

Clinical Legal Education --Where Next? Creating and Becoming Agents of Change [DRAFT] Edgar S. Cahn, JD, PhD

Clinical Legal Education has from the outset functioned as catalyst and change agent for advancing two radical changes: imparting the essential competencies entailed in lawyering and imbuing students with a sense of their fiduciary responsibility as officers of the court to advance justice.

If we are to produce change, we must produce students who can make change happen, and we must ask ourselves how clinical legal education can become a renewed catalyst for change. We are going to have to do things differently, ask ourselves different questions, get our students to see the world differently, and organize ourselves differently.

I. WHERE WE ARE.

FALLING FURTHER BEHIND. At best only 10% of the legal problems of those most in need are being met. Law clinics are part of an army trying to make a difference but the truth is our efforts are at best a drop in the ocean.¹

¹ Stuckey et al., Best Practices in Legal Education 19

“The legal profession, due in part to the shortcomings of legal education, is failing to meet its obligation to provide access to justice.

“According to most estimates, about four-fifths of the civil legal needs of low income individuals, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Less than one percent of the nation’s legal expenditures, and fewer than one percent of its lawyers assist the seventh of the population that is poor enough to qualify for aid. Our nation prides itself on a commitment to the rule of law, but prices it out of reach for the vast majority of its citizens.

“Many of the nation’s biggest law firms – inundated with more business than they can often handle and pressing lawyers to raise their billable hours to pay escalating salaries – have cut back on pro bono work so sharply that they fall far below professional guidelines for representing people who cannot afford to pay. The roughly 50,000 lawyers in the nation’s 100 highest-grossing firms spent an average of just eight minutes a day on pro bono cases in 1999 . . . [or] about 36 hours a year, down significantly from 56 hours in 1992

“The best available research finds that American lawyers average less than half an hour work per week and under half a dollar a day in support of pro bono legal assistance.... And only 18 of the nation’s 100 most financially successful firms meet the Model Rules’ standard of 50 hours per year of pro bono service. The approximately 50,000 lawyers at these firms averaged less than 10 minutes per day on pro bono activities.”⁵⁸ “And seventeen firms were so embarrassed by their pro bono commitment that they refused to share pro bono statistics with *The American Lawyer* at all, even though they proudly shared their income and revenue figures.”

LIMITATIONS IN OUR LEGAL SYSTEM'S CAPACITY TO ESTABLISH JUSTICE: The cost and delay of securing a remedy is prohibitive for many of the kinds of damages inflicted by a system that fundamentally circumscribes life options. Damages as a remedy do not necessarily change practice. System change is not typically available; to secure that will entail a process and problem solving framework, not just a mandate to officials to behave differently.

JUDICIAL AND POLITICAL BACKLASH AGAINST REDISTRIBUTION. Efforts to secure rights through litigation have been consistently blocked. Corporations have now been vested with expanded free speech rights; majoritarian status is now protected by claims of reverse discrimination. But efforts to hold officials accountable, to assert rights conferred by law or to attack pervasive racial disparities in juvenile justice, child welfare or criminal law are not welcomed.

RESTRICTIONS ON EFFORTS TO EFFECT SYSTEM CHANGE Access to justice has dwindled in numerous ways. Legal service programs receiving funding from the Legal Services Corporation cannot bring class actions, take certain types of cases or engage in activities characterized as community organizing. The prison-industrial complex has thrived with an explosion of incarceration in America over the past four decades. America's population is by far the most-incarcerated in the world, as a matter of both percentages and raw numbers of people in prisons and jails. During the 1990s, forty-nine states and the District of Columbia amended their laws to move more children from the delinquency system to the criminal system. During the same time period, zero tolerance policies swept the nation, criminalizing children's behavior in schools and moving large numbers of police officers into classrooms and playgrounds. Restrictions on challenges to unlawful convictions have proliferated with additional procedural requirements to habeas corpus, mass waivers of right to counsel, and ineffective assistance of counsel. Congress also passed a law, euphemistically named the Prison Litigation Reform Act, that curtailed the ability of prisoners to challenge conditions of confinement and that limited the efficacy and scope of impact litigation on behalf of prisoners. The availability of remedy has dwindled with restrictive definitions of standing, requirements regarding fact pleading, more onerous tests to assert intent or deliberate indifference.

FISCAL AUSTERITY MEASURES have disproportionately reduced programs to assist those in greatest need.

A ZERO SUM GAME mentality infects public discourse where any gain for the disadvantaged is regarded as expropriation of wealth by those who purport to have produced it. Worker productivity has risen but real wages have remained stagnant while there has been an unprecedented rise in the income of the wealthiest.

PROBLEM SOLVING WITH DYSFUNCTIONAL CONSTRAINTS Clinical programs teach students to work in teams. But the teams do not include other professions or students from other disciplines. So the competency imparted is artificially restricted. We teach our students to identify and diagnose a problem, articulate ways to reframe the problem, and generate information and dialog that will facilitate the formulation of alternative solutions. However, the framing of the problem and the development of alternative solutions is done exclusively by law students and faculty. Qualitatively different possibilities would emerge if the problem solving were done jointly by clients, community leaders, policy makers, elected officials, and particularly members of other

professions. We teach how to come up with alternative legal theories and strategies -- but we tend to think only in terms of what we know how to do.

THE RATE OF CHANGE is increasing exponentially. Our analysis of competencies does not adequately address coping with change or being a change agent.

THE NON-PROFIT WORLD HAS BEEN CONVERTED INTO A SERVICE DELIVERY SYSTEM that controls and pacifies; indigenous leadership have become non-profit administrators. Mobilization of the community requires new strategies and tactics.

COMPETENCIES IMPARTED BY CLINICAL PROGRAMS are training our students to function within an adversarial system that is pre-occupied with fixing blame by reconstructing the past rather than asking how best to shape a win-win future. We are working hard to equip them to maintain a system of justice that we know does not and cannot deliver justice on the scale needed or at a cost that is affordable. 2

BACKGROUND AND CONTEXT

This Article is grounded in three stories which have changed my perception of what is possible and how to make change happen. I put them up front, aware that they function as a lens, a filter and a prism which limits, distorts and expands the world I see. They are set forth initially as my way of asking the reader's indulgence for assertions I make that are inevitably subjective, personal and idiosyncratic even though I characterize them as self-evident and having universal applicability. Those stories will be followed by a hypothetical example of how a law school clinic might function if it sought to enlist clients as co-producers of justice.

Story 1. Beyond Advocacy to Empowerment. My faith in advocacy by the legal profession to redress structural injustice and bring about a more equitable distribution of wealth and power underlay my role in creating the National Legal Services program in the War on Poverty and later, in creating the Antioch School of Law with a teaching law firm at its core. By 1980, my faith in advocacy standing alone had dimmed. We were winning victories but losing the war for a more just and equitable society on too many fronts. That prompted me to ask: how could those whom the market did not value define themselves as contributors to a civic GDP who had earned the status of stakeholders and shareholders. My response was to develop TimeBanking, a tax-exempt community-based currency that could be earned by people whom the market devalued or rejected (minority members, teenagers, elderly, disabled, and persons on public assistance) doing work the market did not value: caring labor, civic labor, social justice labor, cultural labor, environmental labor. www.timebanks.org TimeBanking has now spread to communities in over 40 states and 32 nations – but TimeBanking is merely a tool or instrument. Late in this article, I will use examples of TimeBank programs to illustrate ways in which the client community can become fully engaged. But this article is not about TimeBanking. TimeBanking is merely a mechanism, a tool. The examples are used to exemplify the values that underlie TimeBanking – the value of contribution by the clients we serve and ways in which clinical legal education programs, by

2 Best Practices in Legal Education lists as one of the three cardinal assumptions: “The process for becoming a lawyer in the United States will not change significantly.”

mobilizing and honoring client and community engagement, can effect system change and advance justice.

Story 2. UDC School of Law The survival of the UDC-DCSL stems in part from my decision to ask something back from the clients whom our clinical program served. I had seen how when the Legal Service Program was fighting for survival in the 1990's, we had provided services to over 100 million clients. But they had not shown up for that fight. Legal service programs had provided extraordinary services and created major changes in law. But in doing so as one-way transactions, they had provided failed to enlist the client community or create a constituency for equal justice.

Anticipating that the DC School of Law might face a similar struggle for survival, I went back to the clinic and negotiated a retainer with some ministers and some resident councils of public housing developments. The retainer provided that the clients they referred to the clinic would be given preference – but those clients would also be given a bill in hours (my hours and student hours) to pay back to their congregation or their public housing community. It would be the job of those congregations and resident councils to “collect” the bill and see that those clients paid back by helping others. When the School faced almost certain extinction because of the District’s financial situation, those congregations and those resident councils made clear to the DC Council that they represented a block of 20,000 votes and that if the members of the Council wanted to be there next year, they had better keep their law school alive. The District’s first “non-voting” delegate to Congress, Reverend Walter Fauntroy put it this way in a statement he made to the D.C. Council:

“We need this law school. It is like no other. I think I know how tight the fiscal pressures are and how critical every dollar is. But I am tired of being told I must choose between Bread and Justice when I know, through the work of D.C. law students that we can gain Bread through Justice. If we choose bread and not justice, then we know from long experience that soon, the bread will be withdrawn and we will have neither bread nor justice.”

Later came Kimi Gray, a former welfare recipient who single-handedly had turned Kenilworth Parkside from an open drug fair to a nationally heralded model of resident ownership and resident management. She spoke to the Council about the pay-it-forward arrangement utilizing Time Banking and what that signaled in her community:

We are about building community, about creating a place where neighbors help neighbors, where we take responsibility for our kids, where we give back as much as we get. The students from the law school are part of that effort. And they are helping us to strengthen this community by helping to institute a program called Time Dollars. We have a lot of volunteering going on but we don't begin to tap the full pool of talent and energy we have out here. We don't reward it. And we don't find ways of spreading the work around as much as we need to. So we are working now to use Time Dollars to reward people who are helping out, to have an information system that keeps track of the incredible

volume of help that people give to each other, and that sends a message to our young people that there is more to life than money.

Finally, she talked about the special relation that the law school had to the community:

I certainly know, better than most, how tight the resources are and how much each cut is hurting. But I have to say: when you start cutting, don't come after our law school. Because when you do, you are doing more than attacking a law school. You are attacking a special resource. You are attacking an ideal of hope and justice and service. You are saying money counts more than justice, more than equality, more than opportunity. I'm speaking out to say, "Don't even think about doing it."

When Kimi Gray speaks, when Rev. Fauntroy speaks for Black church leaders, when other residents such as spokespersons for senior developments speak, D.C. Council members listen, because they know how to count votes. So they voted to keep the law school open and to give it the funding needed to get accreditation. That victory supplied a momentum and created an aura that has continued to envelop the school. Reciprocity has survival value.

Story 3. A Course in System Change. UDCSL is the successor to the Antioch School of Law. Antioch's design was built around a "teaching law firm" modeled after the Inns of Court. That put clinical instruction and case-based scholarship on a par with Langdell and law review publication. The school's law firm was governed by a Client Advisory Council that specified priorities. In keeping with that tradition, the UDC Law Clinic has traditionally sought to provide students with the competencies needed to secure remedies for individual clients. It also endeavors to provide students with a sufficient introduction to the legislative process to create an awareness of the creative role that lawyers can play in shaping the law. But the kinds of cases that come to public interest lawyers are often the by-product of systems that are failing to do what they are supposed to do, and failing to remedy the kind of social problems they were created to remedy. What is needed is systemic change. Securing redress in individual cases and even in class action cases may create an opening for change. But alone, it rarely produces the kind of changes that would drive down the number of casualties from systems failure.

The School instituted a course in system change which will be a cornerstone of its new LLM program. We asked ourselves: Does the following assessment of human service professionals by John McKnight apply to our clinical programs?

In a modernized society where the major business is service, the political reality is that the central need is an adequate income for professional servicers and the economic growth they portend. The masks of love and care obscure this reality so that the public cannot recognize the professionalized interests that manufacture needs in order to rationalize a service economy. Removing the

mask of love shows us the face of servicers who *need* income, and an economic system that *needs* growth. McKnight, THE CARELESS SOCIETY 40

Sooner or later, our students will have the opportunity to function as change agents designing intervention strategies that go far beyond individual representation. They will do so on commissions, as legislative staff, agency personnel, counsel to community groups and non-profits, as judges, and as heads of agencies and organizations. In these roles, our students will need different frameworks and tools to understand what is involved, what system change entails and what approaches offer the greatest possibility of effecting needed, sustained, and transformational systems change.

We instituted this course because we did not think that our clinical program equipped them to realize that role. Our clients might be characterized as the casualties of broken systems.

We asked ourselves: What would it take to fix the systems. Were we doing that and were we teaching our students to do that? Stated otherwise, we are rescuing babies floating down stream to prevent them from drowning. But what would it take for us and our students to go upstream to find out who is throwing them into the water and stop that process.

A Critique of Present Practice

First, we now focus primarily on imparting one-way advocacy competencies to our students. Those are valuable and I do not wish to denigrate them. We teach our students how to respect the wishes of clients and how to address their problems. But we rarely teach our students how to enlist their clients as co-producers of justice.

Second, we teach them to focus on the client's problems, needs or deficiencies as presented by the client. Their assignment is to use the law to find a way of helping that client. But that focus means that we do not teach our students to find out about or value the whole person. It means we fail in a basic way to even learn about that person's talents, knowledge, networks, life experience.

Third, we need to ask how we would restructure our clinic in order to enlist the client as a source of knowledge, energy, and voice for system change. We are beginning to ask that question in some clinics. We are beginning in some clinics to ask clients to help other clients or to enlist in a client-centered organization that can be a source for change. That is looming larger as a way to help us fulfill a larger mission of securing system change and advancing social justice. By and large, we are just beginning to ask or encourage our clients to "pay it forward," to help someone else in return for what we do for them. Generally speaking, we do not provide any way that clients can get to know others in their community who may share the same concerns or goals or perspectives?

With some notable exceptions, we have not used clinics to establish new opportunities, new initiatives that can enable them to build their community and earn a living in their

own neighborhoods. We do not even invest in sharing with them knowledge we may have about remedies they can demand that would make a difference in their neighborhoods, schools, families or the services they receive. And often, we do not get our students to learn about the remedies that have been developed around the nation to address some of the most critical problems that our client community faces.

To do any of this is going to mean that we have to ask some basic questions about how we structure clinical programs, what knowledge and competencies we expect of clinical professors and what might be or should be the relationship of the clinical program to the law school, the university and the community.

Clinical Legal Education from a Co-Production Perspective: What would that look like?

I will start with a Fictional Scenario describing how a clinic might respond to an individual client and then, use that scenario as the basis for exploring six exploratory paths that clinical legal education might undertake to realize its potential as a catalyst for change and as a vehicle to impart to students the competencies that would enable them to function as change agents.

The starting point is one premise: No intervention realizes its optimal potential without enlisting the participation and active engagement of the person or community being helped.

That is true of teaching: we have to enlist the students actively as co-learners and co-teachers. I submit it is equally true of how we relate to clients. If our mission is to function as problem solvers and catalysts for change in their lives, then we have to find some way to enlist them as partners, co-workers and co-producers of that change.

A Hypothetical Scenario:

Let me describe a fictional clinic handling a client's case with a different approach. The hypothetical assumes one important change: that the law school's clinic has established a Client Council with a membership of ex-clients who have made a commitment to give back in some way. And that Client Council uses TimeBanking to enlist its members, to inventory all that they can do and to call upon them to help other clients or to undertake new projects or initiatives.

The Case: Client comes to a clinic specializing in housing and tenants rights facing eviction because of back rent owed. She is also facing job loss because she has been late or had to leave work early because of calls from the school that her teenage son had become a discipline problem and now was truant. The child is below grade in reading and math and teachers say he is out of control. Her childcare arrangements for her three year old have broken down because her grandmother is sick and may have to be hospitalized and she has brought the infant with her.

Just suppose:

1. On entering the clinic's office, there is a babysitting area staffed by client members of a Client Council (hereafter Council).
2. A Council member explains that she can get additional help in the form of Time Dollars that she can use to get tutoring for her son, help for her grandmother and child care services from other Council members if she joins them in efforts to build the community.
3. Membership in the Council means paying back with Time Dollars earned helping others.
4. Members of the Council will
 - ▶ go back with the client to her apartment, identify housing code violations (they have been trained to spot) and take photographs that the clinic can use.
 - ▶ help the client fill out a one-stop application for all government benefits including Earned Income Tax Credit, Food Stamps
 - ▶ work with the client to see if her child is entitled to any special educational help including development of an Individualized Education Plan (IEP)
5. Client joins the TimeBank and is given a number of options to pay back over time in any number of ways. The client can also call upon her family, friends and neighbors to help pay back in ways that would also enable them to earn Time Dollars that they could use.
- 6.. The Council has set up a Time Dollar program that enables them to earn Time Dollars by:
 - ▶ volunteering to provide support to foster families and to kinship care networks
 - ▶ receiving training and then helping others obtain Earned Income Tax Credit payments, food stamps and prescription drugs at weekend events sponsored by the Council
 - ▶ participating in a neighborhood watch programs, or expanding parental enrollment in Headstart programs
 - ▶ testifying before local and state legislatures about the thousands of hours of community service and mutual help they were providing as a way of "giving back" in return for legal services received (all of this would be documented by Time Dollar software maintained by their local client organization.)
 - ▶ initiating additional TimeBank clusters as block captains or tenants groups to reduce vandalism, make developments safer, chase away the drug dealers and provide child care and mentoring for children whose mothers were working and support services that enabled seniors to avoid nursing home care
 - ▶ partnering with programs to feed the homeless, to provide after school tutoring, to provide rides for seniors to medical appointments
 - ▶ receiving referrals from local legislators whose constituents needed help in dealing with some agency
 - ▶ providing stories and actual cases for study commissions and legislators wanting to know what programs were and were not working

What changes would be needed in clinical programs to set in motion processes that would produce the outcomes described above? Do clinical programs have the power and resources to set those processes in motion. If they do, if the power exists to make

certain changes, then the choice to use or not use that power sends an explicit message to the students and the community.

Six Elements of a New Framework

This Article seeks to identify design decisions available to clinical programs if they choose to function as catalysts to produce change. Some are already used. Some are not. The hope is that they will be perceived as elements of a framework that ultimately entails system change for clinical legal education itself. To paraphrase Gandhi: We must become the change we seek in the world.

Design Decisions

- 1. The Retainer:** Injecting a “pay it forward” reciprocity into the relationship with clients. That means thinking of our clients as “paying clients” with the capacity to pass it on by actions that help others, that build community and that advance social justice.
- 2. Specialty.** We choose the specialty area or areas in which we will take cases. The choice of specialty can incorporate a system change strategy.
- 3. Partnerships** We choose the sources from which we will get cases. In doing so, we make membership in that organization more attractive because it provides access to a scarce commodity: free legal instruction and assistance. In making our services available to the clients or members of a specified organization, we are making an investment worth thousands and thousands of dollars in the organization’s mission and purpose, membership, standing in the community and credibility.
- 4. Theory of Change** Organizations engage in community building for a variety of reasons: to bridge racial divides, reduce violence, provide informal support to promote mental health, prevent institutionalization or enable older adults to age in community. Other organizations are engaged in mobilizing the community to demand system change.
- 5. Social Entrepreneurship** The clinic may undertake to create new enterprises, new programs, new initiatives to address a problem or advance a public purpose.
- 6. Being the Change** Clinical legal education has sought to address fundamental deficiencies in the traditional Langdell model. We might add to that agenda our own version of Physician: Health Thyself.

The remainder of this article provides illustrations of how each of those undertakings has been attempted or might be attempted. Clinical legal education programs have the capacity to adopt any of these modalities to introduce students to the notion of system change by enlisting the client community as co-producer of the change. The need is clear. There is ample documentation of the need for some antidote to the negative impact that traditional legal education has on the sense of purpose, excitement and desire to make a contribution that brings students into law school. Clinical legal educators are committed to renewing that sense of purpose and commitment to law as a calling. Co-Production represents a shift from what we do to what we can set in motion as change makers.

I. The Retainer – A Pay It Forward Provision

The hypothetical posits a retainer where the client makes a moral commitment to pay back by putting in some hours helping others or advancing the mission of an appropriate community organization. Client representatives and leaders have greeted the proposal enthusiastically. But faculty colleagues and lawyers in legal service programs have challenged such an arrangement as either unfair or improper. They have said: “we can’t ask for “pay-back.” We are paid to provide the service free of charge. and How can you make a demand of a person in crisis?”

There are many reasons for implementing a “pay it forward” policy. Charity wounds. Charity subordinates the recipient. Charity sends the message that a client has nothing of value to offer if he or she doesn’t have money.

The more important reason however is personal. Our work in clinical legal education can consist of a series of individual victories and students feeling good that they helped someone. But many of us want our work to have wider impact and we certainly know that our students need to learn how to fulfill their dream of making a difference in the world. If our work is to function as a catalyst, we need to send a message to our client that we need what only they can do in their world as badly as they need what we can do in our world.

Former UDCSL students took the “retainer” principle to a different level when employed by Casa de Maryland. This grass roots organization employs lawyers to represent day laborers, particularly recent immigrants, who have not been paid for work done, who have been cheated out of their wages, not paid minimum wage or overtime. The lawyers decided to require payment in Time Dollars on a scale based on the complexity of the case. And that Time Dollar fee could be earned by engaging in collective action, namely picketing and demonstrating in front of the homes, offices and businesses of the employers who have exploited apparently powerless day laborers. Those cases tended to get resolved very quickly and the lawyers report that as a result of imposing a Time Dollar fee, the clients are much more assiduous in getting the necessary paper work together. They show up for hearings and take the representation far more seriously.

Reciprocity -- in the form of a time dollar fee for services -- turns indigent, *pro bono* clients into paying clients. That realigns the relationship along an axis of accountability and authority that vests in the client the ultimate power of decision. For the professional, it also turns the client into a resource. Context determines the meaning and function of that resource. In the context of community building, the resource may mean self-help or it may mean the equivalent of political power. In the context of legal injury, the resource may be tapped to initiate a multi-faceted protest against injustice. Reciprocity is the essential principle, not TimeBanking.

2. Clinic Design Decisions On Specialization

Clinics typically specialize - and often, sheer volume and tenacity impact policy and practice.

Special Education Law UDC School of Law has a clinic in special education law that by dint of volume and by training a group of specialized practitioners has had a systems impact. Children with undiagnosed and unmet special education needs disproportionately populate the juvenile delinquency system and secure juvenile facilities. A juvenile defense attorney who learns and uses special education law on behalf of clients facing status offense charges can implement important and useful problem-solving strategies and advance legal arguments to better represent young clients' interests. A prevailing lawyer in a special education matter is entitled to attorneys' fees at a reasonable rate.

In Washington DC, the clinic and training provided the private bar has led to an average of more than 300 special education hearings a month, which amounts to more than half of all the special education hearings held in the country in a year. This deluge of individual cases has opened the door to major policy reform in special education. The remedy provided by federal law is that if the schools cannot provide the appropriate special education services to the children, then the school system must pay private schools to provide the children with the special education services.

Because of the strategy and its effective implementation, the District is now reforming its special education system, reducing disproportionate minority contact with increased exposure to the juvenile delinquency court process system, and increasing minority contact to quality, legally entitled education.

One offshoot of that initiative has been a non-profit organization, Advocates for Equal Justice in Education, started by an alumna who trains parents as Special Education Advocates. In Chicago, Albany and Lynn, cross age peer tutoring programs have mobilized fifth and sixth graders to tutor first and second graders with documented improvements in test scores, attendance, truancy and reduced violence. Many of the tutors themselves had been designated ADD and Special Education. A clinical program designed to effect system change would impart the knowledge and strategies needed to establish such a program as one element of a Special Education clinic.

Neglect and Abuse The UDC Clinic representing parents charged with neglect and abuse who are trying to prevent their children from being traumatized by being removed or put in foster care now enlists, trains and supports those clients a parent advocates. They have documented the harm done in the name of "protecting the child", the fact that it is primarily children of color who get placed in foster care whereas white families get family support and preservation services. Students have played a key role in partnering with a parents organization to ensure that parents charged with neglect or abuse always have another parent to accompany them as a witness and for moral support.

Partnerships with Community-Based Organizations

Many clinics partner with - or provide legal services to community-based organizations. Few demand something back in return. Clinics should begin to think about the community-based effort they could generate. Here is an example.

MANNA, a community development corporation seeking to rebuild the Shaw neighborhood of Washington DC sought legal assistance on three matters: closing the crack houses that were undermining its community building efforts, investigating police corruption evidenced by radio broadcasts consistently announcing drug raids before they happened, keeping the neighborhood school from being closed as part of a city-wide consolidation effort, and getting appropriated moneys released so that John F Kennedy playground could be cleaned up and the drug dealers driven out.

A major law firm, Holland & Knight, accepted a retainer based upon a negotiated agreement that the legal services would be paid for in Time Dollars, earned by the community undertaking agreed-upon initiatives. Several of the Time Dollar initiatives were straight-forward: an escort program for seniors who were afraid to go out at night alone, a tutoring program at the school, a clean-up program, and a recreation program in the park. But the one departure from this pattern was designated a “hell-raising campaign” to get the city to install decent street lighting to make the neighborhood safer. As a result, the law firm put in approximately \$230,000 worth of legal services. Their “payment” took the form of reciprocal community building by the community B and that included civic activism which generated critically important responsiveness from municipal officials.

Clinic design is more than finding cases, imparting competencies and helping individuals. The choice of specialty, of organization with which to partner, of terms of the partnership represents a fundamental policy decision. When a clinic makes legal services available through a Community Based Organization, it creates an incentive that enables that organization to attract members and to enlist its members to rebuild community. Jennifer Gordon took that approach to a new level with the WorkPlace Project.

Workplace Project In relatively affluent neighborhoods on Long Island, large numbers of immigrant workers have long been subjected to injustices of all kinds. They are beaten, burdened and sexually assaulted in restaurants by their bosses, who threaten to have workers deported when they complain. They suffer incapacitating nausea, blinding headaches, and full-body rashes from working unprotected with toxic chemicals in factories that go out of existence overnight to avoid inspection. They work hauling trash and mowing lawns, only to end the season without being paid for weeks and even months of work. These abuses are not isolated incidents. They are part of the system of exploitation that characterizes the underground economy.

The WorkPlace Project developed by Jennifer Gordon, (now a Professor at Fordham) started from the premise that those who came seeking help as clients were required to give something of themselves. There was a modest fee but the basic prerequisite to being accepted as a client meant taking a nine-week course in labor law, immigration law, and organizing. Every would-be client learns that employers cannot withhold paychecks, are required to pay overtime, cannot threaten bodily harm, and cannot fire someone in retaliation for demanding pay owed them. They are taught how to represent themselves in hearings.

Most of the clients are non-citizens; powerless persons. They are without the vote and without money. But by virtue of learning their rights and organizing and contributing time on picket lines, demonstrations and legislative hearings, they have actually secured passage of the nation=s toughest legislation protecting the right of workers to be paid what is their due. That legislation was signed into law by Governor Pataki, a conservative Republican, raises penalties from 25 percent to 200 percent against employers who repeatedly do not pay their workers, and it makes repeat non-payment a felony rather than a misdemeanor.

The Workplace Project has enlisted clients as more than lobbyists. It also has worked with clients to establish the first worker-owned landscaping cooperative. And collectively, those same clients have carried out an organizing campaign on street corners that has increased wages by more than 30 percent.

4. Theory of Change Co-Production as a framework calls for a two level partnership. The first level is between the professional and the client. The second level is between the service providing system and the community.

Co-Production to Build Community as System Change: As a system change strategy, co-production now enjoys widespread official and think-tank support in Great Britain. Consider what it would mean if the legal services now provided as charity by law school clinics were intentionally utilized as an incentive to enlist clients to bridge divides of race, class, age and national origin.

The efforts at community building described below were successful. But they could have even greater impact and sustainability if law schools' clinical programs had been partners.

Reducing Violence - Increasing Collective Efficacy In Oakland California, the Alameda County Department of Public Health confronting violence between long time Black residents and newly arrived Hispanic neighbors realized after shootings that it needed to confront the latest form of lead poisoning: bullets. A previously all-Black church became the home of the TimeBank program with both an Hispanic and African America matchmaker. A rigorous evaluation designed to measure changes in the "collective efficacy" of that community found a significant decrease in violence coupled with an increase in trust and sense of control. Jointly, African Americans and Hispanics were reclaiming habitat.

Co-Production: Making Health Care Community-Based In New York City, the Visiting Nurse Service of New York is a not-for-profit Health Maintenance Organization (HMO) dedicated to home and community-based health care. In the winter of 2006, VNSNY launched the first multi-neighborhood, community-based time bank in Washington Heights and Inwood in Upper Manhattan. They have since launched TimeBanks in Chinatown and Brooklyn. Members of the VNSNY Time Bank swap non-licensed services that neighbors can safely do for one another. Some typical examples include: language lessons/translation, computer lessons, alterations, cooking/baking, assistance with shopping, serving as an escort to the doctor=s office, music lessons,

social visits, minor home repair, light housekeeping, tutoring. In response, Mayor Bloomberg has just launched a TimeBank program for seniors in thirty neighborhoods.

Co-Production – Mobilizing the community to secure change.

When public systems don't work, the community as consumer has been injured and even defrauded. The consumer's voice needs to be heard. Just complaining isn't enough. Just suing may help individuals. But the community needs to be informed about alternatives it can demand that will provide a remedy.

The failure of public systems has had a disproportionate impact on minorities. Disparities in outcomes are well documented in juvenile justice, child welfare and education.³

This is where clinical legal programs as agents of change could develop processes other than litigation that build support for system change. That involves outreach to build awareness in the community of the existence of alternatives that they can demand. It involves amplifying the voices of those youth and families who have been injured by prevailing practice. It involves creating support for legislators who will use their powers of oversight to press for change. It involves creating public forums that put sustained pressure on the system for change.

These are not problem solving strategies normally taught in clinical programs. But those of us who have used litigation to effect system change know the extent to which litigation essentially vests all power in the lawyers, relies on the judicial system to set the pace of system change and by implication, takes all power away from the community to effect system change.

Teaching student to do this involves providing students with at least two types of problem solving competencies that are not normally part of the syllabus.

First, students have to learn about alternatives that work in whatever domain their cases take them. Those are labeled best practices, promising practices, evidence based practices and evidence based models. But often there will be grass roots solutions funded by philanthropy that are not well established but that are particularly effective in generating community engagement. Knowing how to look for those, how to identify them, how to gather the evaluations that demonstrate their effectiveness and how to

³ We believe we have found a way to meet the intent requirement by utilizing the test supplied in *City of Canton v. Harris*. "Intent can be inferred when government policymakers choose among alternatives to follow an injurious course of action, demonstrating a 'deliberate indifference' to rights protected by the United States Constitution and federal laws." Applying that proposition to prevailing practice means that when official decision-makers have had formal notice of alternatives that are less costly and yield significant, sustained effects, they are no longer free to continue business as usual. Failure to use these alternatives represents "deliberate indifference" to injury to the fundamental constitutional rights of youth of color in the juvenile justice system. It would at least shift the burden of proof from plaintiffs alleging discrimination to the institutional actors denying intent. Cahn & Robbins: An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work. 13 UDC L.Rev 71 (2010)

present them are all required for that aspect of problem solving entailed in shaping alternative remedies.

Second, lawyering competencies have always included communication skills: written and oral. But competency in communications is dependent on both the audience that one is trying to reach and the methodology by which one seeks to reach them. We are going to have to expand our approach to imparting those competencies when the audience is the community or some subset of the community – and when the vehicle to reach them involves TV, talk radio, the internet, smart phones and social network systems.

Summary

Law school clinical programs should undertake to be contributing members of such collaborative efforts. Clinical Programs could enable them to be valued partners in rebuilding community. Recently, the Appleseed Foundation issued a report, *SOWING THE SEEDS OF JUSTICE*, calling upon the law school world to go much farther in instilling a sense of responsibility to seek justice. The Report declares: “Distance from the broader community is no longer a viable option.”

5. Social Entrepreneurship and Architects

Charles Houston, the Dean of Howard Law School, who mapped the strategy leading to *Brown v Board of Education* was noted for saying: “Lawyers are either parasites or social architects.” Clinical legal programs should be turning out social architects who can create new programs, enterprises or institutions that enlist at-risk, disenfranchised or “targeted” client groups as the labor force to address critical social problems. There is no lack of opportunity. There is a constant stream of RFP’s (Requests for Proposals) or NOFA’s (Notice Of Fund Availability) that invites grassroot groups to come forward with proposals to provide programs that meet local needs. Clinical Law Programs can teach law students to work with those groups and help them to respond to Requests for Proposals to address social problems.

The following are some examples. They all make use of Time Banking because TimeBanking provides a way to enlist community members and reward them without sending costs skyrocketing. There is no reason why a clinic devoted to community economic development could not be the incubator for such initiatives.

Time Dollar Youth Court The Administrative Law class at the (then) DC School of Law was instrumental in creating one such enterprise. First came the mission statement: to convert a youth’s brush with the law into a turning point in that youth’s life leading to self-esteem, contribution and opportunity. Then came a discussion of other objectives:

- ▶ Foster creation of a peer culture that respects the rights of others, that fairly and consistently holds youth accountable for their actions, and that promotes activism by youth on behalf of the victims of crime, violence, poverty, sexism and racism
- ▶ Reward with Time Dollars and other means the involvement of youth helping other youth as a contribution that brings meaningful incentives, creates new leadership roles and enhances life opportunity for all participants

- ▶ Empower youth as spokespersons against injustice, as partners to help other youth, and as a voice and force for the redevelopment of the justice system

Now ten years old, the Time Dollar Youth Court handles over 65% of non-violent juvenile crime. Recidivism has gone down by more than 50%. Offenders are sentenced to community service, restitution, an apology, an essay, curfews, life skills course and also to jury duty. Now a majority of the jurors are former offenders. But perhaps the most significant accomplishment was captured by one former offender serving as a juror when she told the District's Juvenile Advisory Commission: "I learned my acts had consequences."

Parent Support Network In Rhode Island, an organization led by families whose children have been diagnosed with serious emotional disturbance now utilizes Time Banking to provide support to other families throughout the state for children who may be bipolar, autistic or schizophrenic but who with mutual support are able to function, learn, develop and contribute. The Rhode Island Department of Children, Youth and Families now contracts with this family-centered organization to assist in the redesign of the entire state system for children at risk of institutionalization.

Solar Power Heating and Lighting A local minister organized teams of people producing solar panels together TimeBank members have been trained to produce solar panels. They buy a kit, pay for it, and produce the panel. If it passes the test and can be used, the church then buys it back. The TimeBank members making the panels then can get a loan in dollars and Time Dollars for the material and labor needed to have the solar panels installed in their homes so they can stop paying high fuel bills. They pay back the Time Dollar loan with their own labor and they pay back the multi-year dollar loan with savings generated by having shifted to solar power.

Homecomers Academy TimeBanks USA played a central role in creating a new vehicle for re-entry for youth sentenced in adult court to adult prison. The challenge was how to enable those returning to make a clean break from the past and be accepted by the community. The answer was to define themselves as Homecomers enrolled in an Academy on a journey of learning and community service. Funding has just been secured and strategies are being developed to enable them to enroll at the new Community College of the University of the District of Columbia.

Carebanks This innovation combines Time Banking and insurance to enable seniors and their families to create a mutual support system that enables them to remain in community, saves the family money and reduces the need for nursing homes. As a form of insurance, CareBanks™ requires members to pay dual monthly premiums in money and Time Dollars to receive assured help from the CareBank when qualifying events occur (e.g. a hospital stay, caregiver illness, loss of loved ones, recuperation from illness). Revenue from the money premium pays the CareBanks coordinator and affiliation fees. The Time Dollar premium obliges members to make a monthly commitment of hours helping other CareBank members or the community (working with partnering local groups, schools, businesses etc.) Time Dollar premiums can be earned by providing care to CareBanks™ members or by volunteering with non-profits that

agree to reciprocate, generating broader appeal and civic engagement.

Creating social enterprises and grantsmanship are not normally skills imparted to law students. It involves learning how to characterize the problem, specify a strategy, and lay out goals, objectives, tasks and timelines. But if law students are going to be trained as change agents, they need to be able to assist community based groups to get the resources needed to initiate programs they control and that enlist community members as an essential resource.

6. Be The Change You Want To See In the World

To become a force for change, this Article contends that those associated with Clinical Legal Education as a movement must undertake a self-examination of clinical legal education. It entails a transformation from delivering traditional lawyering competencies to transforming students and ourselves into change agents.⁴

⁴ The need to counter the negative impact of legal education on sense of purpose, self-esteem, vision, idealism has been amply documented. See Stuckey et Al, Best Practices 22 fn 76.

The following list includes some of the more well-known articles about the negative impacts of legal education. They include cites to many studies, some of which are ongoing. Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 *Clinical L. rev.* 425 (2005) [hereinafter, Krieger, *Professionalism and Personal Satisfaction*]; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 *J. Legal educ.* 112 (2002) [hereinafter, Krieger, *Institutional Denial*]; Gulati et al., *supra* note 3; Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *vand. L. rev.* 871 (1999); Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 *J. Legal educ.* 524 (1998); Lawrence S. Krieger, *What We're Not Telling Law Students (and Lawyers) That They Really Need to Know: Some Thoughts in Action Toward Revitalizing the Profession from its Roots*, 13 *J. Law and health* 1 (1998) [hereinafter, Krieger, *What We're Not Telling*]; Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 *harv. L. rev.* 2027 (1998); r. granfield, *making Elite Lawyers* (1992); Barbara A. Glesner, *Fear and Loathing in the Law Schools*, 23 *conn. L. rev.* 627 (1991).

One of the more poignant illustrative statements by Daisy Hurst Floyd reads:

Students come to law school with an idea that being a lawyer is something meaningful, something important and valuable. They are drawn to a vision that includes a job undertaken in relationship with and on behalf of other people, helping clients to solve problems or move through difficult times. While they may not have a detailed or even realistic picture of what lawyers do, students envision themselves engaged in professional work that is intellectually challenging and that has value and meaning. They arrive at law school with hope and expectation that their work as lawyers will have a positive impact for society as a whole.

Upon beginning law school, students quickly learn that law school values rational, objective analysis to the exclusion of other qualities, such as self-awareness and interpersonal relationships. They also learn that winning – as measured by the prizes of grades, law review membership, and certain jobs – is the most important goal. They believe that they must adopt those values as part of their changing professional identities. They believe that their personal visions of lawyering are naive and unrealistic. As a result, students replace their hopeful expectations for finding meaning and purpose in their work. *Id.* at 22.

To do any of the above means examining basic assumptions about the values we are trying to advance and the implications of shaping what we do to be in synch with those values. If we are to advance social justice by serving our clients, we must find ways to enlist those clients as our partners, as co-producers of justice. We need to ask what that means in terms of the operating principles that should guide that effort.

In reviewing past efforts to do that, certain values consistently emerge as operating principles. The values do not seem to be controversial. If we accept them, then we need to ask what would it mean for a clinical program to internalize them as operating principles shaping what we teach students, how we serve clients and what we undertake. The basic values are straightforward:

An Asset Perspective: Every human being has something of value to contribute.

Honoring Real Work. We must find ways to value types of contribution which may not be valued adequately in the market: caring labor, civic labor, cultural labor, social justice labor and environmental labor.

Reciprocity. Everyone who gets help needs to “pay it forward” by helping others.

The recipient of help needs to know that they have the capacity to give back in a way that values them as partners. Unilateral transactions tend to support the recipient and send the unintended message that persons receiving help has nothing of value unless they have money.

Community. Justice defines relationships; it requires a social infrastructure built on trust, reciprocity and civic engagement. Seeking justice entails building networks that provide mutual support and can be mobilized for joint efforts.

Respect. Both justice and democracy require that respect is owed to every person regardless of power, station, authority or status. The voices of all need to be heard – both to provide a feedback loop to tell us if our efforts are succeeding and to hold those with power accountable.

Each one of those values takes on a different meaning when we deal with clients or the conditions that produce the clients we serve. We start with a different perspective if our mission is to further Justice B and here, I invoke my father, Edmond Cahn’s definition:

“Justice is the active process of remedying or preventing what would arouse the sense of injustice.”

From that perspective, each core value has a correlative mandate that resonates for clients whose legal problem reflects structural racism or classicism or some other “ism” reflective of a more pervasive pathology that has systematically devalued them and circumscribed their life options:

The Asset Perspective becomes: No More Throw-Away People.

Honoring Real Work becomes: No more free rides exacted from the subordination or exploitation of vulnerable individuals and groups

Reciprocity becomes: Do not exact dependency as the price paid for providing

help.

Community becomes: Do not invoke and misuse values of privacy and confidentiality to leave clients isolated and vulnerable.

Respect becomes: The voices of the unheard must be amplified to provide feedback and compel accountability.

If clinical legal education is going to realize its potential as a catalyst to effect system change and impart competencies needed by lawyers functioning as change makers, then we need to ask whether our clinical programs are putting those values into practice internally while trying to get them applied and implemented externally.

We need to examine our syllabus, our pedagogy, our educational objectives to see whether the way in which we have designed and operate the clinic actually “walks the talk.” I believe that this movement wants to do more than train students to function in a system that currently is incapable of providing remedy and preventing injustice on the scale needed and at an affordable cost.

We need to take Gandhi's admonition to heart: We must be the change that we want to see in the world. We need to begin with ourselves, with a self-examination and a transformation of clinical legal education from a process of delivering lawyering competencies to a process that transforms both our students and ourselves.