The Penn Legal Assistance Office: Theory and Practice in Learning and Lawyering

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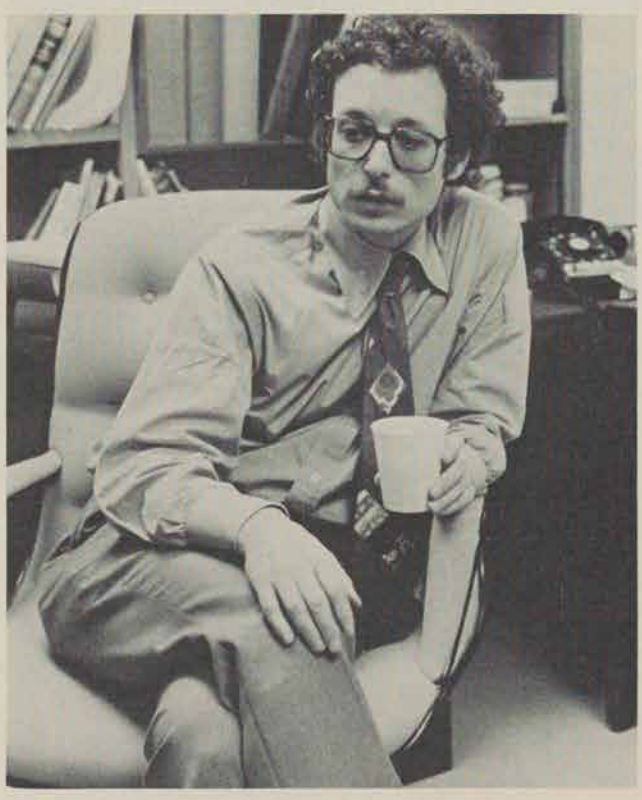
The Law School opened the Penn Legal Assistance Office, a teaching law office, in the Fall of 1977. Here each semester, approximately thirty Penn law students represent clients under the supervision of experienced attorneys and engage in intensive discussion and study of the lawyering work they are doing. The following article sketches the developments within legal education and the Law School that led to the opening of the office and discusses the manner in which we try to combine the theory and practice of law.



A Short History of Legal Education as It Relates to Clinical Education

Over the past 100 years or so, since the age of Langdell, American Legal education can be viewed as having been shaped by the need to contend with two problems: how to gain control from the practicing bar over the certifying process of the profession, and how to become a legitimate part of the intellectual world of the University. Contending with these problems naturally led to the avoidance of anything in law school that looked too much like apprenticeship and, traditionally, little time if any had been spent teaching law by having students represent real clients. Consequently, except for aberrational articles by people like Karl Llewellyn and Jerome Frank, until recently there was little thought and virtually no serious experimentation by American law schools in what might be accomplished by combining theory with practice. This history lingers on because of a perception that there is an underlying tension between the goals of American law schools and those of clinical education.

Nevertheless, over the last ten years, clinical programs have been instituted in law schools. Although I cannot claim to explain with confidence the causes, a review of some of the forces that have contributed to this change will help put the present situation in perspective.

First, I don't believe that American legal education has changed its goals of becoming an intellectually valid part of the University and of controlling the certifying process. Rather, it is my hunch that the close-to-complete achievement of these goals has made it possible for law schools to more comfortably explore clinical education. Second, in developing clinical education programs, law schools responded to students' complaints of the late sixties that the second and third years of law school were boring and lacked relevance. These complaints were perceived as legitimate by a significant part of law school faculties who felt unsure of the "mission" of law school after the first year. Coalescing with these demands were two outside forces that made feasible the inauguration of clinical courses: the rise of the legal services

programs which provided a socially acceptable fieldwork vehicle, and the Council for Legal Education and Professional Responsibility, a foundation which provided money. Cynics would say only this last factor—money—was critical. Regardless of the validity of this view, clinical education did not emerge from consensus that time was ripe for large-scale educational innovation in law schools or that clinical education was a necessary part of a law school education. Instead, clinical education was simply a way of enabling students to get out of the classroom to experience the real world with a minimum of law school involvement. Therefore, little thought was given to basic questions concerning what clinical education had to offer law students and law schools other than the opportunity for the earlier acquisition of real life experience.

Since the not-too-distant past of the late 1960's there have been changes. Law schools and clinicians have begun to explore seriously what law schools can add to learning from experience and what there is about lawyering, as a subject matter, that usefully can be taught in law school.

These changes have developed from certain assumptions about clinical education and its appropriate role in a law school. A wide range of programs and activities in law school have been called "clinical." Some are pure simulation such as Appellate Advocacy or Trial of an Issue of Fact; others place students in real activities but with little client contact; still others have students primarily responsible for representing clients. As the above history suggests, these programs developed in response to particular institutional pressures, not out of a coherent theory of clinical education. Having the wisdom of hindsight, we now can begin to abstract the common elements that make these programs clinical: students are placed in the role of lawyer and are asked to perform while in that role. Learning then proceeds from the students' experience in that role and the analysis of that experience.

But why utilize clinical methodology in law school? If learning proceeds primarily from the experience of being in the role of lawyer and if placing people in this role is sufficient to create a successful experiential learning model, then law schools are both an inappropriate and expensive place for this type of education. Won't the same kind of learning occur during the first few years of practice or via released time arrangements?

Clinicians believe otherwise. We believe that there are ways to structure learning by experience that enhance learning beyond what practice itself provides. Clinical programs should focus closely on the role of the lawyer and the decisions the lawyer makes. And, while acting as lawyers, students should be asked to analyze the decisions they make or will make in order to reflect introspectively upon:

> What is the lawyer's role? What are the lawyer's goals? What are the available means for attaining those goals? . . . What are the ingredients of judgment—of wise decision-making—in those choices? How are the lawyer's role, goals, means and decisionmaking processes affected by the structure of the legal institutions within which he works? And: how did you act or decide? . . . What choices did that decision or action imply? What alternative courses were open? Why were they rejected, or not considered? In light of your objectives and resources, how could your process of decision-making and responsive action be improved? (Anthony Amsterdam, Unpublished Memorandum to Stanford Law School Faculty, July 27, 1973).

Clinical courses with such a focus are continuing the first year goal of teaching students to think like lawyers; however, rather than teaching case analysis, they are concentrating on other levels of the lawyering process: fact exploration, counselling, negotiation and trial advocacy. Furthermore, because these parts of the lawyering process inevitably involve other persons, clinical courses explore issues raised by interpersonal behavior and how those interpersonal elements affect lawyering. Finally, clinical courses force students to confront the professional responsibility issues raised by the lawyer's role as professional and advocate. Exploring these dimensions of lawyering—decisionmaking, interpersonal behavior, and professional responsibility—are important

goals for a law school that, by and large, are not dealt with in the rest of the curriculum, and are best furthered by having a course in the law school that has, as its major pedagogical focus, behavior by students assuming the role of lawyers.

The Penn Experience

This Law School's experience has paralleled that of legal education, but with some deviations. The University of Pennsylvania Law Review published Jerome Frank's article *Why Not a Clinical Law School* (81 U. of Pa. Law Rev. 907 [1933]) back in the thirties. The Law School in the 1950's did have the Downtown Lawyers Program. And from 1967 to 1969, under Tony Amsterdam with the support of a Ford Foundation grant, the Law School had an intensive criminal clinical program for law students. Despite these deviations, the Law School's first large scale effort in clinical education was the creation of the Community Law and Criminal Litigation Course during the late 1960's. In this course students were placed in legal services offices and elsewhere with the hope that the experience itself would be sufficient to justify the Law School's involvement (or at least be no worse than other third year courses students might elect), but with little thought given to the underlying methodological and substantive issues of learning from experience and lawyering.

Since that time, the Law School has moved in several directions. For a time, under the leadership of Professor Ed Sparer, it sponsored the Health Law Project, a sophisticated law office dedicated to developing a new area of the law which included teaching students as part of its function. The Law School has given credit for student-run programs such as Prison Research Council, Government Policy Research Unit and the Environmental Law Group. The School also has given credit for externships, such as a semester at the Washington public interest law firm, the Center for Law and Social Policy. But none of these developments has had as its major focus the study and development of learning from experience. The creation of the Penn Legal Assistance Office is the beginning of this study and development.

The Penn Legal Assistance Office

Students who work at the office are enrolled in a seven credit Law School course, *Introduction to Lawyering Process*. They spend fifteen to twenty hours a week representing clients and four to five hours a week in class.

The cases the students are working on are referred to the office from a variety of sources: Community Legal Services, Lawyers Reference Service, ACLU, the Federal Court, etc. These are primarily prisoners' rights cases, employment problems, domestic cases (particularly custody), juvenile cases and education problems. This referral system enables us to control the volume of cases without creating the expectation that we must provide service to the community. In accepting cases, however, we are not as concerned with the substantive area of law as in trying to provide students with a set of cases that together are likely to yield a variety of lawyering experiences ranging from client interviews to court work.

Each student is assigned four to five cases at any particular time. Because it is our assumption that experience-based learning proceeds best if

students have responsibility for their actions, students are assigned to represent their clients directly and are not simply assisting their supervisors. Students, therefore, make the decisions, do the client interviews, negotiate with other lawyers, do discovery work and argue in court.

This could not occur, of course, without protection for the client. The supervisor must insure that the client is receiving adequate representation. This requirement at times interferes with the goal of allowing students to assume responsibility. But, by and large, this conflict does not occur. Rather, it is close supervision that allows students to assume responsibility, and close supervision and critique that maximizes the educational value of the fieldwork experience.

The office and the supervisor's job, therefore, are structured to provide as much critique of student work as possible. First, the program is staffed by four full time teachers at the Law School. The supervisor's job in a clinical program is always potentially schizophrenic—part of the demands of the job push towards performing a lawyering role (and feeling and thinking like other lawyers); other demands of the job push towards being a teacher (and thinking and feeling and acting like other teachers). But because our supervisors see teaching as their primary function, they are constantly asking themselves not only lawyering questions but also, "what do I want to use this student experience to teach and what is the best way to teach it?"

Second, each student is assigned to one supervisor throughout the semester. Not only does this concentrate the responsibility for the student's development on one person, but it insures that this development is assessed and monitored with attention to the particular students' learning needs and prior experience.

Third, every piece of student work going out of the office is reviewed; every court appearance is attended by a supervisor and is critiqued. Where it is physically impossible for the supervisor to be present at a meeting between a student and his/her client, or a student and another lawyer, recordings, transcripts and student memos in the form of dialogues are utilized to allow subsequent review of these meetings.

Fourth, each student meets regularly with his/her supervisor to review the work done on cases and, also, has a midsemester evaluation meeting and a final evaluation meeting, at which time the student is provided a written critique of his/her semester's performance.

Finally, a series of classes further enhances the process of evaluation and critique. The classes are designed to relate directly to the field work experience enabling students to learn more readily from their field experience by helping them to develop models of performance and the ability to critically analyze their own work.

Each student attends classes twice a week—once with all the clinical students, and once in a seminar with his/her supervisor together with the other six or seven students who share the supervisor. (The program as a whole, then, has four or five classes a week—one large class and three or four smaller seminar sessions.) In both the large classes and the seminars the materials for discussion are always a lawyer's or a student's work product in the form of documents or videotapes. The focus of the discussion is always on identifying and evaluating courses of action and decision.

For example students, for the initial class, are asked to study the materials from a case file which includes a long memo from the lawyer who was handling the case chronologically describing its developments, several complaints (a state court eviction and a federal court §1983 complaint), a legal memo, and some correspondence. The basic question for class discussion is "how would you evaluate the lawyer's performance?" Focusing on that question is intended first to prompt students to ask that question of their own work; and second, to indicate that evaluation of other lawyer's files is a valuable way to learn about lawyering. The class discussion, itself, explicitly addresses the issue of standards for evaluating lawyer's work. What criteria should be used to evaluate lawyer's decisions? What is a good interview, a good negotiation, etc.? The discussion of the standards invariably raises questions about who appropriately makes certain

decisions—the lawyer or the client. This points out the need to address ethical questions in setting standards of performance. It also illustrates how different conceptions of the lawyer's role influence both the evaluation and the outcome of a case. There is no pretense that these issues are discussed fully; rather they illustrate an approach and raise an agenda that will be discussed throughout the semester.

The second class begins the discussion of particular lawyering skills—in this instance, interviewing. Students are about to begin their own field work interviewing and the class capitalizes on their need to know how to do an interview. A videotape of a client interview in a consumer case is used to focus the class discussion. This case is then developed and used in other classes throughout the semester to discuss other lawyering activities. The class emphasizes the need to define objectives for the interview and to analyze what techniques are available to fulfill particular objectives. But the class also introduces the importance of interpersonal relationships in lawyering. It begins the semester-long discussion of how this interpersonal element enters into lawyering transactions. Finally, the class introduces the use of a particular skill-questioning which is followed across a spectrum of lawyering activities.

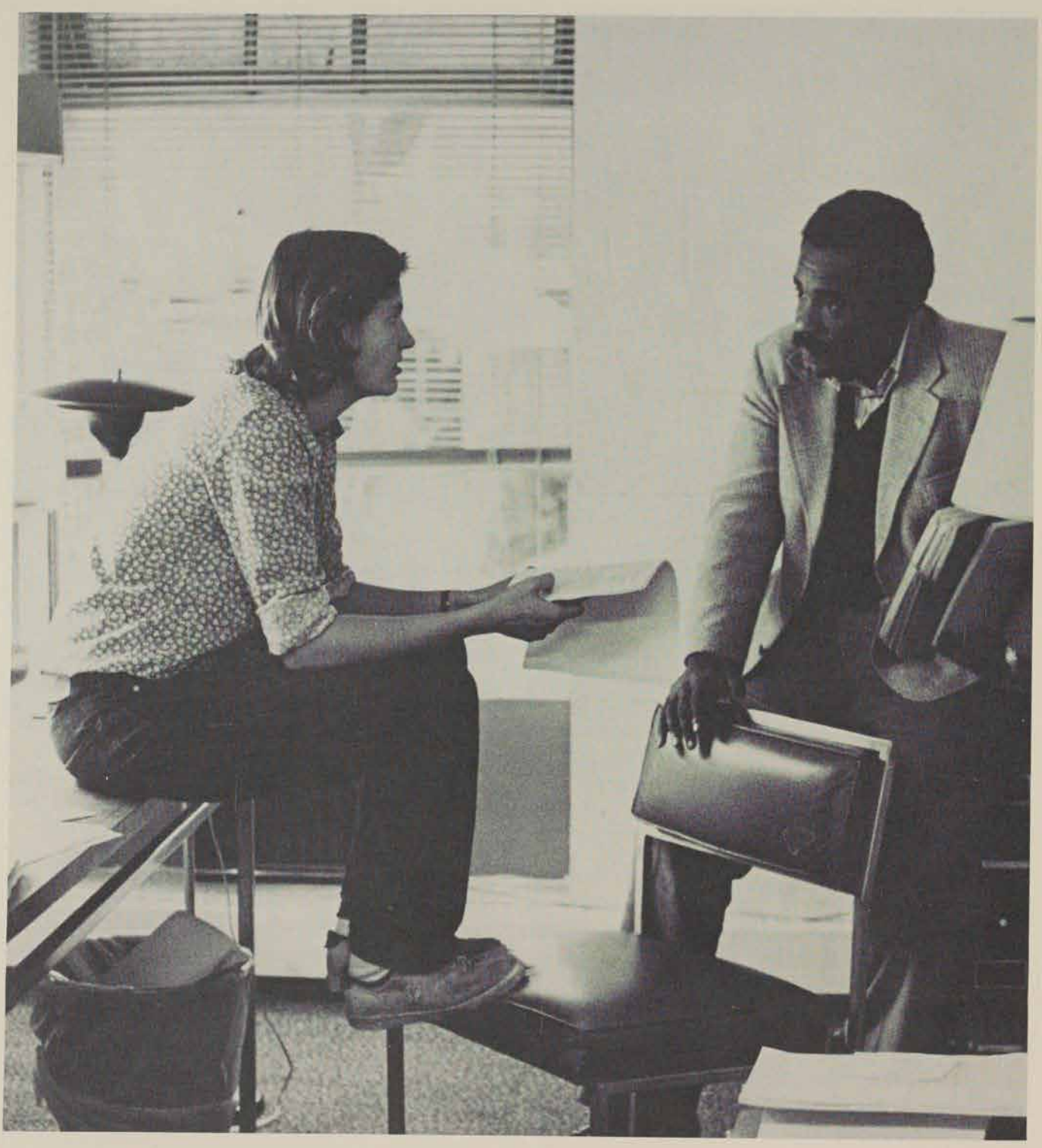
In the first month of the semester, the concepts that are discussed in the class on interviewing are developed and tested in various ways. In their field work, the students observe their supervisors

interviewing, they change roles and then conduct interviews themselves under close supervision. In addition, each student conducts a simulated interview which is videotaped and reviewed by one of the supervisors. A final class on interviewing is held utilizing the student's taped simulated interviews.

For counselling, negotiation, complaint-drafting and discovery, a series of classes similar to that described for interviewing are offered. First, a lawyer's work product is discussed; then, the students perform the specific task, in real cases and simulations, and their performance is evaluated both in individual meetings and classes. By the end of the semester, each student will have performed three videotaped simulations: an interview, a negotiation and a deposition, and will have drafted a complaint and a set of interrogatories.

The weekly seminars focus on the students' actual cases. Each week one or two students present one of their pending cases to the seminar. The seminar group evaluates the student's work product and discusses how to proceed with the case. If feasible, a case is chosen that is relevant to what is being discussed that week in the large class. For example, after counselling is discussed in the large class, students present their own counselling problems to the seminar. Similarly, after complaint-drafting is discussed in the large group, students circulate drafts of complaints being done for their active cases.

What follows is an example of the kind of



discussions these seminar classes can provide and how they link up real-world decision-making problems with more "academic" concerns: Our client had been fired from his job for excessive absenteeism. Because his last absence was excused and the company rules only referred to unexcused absences, there was an arguable claim for breach of contract that could be brought under §301 of the Labor Management Relations Act. However, to sustain this claim, besides proving the breach of contract, there were difficult questions of whether the Union contract required exhaustion of grievance procedures. If the contract did require exhaustion, could the Union be found to have breached its duty of fair representation? Compounding these legal difficulties was the client who kept demanding that additional time be spent on his case although we felt that he was receiving more than his fair share of resources.

Preceding the seminar session we passed out a description of the facts and several legal memos that had been written by the student. Since at that point in time we were agonizing over whether we had sufficiently meritorious suit to press forward, we asked the seminar to help us with our decision.

First, the class discussed the legal issues posed in the memos which uncovered further areas of exploration. Second, we discussed the facts, considering whether there were contradictions, or whether there were theories that could reconcile the discrepancies. Third, assuming there were contradictions in the facts, we considered our obligation at this stage of the case: Should we believe our client, even if his story was less credible, and file suits using discovery to get us more information? Or should we try to screen out "frivolous" suits? Fourth, we discussed the definition of a frivolous suit: Can any suit that turns on different facts be frivolous? How do law-uncertainty and fact-uncertainty join to give an evaluation of a suit? Fifth, we compared the use of money in private practice to screen out lawsuits to those devices available in legal services (client's inclination, lawyer's judgment, office policy, etc). Finally, our discussion of the role of a lawyer's judgment in screening out legal services cases returned us to our case. The student working on the case and I were questioned about the possibility of our personal feelings influencing our judgment about the case. Were we undervaluing the client's case because of negative feelings or over-compensating for fear that we might undervalue it? We then discussed, in the context of this case which illustrated the potential subjectivity of evaluations of cases as frivolous (and the potential intertwining of such evaluations with feelings about the client), whether legal services had an obligation (ethical or constitutional) to provide a review procedure for a client if an individual lawyer refused to proceed with his/her case. (Subsequent to the time of this class, the Legal Services Corporation adopted regulations requiring local program to have a grievance procedure for clients.) Finally, the student had to take what he learned from the seminar and re-think what he was going to do on his case for he not only had seminar questions to answer, but a real case presenting real questions.

The structure of the program, then, is to have repeated movement back and forth between practice and theory, theory and practice. Through this process it is hoped that students will be constantly questioning and evaluating new data and performances and, therefore, learn not only "how to handle" the particular case he/she is working on, but recognizing his/her learning patterns and what steps he/she must take to arrive at decisions. Each case is important then, not only because of the substantive information, but for the lawyering questions which the case forces the student to raise and answer, and which can be generalized to other situations. It also is hoped that this combination of theory and practice will lead to the development within law schools of studying different aspects of lawyering behavior as well as new teaching methodologies. It has been over 100 years since the age of Langdell, and it is time to begin a new age of inquiry.

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