

THE NEW LEGAL REALIST VOICE OF CLINICIAN-SCHOLARS

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One of the earliest calls for clinical legal education came from the American Legal Realist movement of the 1920s and 1930s, in Jerome Frank's plea for the creation of "clinical lawyer-schools."¹ Like many calls for reform in legal education, Frank's plea for clinical lawyer-schools was based on a critique of the appellate case method of legal instruction. However, unlike most critiques that focus on the paucity of lawyering skills instruction in traditional legal education,² the legal realist critique was embedded within a jurisprudential challenge to the meaning of law itself.³ Running through legal realist jurisprudence was a distinction between the "law in books" and the "law in action," with the idea that law is not found primarily in statutes and judicial opinions, but rather in the behavior of judges and other legal officials.⁴ From the legal realist perspective, the value of clinical legal education lay in its

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¹ Frank published two articles in 1933 calling for the creation of "clinical lawyer-schools." Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) (hereinafter Frank, *Why Not?*); Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723 (1933) (hereinafter Frank, *Good Education*). In 1947, he repeated his plea for "clinical lawyer-schools," noting that his proposals had garnered little support in the intervening years. Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947) (hereinafter Frank, *A Plea*). For a discussion of Frank's ideas within the context of the history of clinical legal education, see George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 166 (1974).

² The failure of law schools to provide practical training has been the focus of critiques over a number of years. See e.g. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) (hereinafter "the Reed Report"); REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL CONTINUUM (1992) (hereinafter "the MacCrate Report"); WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87 (2007) (hereinafter "the Carnegie Report").

³ KARL LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 5 (1930) (emphasizing in a series of lectures to incoming students at Columbia Law School, the business of law was the settling of disputes by legal officials, and "[w]hat these officials do about disputes, is to my mind, the law itself") (emphasis in the original).

⁴ Karl Llewellyn, *A Realistic Jurisprudence--The Next Steps*, 30 COLUM. L. REV. 431, 447-49 (1930). The distinction between "law in books" and "law in action" was coined by Roscoe Pound. Roscoe Pound, *Law in Books and Law in Action*, 44 AMER. L. REV. 12 (1910).

potential to force law students out of the artificial world of the "law in books" and expose them to the complex and variegated world of the "law in action."

As histories of clinical legal education have recounted, the legal realist call for clinical legal education eventually waned.⁵ When the clinical legal education movement gained momentum in the 1960s, it developed around other goals: (1) a social justice mission;⁶ and (2) a pedagogy of generalized lawyering skills.⁷ Clinical scholars have grappled with the complexities of these dual and arguably competing goals, spawning a rich body of literature about how to shape clinic design and clinic pedagogy around social justice, lawyering skills, or both.⁸ Although few clinicians would dispute that clinical legal education exposes students to gaps between the "law in books" and the "law in action," there has been relatively little analysis of how clinical legal education might be consciously designed around that pedagogical goal.⁹

The picture of "law" painted from the palate of appellate decisions is inadequate in ways that affect legal scholarship as well as legal education. As Karl Llewellyn wrote, a realist study of law must capture "the area of contact between judicial (and official) behavior and the behavior

⁵ Grossman, at 169; *See also* Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 8 (2000) (describing Legal Realists John Bradway and Jerome Frank as part of the "first wave" of clinical legal education).

⁶ For articles that emphasize the social justice mission of law school clinics, see Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 S.M.U. L. REV. 1461 (1998); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLIN. L. REV. 307 (2001); Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327 (2001).

⁷ For articles that emphasize the skills instruction aspects of clinical legal education, see David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191 (2003); David A. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 S.M.U. L. REV. 1509 (1998).

⁸ *See, e.g.* Jane Aiken, *Walking the Clinical Tightrope: Embracing Teaching*, 4 U. MD. L.J. RACE, RELIGION, GENDER AND CLASS 259 (2004); Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008); Juliet M. Brodie, *Little Cases on the Middle Ground: Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. 333 (2009); Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 259 (2004).

⁹ *But see* Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLIN. L. REV. 779, 791-93 (2007) (describing the intellectual roots of the University of Wisconsin's "systems approach" to clinical legal education in Legal Realism).

of laymen.”¹⁰ Missing from the “law in books” are the myriad ways that the meaning of law shifts as it filters down from appellate opinions to lower court cases; as it spreads from lower court cases to local practices; as local practices influence the information and advice about the law transmitted by lawyers, court clerks, social workers, probation officers, friends, neighbors, employers, and others; and as it ultimately shapes the lives of people who receive information or advice from these multiple sources of legal authority. Empirical legal scholarship in the legal realist tradition has explored both behavioral trends in judicial decision-making and behavioral gaps between the “law in books” and the “law in action.”¹¹ Yet such scholarship often fails to connect its behavioral insights to the practices of adjudication and legal representation, drawing the criticism that social scientific “law and” scholarship is irrelevant to judges and lawyers engaged in the practice of law.¹²

This Article explores the relationships between clinical legal education, clinical scholarship and Legal Realism. It demonstrates that, although there is an obvious synergy between clinical legal education and the legal realist focus on the “law in action,” there are also significant barriers to integrating the behavioral study of law into legal education generally and clinical legal education specifically. Part I looks back on Legal Realist movement of the 1920s and 1930s, examining why Jerome Frank’s call for clinical lawyer-schools failed to gain traction within that movement. It demonstrates that, although Frank was a central figure in the Legal Realist movement, his views about the idiosyncrasy of judging and emphasis on fact-finding—the same aspects of this thought that motivated his call for clinical lawyer-schools—put him at

¹⁰ Karl Llewellyn, *A Realistic Jurisprudence--The Next Steps*, 30 COLUM. L. REV. 431, 455-56 (1930) (emphasis omitted).

¹¹ See generally Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009).

¹² See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

the margins of legal realist thought. Moreover, Frank's call for clinical lawyer-schools was not widely shared by other Legal Realists, whose scholarship remained focused in large part on appellate cases, and whose reforms to legal education stayed comfortably within the confines of classroom teaching.

Part II looks to the future. It analyzes the barriers to integrating the insights of social science into legal education generally, and explores the potential of clinicians to overcome those barriers in both their teaching and their scholarship. Specifically, it examines the place for clinician-scholars in recent calls for "New Legal Realist" scholarship, which aims "to develop a new set of approaches to the interdisciplinary research on law,"¹³ which aims to examine law from the "bottom up"¹⁴ and to both "critically examine the law's failures . . . but not neglect examination of spaces for positive social change in and around the law."¹⁵ Clinicians are naturally situated to add to this kind of legal scholarship in ways that would both enrich their clinical teaching and help to focus the academic New Legal Realist study of "law in action" on pragmatic and integrative goals.

I. BACK TO THE PAST: AMERICAN LEGAL REALISM AND CLINICAL LEGAL EDUCATION

Jerome Frank's failed call for a "clinical lawyer-school" is cited so frequently in clinical scholarship that it borders on the canonical. Yet there is a danger in assuming that all calls for clinical legal education—including Frank's—share the values and goals that animate clinical legal education today. Nothing illustrates this danger better than clinicians' incautious invocations of William Rowe's 1917 proposal for a program of clinical legal education.¹⁶

¹³ See, e.g. Howard Erlanger, et al., *Forward: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339.

¹⁴ Erlanger, et al., *Is It Time?*, at 339-40.

¹⁵ Erlanger, *Is It Time?*, at 345.

¹⁶ William V. Rowe, *Legal Clinics and Better Trained Lawyers--A Necessity*, 11 ILL. L. REV. 591 (1917).

Although often cited uncritically in clinical scholarship,¹⁷ Rowe's advocacy for clinical legal education was grounded in an appalling reaction to the rapidly diversifying bar of his time. Clinical legal education was necessary, Rowe argued, to socialize the "great flood of foreign blood, much of it antagonistic by instinct, which is now sweeping into the bar,"¹⁸ and to instill in them "the instinct for right and the consciousness of wrong, which constitute the true spirit of the profession."¹⁹ Although some of the most "thirsty seekers for knowledge and light and material progress" are found among immigrant lawyers of "foreign stock," Rowe warned that their thirst for knowledge "has slight relation to those qualities having to do with morals and character,"²⁰ and is instead "centered mainly upon their own selfish advancement, in a material way."²¹ In the many citations of Rowe's article, it is disturbing that only one article—written by a legal ethicist rather than a clinician—places Rowe's call for clinical legal education within the historical context of the racist and protectionist bar politics of his day.²²

Although Frank's proposal for a clinical lawyer-school is not tainted with Rowe's explicit xenophobia, Frank's vision of clinical legal education is historically situated in the goals and concerns of the Legal Realist movement. To get a full understanding of how and why Frank's legal realist call for clinical lawyer-schools failed to catch on in his time, we must examine it within that fuller context. This examination reveals lessons that we can take into the future in

¹⁷ See, e.g. Barry et al., at 6-8; Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLIN. L. REV. 57, 73 (2009); Andreas Buckner, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experience*, 9 GERMAN L. J. 575, 585-86 (2008); Phillip W. Broadhead, *A Model Program for Establishing a Criminal Appeals Clinic at Your School: More Bang for the Buck*, 75 MISS. L.J. 671, 676 (2006); Grady Jessop, *Symbiotic Relations: Clinical Methodology--Fostering New Paradigms in African Legal Education*, 8 CLIN. L. REV. 377, 393-94 (2002).

¹⁸ Rowe, at 593. The "foreign element" that was invading the legal profession, Rowe cautioned, was "largely of the blood of southern, eastern and central Europe" and was "[b]y inheritance more or less hostile to all authority, and with little inherited sense of fairness, justice and honor as we understand them." Rowe, at 602.

¹⁹ Rowe, at 598.

²⁰ Rowe, at 602.

²¹ Rowe, at 594.

²² James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 729, n.14 (2005) (identifying Rowe's essay as an example of attempts to cloak anti-immigrant bar restrictions in neutral-sounding concern about competence and moral character).

contemplating the space that clinician-scholars might occupy today within recent calls for a New Legal Realism.

A. *Jerome Frank's Call for a Clinical Lawyer-School*

In 1933, Jerome Frank called for a truly radical reform to legal education. He proposed not merely to add practical training to the law school curriculum, but to change the central focus of legal education from appellate case study and to immerse students in the day-to-day work of practicing lawyers. Unlike proposals for curricular reform today, which value the Langdellian method of appellate case instruction as one among many necessary components in the preparation of students for the practice of law,²³ the clinical lawyer-school Frank proposed amounted to "a complete abandonment of Langdell's central aim and a reversion to the apprenticeship system but on a more sophisticated level."²⁴

Frank launched his critique of the appellate case method of instruction with a searing critique of the man behind the method: Christopher Columbus Langdell.²⁵ In Frank's view, the case method of instruction was indelibly stamped with the "neurotic escapist character"²⁶ of Langdell, whom he described as a man who preferred the "hush and quiet of a library" to the "all-too-human clashes of personality in law office and courtroom."²⁷ Frank derisively quoted Langdell as saying, "The library is to us what the laboratory is to the chemist or to the physicist and what the museum is to the horticulturist,"²⁸ acerbically noting that studying law from books

²³ See Carnegie Report, at xxx; MacCrate Report, at xxx.

²⁴ Frank, *Good Education*, at 723.

²⁵ Frank, *Why Not?*, at 907-08; Frank, *Good Legal Education*, at 723; Frank, *A Plea*, at 1303-04. Frank's focus on Langdell's character was not simply an ad hominem attack. Rather, it was consistent with Frank's view that judges' decisions were derived primarily from their personal idiosyncrasies and only later justified with reference to the legal rules and principles espoused in their written opinions.

²⁶ Frank, *A Plea*, at 1304.

²⁷ Frank, *Good Legal Education*, at 723. Frank chronicled Langdell's career from law school, in which Langdell was said to have spent his time "almost constantly in the library," to his "peculiarly secluded life" in practice as an appellate attorney who spent most of his time in the "inaccessible retirement of his office" and the library of the New York Law Institute writing briefs for other attorneys. Frank, *Why Not?*, at 907-08.

²⁸ Frank, *A Plea*, at 1304.

was akin to training "prospective dog breeders who never see anything but stuffed dogs."²⁹ The real laboratory for the study of law, according to Frank, was not the law library, but the law office; and there was no better way to implement a realist study of law than "to have such laboratories inside the law school."³⁰

What legal education needed, argued Frank, was the development of full-fledged "lawyer-schools" in which "[t]heory and practice would . . . constantly interlace" and "students would learn to observe the true relation between the contents of upper-court decisions and the work of practicing lawyers and courts."³¹ At the center of law school activity would be a legal clinic, in which law students would represent clients on a range of issues including the work of a legal aid society, and also "take on important jobs, including trials, for government agencies, legislative committees, or other quasi-public bodies."³² The study of appellate doctrine would be consigned to a peripheral role, as a way for students to learn the linguistic formalities needed by lawyers to present legal arguments.³³ Rather than excerpted appellate cases compiled in casebooks, Frank proposed that students in the classroom study the full record of cases from pleading to verdict and appeal.³⁴ The study of law would be integrated with the study of social science, bringing the insights of history, psychology, economics, ethics, and anthropology to bear on what might otherwise be considered "strictly legal problems."³⁵

Frank's primary objection to the appellate case method reflected his jurisprudential views about appellate judging. First, Frank argued, the appellate case method does not really study

²⁹ Frank, *Why Not?*, at 912.

³⁰ Frank, *A Plea*, at 1329.

³¹ Frank, *A Plea*, at 1317.

³² Frank, *A Plea*, at 1316. *See also* Frank, *Good Education*, at 723-24; Frank, *Why Not?*, at 917-18.

³³ Frank, *Why Not?*, at 914-15; Frank, *Good Education?*, at 723; Frank, *A Plea*, at 1315.

³⁴ Frank, *Why Not?*, at 916; Frank, *A Plea*, at 1315.

³⁵ Frank, *Good Education*, at 724; Frank, *Why Not?*, at 921-22.

cases but "the so-called principles and rules" spelled out in judicial *opinions*."³⁶ Yet, the central concern for lawyers in advising and advocating for their clients is not how principles and rules fit together in the abstract, but predictions about how courts are likely to decide specific cases involving their clients.³⁷ The study of judicial opinions provided little insight into such predictions, in Frank's view, because the reasons recited by judges in their printed opinions as nothing more than post hoc rationalizations for the results the courts wanted to reach, rather than the real reasons that motivated the decisions.³⁸ Second, Frank argued that appellate cases give no insight into "the transcendent importance of the facts of cases."³⁹ The case method's focus on appellate decisions, Frank argued, misleads students into thinking that "the difficulty of predicting decisions stems largely from uncertainty about or in the rules."⁴⁰ However, the greatest perils of prediction do not lie primarily in uncertain rules, but in "the obstacles of guessing what the court will guess to be the facts" of a case.⁴¹

As we will see in the next section, Frank's call for clinical lawyer-schools arose directly from the unique features of his legal realist jurisprudence, particularly his emphasis on the central role of fact-finding and the idiosyncrasy of judicial decision-making. And, the very features of Frank's jurisprudence that grounded his views on legal education also placed him at the margins of the Legal Realist movement.

³⁶ Frank, *Why Not?*, at 910.

³⁷ Frank, *Why Not?*, at 911.

³⁸ Frank, *Why Not?*, at 910-11.

³⁹ Frank added this critique in his 1946 writing. Frank, *A Plea*, at 1306.

⁴⁰ Frank, *A Plea*, at 1310.

⁴¹ Frank, *A Plea*, at 1310.

B. *Jerome Frank's Call in the Context of American Legal Realism*

Jerome Frank was a central figure in both developing and exemplifying legal realist thought.⁴² While practicing as a Wall Street lawyer in 1930, he published *Law and the Modern Mind*, a book that pushed him to the forefront of the legal realist movement.⁴³ Frank's prominence in the Legal Realist movement was cemented in 1931, when Karl Llewellyn's credited Frank as a co-author of Llewellyn's famous article, *Some Realism About Realism*, one of the seminal articles that defined an emerging Legal Realist movement.⁴⁴ In the 1930s, Frank served in the New Deal administration as General Counsel to the Agricultural Adjustment Administration and as a Commissioner on the Securities and Exchange Commission.⁴⁵ In 1941, he was appointed to the United States Court of Appeals for the Second Circuit.⁴⁶ Throughout this time, Frank continued to publish numerous books and law review articles that developed his ideas about the nature of fact-finding and the judicial process.⁴⁷ Although he was denied appointment as a faculty member at Yale Law School in 1935,⁴⁸ Frank taught at Yale from 1946 until his death in 1957.⁴⁹

⁴² Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J. L. & SOC'Y 175, 175 (1991); Brian Bix, *Introduction to the Transaction Edition*, LAW AND THE MODERN MIND xi (2009 edition).

⁴³ Duxbury, *Jerome Frank*, at 176; Bix, *Introduction*, at xi. As Neil Duxbury put it, the book "arrived on the crest of the realist wave" and "captured the mood of many progressive lawyers both in the universities and in practice." Duxbury, *Jerome Frank*, at 181. See also, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82 (1931) (reviews of Frank's book by Karl Llewellyn, Mortimer J. Adler and Walter Wheeler Cook). After the publication of *Law and the Modern Mind*, Frank was appointed as a visiting research associate at Yale Law School, where he also taught part-time from 1946 until his death in 1957. Duxbury, *Jerome Frank*, at 176-77.

⁴⁴ Karl Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931).

⁴⁵ Duxbury, *Jerome Frank*, at 176.

⁴⁶ Duxbury, *Jerome Frank*, at 176.

⁴⁷ The most important other works laying out Frank's ideas about the judicial process are JEROME FRANK, *IF MEN WERE ANGELS* (1942); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); and JEROME FRANK, *NOT GUILTY* (1957) (with Barbara Frank). For a comprehensive list of book, articles and miscellaneous writings of Jerome Frank, see JULIUS PAUL, *THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS* 158-62 (1959).

⁴⁸ KALMAN, *LEGAL REALISM AT YALE*, at 138.

⁴⁹ Duxbury, *Jerome Frank*, at 177.

Despite his centrality to the Legal Realist movement, Frank's ideas are commonly described as "extreme" or "fringe" realism.⁵⁰ Controversially, Frank drew on psychoanalytic theory to argue that both the legal system and the study of law were plagued by the “basic legal myth that law is, or can be made, unwavering, fixed and settled,”⁵¹ and that this “basic myth” derives from a childish longing for a father-substitute in the form of authoritative law.⁵² Frank was insistent that judges decided cases primarily on “hunches” arising from an intuitive sense of right and wrong under the circumstances and used legal reasoning to rationalize these intuitive conclusions.⁵³ He speculated that the factors that produce a judge’s “hunch”—the true basis for the judge’s decision—are “multitudinous and complicated” and that at least some of these factors cannot be predicted because they are “uniquely individual” to each judge.⁵⁴

Frank’s legal realist writings were also distinctive because they focused skeptical attention, not only on the rules that judges announce in deciding cases, but also on the fact-finding process in trial court proceedings.⁵⁵ Fact-finding was more crucial to the administration of justice than appellate court decision-making, Frank argued, because “the overwhelming majority of decisions are not appealed; the disputes in most of the relatively few appealed cases turn on such issues of fact, and the appellate courts accept the trial court’s determination of the

⁵⁰ Leiter, *Rethinking Legal Realism*, at 269 (“Even among the Realists, of course, Frank's view represented a particular sort of extreme”); Duxbury, *Jerome Frank*, at 178 (“Commonly and with reason, [Frank] has been classified as a 'fringe' or 'left-wing' realist.”); Bernie R. Burres, *American Legal Realism*, 8 HOWARD L.J. 36, 43 (1962) (describing *Law and the Modern Mind* as “the most interesting espousal of 'fringe-realism'”).

⁵¹ FRANK, *LAW AND THE MODERN MIND*, at 21.

⁵² See FRANK, *LAW AND THE MODERN MIND*, at 19.

⁵³ See FRANK, *LAW AND THE MODERN MIND*, at 111-12. Frank adopted the “hunch” theory of judicial decision making from the work of Joseph Hutcheson. Joseph C. Hutcheson, *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. REV. 274 (1928).

⁵⁴ FRANK, *LAW AND THE MODERN MIND*, at 114. Frank recognized that legal rules and principles also play a role in producing the judge’s “hunch,” as do broader political, economic and moral sentiments that are capable of sociological study. *Id.* at 113-14. However, he argued that the role of idiosyncratic personality traits renders systematic study of judicial trends difficult to discover. *Id.* at 120-25.

⁵⁵ See generally, Edmond Cahn, *Jerome Frank’s Fact-Skepticism and Our Future*, 66 YALE L.J. 824 (1957); Sam A. Beatty, *Some Basic Ideas of Jerome Frank*, 11 ALA. L. REV. 239 (1958); Julius Paul, *Jerome Frank’s Contributions to the Philosophy of American Legal Realism*, 11 VAND. L. REV. 753, 753 (1958).

facts in a large percentage of such cases.”⁵⁶ As Frank pointed out, trial-level fact-finding is a form of lawmaking; whenever a court applies the law to the facts incorrectly, it essentially nullifies the applicable statute.⁵⁷ And, trial courts have the power to evade appellate review by cloaking their decisions in findings of fact rather than rulings of law.⁵⁸

Frank’s emphasis on the personal and idiosyncratic nature of lower-level judicial decision-making and his focus on trial-level fact-finding process divided him from other legal realist thinkers. Frank differentiated his work from Llewellyn’s later writings, which had come to focus on discerning the behavioral uniformities and regularities behind the surface reasoning in appellate opinions.⁵⁹ And, Frank repeatedly criticized the tendency of Llewellyn and other Legal Realists to confine their study to the “artificial two-dimensional legal world” of upper-court decisions without questioning whether the regularities they sought in appellate decision-making had any bearing on predictions of trial court decisions.⁶⁰

Yet, at the center of Frank’s jurisprudence stood a glaring contradiction. As Frank insistently pointed out, from the perspective of clients, what is important is the prediction of what the judge will do in *their case*, not social scientific generalities of what judges often do in cases like theirs.⁶¹ However, as Frank acknowledged—particularly in his later writings—honest appraisal of the “unruly” process of fact-finding revealed such profound uncertainties that the most one could hope was to discover regularities at the level of rules; fact-skepticism left little

⁵⁶ Frank, *Say It With Music*, at 922.

⁵⁷ Jerome Frank, *Words and Music*, 47 COLUM. L. REV. 159, 1274 (1947).

⁵⁸ Frank, *Say It With Music*, at 927-28.

⁵⁹ JEROME FRANK, *Preface to Sixth Edition*, LAW AND THE MODERN MIND xxii (2009 edition). For a discussion of Legal Realist “trend analysis” of appellate cases in the “scientific wing” of Legal Realism, see S.N. Verdun-Jones, *Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism (Part II)*, 5 DALHOUSIE L.J. 249, 261-71 (1979).

⁶⁰ FRANK, *Preface to Sixth Edition*, at xxii-xxiii. See also Jerome Frank, “*Short of Sickness and Death*”: A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. REV. 545 (1951) (critiquing the work on Felix Cohen on these grounds); Jerome Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. v. Aristotle*, 25 NOTRE DAME LAWYER 207 (1950) (critiquing the work of Walter Wheeler Cook on these grounds).

⁶¹ See e.g. FRANK, LAW AND THE MODERN MIND, at 46-52.

ground for predicting the outcome of results in particular cases.⁶² The Legal Realists had sought to provide a more accurate picture of the operation of law with the pragmatic goal of better predicting the application of law;⁶³ by making explicit the true operating principles of law, they also hoped to guide law and policy reform in ways that were more responsive to societal needs and conditions.⁶⁴ Frank's emphasis on idiosyncrasy in judging and fact-finding were antithetical to the Legal Realists' mission to discover the patterns of behavioral regularity at the heart of these predictive and reform goals.⁶⁵

The contradiction at the heart of Frank's jurisprudence also infected the pedagogical program of his proposed clinical lawyer-school. Although Frank's proposal touted the benefits of real-world exposure to "law in action" at the trial court level, he did not have a pedagogical program that went much beyond immersing students in practice. Frank proposed that his clinical lawyer-school be a laboratory for teaching students about "the human side of the administration of justice"⁶⁶ with all the distortions of its personal, idiosyncratic features of trial level fact-finding. In the "clinical lawyer-school" Frank envisioned, students would learn, among other things, the inherent uncertainty and subjectivity of facts in contested cases; the way the "facts of the case" may vary based on "the faulty memory of witnesses, the bias of witnesses, the perjury of witnesses"; the "effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, impatience, prejudice and open-mindedness of judges" and the methods used in negotiating disputes and drafting documents.⁶⁷

⁶² Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 444-52 (1954).

⁶³ Singer, *Legal Realism Now*, at 469-73.

⁶⁴ White, *From Realism to Critical Legal Studies*, at 823.

⁶⁵ KALMAN, LEGAL REALISM AT YALE, at 42-43; Leiter, *Rethinking Legal Realism*, at 279-81.

⁶⁶ Frank, *Why Not?*, at 918.

⁶⁷ Frank, *Why Not?*, at 918.

By the more sophisticated pedagogical standards of clinical teaching today, Frank's vision of clinical education lacked a structure for helping students generalize from and transfer the knowledge gained from exposure to practice in their clinical law firm to their experience as lawyers in the future. And, Frank's focus on the "unruly" nature of fact-finding and judicial decision-making provided little ground on which to build such a pedagogy.

C. Clinical Legal Education and Legal Realist Curricular Reforms

Like his fact-skepticism, Jerome Frank's call for a clinical lawyer-school kept him on the fringe of legal realist reforms to legal education. Other Legal Realists pursued or proposed changes to legal education, but unlike Frank's call for a "clinical lawyer-school," their proposals stayed comfortably within the confines of classroom teaching and appellate casebooks.

The 1920s and 1930s saw a "realist revolution in casebooks," as Legal Realists published casebooks that reorganized teaching materials around factual trends or problem situations rather than according to doctrinal categories based on legal principles.⁶⁸ During the 1920s, Legal Realists at Columbia Law School engaged in an extensive study of the reclassification of their curriculum according to functional rather than doctrinal categories.⁶⁹ The purpose of these reforms was to "bring about a closer integration between law and the social sciences"⁷⁰ by classifying law according to the social purposes that law served.⁷¹ For example, the curriculum was divided into four major categories: business relations, familial relations, communal-political relations and law administration.⁷² New courses that cut across doctrinal categories were created, such as a course on industrial relations that "overlapped with constitutional law,

⁶⁸ KALMAN, *LEGAL REALISM AT YALE*, at 78-97.

⁶⁹ LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* 67-78 (1986); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 41-55 (1973).

⁷⁰ TWINING, *KARL LLEWELLYN*, at 45.

⁷¹ TWINING, *KARL LLEWELLYN*, at 49.

⁷² TWINING, *KARL LLEWELLYN*, at 48.

contract, torts, agency and equity.”⁷³ A similar fluorescence occurred at Yale Law School in the late 1940s, whose faculty members published a number of casebooks that incorporated social science and social policy.⁷⁴ In many ways, these casebook revisions were the most successful legacy of the legal realist educational reforms. Courses organized around functional rather than doctrinal categories—landlord-tenant law; family law; debtor-creditor law—have become staples in the law school curriculum. And, most law school textbooks now include both cases and other materials that add explicit discussion of public policy concerns relating to law.⁷⁵

Moving in a different direction, Karl Llewellyn urged a reorganization of the law school curriculum around the acquisition of craft skills, both in his own writings⁷⁶ and in the 1944 report of the AALS Committee on Curriculum that he chaired.⁷⁷ Llewellyn argued that the appellate case method was an inefficient way of learning substantive law and should therefore be viewed primarily as a method for honing the analytical skills necessary for lawyering.⁷⁸ After the first year of law school, Llewellyn argued, most students had mastered the skill of case analysis, and classroom instruction should turn to teaching students how to apply the law to other lawyering tasks such as drafting and client counseling.⁷⁹ The Llewellyn Report, which was published in 1944, similarly proposed that the law school curriculum beyond the first year be organized around teaching other basic skills of the lawyer’s craft, including statutory construction, appellate advocacy, drafting and client counseling.⁸⁰ Although his proposed reforms were not adopted, Llewellyn’s conceptualization of the case method of instruction as

⁷³ TWINING, KARL LLEWELLYN, at 46.

⁷⁴ KALMAN, LEGAL REALISM AT YALE, at 150-53.

⁷⁵ Singer, *Legal Realism Now*, at 473-75.

⁷⁶ See generally Karl Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); Karl Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

⁷⁷ *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) (hereinafter Llewellyn Report).

⁷⁸ Llewellyn, *Crisis in Legal Education*, at 216.

⁷⁹ Llewellyn, *Crisis in Legal Education*, at 216-18.

⁸⁰ Llewellyn Report, at 369-77.

merely one form of skills training is an important predicate to the later expansion of clinical legal education,⁸¹ and is consistent with current calls for curricular reform.⁸²

Even Llewellyn's more ambitious proposals, however, stayed within the basic structure of classroom study. Despite its innovative reorientation of the curriculum around skills, the Llewellyn Report was self-consciously conservative in the methods it proposed,⁸³ explicitly eschewing any changes that would challenge the traditional values of legal education or require additional resources.⁸⁴ For example, in choosing which craft skills to teach in law school, the Committee suggested looking "for lines of craftsman's skill which are, first, identifiable, communicable; second, within the knowledge and teaching power of law professors in general; third, capable of instruction in classes run with case-books and supplemented case-books; fourth, capable of such instruction without material disruption of the current law curricula."⁸⁵ Even outside the context of AALS committee work, where Llewellyn was free to voice his personal views, he dismissed law students' engagement in real-world practice as a supplementary activity, primarily beneficial "in the livening up, the making real, of theoretical work by practical complement."⁸⁶ Llewellyn explicitly rejected Frank's proposals for clinical education, characterizing them as insufficiently theoretical.⁸⁷

Frank's views on legal education were received with similar skepticism by his colleagues at Yale. Some dismissed the idea of a clinical lawyer-school as unaffordable,⁸⁸ and others

⁸¹ See generally Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

⁸² See Carnegie Report; MacCrate Report.

⁸³ Llewellyn Report, at 348.

⁸⁴ Llewellyn Report, at 347.

⁸⁵ Llewellyn Report, at 369.

⁸⁶ Llewellyn, *What Is Wrong*, at 675. He supported the idea of law schools working with law firms to create "interstitial apprenticeships," and encouraged afternoons off so that students could attend various courts with an instructor to observe and critically reflect on what they had seen. Llewellyn, *What Is Wrong*, at 675.

⁸⁷ Llewellyn, *What Is Wrong*, at 675.

⁸⁸ KALMAN, LEGAL REALISM AT YALE, at 175.

perceived Frank's pleas for practical training as playing into the hands of a conservative and anti-intellectual backlash by Yale alumni against the progressive political activities of faculty members.⁸⁹ In the end, Frank wearily acknowledged the challenges of swimming against the tide of legal academic culture, recognizing that "[s]o long as teachers who know little or nothing except what they learned from books under the case-system control a law school, the actualities of the lawyer's life are there likely to be considered peripheral and of secondary importance."⁹⁰

Although Frank's comment could easily be repeated today,⁹¹ clinical legal education has taken tremendous strides since Frank penned those words in 1947. An infusion of money in the 1950s and 1960s helped to establish clinics as a significant presence within legal education.⁹² A series of amendments to the American Bar Association's standards for the accreditation of law schools helped to solidify the status of clinicians within the legal academy.⁹³ An increasingly professionalized corps of clinicians has developed a sophisticated pedagogy for clinical instruction that integrates theory and practice and helps students generalize from their clinic casework to larger issues of law, lawyering and social justice.⁹⁴ And, this pedagogy has been articulated, debated and honed in a body of literature about clinic teaching, clinic design and lawyering, which has come to be known as "clinical scholarship."⁹⁵

⁸⁹ KALMAN, *LEGAL REALISM AT YALE*, at 172-73.

⁹⁰ Frank, *A Plea*, at 1314.

⁹¹ Indeed, the recent Carnegie Report includes an observation similar to Frank's, that lawyering skills courses at most law schools are elective courses taught by faculty with lower academic status, and that "[i]n many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance." Carnegie Report at 87-88.

⁹² See Wallace J. Mlyniec, *The Intersection of Three Visions-- Ken Pyle, Bill Pincus and Bill Greenhalgh--And the Development of Clinical Teaching Fellowships*, 64 *TENN. L. REV.* 963, 964-67 (1997).

⁹³ See Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 *TENN. L. REV.* 183 (2008).

⁹⁴ See generally Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 *UCLA L. REV.* 577 (1987).

⁹⁵ Stephen Ellmann, Isabelle R. Gunning & Randy Hertz, *Why Not a Clinical Lawyer-Journal?*, 1 *CLIN. L. REV.* 1 (1994). This article announced the formation of the *CLINICAL LAW REVIEW*, a "peer-reviewed journal devoted to issues of lawyering theory and clinical legal education."

With an increasing number of clinical faculty members in tenure-track positions under the same or substantially similar expectations for scholarship as their non-clinical colleagues, clinician-scholars have increasingly turned attention to more traditional forms of scholarship.⁹⁶ The next section looks to the potential of this generation of clinician-scholars to connect with the generation of legal scholars who are claiming the heritage of the Legal Realism movement and re-defining it into a New Legal Realism.

II. BACK TO THE FUTURE: NEW LEGAL REALISM AND CLINICAL SCHOLARSHIP

Legal Realism has a paradoxical legacy in American legal thought. On the one hand, it is credited as one of the most influential movements in American legal history, whose insights about judicial decision-making have so pervaded contemporary legal thought that they seem too obvious to mention.⁹⁷ As it is commonly put, “We are all realists now.”⁹⁸ On the other hand, Legal Realism is seen as a failed movement that “simply ran itself into the sand.”⁹⁹ Among legal philosophers, Legal Realism is described as a “jurisprudential joke,” not taken seriously since H.L.A. Hart refuted realist rule-skepticism as an “incoherent” and “obviously false” description of law in his 1961 classic *The Concept of Law*.¹⁰⁰ Moreover, in the post-World War II atmosphere of rising totalitarianism, the legal realist divorce of law from morality was criticized as promoting authoritarian and anti-democratic values.¹⁰¹

⁹⁶ Cite to the AALS Clinical Section Report on the Status of Clinical Faculty in the Academy.

⁹⁷ See, e.g. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 633-34 (1989); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 467 (1988). But see, Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009) (disputing the historical accuracy of the commonly-told story about the Legal Realist influence and viewing Legal Realism as merely a reflection of wider trends in thinking about the law).

⁹⁸ Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUDIES 137, 137-38 (1992).

⁹⁹ John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Yale Experience*, 28 BUFF. L. REV. 459, 459 (1979).

¹⁰⁰ Leiter, *Rethinking Legal Realism*, at 270. See also Mark Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005). For Hart's critique, see H.L.A. HART, *THE CONCEPT OF LAW* 136-47 (1961).

¹⁰¹ See Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUDIES 137, 144 (1992)

Despite this paradoxical legacy—or perhaps because of it—Legal Realism has continued to captivate legal scholars. In the 1970s and 1980s, the Critical Legal Studies movement claimed the legacy of Legal Realism, drawing connections between the legal realist “debunking” of legal doctrinal rules and CLS claims that law is radically indeterminate.¹⁰² Drawing on the social scientific aspect of Legal Realism, the Law and Economics movement can also claim its intellectual roots in the Legal Realist movement.¹⁰³ More recently, legal theorist Brian Leiter has attempted to rescue Legal Realism by re-situating it within a Pragmatist and natural law jurisprudential tradition.¹⁰⁴ Moreover, within the past decade, a host of diverse legal scholars interested in empirical study of the law and legal institutions have been invoking the idea of a “New Legal Realism.”¹⁰⁵ Scholars who explicitly lay claim to a Legal Realist legacy are engaged in a variety of endeavors with arguably little in common, and, surprisingly, “have generally failed to acknowledge each other's existence.”¹⁰⁶ Yet their eagerness to claim the Legal Realist title and lineage attests to the vitality of the urge to move beyond formalistic accounts of law and legal institutions and to test assumptions deeply embedded in legal scholarship with empirical evidence of human behavior.

The New Legal Realism is but the latest in a line of movements to unite law and social science—including Legal Realism and Law & Society—that have failed to take significant hold within the legal academy.¹⁰⁷ Whether the various branches of New Legal Realism that are currently springing to life in the legal academy can escape the paradoxical legacy of the Old

¹⁰² White, *From Legal Realism to Critical Legal Studies*, at 820-22. See also *Round and Round the Bramble-Bush: From Legal Realism to Critical Legal Studies*, 95 HARV. L. REV. 1669 (1982).

¹⁰³ Minda, *Jurisprudential Movements of the 1980s*, at 633-636.

¹⁰⁴ See generally, Leiter, *Rethinking Legal Realism*. See also WOUTER DE BEEN, *LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM* (2008).

¹⁰⁵ Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 64 (2009) (noting that over 300 articles in the past eight years had invoked the phrase “new legal realism”).

¹⁰⁶ Nourse & Shaffer, *Varieties of New Legal Realism*, at 76.

¹⁰⁷ See White, *From Legal Realism to Critical Legal Studies*, at 839-40.

Legal Realism depends on whether they can overcome the barriers that impeded the Old Legal Realists from creating a space for their work within the legal academy and the enterprise of legal education. It is to these barriers—and their significance for clinical legal education—that this section next turns.

A. *Barriers to Integrating Legal Realism into Legal Scholarship and Legal Education*

This section will consider two barriers to the integration of legal realist thinking into legal scholarship and legal education that are reflected in the history of Old Legal Realism: the dominance of appellate cases in legal education; and the relevance gap between the behavioral study of law and the practice of law. Although clinical legal education naturally transcends the first barrier by being situated primarily in the world of “law in action” rather than the “law in books,” the second barrier remains a concern for the integration of legal realist thought into clinical legal education and the concomitant engagement of clinician-scholars in New Legal Realist scholarship.

1. *The Dominance of Appellate Cases in Legal Education and Legal Scholarship*

As the history of Legal Realism and its intellectual progeny demonstrate, it has been remarkably difficult for behavioral scholars to break free of the dominance of appellate case law, even when they have recognized the importance of studying the behavior of lower-level officials. Legal Realists historically recognized that there is something profoundly unrealistic about the world of law as portrayed in appellate court decisions, given the small number of legal disputes that reach the appellate stage and the limited factual record on which these cases are decided. In calling for a realist study of law, Karl Llewellyn was emphatic that “the focus, the center of law,

is not merely what the judge does . . . but what *any* state official does, officially.”¹⁰⁸ Elsewhere, he insisted that “. . . the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*”¹⁰⁹

Yet, these insights have not always translated into actual study of law beyond appellate cases. Llewellyn’s own behavioral studies of “the law itself” eventually came to focus primarily on the process of appellate judging and the underlying patterns found in the factual contexts of reported appellate cases.¹¹⁰ Walter Wheeler Cook, a stalwart in the “scientific wing” of the American Legal Realists and founder of the Johns Hopkins Institute for behavioral research, was similarly drawn into the vortex of published appellate cases.¹¹¹ And, some of the self-proclaimed heirs to the American Legal Realist tradition today are situated squarely within the behavioral study of appellate court judging. Exemplary of this trend are empirical studies by political scientists of the influence of political attitudes on judging.¹¹²

However, other heirs to the Legal Realist tradition—especially those who come to it through the portal of sociological studies in the Law & Society tradition—have broken quite decisively out of the appellate case mold to study the “law in action.”¹¹³ Some of these studies focus on identifying gaps between “law in books” and “law in action,” documenting the differences between what the law says and the actual practices of judges and other legal officials

¹⁰⁸ Llewellyn, *Next Steps*, at 456.

¹⁰⁹ LLEWELLYN, *THE BRAMBLE BUSH*, at 5 (emphasis in the original).

¹¹⁰ See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

¹¹¹ Verdun-Jones, *Scientific Wing Pt. 1*, at 21.

¹¹² Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

¹¹³ Nourse & Shaffer, *Varieties of New Legal Realism*, at 79-80. See generally, *Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335. For a history of the development of the Law & Society Movement, see Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 L. & SOC’Y REV. 409, 434-40 (1998); White, *From Legal Realism to Critical Legal Studies*, at 832-33.

in implementing the law.¹¹⁴ Others go beyond conventional "gap studies" to investigate a broader field of "norms, sanction systems and institutions" that sociologist Eugen Erlich called "living law."¹¹⁵ This second kind of inquiry looks not only at law in lower courts, but at societal practices that interact with law and influence the behavior of people who form agreements and resolve disputes in the "shadow of the law."¹¹⁶

Although the "law in action" branch of emerging New Legal Realism holds out promise for connecting with clinical legal education and clinical scholarship, it faces a different kind of barrier to integration into the world of legal education and legal scholarship, which I call the "relevance gap" between the behavioral studies of law and legal practice. It is this gap that clinician-scholars can most help to bridge.

2. *The Relevance Gap between Behavioral Studies of Law and Legal Practice*

While the behavioral study of law is interesting as an academic pursuit, it is not always apparent how the insights of social science can be translated into knowledge with practical utility to lawyers and jurists. There is an inherent tension between the internal perspective necessary for the practice of law and the external perspective that researchers adopt in studying the law from a behavioral point of view.¹¹⁷ As H.L.A. Hart famously pointed out in his jurisprudential critique of Legal Realism, the "external point of view" captured by the Legal Realists' predictive theory of law disregarded the "observable fact of social life" that persons in society accept and

¹¹⁴ Macaulay, *Old Versus New*, at 386.

¹¹⁵ Macaulay, *Old Versus New*, at 386; Stewart Macaulay, *Contracts, New Legal Realism and Improving the Navigation of The Yellow Submarine*, 70 TUL. L. REV. 1161, 1169 (2006) EUGEN ERLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936). Macaulay credits David Nelkin for clarifying the distinction between "law in action" and "living law" research. David Nelkin, *Law in Action or Living Law? Back to the Beginning Sociology of Law*, 4 LEGAL STUD. 157 (1984).

¹¹⁶ Macaulay, *Yellow Submarine*, at 1169-70.

¹¹⁷ For a recent exploration of this tension see Tracey E. George, Mitu Gulati & Ann McGinley, *The New Old Legal Realism*, NW. L. REV. (forthcoming).

use rules as normative guides to conduct.¹¹⁸ And, while "external point of view" adopted in the behavioral study of judging may help explain the underlying dynamics of judicial decision-making, it fails to capture the way that judges and lawyers need to look at law in making legal arguments and decisions. In the world of legal practice, legal rules and legal reasoning are a necessary part of the lawyering process.

The disconnection between the external and scientific perspective needed for behavioral study of "law in action" and the cultivation of internal perspectives necessary to the practice of law is illustrated by the troubled fit of the "scientific wing" of the Legal Realist movement within the legal academy.¹¹⁹ The scientific realists—a group that included Walter Wheeler Cook, Herman Oliphant, Hessell Yntema, William O. Douglas, Leon Marshall, and Underhill Moore—were outsiders to the practice of law, and actively hostile to practical legal training.¹²⁰ While at Columbia, Oliphant spearheaded a movement for curricular reform, which proposed that the school abandon its professional training functions and become a "community of scholars" engaging in the scientific study of law.¹²¹ This proposal divided the faculty between professors who believed "that the school should have as its principal objective scientific research into law as an aspect of social organization" and those who favored the view that "professional training should continue to be the school's principal function, albeit by means of a radically different approach."¹²² When Oliphant was passed over as Dean in 1927, a number of Columbia faculty members in the "scientist wing" resigned in protest.¹²³

¹¹⁸ HART, CONCEPT OF LAW, at 138.

¹¹⁹ See generally S.N. Verdun-Jones, *Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism*, 5 DALHOUSIE L.J. 3 (1979); S. N. Verdun-Jones, *Cook, Oliphant and Moore: The Scientific Wing of American Legal Realism, Part II*, 5 DALHOUSIE L. REV. 249 (1979). See also TWINING, KARL LLEWELLYN, at 54-55.

¹²⁰ TWINING, KARL LLEWELLYN, at 54-55; Verdun-Jones, *The Scientific Wing*, at 3-4.

¹²¹ TWINING, KARL LLEWELLYN, at 51; KALMAN, LEGAL REALISM AT YALE, at 73-74.

¹²² TWINING, KARL LLEWELLYN, at 51. Twining called these factions the "scientists" and the "prudents." TWINING, KARL LLEWELLYN, at 54.

¹²³ TWINING, KARL LLEWELLYN, at 52-53; KALMAN, LEGAL REALISM AT YALE, at 74.

Several of the disaffected Columbia Realists joined Walter Wheeler Cook, who had left Columbia in 1922 to found the Johns Hopkins Institute of Law, a research institute devoted to the empirical study of law.¹²⁴ The work of these scholars, along with the empirical studies of William O. Douglas and Underhill Moore at Yale, created a heyday of Legal Realist empiricism, which produced a number of large-scale empirical studies of judicial administration.¹²⁵ Yet the criticisms of the Realist empirical studies were that they produced knowledge without sufficient utility to practitioners, or that they lacked a sufficient critical audience within the academy to sustain their work.¹²⁶ As Karl Llewellyn later noted, “The Hopkins ebullition and its partial counterparts at Yale had a single notable effect. For twenty-five years, they pretty thoroughly choked off foundation interest in such research in law as quested beyond doctrine.”¹²⁷ The Johns Hopkins Institute was eventually forced to close before its first series of projects was complete, having run out of funds in the aftermath of the Great Crash and Depression.¹²⁸

Merging the social scientific study of law into the law school curriculum was also a challenge. For example, in the late 1940's, the Yale curriculum "witnessed an explosion of electives" that that combined the study of social science, public policy and law.¹²⁹ However, these courses did not draw student interest: a 1948 committee study demonstrated that “most students ignored the frill courses that legal realism had spawned” in favor of more traditional bar courses.¹³⁰ And, a summer session proposed in January 1948 “for advanced study in law and allied social scientists”—which aimed to attract a mix of lawyers, law student and

¹²⁴ KALMAN, LEGAL REALISM AT YALE, at 32-34; Verdun-Jones, *The Scientific Wing*, at 4.

¹²⁵ TWINING, KARL LLEWELLYN, at 60-67.

¹²⁶ TWINING, KARL LLEWELLYN, at 62, 64. *See also* Verdun-Jones, *Scientific Wing*, at 43 (“none of the three scholars developed any general theory capable of generating hypotheses susceptible to empirical testing; instead, . . . Oliphant and Yntema lent their efforts to a mindless amassing of statistics without reference to any guiding theory whatsoever.”)

¹²⁷ 8 J. LEGAL EDUC. 399, 400 (1952), quoted in TWINING, KARL LLEWELLYN, at 64.

¹²⁸ TWINING, KARL LLEWELLYN, at 62.

¹²⁹ KALMAN, LEGAL REALISM AT YALE, at 153-54.

¹³⁰ KALMAN, LEGAL REALISM AT YALE, at 161.

interdisciplinary researchers—had to be canceled for lack of enrollment.¹³¹ Ironically, the lack of student interest in Yale’s specialized courses was raised by the law school in defense of its curriculum, which had come under attack by the Yale Corporation as being inadequate to prepare students for the practice of law.¹³²

Historically, then, the most serious of the Legal Realist scientists failed to bridge the relevance gap between the scientific study of law, the concerns of legal scholarship, and the practicalities of professional education. The Law & Society movement’s study of the “law in action” encountered difficulties. . . [need to fill this in with the trajectory from sociological study, to CLS critique of objectivity of science, to charges that CLS lack relevance]

B. Clinician-Scholars in the New Legal Realist World

The New Legal Realist “law in action” scholars aspire to overcome the relevance gap blur the boundaries that create this relevance gap in ways that make space for the voice of clinician-scholars to emerge. One of the defining features of the “law in action” wing of the New Legal Realism is a commitment to study the law from the “bottom up,” defined as a focus on “the impact of law on ordinary people’s lives” and a sensitivity to the fact that “less powerful persons in society are often more invisible and silenced.”¹³³ A second defining feature of the new approaches is integration of the awareness that social science research is situated and “skepticism about the possibility of neutral or objective scholarship.”¹³⁴ This wing of the New Legal Realism also seeks to encourage pragmatic approaches and methods to the study of law,

¹³¹ KALMAN, *LEGAL REALISM AT YALE*, at 154.

¹³² Kalman, *Legal Realism at Yale*, at 159-62.

¹³³ Erlanger, et al., *Is It Time?*, at 339-40.

¹³⁴ Erlanger, et al., *Is It Time?*, at 342. For a description of how Critical Legal Studies challenged and broke form the Law and Society movement on this point in 1977, see White, *From Legal Realism to Critical Legal Studies*, at 833-836.

proposing a principle of “legal optimism” that would "critically examine the law's failures. . . but not neglect examination of spaces for positive social change in and around the law."¹³⁵

This proposed "path between idealism and skepticism" is paved by pragmatist methods of engaged and experimental problem-solving.¹³⁶ According to Victoria Nourse and Greg Shaffer, Pragmatism contributes to the New Legal Realism "the insight that theory must come from the world; that only theory that works has established its truth; and that there is no way to divorce theory from fact."¹³⁷ Hence, they argue, Pragmatism supports engaged or embedded "action research, "in which scholars "study a real problem in the world" and investigate it by "learning from those who must deal with the problem"¹³⁸ It is through "leaving one's office and venturing into the field" to engage in the world, rather than merely study it, that New Legal Realist scholars hope to make new and transformative discoveries about law and legal institutions.¹³⁹

These tenets of the New Legal Realism—the commitment to studying law from the "bottom up" perspective of those who lack power in society, the critical questioning of neutral and objective standpoints, and the call for engagement in the world as a platform for legal research—fit closely with the teaching goals and methods of clinical legal education.¹⁴⁰ Clinical legal education largely avoids one of the barriers that historically plagued legal realist efforts: the dominant focus in legal education on appellate case law. In the clinic, students are immersed in the heart of the “law in action” as participant-observers, representing clients in lower-level

¹³⁵ Erlanger, *Is It Time?*, at 345. As the New Legal Realists point out, empirical legal scholarship in the past "has divided between the unregenerate pessimists (the gap studies) and the unregenerate optimists who believe that law always succeeds (the efficiency studies)." Erlanger, et al., *Is It Time?*, at 358. In addition to Howie Erlanger, the authors of the "foreward" to the symposium included Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, and David Wilkins.

¹³⁶ Erlanger, *Is It Time?*, at 358; Nourse and Shaffer, *Varieties of New Legal Realism*, at 84-85.

¹³⁷ Nourse & Shaffer, *Varieties of New Realism*, at 84.

¹³⁸ Nourse & Shaffer, *Varieties of New Realism*, at 85, and at 84-85, n.85.

¹³⁹ Nourse & Shaffer, *Varieties of New Realism*, at 85.

¹⁴⁰ Taking the commitment to this research seriously arguably requires a blurring of the boundaries between classroom and clinic teaching. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455.

courts, administrative agencies and in other venues for social change; they daily encounter the gaps between what the law says, what it aspires to be, and what legal officials actually do. And clinical teaching methodology provides ready-made tools for reflective analysis on students' observations about how law operates in the world and a methodology of case rounds for drawing out generalities from those experiences.

However, as Jane Aiken has written, one of the biggest challenges in clinical education is figuring out how to structure clinic experiences that will do it all: help students understand what it means to be a lawyer, help them advance and acquire lawyering skills, expose them “to the deep injustices of poverty and abuse of power,” and “instill in them an abiding desire to use their legal skills to remedy these injustices.”¹⁴¹ To earn a place in the lexicon of clinical teaching, social scientific studies of law and legal officials must produce insights that are relevant to analyzing the problems that a clinic student faces in negotiating lower-level legal systems on behalf of clients.

By participating in “law in action” scholarship, clinicians can add a sense of practical relevance to the scholarly field, helping to overcome the seemingly intractable problem of how to integrate social science insights into law teaching. Because clinicians teach students “in role” as lawyers, they have a natural standpoint from which to bridge the “relevance gap” between the insights of social science *about law* and the practice *of law* through teaching methods that translate the systemic lessons into insights that are relevant to practice. And, the experience of writing about the law from the “bottom up” would sharpen and enhance that teaching. One of the criticisms of clinical legal education in the skills training/social justice mission debate is that there is a tendency within the individual client clinical model to focus too narrowly on the interpersonal aspects of the lawyer-client relationship to the exclusion of broader systemic social

¹⁴¹ Jane H. Aiken, *Provocateurs for Justice*, 7 Clin. L. Rev. 287, 287-88 (2001).

justice issues. As situated researchers of the way law and legal systems interact with social systems, clinicians can come to view the world within which they operate differently.¹⁴² Learning social science methodologies, or collaborating with those who know how to use them, can help clinicians sharpen and deepen their scholarly insights beyond case-based anecdotes.

¹⁴² Trubek, *Crossing Boundaries*, at 475 (describing the development of new paradigms and empirical testing of legal service delivery methods in clinical legal education as clinicians use research to improve practice).