculty of the supervision of their placement experience, as opposed to their case work. The case work is supervised not by law professors, but by lawyers who work in the placement.

14. Case supervised externships join the placement in community law offices that is characteristic of externships with the close faculty supervision that is characteristic of inhouse clinics. Case supervised externships that employ intensive faculty supervision resemble inhouse programs conducted off-campus.

The approach to clinical education with the most potential to provide all students with clinical training is the practice supervised externship approach. In recent articles, I have argued that properly designed and monitored practice supervised externship clinics have the potential to make a valuable contribution to both the education of law students and the public interest.\textsuperscript{16} The bulk of the legal services delivered to the poor through law school clinics has been delivered through such programs. The two other major clinical models, inhouse programs and case supervised externships, are not good vehicles for providing either cost-effective service delivery or broad access to clinical training because of their high cost. Both are heavily dependent on close faculty supervision of the students' case work to provide the educational value of the clinical experience.

High cost is not the only reason that the inhouse approach may not be the best way to train law students in a number of important practice skills. How likely is it that recent law school graduates will be given the intensive supervision that is characteristic of the inhouse clinic? How well does the close supervision of the clinic prepare students for the less supervised practice that may await them after graduation? That experience may help students to recognize good supervision when they see it, but does it help students to learn how to seek out supervision, or how to improve the quality of the meager supervision they may obtain, or how to learn on their own, and thus survive without good supervision? These important skills can be learned, but a less supervised setting is better suited to this task. The best way to learn how to obtain, improve, or get along without supervision may well be to experience these problems in an academic program with the educational objective of supporting that learning by assisting students to develop the learning skills and strategies necessary to overcome these obstacles. The object would not simply be to help students become more assertive. Ideally, the students could learn to take more responsibility for their own learning. That would stand them in good stead as practitioners, but it is something that is rarely learned in law school. Inhouse clinics are unsuited to such learning for two reasons. First, their faculty intensive approach is not compatible with the less supervised environment needed to help students learn how to take more responsibility for their own learning. Second, inhouse clinics would be hard pressed to justify

\textsuperscript{16} The Praise of Folly, supra, note 5; Clinical Education: Past, Present and Future, THE FLORIDA BAR JOURNAL, July/August'1991 at 28.
expending their scarce resources on such lessons because of the inhouse clinic's high cost.

It could be argued that the close supervision of the inhouse clinic prepares students for less supervised practice because it shows them "how to do it right." However, the ideal model that the inhouse clinic may provide may have limited usefulness. Students in practice must not only know how to do it right, they must figure out how to do it right within existing constraints. The constraints that graduates face in the practice may not exist in the clinic. More significantly, the clinic may not provide students with opportunities to understand the constraints they will face in practice. Take, for example, the constraints imposed by billable time. When students are encouraged to spend weeks on a single social security disability case that would, in practice, be handled by a paralegal, they do not learn how to handle a caseload as well as a case and the clinic may actually send the students the wrong message on cost-effective time utilization. The meticulous study of an individual case, or even a few cases, may teach students valuable lessons, but the same can be said of the traditional curriculum. Neither the inhouse clinic or the traditional curriculum are likely to prepare the student for the largely unsupervised balancing act that many lawyers are called upon to perform each day.

Practice supervised externships have the potential to provide training in these areas, because they are less expensive, less faculty-controlled, less likely to have students concentrate on a few cases and because they must, for quality control purposes, regularly address concerns about the amount and quality of supervision that is being provided by the supervising attorneys in the placement. However, law schools and the clinicians they employ have largely failed to design and operate externships in an educationally responsible manner. Thus, the potential of practice supervised externships to teach students to take more responsibility for their own learning by encouraging them to learn how to improve the quality and increase the quantity of supervision and to learn how to learn on their own has thus far not been realized in most practice supervised clinics. This, in turn, has dimmed the prospects for the future development of externships. Regulators, with the encouragement of clinicians, have used the deficiencies evident in many practice supervised externships to take action against all practice supervised externships through the accreditation process. All this may leave those who see great untapped potential in practice supervised externships dispirited. However, there is a way to remove the political barriers that have thus far prevented the full potential of these programs to be developed.
In retrospect, the clinical pioneers and their patrons should have considered an alternative to incorporating clinics in the law school. They should have established the clinic as an independent institution outside the law school. It is surprising that more attention has not been given to this option. There have been indications all along that while training students at the time they are in law school is ideal, doing all that training within the law school itself is problematic. The law school is not an ideal location for the clinic for a number of reasons. The most significant are that clinical training does not generally have the respect and support of the traditional faculty and that clinicians have allowed their desire to be accepted in the law school to shape their clinical approach in ways that may not be best for their students. These problems have already been discussed. Another problem is that the life of an inhouse clinician is not the life of a scholar, it is the life of a practitioner, and the placement of the clinic in the law school may distract those clinicians from their task.

What is the effect of placing clinicians in the midst of a community of scholars? There are certainly some benefits that they can derive from exposure to the work of scholars. But this exposure is likely to be disruptive to the practitioner's work. When clinicians work beside scholars, but are not themselves permitted the time to reflect and write, they are likely to become envious of the scholar's life. After all, the attraction of teaching has always been the freedom that it provides the teacher, because practice can be more lucrative. Clinicians doing case supervision soon discover that clinical teaching, as it is practiced pursuant to the prevailing orthodoxy, permits little freedom. Even clinicians who begin their work with commitment, rather than with the goal of becoming members of the traditional faculty through the back door, are sorely tempted to abandon the clinic for a position on the traditional faculty if that opportunity is available. Those who remain in the clinic, either because they are not permitted to become classroom teachers or because they have a level of dedication that permits them to accept their lack of freedom and second class citizenship in the law school in stride, are a tattered remnant of those who mounted the assault on the law school citadel years ago.

Perhaps foundations will recognize that they played a part in creating the present situation and will therefore feel an obligation to provide funding to help develop an independent institution when one is proposed. The establishment of a new institution would create a new dynamic in clinical education and
could free clinicians from the restraints they have imposed on themselves in
order to remain in the law school.

A. A New Dynamic

The assumption that clinicians must be members of the faculty if clinical
education is to succeed is only true because clinicians and their patrons have
thus far made it true. It has become increasingly clear that their decision to do
so was misguided. The time has come for clinicians to leave the law school,
and set up a separate institution outside the law school to develop a new form
of training that would provide a supervised practice experience in the field for
all law students who want it. Once they work outside the law school,
clinicians will be free to make educational choices on the merits, rather than
based upon self-interest. This is true because, as they leave the law school, the
self interest of clinicians will shift and they will be free to cast aside their
reflexive opposition to approaches that threaten clinical orthodoxy.

It is reasonable to expect the clinicians who will design and operate new
independent institutions to have certain very specific changes of heart. First,
clinicians can be expected to drop their preoccupation with case supervision
when they leave the law school, because case supervision will no longer be
essential to their survival. When clinicians are given the freedom to design
their own programs and to handle their own budgets, they are much more
likely to allow budget realities to influence their policy positions. Those
realities will move them toward greater utilization of community resources and
away from case supervision.

Second, clinicians in an independent institution will have to adopt more
realistic staffing goals. In the clinic, the goal has been to add as many
clinicians as possible. In a new institution, it would seem preferable to use a
small core of full-time clinicians who would be responsible for designing and
overseeing the operation of the institution, and to supplement that core with a
more flexible staff of part-time trainers drawn from the agencies in which
students are placed. This would permit the institution to keep its costs down
and would give the institution the flexibility to shift its staff as student
placement preferences change. For example, senior lawyers in a popular
placement might be willing to take a six month or a year sabbatical from their
normal duties with the agency in order to work full-time with students placed
in the agency. This would benefit the students, who would be trained and
supervised by an experienced agency insider, and it would help the senior
lawyers and the agency, who might see such sabbaticals as a way to prevent
burnout in senior staff and to periodically reinvigorate them in this way. Also, supervisors who remain employed full-time in the agencies could be used, a few hours a week, to handle specified training tasks. The clinician’s challenge is to train these individuals to be good teachers, and to monitor, evaluate and improve their teaching and supervision, so that the agency lawyers’ great knowledge of the agency and of their area of practice can be tapped for the students’ benefit. It would not necessarily be wise or cost-effective to turn those individuals into full-time clinicians. Hiring lawyers who work with the institution on a full time basis would reduce the organization’s flexibility and diminish its ability to meet changing student demand.

A shift in the self interest of clinicians once they are outside the law school can be expected on other important issues as well. For example, thus far, clinicians have convinced regulators to reject “credit plus pay.” Students are not now permitted to receive both credit and pay for the same clinical work. As clinicians’ leave the law school, they may come to favor credit plus pay. There are good reasons for such a change in position. First, awarding credit plus pay for student work in the clinic could give the office in which students are placed more of an investment in the students. This might help clinicians encourage better supervision and might discourage the assignment of menial tasks. Second, awarding credit plus pay would provide students with money to defray their expenses. This might be of particular benefit to students who cannot now afford to give up part-time work to participate in the clinic. Third, it could make the new institution’s programs even more attractive to students. Externships have always been popular with students and the legal community. If credit plus pay was offered for a well designed educational program operated in community law offices where students want to work, that program would be even more popular than traditional externships. Credit plus pay externships have many advantages over regular clerkships. The most obvious is the fact that legal interns can practice law without supervision, while law clerks cannot. Credit plus pay programs would also be preferable to regular clerkships because paid student work would not be competing with the students’ academic program, it would be a part of it.

Credit plus pay has been opposed by inhouse clinicians who believe its approval will further weaken the position of the inhouse clinic. In an externship, the placement would be asked to provide the pay. In an inhouse

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17. For a detailed discussion of the debate over credit plus pay see Ths Praise of Folly supra note 5, at 617-621.
program, the money would come from the school. Thus approval of credit plus pay would make inhouse clinics either less competitive (if they did not offer both credit plus pay) or even more expensive than they now are (if they did). Therefore, if clinicians were to leave the law school and establish an independent organization, their self interest will shift in a way that will free clinician creativity from its present restraints.

B. A New Institution

The approach I suggest envisions the creation of a network of new institutions, Centers for Alternative Training (CATs), that would provide community based clinical training to law students but operate outside the law school. Clinicians operating their own independent field training institutions could be more innovative than the law school clinicians’ burden and orthodoxy will ever permit them to be. CATs would develop, organize and supervise the placement of students in community law offices in a cost-effective manner that would permit all law students to have the opportunity to obtain clinical training prior to their graduation from law school. The idea would be to take better advantage of the same resources that are now available or potentially available to the law schools: student tuition, volunteer and modestly compensated adjuncts, placements in the community that would be well suited to student practice, technological advances and skilled clinicians. Tuition revenue would be essential to the success of CATs, because it would be the primary source of the money needed to pay the institution’s overhead. Many community resources could be obtained on very favorable terms, but without some cash, the operation would fail. The decision to use practice supervision, rather than case supervision, would allow CATs to keep their costs down. However, a financial investment in the practice supervision approach would be required. It will be important to adequately staff and support this component, and that would be a significant expense. It would be necessary to hire at least three full-time clinicians, more, depending on enrollment, who might rotate through three roles: administrator, practice supervisor/class component teacher and long range planner/materials draftsperson. If clinicians did not handle case supervision, tuition revenues should be adequate to support the full-time clinicians as well as provide compensation for the agency lawyers who provide case supervision in the program and cover other costs. Compensation of agency lawyers by the CAT would enable the CAT clinicians to make greater demands from and exercise more control over the case supervisors. Visiting senior agency lawyers, who might work full time for short periods of time or
part-time on a more or less permanent basis, would give the CAT even more clout with agency case supervisors. The possibility that the best supervisors might be considered for a visit might provide added incentive. Computer hardware and software would be needed both to establish a system for recording and monitoring student work and field supervision of that work and to make computers available to the student. Students should be trained to use computers and should have access to them. They should be required to complete their work for the program (timesheets, assignments for class) on the computer. Computers should also be available for computer-assisted learning. Also, office/teaching space would have to be acquired. It should be a downtown location and it should be multiple use. It should provide adequate class space, a place for the clinicians to do their work, and should also serve as a support center for students, providing students access to computer resources and working and meeting space.

Thus, the shift to practice supervision would allow the clinicians to change their practitioner role, not to that of scholars, but to that of administrators, educators and planners. Would there be enough opportunity for growth and change in this role to satisfy clinicians and avoid burnout? I think so. At first, there will be much planning, writing and thinking to do, as clinicians struggle to design programs that make significant use of community resources and also maintain their educational integrity. We know some of the problems that can be expected to arise from this effort, but there are surely many others that will have to be addressed since planning and teaching roles. The fact that clinicians could rotate through roles as administrators, supervisors and long range planners should add challenge to the endeavor. Each role would provide the clinician with an opportunity to develop different skills and each would produce different kinds of rewards.

Monitoring and evaluating student learning would be a major role of the CAT clinicians. Using technological advances just now becoming available, CATs could keep track of students, what they are doing and what they are learning from what they are doing. Detailed time and activity records could, with the help of database management programs, keep careful track of what each student was doing, and structured journals could be used to keep track of what the student was learning. Even multimedia journals kept by computer, which could even include video records of court proceedings, are now possible. At the end of the experience, there would be complete records of what the students did, and what they learned from their experiences.

Why have a separate CAT to perform these functions? Why not have the law school perform these functions? There are several reasons. First, if there
are several law schools in a single city, why duplicate such an operation several times? By combining these resources, a better program can be provided with less duplication. Second, not all law schools are in urban areas where the best opportunities to develop CATs exist. Third, law schools, as a group, cannot be trusted to follow through on this proposal. This is true because many law schools are not committed to clinical training and clinicians often have little power to influence law school policy. Regular faculty, who do control those institutions, do not understand or appreciate the value of clinical training and will often choose not to devote the resources needed to do a good job. Clinicians need freedom to be creative in program design. That freedom is better preserved through oversight by sympathetic regulators than by curriculum committees and colleagues with little understanding or interest in clinical education.

Of course, for the CATs concept to have a chance of succeeding, law schools would have to be willing to accept credits earned at CATs toward law school graduation requirements. If law school credit could not be earned, CATs could only operate on a postgraduate basis. This would complicate matters considerably. While CATs training before graduation would have the positive effect of making students more marketable after graduation, training after graduation would have the negative effect of delaying the students' entry into the job market. Also, the economies of post-graduate study are different. Graduates would demand higher wages for their work in the CATs and would have little incentive to accept credit for their experience in lieu of greater compensation. Also, since the award of credit for CATs work would lose its allure after graduation, it is less likely that students would be willing to pay tuition to the CATs after they have received their degree. Thus, the creation of a system of transferable credit is essential to this enterprise.

The fight for tuition and transferable credit will be difficult, but given the strong regulatory support that clinicians have traditionally enjoyed, the logical arguments in favor of the CATs approach and the benefits that could be secured if the fight was won, it is a fight worthy of clinician efforts. Framing the fight over resources in terms of permitting a new institution to do what the schools have thus far been unwilling to do puts the schools at a disadvantage. Schools that do not offer their students adequate clinical training, and who oppose CATs, would be forced to justify why their students should not be permitted to go elsewhere to receive the training that the schools have been unwilling to provide. The defense that such training is not really needed to prepare students for the practice of law may not play well with the school's alumni and other practicing lawyers. But even if the schools' response is to
put more resources into their clinics, the students and the clinicians will still receive some benefits.

This approach to framing the debate is preferable to the present debate over how to allocate resources within the law school for a number of reasons. First, if the clinicians win the fight for CATs, they win control of their own destiny. By giving up the dream of becoming professors they gain control of their budget and their educational programs. Second, CATs are a concrete alternative which make concrete budgetary and regulatory demands for their establishment or survival. There is no half way. Either schools will permit them to exist by making certain concessions on tuition and credit or they will not. In this debate, schools cannot simply agree to add a clinician, or take some other half way step to make the problem go away for a while. Third, after law schools agree to allow CATs, there is no going back. They cannot cut back their clinic, or allocate those resources elsewhere. The students will then be free to vote with their feet. The more students CATs attract, the larger and more powerful they will become. Fourth, once they are established, CATS can become the foundation for additional innovations in the training of law students, yet undeveloped, that may have little chance of flourishing in the law school environment.

It is not inevitable that law schools will oppose CATs. They may see the CATs as a solution to the disputes over status and job security for clinicians that have plagued them since clinical education became popular two decades ago. Law schools may prefer to share the tuition revenue of students who want CAT training if, in return, they can fire their clinicians and drop the pretense of providing clinical training to their students. In the long term, the schools really risk no loss of tuition. Once they can determine how many students will usually spend how much time in the CATs, they can compensate for that loss through the admissions process.

The support of at least some law schools for CATs will probably prove critical to their success. While the debate over the accreditation of these free standing organizations is conducted, CATs should be established as discrete programs in a few existing law schools in major metropolitan areas. CATs could probably only be effectively operated in large urban centers, because adequate placement opportunities may not exist in rural areas. Since law schools have the power to award credit for their academic programs, law schools could set up programs based on the CATs model and make those programs available while the accreditation battle rages. These experimental CATs type programs could demonstrate the feasibility of the concept and this could help convince regulators to accept this new approach. Since one large
CAT could effectively serve many law schools from all over the country, provided arrangements were made to address the housing and other needs that would result from the students' temporary residence in the CAT's community, even a few experimental CATs could provide a powerful demonstration of the potential of the program.

Students should be permitted to earn at least a one semester of law school credit at a CAT. If that much credit were not permitted, students would either have to participate in the CAT part time while they attend law school, earn extra credit elsewhere, or risk not finishing law school on time. Part time work in the CAT would take the students' attentions away from their supervised practice and make it difficult for students to attend CATs outside their law school's vicinity. This would significantly limit the attractiveness of CATs.

If competition for positions in the CATs develops, interested students might be required to apply for admission just as they must apply for admission to a law school. In any event, certain courses that would help students prepare for their field training might be required. It would also make sense to require all new entrants to take a short, intensive training course at the beginning of the program. Also, during the placement, all students should be required to participate in a course component, a weekly course which would use lecture, demonstration, simulation, and written work to assure that the students are learning from their field work.

Students practicing law under supervision in the program would need to be certified to practice law under supervision pursuant to the state student practice rule in the CAT's jurisdiction. Some revisions to student practice rules might be necessary in order to take full advantage of the opportunities of this approach. For example, it might be a good idea to set up a summer program designed specifically for students who have finished one year of law school. Law students may have great difficulty getting good jobs during the summer after their first year, and this might be a perfect time to offer some sort of supervised practice opportunity, especially one that trained and monitored the students and that offered both credit and pay. Many student practice rules do not permit such students to conduct supervised practice. Perhaps a model rule could be suggested that would permit such students to engage in certain limited practice opportunities conducted by CATs.

Assuming strong institutions can be developed, the logical extension is to bring all forms of law student work, prior to licensure, under the control of the CATs in communities where such an arrangement is feasible. This can be accomplished quite easily, assuming CATS are permitted to offer transferable credit and some other regulatory changes are made to support these efforts.
First, state licensing authorities must be convinced to expand student practice rules to permit placements in private firms, as well as public agencies, and to permit limited forms of student practice early in the law student’s course of study. Next, the ABA must permit students to earn both credit plus pay for their work with a CAT. This would make CAT placements much more attractive to students than ordinary clerkships and would make them better educational experiences because the placements would be supervised through the CAT. CATs in places like Washington and New York might become very large, as a result of student demand for the wealth of possible placements in those communities.

VI. CONCLUSION

Law schools may be threatened by the possibility of a new institution that is independent from their control that is able to take tuition dollars the law schools would otherwise receive and that is the possible foundation for the development of a new and at least partially competing form of legal education. On the other hand, the demand for greater access to clinical education, both by students who need it and practitioners who believe students should have it, is strong and shows no signs of diminishing. The creation of an independent institution would permit the law schools to shed their clinics and their clinicians, and in that way free law schools from the ongoing battle over status and job security that has preoccupied clinicians and law faculties for years. In the long term, law schools could probably compensate for lost tuition revenue through the admission process. In the end, it may be the clinicians who are the most reluctant to rise to the challenge of creating a new institution for educating lawyers. The rewards that the freedom of this new institution would offer are great, but the risks of finally abandoning the attempt to join the law school faculty for a more uncertain future are also substantial. It is no easy walk to freedom, no easy walk to freedom, keep on walking and you will see, that’s how we’re going to change history.