NEW YORK LAW SCHOOL

NYLS Law Review

Volume 35 | Issue 1 | Article 13

January 1990

What's Going on Down There in the Basement: In-House Clinics Expand Their Breachhead

Marjorie Anne McDiarmid
West Virginia University College of Law

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Recommended Citation
Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Breachhead*, 35 N.Y.L. Sch. L. Rev. 239 (1990).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

WHAT'S GOING ON DOWN THERE IN THE BASEMENT: IN-HOUSE CLINICS EXPAND THEIR BEACHHEAD

MARJORIE ANNE McDIARMID*

> . . . [M]ore stress is laid perhaps upon the platitudes of the magistrate than upon the details, which to an observer contain the vital essence of the whole matter.[1]

I. INTRODUCTION

The first fundamental debate in current legal education is not over how to, but rather *what* to teach. Both conventional faculty and clinicians agree that student practice of the skill to be taught is critical to learning.[2] After all, what claim to legitimacy has the Socratic method but that it permits students to practice legal analysis from appellate case opinions. Its objective is variously expressed as teaching students to "think like" or "make a noise like" a lawyer. Law school in its Langdellian/Amesian[3] purity is based on the notion that practice in manipulating what Langdell conceived as the stuff of the law—the appellate case[4]—is necessary to student mastery.

Where clinicians part company is in disagreement over whether appellate case analysis is the sole skill which defines lawyer competence. We can draw on several sources to support the contention that it is not.

---

* Associate Professor, West Virginia University College of Law.

1. A. DOYLE, *A Case of Identity*, in THE COMPLETE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES: A FACSIMILE OF THE ORIGINAL STRAND MAGAZINE STORIES 1891-1893, at 31 (1975).

2. It would be very strange if they did not. After all, we teach history students, in part at least, by having them read historical sources; students of literature read literature; aspiring physicists do physics experiments, etc. For a discussion of the epistemological bases of learning through experience see *infra* note 29.

3. For the role of James Barr Ames in the development of the case method, see R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 38-40, 54-56 (1983).

4. "To accomplish . . . [the elevation of the status of law teaching], so far as . . . [it] depended upon the law school, it was indispensable to establish at least two things — that law is a science, and that all the available materials of that science are contained in printed books." *Id.* at 53. *See also* A. HARNO, LEGAL EDUCATION IN THE UNITED STATES 58 (1953). For an amusing view of how Langdell's personal history might have led him to these conclusions, see Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 907-08 (1933).

First, a quantitative analysis of lawyer activity indicates that something other than legal analysis is going on.[5] At best, fewer than 1% of legal matters arrive at the doors of the appellate courts.[6] Therefore, most lawyers infrequently use the type of argumentation learned in law school. While it is certainly true that skills in legal analysis inform lawyering activities such as client counseling, litigation planning, and litigation itself, it is doubtful that most cases turn upon nice points of law. Even if they did, surely all would concede that something other than straight legal analysis is going on in counseling or litigation settings. Studies of lawyers[7] reflect that there are at least two other critical skills which affect lawyering competence: fact marshalling and persuasion.[8] The need to expand the law school curriculum to include the teaching of these skills has been recognized for the greater part of this century.[9] The purpose of this Article is to chart the progress made to date toward this goal.

The data upon which this Article is based came from a questionnaire

5. This study does not address the question of whether effective legal analysis can be taught through the case method. Both the legal realists, and more recently the exponents of critical legal studies, tell us that it cannot. *See* Frank, *supra* note 4, at 910-11; *see generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) (compilation of critical essays).

6. According to the Federal Judicial Workload Statistics Report for 1985, 33,880 cases were filed in the United States Courts of Appeals (including 11,568 which were either criminal appeals or prisoner petitions) as opposed to 319,767 in the district courts (40,974 of them criminal). ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS STATISTICAL ANALYSIS AND REPORTS DIVISION A-2, A-10, A-33 (1986). This would suggest that appeals constitute approximately 10% of lawyers' work. This conclusion, however, neglects the large quantity of legal work which has no involvement with litigation. Our best quantitative source for these cases is the data collected by the Civil Litigation Research Project funded by the Office for Improvements in the Administration of Justice of the Department of Justice. Initial results were reported in 1981. That study showed that less than half of all *disputes* brought to lawyers ended in litigation. Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture,* 15 LAW & SOC'Y REV. 525, 537, 542-43 (1981). Thus, we can cut our 10% estimate at least in half. Lastly, in analyzing lawyers' work, we must consider the nondispute related activity of attorneys which includes business and estate planning, document drafting, and property transfer. Therefore, I feel confident in the assertion that only 1% of lawyers' work involves appellate litigation.

7. *See infra* note 48 for a list of studies. The most detailed report was of Chicago lawyers in which fact marshalling and persuasive skills were rated by practicing lawyers as the two most important requirements of their profession, ahead of legal analysis. *See* F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 124-26 (1981).

8. Let us lay to rest the canard that these skills cannot be taught. Rhetoric has held an acknowledged place in the curriculum since Greek antiquity, and we comfortably study the gathering of facts in the philosophy of science, in historiography, and in the psychological study of perception and memory. The literature on the methods used in teaching these subjects to law students grows daily. *See infra* note 32.

9. Legal realist Jerome Frank raised the question: "Why Not a Clinical Lawyer-School?" in 1933. *See* Frank, *supra* note 4.

sent by the Clinical Section of the Association of American Law Schools (AALS) to member law schools in the summer of 1987.[10] The study, conducted over a two-and-a-half-year period, indicates that the health of live-client, in-house[11] clinics is more robust now than at any time since the inception of these programs.[12] The study demonstrates a growth of in-house clinics in proportion to clinical offerings available, continued good student/faculty ratios, high student demand, increased pedagogical sophistication in law school clinics taught by law school employees, and an exposure of students to practicing with real clients. Two major challenges remain to be confronted. The first of these is the status of clinical faculty in the eyes of other law school teachers. The second is the limited number of law students for whom such a clinical experience is available.

A. *The Study*

An AALS committee formed to chart the progress of in-house clinics[13] polled one hundred and seventy-five schools in 1987.[14] This survey

10. It is important that the reader know that the analysis contained herein and the conclusions drawn are not those of the Association. They are the author's alone and carry no imprimatur.

11. This terminology is used throughout this Article to distinguish the clinics reviewed here from others using different methodologies. Three distinct teaching methodologies currently lay claim to the designation "clinical." I will discuss live-client clinics which use, as at least part of their teaching methodology, law faculty-supervised work by students on behalf of real clients with real legal problems. The use of live cases distinguishes these clinics from programs which rely entirely upon simulation. The use of law school faculty as supervisors distinguishes these programs from externships where supervision is provided by attorneys not employed by the school.

12. Robert Stevens credits Duke University as having the first clinical program. R. STEVENS, *supra* note 3, at 214. For additional information on Duke's clinics, see J. BRADWAY, THE DUKE UNIVERSITY LEGAL AID CLINIC HANDBOOK (1954).

13. Members of the Data Collection Sub-Committee of the Association of American Law Schools' Section on Clinical Legal Education, Committee on the Future of the In-House Clinic were Carolyn Kubitschek from Hofstra University School of Law, Robert Deiter from the University of Denver College of Law, and I. Other members of the section who assisted in the questionnaire design were John Elson from Northwestern University School of Law, Robert Dinerstein from American University, Washington College of Law, Peter Hoffman from the University of Nebraska College of Law, and Roy Stuckey from the University of South Carolina School of Law. I thank them all for their invaluable assistance. As noted above, however, the faults of this Article are mine and are not to be attributed elsewhere.

14. These included both AALS member schools and those which were simply fee paid. Where the AALS directory listed one or more clinicians teaching at a school, the questionnaire was sent to the first such clinician in alphabetical order. Where no clinician was listed for an institution, the questionnaire was sent to the school.

found, and was confirmed by data from the American Bar Association (ABA), that 80% of approved law schools offer in-house clinical programs.[15] This finding is significant because, until 1980, in-house clinics made up approximately 58% of clinical offerings.[16]

As noted above, the ABA data for 1987 indicates that 80% of all approved law schools offered live-client, in-house clinics during that year.[17] Therefore, of the 175 schools surveyed, 140 may be presumed to have such clinics. Fifty-seven questionnaires were received from schools having in-house clinics.[18] Thirteen responses came from schools lacking such clinics.[19] The fifty-seven schools reporting in-house clinics constitute 41% of all such clinical programs.[20] A sample representing 41% of the universe of respondents is a fairly reliable sample if it does not disproportionately

---

15. ABA data for 1987 indicates that the sample fairly reflects the proportion of schools having and lacking in-house clinical programs. In a memorandum to member schools, the Section of Legal Education and Admissions to the Bar displayed the results of question 43 of the ABA questionnaire for 1987, dealing with various types of skills courses offered by member institutions. Memorandum from ABA Section of Legal Education and Admissions to Deans of ABA-Approved Law Schools (April 6, 1987) (on file at the *New York Law School Law Review* office). One hundred and sixty-eight schools responded to that questionnaire. Those results indicate that 80% of member schools offered live-client, in-house clinics in 1987. From a total sample of 70 respondents, 80% would be 56 schools. Therefore, our return, which contained 57 schools having live-client, in-house clinics, is fairly representative.

16. *See* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION published yearly from 1974 to 1979 [hereinafter CLEPR SURVEY]. During this period, the percentage of in-house clinics rose gradually from 41% to 58%. On the other hand, the percentage of schools offering some clinical program, either in-house or externship, stayed relatively constant at 80%. It appears that 80% of schools currently offer in-house clinics while virtually all schools (at least 98% according to the ABA) offer some clinical opportunity. These data and all other references to the CLEPR survey were based on an analysis of the information contained in the CLEPR Surveys from 1974 through 1979.

17. *See supra* note 15.

18. *See supra* note 15.

19. Therefore, the total sample on which this report is based numbers seventy schools or 40% of the schools surveyed. Schools with in-house clinics reporting made up 33% of all schools questioned. Interestingly, a "goodness of fit" chi-square (*see infra* note 23 for a discussion of this technique) comparing all ABA reporting schools to schools having live-client, in-house clinics, demonstrates that there is no statistically significant pattern in terms of student body size or funding source which differentiates schools with or without such clinics. The chi-square is 1.037 which is insignificant (with five degrees of freedom) even at the 10% confidence level.

20. A 41% return on a questionnaire of this sort is quite high and we can have a fair level of confidence in the results obtained.

represent some segment of the total population.[21] In an effort to see whether this sample in fact represented all the schools surveyed, characteristics of that sample were matched against characteristics of all law schools having clinical programs.[22]

Figure 1 shows a comparison of the samples with the universe of all schools on the issues of size of the student body and their status as either public or private institutions. Schools are clustered into six categories: small/public and small/private (schools with less than 600 students), medium/public and medium/private (schools with 600 to 1000 students), and large/public and large/private (schools with more than 1000 students).

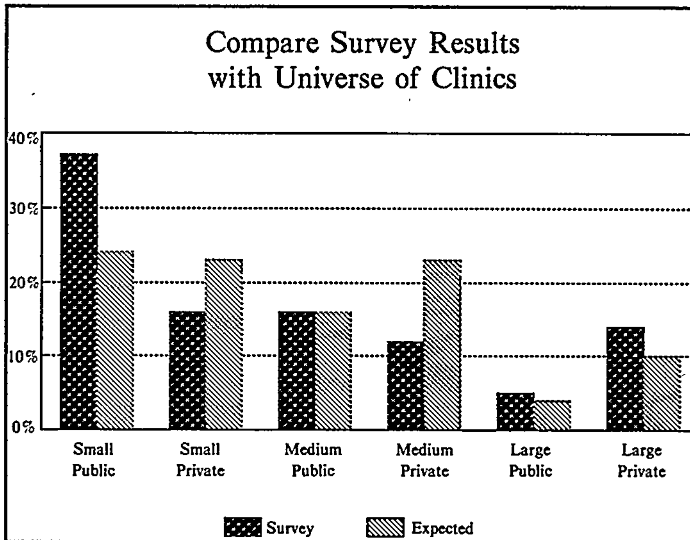

Figure 1

21. We were attempting through this questionnaire to get a *proportional stratified sample*, i.e., a sample which mirrored the characteristics of the universe of law schools with respect to size and funding distribution. Although we did not succeed entirely, the size of the sample obtained gives some confidence that the results are not likely to be too prone to error. For a discussion of sampling technique, see D. BARNES & J. CONLEY, STATISTICAL EVIDENCE IN LITIGATION 249 (1986).

22. Data on the size and funding base of law schools in general was obtained from a computer data base, LAWLINE (Arnold Library Systems 1987), which contains a compilation of information from law school catalogues nationwide. Only schools having live-client, in-house clinics are considered in this sample. Those schools were identified using the ABA data discussed *supra*, at note 15.

Twenty-four percent of all law schools are small and public by this definition, 23% are small and private, 16% are medium and public, 23% are medium and private, 4% are large and public, and 10% are large and private. Of the schools in the reporting sample which had in-house clinics, 37% were small and public, 16% were small and private, 16% were medium and public, 12% were medium and private, 5% were large and public, and 14% were large and private.

There are some evident disparities between the makeup of the sample and the universe of schools having live-client, in-house clinics. Small public schools are over-represented in the sample, while small and medium private schools are under-represented. These disparities, however, are statistically insignificant.[23] Nevertheless, in reviewing the data below,

---

23. The technique used to test this issue is a chi-square "goodness of fit" test. The proportions from each category actually reporting are compared to the proportions which would have been present if schools of all types had reported equally. If the difference between reporting patterns reaches a fixed level, it is presumed to be statistically significant, otherwise the difference is presumed to be insignificant. In this case, the test results in a chi-square of 9.589. This is regarded at the 95% confidence level as statistically insignificant. A normal chi-square test measures the likelihood that a frequency result is the product of chance. Essentially, it takes the results actually obtained and compares them to the probable results which would have been forthcoming if the result were a mere product of random reporting. For those interested in a relatively simple and occasionally humorous explanation of how such tests are done, see J. O'DELL, BASIC STATISTICS: AN INTRODUCTION TO PROBLEM SOLVING WITH YOUR PERSONAL COMPUTER (1984). The chi-square tables in this book are also the source of the confidence level minima discussed below.

Statisticians are unwilling to declare that a result is not random unless they are 95% certain that the result could not be the product of chance. This is referred to as the 95% confidence level. They are happier if they can be 99% certain that chance is not the explanation. To determine whether a particular chi-square result gives you the requisite 95% or 99% certainty, you compare your result with a published chi-square table. The number of categories involved in the data governs the entry on the table to which your result should be compared. These are referred to as degrees of freedom. A degree of freedom represents an independent piece of data which could not be calculated by knowing the other information available. *Id.* at 224-26.

"Goodness of fit" chi-squares differ from frequency testing chi-squares only in that the resultant data are not compared to random distributions, but rather with known proportions from some outside source. Otherwise, the method of computing chi-squares, degrees of freedom, and significance levels is as set forth here. Throughout this paper, statistical significance will be tested at the 99% and 95% confidence levels. At these levels, a chi-square of 9.589 with five degrees of freedom is below the threshold for significance. At the 90% confidence level, however, such a chi-square is significant.

we must constantly keep in mind that our sample is not a perfect mirror of all schools with live-client, in-house clinics.

B. *Current Clinic Status*

Section II of this Article discusses the current status of live-client, in-house clinics in comparison to that which prevailed as little as ten years ago. Only if we understand where clinics are now, can we appreciate their progress to date and the remaining problems which confront them. Part A of Section II reviews the pedagogical methods in use by clinics today and the basis of those methods in teaching theory. The study indicates that clinicians are using a wide variety of teaching techniques to convey their material. In fact, virtually all teaching techniques employed in law schools today are used by clinical faculty.[24] The study also shows that there is a fair degree of unanimity among clinicians as to the content of their courses. Ethics, lawyering skills, decision making, and substantive law are the common topics explored through clinical methodology.

Part B of Section II analyzes the learning activities of clinic students. On average, clinic students seem to work more hours for their clinic academic credit than is the norm for other classes. Part C reveals the size of clinic faculty. Funding for faculty is more stable than in the late 1970s, though there is still a substantial reliance on faculty that are not fully integrated into the law school. Part D describes the student/faculty ratio of clinics and their structure generally. This small ratio permits a high level of teaching supervision. Part E discusses demand for clinical experience among students. The survey found that demand is generally constant and that instances of increased demand outnumber those of decrease. Lastly, Part F of Section II describes support provided by law schools to the clinics they house. Most clinicians find this support adequate in all areas except the physical space allocated.

C. *Status of Clinicians*

Since the inception of clinical programs, warnings have been sounded as to their acceptance into the law school community.[25] Early in the history of clinical programs, clinical faculty were being treated differently from other law school faculty on issues such as job security, faculty governance, and pay. This condition has not changed.

---

24. Such a breadth of teaching methodologies is called for by CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS-AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [hereinafter GUIDELINES REPORT].

25. Frank, *supra* note 4, at 914-15.

When clinicians describe the major challenges facing their educational efforts, they uniformly rank the attitude of other faculty as their major difficulty. This doubt perceived on the part of other faculty translates into difficulty in retaining qualified clinicians and undermines the stability of clinical programs. Part A of Section III demonstrates that this view is widely held and uniformly distributed across the schools surveyed. Objective measures of clinician status tend to support this view in that they demonstrate that clinicians are frequently accorded a status less than that accorded other members of the faculty. Part B describes the status of clinicians and contrasts that status with their qualifications. Part C describes the workload of those clinicians.

The issue of disparity is not merely one of fairness. The strength, stability, and intellectual respectability of clinical programs are inhibited by the low status accorded their faculties. The ABA and the AALS have attempted to address this status disparity. Part D discusses Standard 405(e) of the ABA Standards for the Approval of Law Schools.[26] It is still too early to assess the overall effect of these standards, but Part E reviews the preliminary reaction of clinicians to them.

D. *Limits on Availability*

A live-client clinical experience taught by the faculty of a law school is available on average to only 30% of law students in the schools which offer such courses. Only one school requires such an experience prior to graduation.[27] In Section IV, Part A discusses the availability of clinical study. Part B contrasts clinic costs with those of other forms of legal education. In Part C, steps are proposed to target clinical resources and thus increase availability.

II. CURRENT STATUS OF CLINICS

Clinical curricula have remained fairly uniform since the rapid growth of clinics in the 1960s and 1970s.[28] As detailed below, the content of materials taught is the subject of general agreement, the methods of teaching have grown in sophistication, and faculty supervision of student

---

26. *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 405(e) (1988).

27. This finding represents the only decline in clinic strength noted in the survey. In a survey done for the National Legal Aid and Defender Association in 1969, Jewel Klein reported that in 1968 and 1969, five schools required clinical experience before graduation. J. KLEIN, LAW SCHOOL LEGAL AID PROGRAMS: A SURVEY 4-11 (1969).

28. Topics identified for clinical study are: professional responsibility, interviewing, counseling, fact gathering and investigation, negotiations, drafting and briefs, motion and pre-trial practice, trial practice, and appellate practice. *See* CLEPR SURVEY, *supra* note 16.

work has remained consistent and at a high level. Clinicians report that on average, clinical students work more hours per credit than do their nonclinical colleagues. Today, it is more common for faculty funding to come from law schools rather than from outside sources.

A. *Instructional Program*

All of the in-house clinics surveyed shared the characteristic of offering their students the experience of representing real clients.[29] In addition, Figure 2 indicates that 89% of clinical programs now include a classroom component.[30] For most clinics, the credit for this classwork is included in the overall credit given for the clinic, but in 24% of the clinical programs, separate class credit is given. Sixty-five percent of the clinics also use simulation as part of their teaching methodology.[31] In

---

29. That experience, which separates these clinics from other forms of legal education, can claim impressive epistemological antecedents. John Locke asserted that knowledge must arise through experience with the outside world. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 121-22 (A. Fraser ed. 1959) (1st ed. 1894). Jean Piaget observed that children require experience for their formation of logical and mathematical notions (his terminology for rule making or construct formation). J. PIAGET, PSYCHOLOGY AND EPISTEMOLOGY 70 (1971).

Jerome S. Bruner emphasizes that: "The cycle of learning begins, then, with particulars and immediately moves toward abstraction. It comes to a temporary goal when the abstraction can then be used in grasping new particulars in the deeper way that abstraction permits." J. BRUNER, ON KNOWING: ESSAYS FOR THE LEFT HAND 123 (1979). It is not surprising among modern psychological theorists that behaviorists such as B. F. Skinner believe that learning occurs through interaction with the environment. *See* B. SKINNER, BEYOND FREEDOM AND DIGNITY 16-22 (1971). It is interesting that cognitivists are coming to this conclusion as well. Students on all three sides of the current "artificial" intelligence debate seem to agree on the requirement of detailed, problem-specific knowledge gained from the real world environment. For the skeptics view of this position, see H. DREYFUS & S. DREYFUS, MIND OVER MACHINE 5 (1986); for the connectionists, see 2 PARALLEL DISTRIBUTED PROCESSING 545-46 (D. Rumelhart, J. McClelland & the PDP Research Group eds. 1986) (arguing that learning capacity stems from the ability of our brains to store and retrieve patterns of environmental stimuli rather than rules); and for the believers in rule-based systems, see J. HOLLAND, K. HOLYOAK, R. NISBETT & P. THAGARD, INDUCTION 9 (1986) (the authors claim a central role for context-specific information in triggering rule application). For a discussion of the role of clinical education outside the law school context as the means to order this external experience, see D. SCHON, EDUCATING THE REFLECTIVE PRACTITIONER (1987).

30. The GUIDELINES REPORT, *supra* note 24, requires such a component.

31. This simulation is used to teach discrete lawyering skills in a more structured way than fieldwork permits. For a discussion of the use of simulation in classroom teaching and the role which it fulfills, see C. ARGYSIS, REASONING, LEARNING AND ACTION (1983). The use of simulation in law schools can be traced back to moot court exercises, but finds its more modern expression first in R. KEETON, TRIAL TACTICS AND METHODS (1954). For a description of the use of simulation in the clinic class, see Menkel-Meadows, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering*

addition, 36% require writing from their students which is not case work related. This writing may include journals, moot exercises, and examinations.

As set forth in the introduction, lawyers identify fact gathering and advocacy as two major gaps in the traditional law school curricula. Clinics aim to close those gaps. Of the twenty-four schools that provided information on their priorities for clinical course content, nineteen, or

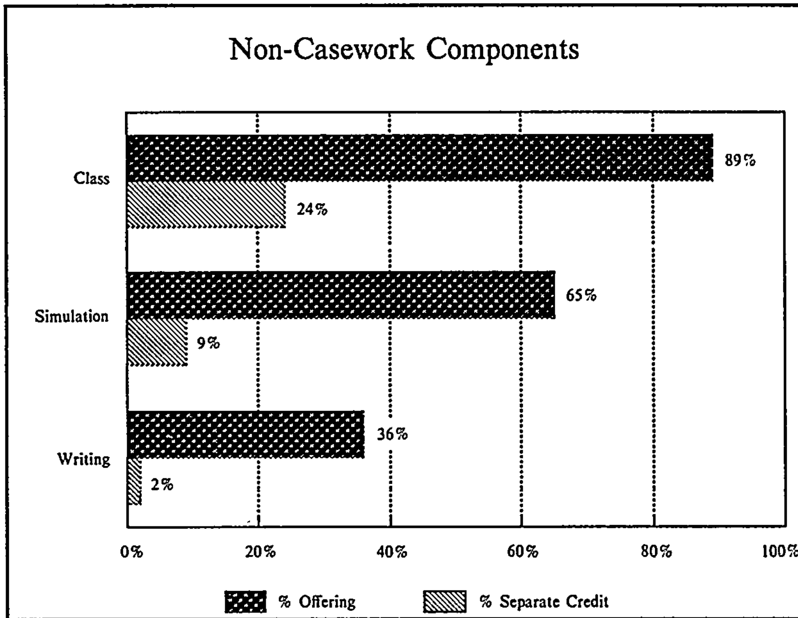

Figure 2

79%, rated the teaching of lawyering skills among their top priorities. Typically, these skills include interviewing, counseling, negotiation,

---

Education, 4 ANTIOCH L. REV. 287, 291-94 (1986).

discovery, drafting, and trial work.[32] Therefore, skills teaching addresses both needs which practitioners have identified as lacking in the law school curriculum.

The next priority, the development of analytical skills, was mentioned by fourteen schools, or 58%. The objective is to sharpen the students' critical and decision-making faculties as they apply to lawyering work beyond appellate case analysis. Many clinicians see this as their prime contribution to their students because the development of these skills equips students to continue their learning after leaving law school.[33]

Clinicians next seek to teach professional responsibility and an ethic of client and community responsibility. Fifty-four percent of the clinics stress the professional role, and an equal percentage seek to inculcate a sense of relationship between lawyers and their clients. This emphasis on the professional capacity is not surprising for two reasons, one historical and the other endemic to the clinical model. The chief support, both financial and intellectual, for the modern clinical movement came from the Council on Legal Education for Professional Responsibility (CLEPR) in the early 1970s.[34] CLEPR, which gave significant funding to clinics in that period, had the express goal of the teaching of ethics and a commitment to community service.[35] Clinical education also necessarily raises these issues. When students begin to represent real clients, the meaning of professional norms becomes concrete and the issue of professional role inescapable.[36]

---

32. These topics, with the exception of explicit emphasis on drafting, were identified in G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978) as issues for clinical instruction. Other books on specific skill areas are now in wide use in clinical programs. For a representative sample, see R. BASTRESS & J. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); P. BERGMAN, TRIAL ADVOCACY IN A NUTSHELL (2d ed. 1989); D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1983); D. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (1989); R. HAYDOCK & D. HERR, DISCOVERY PRACTICE (1982); T. MAUET, FUNDAMENTALS OF PRETRIAL TECHNIQUES (1988); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (1988); T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (2d ed. 1987).

33. *See* Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973) [hereinafter CLINICAL EDUCATION].

34. For CLEPR's history, see Marden, *CLEPR: Origins and Program*, in CLINICAL EDUCATION, *supra* note 33, at 3.

35. *See id.*; Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION, *supra* note 33, at 27; Seymour, *CLEPR from the Viewpoint of the Practicing Bar*, in CLINICAL EDUCATION, *supra* note 33, at 12; Toll, *CLEPR from the Viewpoint of Legal Aid and Legal Services*, in CLINICAL EDUCATION, *supra* note 33, at 17.

36. *See* Bellow, *supra* note 33, at 380-86.

Only two schools mentioned the teaching of substantive law as a priority, although all clinics experience the need to teach the law in the areas of their practice.[37] Only one mentioned law office management as an important content issue, although again, virtually all clinics teach such management issues as a necessary component of running their programs.[38]

B. *Relationship of Student Work to Credit Received*

Clinical students, from evidence in this survey, work one more hour per credit than do other law students. Class work is in addition to the work required for the clients whom the students represent. Survey respondents were asked to estimate the number of hours students devoted to case work and to provide the hours devoted to classes, simulations, and other written work. The average of these combined times was 212.08 hours per semester.

As you can see from Figure 3, the average credit for a clinic is 3.72 credit hours plus an average of 2.17 additional hours for those programs which give separate class credit. When the average time required per credit hour per week is computed, we discover that, with no time allocated for class preparation, the average clinic student must work 3.88 hours per week for each clinic credit hour.[39] If we were to assume that for those clinics with class components, students spent one hour in preparation for each hour in class, then the average time spent per week for each credit hour would rise to 4.60 hours.[40] Finally, if we were to assume, as most of legal education does, that students spend two and one-half hours in preparation for each classroom hour, the average hours per week per clinic credit would jump to 4.91.[41]

---

37. Teaching subject matter is required for malpractice prevention if nothing else.

38. Clinics which require multi-person access to client files are an ideal setting in which to teach the basics of file management. Conflict prevention systems, paperwork flow controls, client trust accounting, and all other basic law office management devices are as critical to clinic program function as they are to any firm.

39. The standard deviation is 1.46 so that approximately 68% of clinic students may be presumed to work between 2.42 and 5.34 hours per week per credit hour. This rule of thumb assumes that credit hours per week are *normally* distributed. In fact, they are not. However, the distribution is close. For a discussion of this issue see J. O'DELL, *supra* note 23, at 122-25.

40. The standard deviation for these figures is 1.69, so 68% of clinic students under this assumption probably work between 2.91 and 6.29 hours per credit hour per week.

41. The basis for the estimate of 2.5 hours per class hour in preparation time stems from a time log study conducted by R. M. Pipkin in 1975-1976. He asked nearly 1200 law students at seven schools to keep a log of their activities at 15-minute intervals. Compilation of those logs produced the 2.5 hour figure. *See* Pipkin, *Legal Education: The Consumers' Perspective*, 1976 AM. B. FOUND. RES. J. 1161. The standard deviation is 1.83, so we may assume that 68% of clinic students work between 3.08 and 6.74 hours per week for each

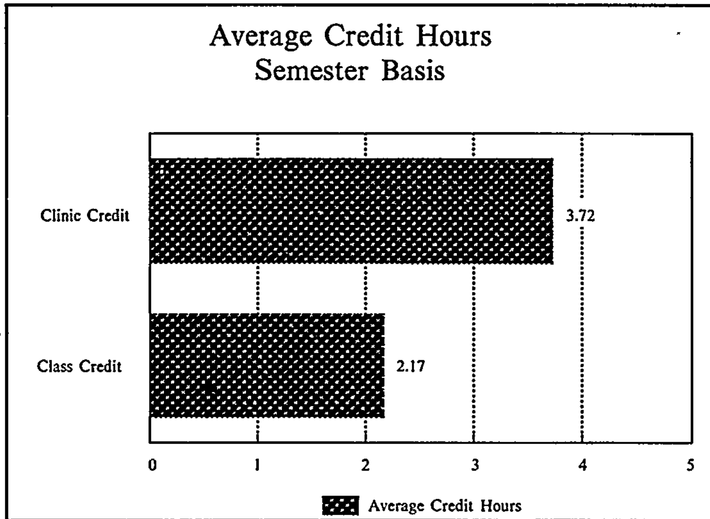

Figure 3

Based upon these calculations, it is possible to conclude that the average clinic student spends approximately one hour more per week per credit than his nonclinic colleague. Three and one-half hours per credit for the nonclinic student (one hour of class plus two and one-half hours of preparation), compared with 4.91 hours per clinic student (case work time plus class time plus two and one-half hours of preparation for class). As indicated in Figure 4, a count of the schools requiring more than four hours per credit hour per week reveals that 67% of the clinics surveyed exceed that requirement.

---

clinic credit hour.

Averages, however, can be misleading. It is possible that some clinic students are working disproportionately hard for each credit while others are having an easier time. To examine this possibility I will use a technique called linear regression analysis. Under this technique, I match an independent variable, such as hours of work, against credit, a variable which I assume for purposes of this calculation to be dependent. This is done in order to determine if rises and falls in hours produces equivalent rises and falls in credit. For a description of the mathematics involved, see D. BARNES & J. CONLEY, *supra* note 21, at 403; J. O'DELL, *supra* note 23, at 173.

The key number in analyzing a regression is R^2. This number tells us whether the relation between hours of work and credit is truly linear. An R^2 of 1 would indicate a perfect relationship, every time hours rose, credit would rise commensurately. An R^2 of 0 would indicate no relationship at all; movements in hours have no predictable effect on credit. The R^2 in this case is .5925 or approximately .6. This indicates some clear relationship between hours and credits, but warns us that this relationship is not perfect. Students work harder at some schools per credit than they do at others.

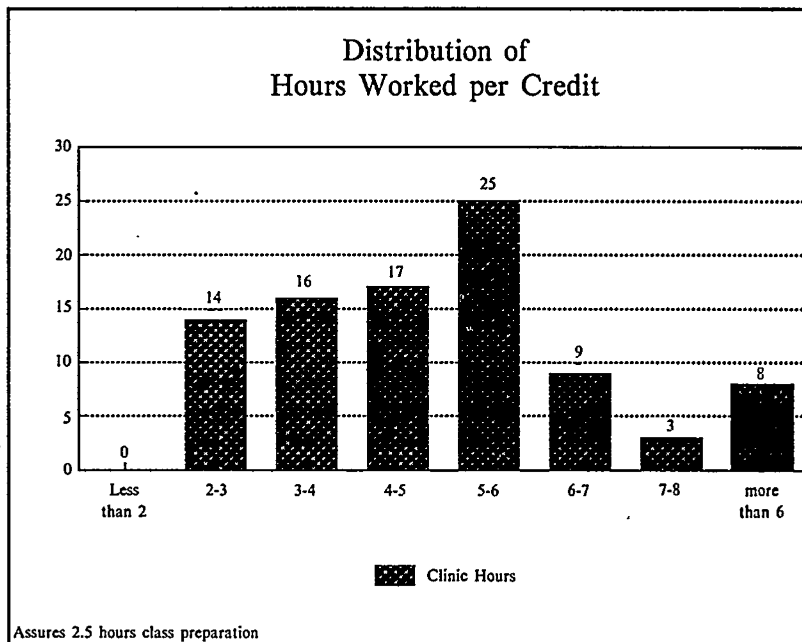

Figure 4

C. *Faculty Size*

Figure 5 displays the average clinical faculty by size of school. Figure 6 shows the funding sources for these faculty. Figure 7 shows a merging of these two sets of data. From Figure 7 we can see that the average overall clinical faculty size is 4.36 teachers with 3.66 of those teachers paid from law school funds and 0.7 paid by external grants. Small schools average 3.43 faculty members. Medium schools average 5.8 faculty, but are much more dependent on external grants which fund almost 25% of their teachers. Large schools average 5.13 faculty members. Both small and large schools fund less than 15% of their clinical faculty with external grants. With respect to all except the medium-sized schools, this predominance of law school funded positions is an improvement over the pattern which prevailed from 1975 through 1980. During that period, 77.5% to 85.9% of clinic costs were paid with law school funds, leaving the remainder to be paid by outside sources.[42]

42. CLEPR SURVEY, *supra* note 16. The comparison is not exact. The CLEPR figures cover all clinic costs, while survey data is for salaries only. As salaries, however, are the major component of clinic budgets, the comparison is likely to be meaningful. Further evidence for this proposition is found in the 208% increase in law school clinic expenditures

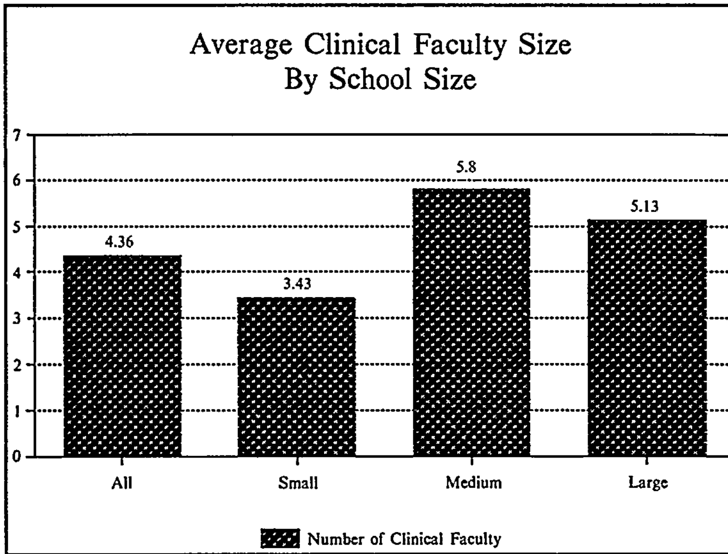

Figure 5

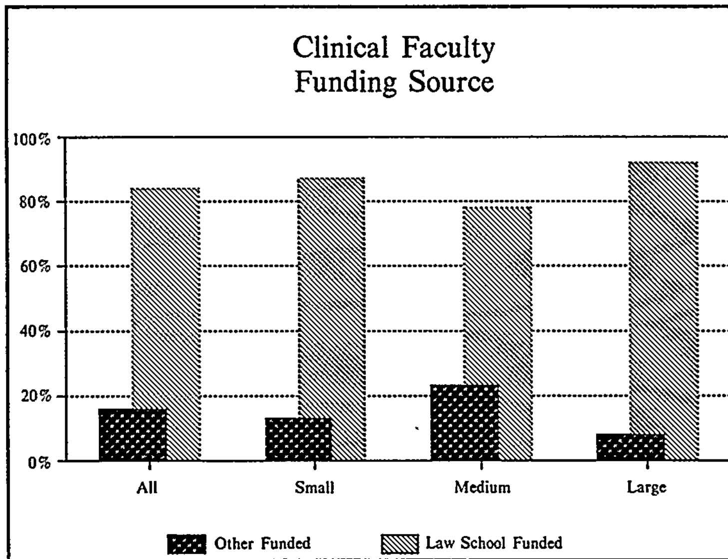

Figure 6

experienced between 1977-1978 and 1987-1988. *See* Kramer, *Who Will Pay the Piper or Leave the Check on the Table for the Other Guy?*, 39 J. LEGAL EDUC. 655, 660 (1989).

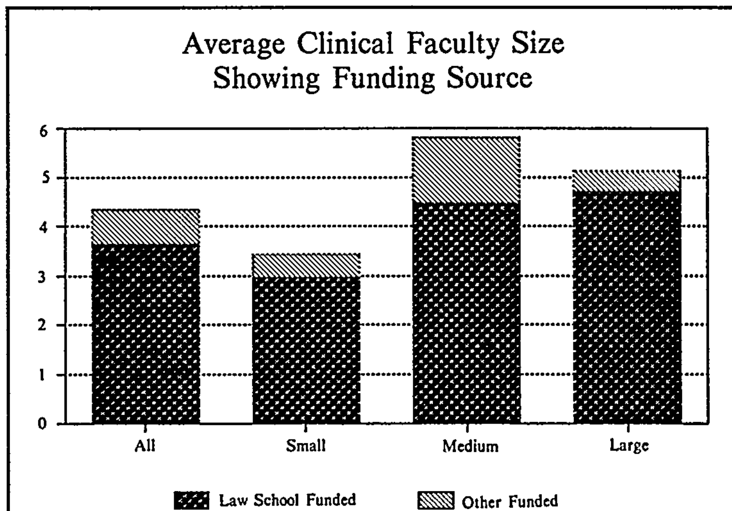

Figure 7

D. *Faculty Workloads*

Figures 8 and 9 record information about teacher/student ratios. From Figure 8 we can see that 54% of the clinics have a teacher/student ratio between 1:8 and 1:10. The probable average ratio for all reporting schools is 1:8.41.[43] As Figure 9 demonstrates, schools differ by size on this issue, with small schools still exhibiting high numbers of students per faculty member. This difference, however, is not statistically significant.[44] This student/faculty ratio has apparently held constant for more than ten years. In 1980, the report on the *Guidelines for Clinical Legal Education* described a typical student/faculty ratio of 8:1 to 10:1.[45] As we shall see below,[46] however, other law school courses have experienced declines in their student/faculty ratios so that they now more closely approximate clinics.

43. Probable average is used because respondents were not asked for their exact ratio, but were asked to choose the one that most nearly defined their situation. Since groupings jumped, i.e., 1:2, 1:4, 1:6, etc., exact averages cannot be computed.

44. *See* Figure 9. The chi-square for this size distribution is 1.33. This is below the 5.99 required at the 95% confidence level with two degrees of freedom. Public and private schools also do not vary significantly on this issue. The chi-square for that distribution is 3.55, which is below the 3.84 required at the 95% confidence level with one degree of freedom.

45. *See* GUIDELINES REPORT, *supra* note 24.

46. *See infra* notes 99-101 and accompanying text.

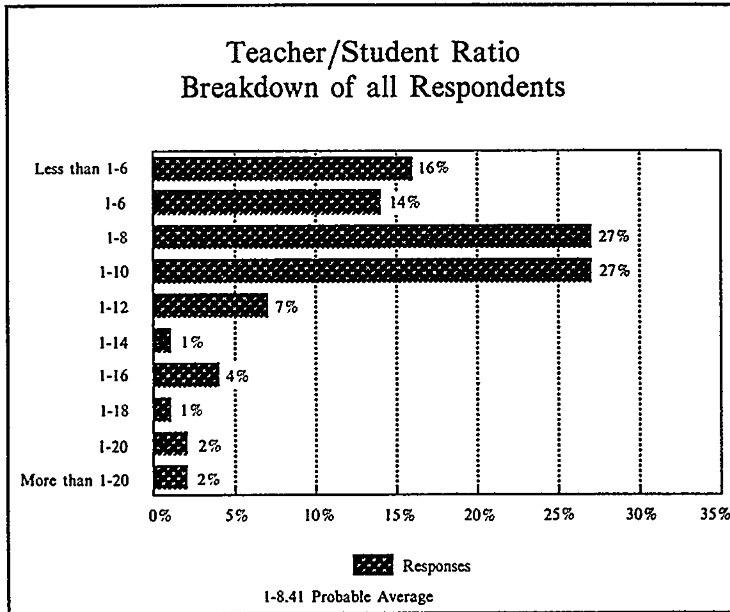

Figure 8

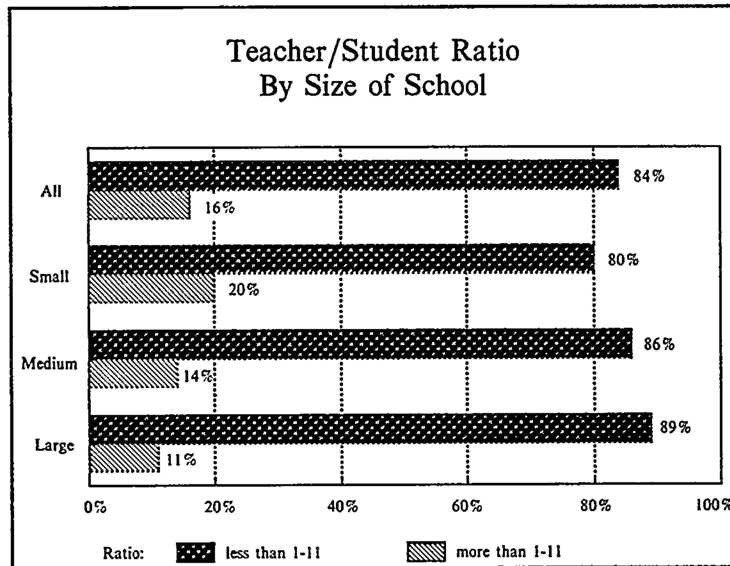

Figure 9

Figure 10, which charts the number of students per clinic, shows that the average clinic accommodates 24.2 students. Eighty of the responding clinics[47] are offered on a part-year, i.e., semester or quarterly basis, and forty-eight are offered on a yearly basis, as demonstrated in Figure 11.

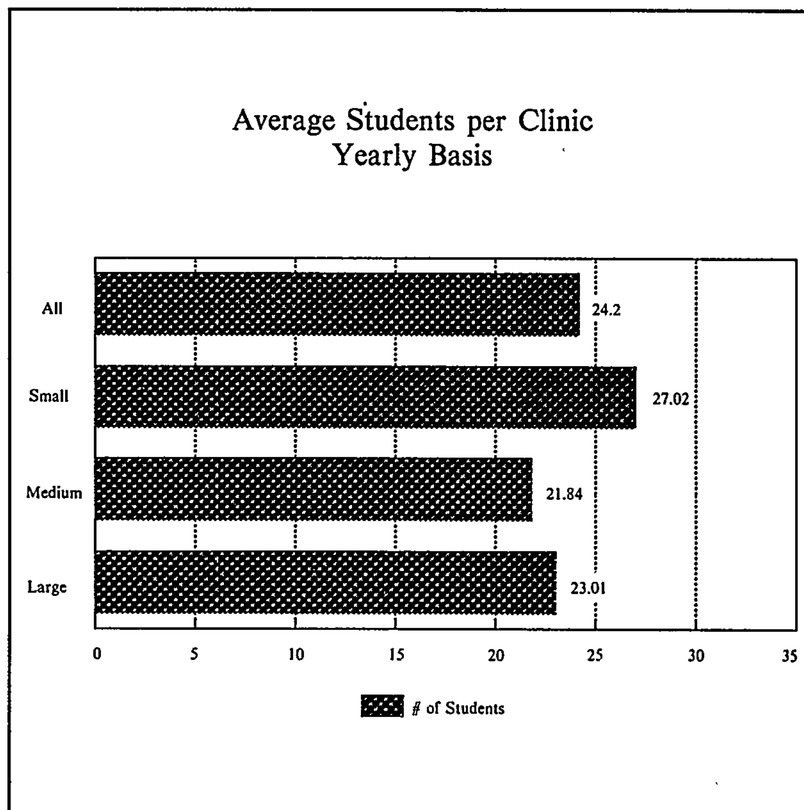

Figure 10

47. Many respondents to the questionnaire had more than one clinic, hence the number of clinics higher than 57.

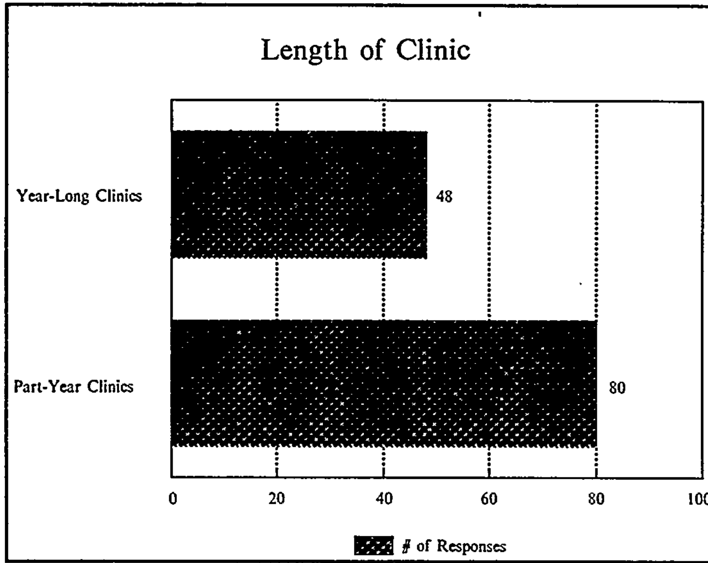

Figure 11

E. *Demand*

Demand for clinics appears, on the basis of this survey data displayed in Figure 12, to be climbing or at least remaining stable. This finding is consistent with other earlier studies.[48] All of the studies reflect that law students and practitioners want greater coverage of fact gathering, interpersonal, or more "practical" skills from their legal educations.[49]

---

48. *See, e.g.,* F. ZEMANS & V. ROSENBLUM, *supra* note 7 (survey of Chicago practitioners); Baird, *A Survey of the Relevance of Legal Training to Law School Graduates,* 29 J. LEGAL EDUC. 264 (1978) (summarizing findings from lawyers in surveys conducted by the Illinois Bar in 1968, Harvard alumni in 1969, Stanford alumni in 1972, Wisconsin alumni in 1954, 1959, 1964, 1969, and 1972, Toledo alumni in 1972, the California Bar in 1973, the Michigan class of 1969, and the Kentucky Bar in 1974); Pipkin, *supra* note 41, at 1176 (reporting empirical survey results from law students in the class of 1975); Stevens, *Law Schools on Law Students,* 59 VA. L. REV. 551, 595 (1973) (survey of law graduates from the classes of 1960 and 1970).

49. For a summary of these findings, see LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 41-55 (1980) [hereinafter PROFESSIONAL EDUCATION].

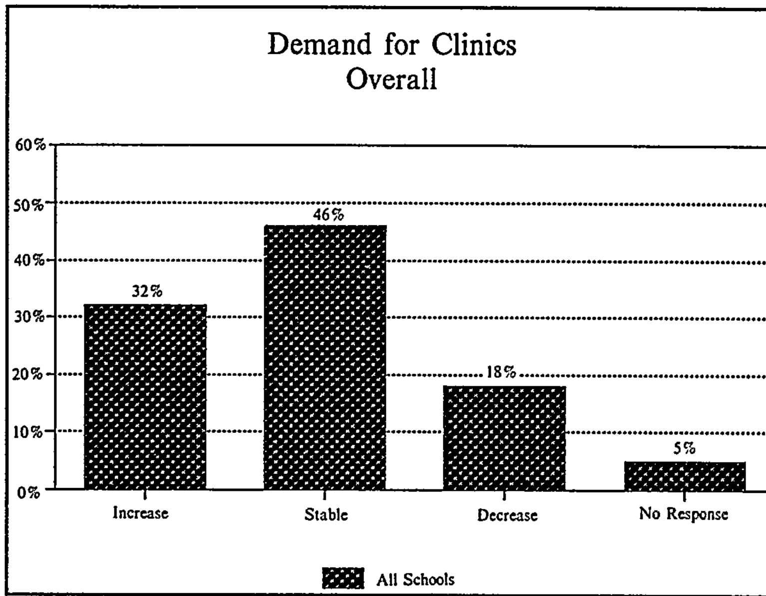

Figure 12

These consistent findings support the conclusion that interest in clinical material was not merely a product of the social activism of the late 1960s and early 1970s.[50] The conclusion of this current survey is unlikely to be the product of random chance.[51] In an attempt to determine whether the difference in demand experienced at different schools is associated with any characteristic shared by the schools reporting, comparisons were done using a variety of different characteristics. Two phenomena are associated with demand characteristics. First, the number of clinics which a school offers is related to such a difference. Single clinic schools show stable demand, two clinic schools run a greater risk of demand decrease, and schools with more than two clinics show a greater likelihood of demand increase. Second, private schools are also associated with demand increase, while public schools are more likely to exhibit stable demand. All other associations examined were not

50. *See generally* Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971) (discussion of the psychological aspects of conflict between student activist law students and law faculty).

51. A chi-square analysis of this data shows a result of 7.11. With two degrees of freedom, that result indicates that the result was not the product of random chance at the 95% confidence level (the threshold at that confidence level is 5.99). Therefore, I believe it is safe to conclude that the pattern displayed here is meaningful.

statistically significant, although some exhibit intriguing patterns.

1. By Size of School

Demand levels at schools of various sizes were compared. As explained in Section I, Part A, schools were grouped as small (less than 600 students), medium (600-1000 students), and large (more than 1000 students).[52] The results of this breakdown are displayed in Figure 13. Although there are differences between the behavior of the various samples, these differences are below the levels required to show an association.[53]

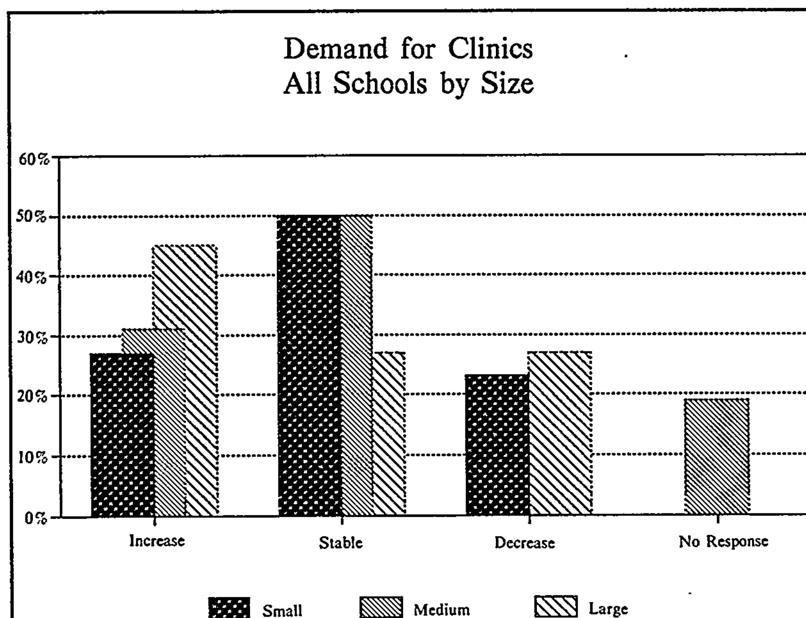

Figure 13

52. *See supra* p. 243.

53. The multi-variant chi-square value for this table is 5.73. With four degrees of freedom, the chi-square value would need to be 9.49 to show an association at the 95% confidence level. Therefore, the differences might be the product of random chance.

2. Public or Private Schools

As Figure 14 demonstrates, the association between demand level and the public or private character of the institution was examined.[54]

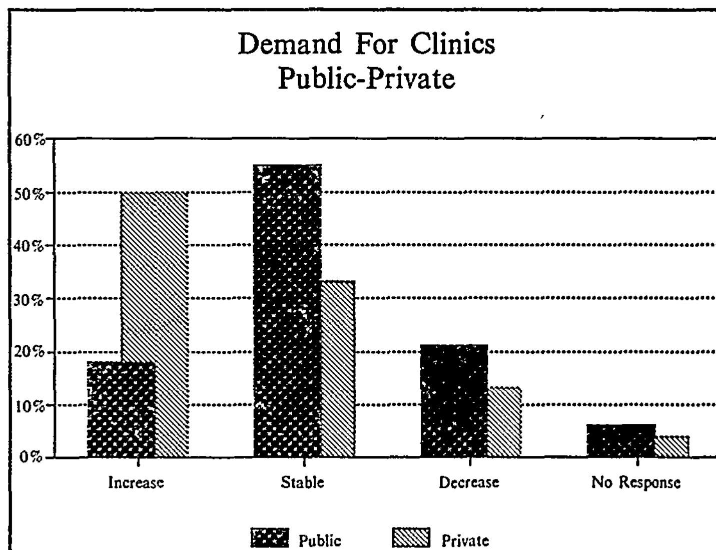

Figure 14

There are differences which appear significant to the eye and show a statistical association. Two points should be kept in mind, however, when interpreting these data. First, as noted above, responses to the survey came disproportionately from public schools. Therefore, the sample size of private institutions was small. In addition, the data in this chart came solely from schools which currently have live-client clinics. The data from schools without live-client clinics came disproportionately from small private institutions.[55] These schools did not provide us with information as to demand for clinics. It is possible that if such data were available, the apparent difference between public and private institutions would be affected. Even with these caveats, it is clear that current data show a

54. Using a multi-variant chi-square test, the value rendered is 6.40, which is above the value required to rule out chance distribution at the 95% confidence level (5.99). With two degrees of freedom the 95% confidence level chi-square would be 5.99 and the 99% level would be 9.21.

55. Of schools reporting a lack of live-client, in-house clinics, 67% were small and 58% were private.

significant difference between public and private institutions, with increased demand characterizing the private schools, and stable demand the public schools.

3. By Enrollment

Demand and the percentage of students for whom a clinical experience was available was another association examined. All schools were asked to report on the percentage of their student body who could be enrolled given the capacity limits of their clinic.[56] Schools were then grouped by those which could accommodate less than 20% of their student body, those serving between 20% to 35% of their students, and those offering a clinical opportunity to more than 35% of students. In Figure 15, these data were compared with the statistics on demand to determine whether demand fell off as capacity rose or fell. Although differences appear on the graph, these differences are not statistically significant.[57]

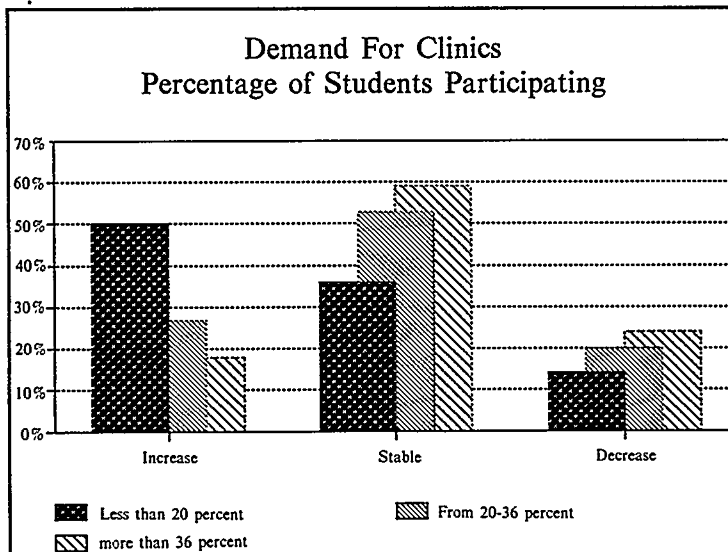

Figure 15

56. *See infra* pp. 280-86.

57. The chi-square value for this data is 4.95. At four degrees of freedom, that value should be 9.49 to be significant at the 95% confidence level or 13.28 at the 99% confidence level.

4. By Number of Clinics

A comparison was made based on the number of clinics offered by the school. Typically, schools offering one clinic have a general civil practice caseload.[58] Schools offering two clinics most frequently offer a civil and a criminal clinic.[59] Schools offering more than two clinics almost uniformly offer a clinic in some specialized subject matter area in addition to one or more general practice offerings. In Figure 16, these groups of clinics are compared as to their experience with demand. The apparent difference in this survey is also statistically real. One-clinic schools report a much higher proportion of stable demand than do schools in either of the other classes. Two-clinic schools show a much greater likelihood of a decline in demand (only in this group comparison does the number of schools reporting decline equal the number reporting stability). Finally, schools with more than two clinics report the highest proportion of an increase in demand.[60]

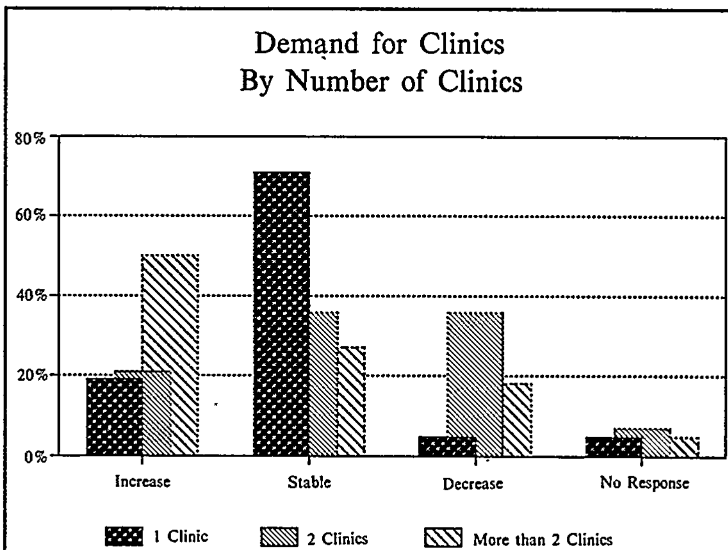

Figure 16

58. There are exceptions such as schools which offer a prison or tax practice clinic only. The vast bulk of single clinics, however, are general civil practice.

59. Again, there are some exceptions such as schools which have a general civil clinic and a more specialized clinic in a specific civil practice area.

60. The chi-square test for these frequencies indicates that these differences are significant at the 99% confidence level. The chi-square result is 13.45. At four degrees of freedom, 9.49 would have been significant at the 95% confidence level while 13.28 is the threshold at the 99% level.

There is a difference between statistical association and cause and effect. The fact that two phenomena are statistically related obviously does not mean that one caused the other. It may be that a totally independent third factor caused or influenced both.

5. By Size of Location

Finally, I compared the frequency of demand levels with the size of the metropolitan area in which the school was located. When these data on demand first became available, several clinicians put forward the "medium-sized city" hypothesis. Under this theory, schools located in medium-sized cities are in competition with paying jobs as a means for students to obtain real world experience. Small cities and rural areas are presumed not to offer many clerkships and large cities have firms less dependent on part-time student assistance. Figure 17 shows the distribution for different demand categories over cities of varying sizes.[61] The "medium-sized city" hypothesis seems to have some support because there are more medium-sized city schools reporting declining demand than schools located in either large or small areas. When subjected to tests for statistical significance, however, no pattern which could not be explained by random chance emerges.[62] Furthermore, although five schools reporting a decrease in demand are located in medium-sized cities, six schools in the same sized cities show an increase in demand, and seven show stability. Therefore, we cannot say that medium-sized cities show peculiar demand problems.

Thus, except for the associations with number of clinics and private versus public schools, demand for clinic courses seems to be as prone to idiosyncratic factors as is the demand for any other courses. Teacher reputation, competing course offerings, recommendations of faculty, and norms of the institution are as likely to explain demand patterns as are any of the other factors studied here.

---

61. For these purposes, cities are grouped as follows: areas with fewer than 100,000 inhabitants are small; areas with between 100,000 and 500,000 inhabitants are medium; and areas with more than 500,000 inhabitants are large. The source of the population data is from BUREAU OF THE CENSUS, CITY AND COUNTY DATA BOOK (1983) which is based on 1980 census data. Where a small town was within a greater metropolitan area, the larger area was used to determine its status.

62. The chi-square for the multi-variant analysis is only 2.75, well below 9.49 at the 95% confidence level or 13.28 at the 99% confidence level for a problem with four degrees of freedom such as this. Even a single variant chi-square test to compare the difference in readings between only schools showing a decline in demand, shows only a value of two which is below the 5.99 required at 95% confidence or 9.21 needed at 99% confidence (there are two degrees of freedom in the latter test).

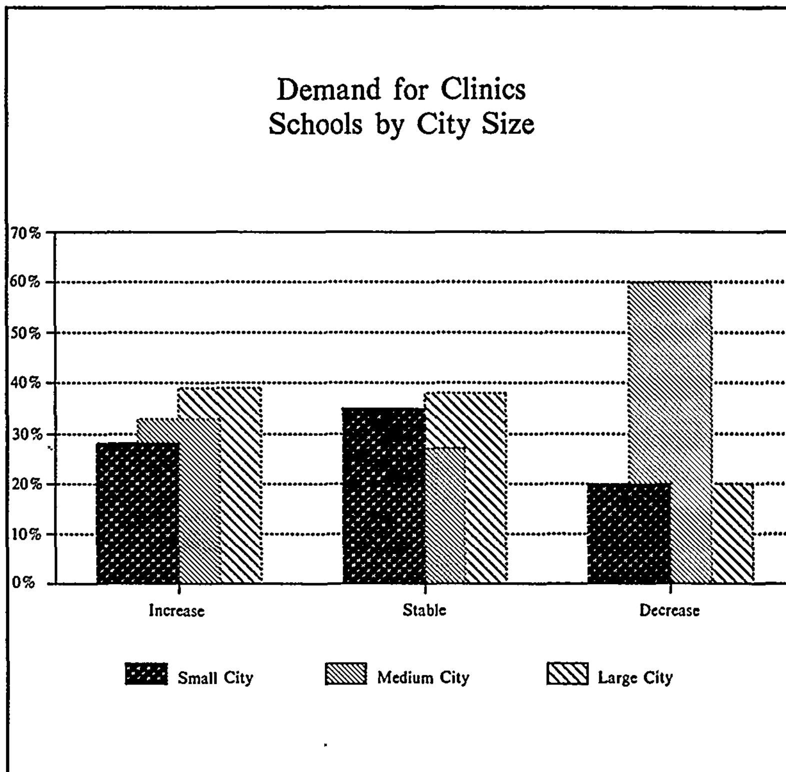

Figure 17

F. *Infrastructure*

Figure 18 charts the reactions of clinicians to the law office, teaching and research support which they receive from their schools. Space was the only issue on which a majority of clinicians rated such support unsatisfactory. Clinicians believe that they need more space or space more appropriate for clinical purposes. Only in the area of litigation funds did the number of clinicians unhappy with their support exceed those who found that support ample.

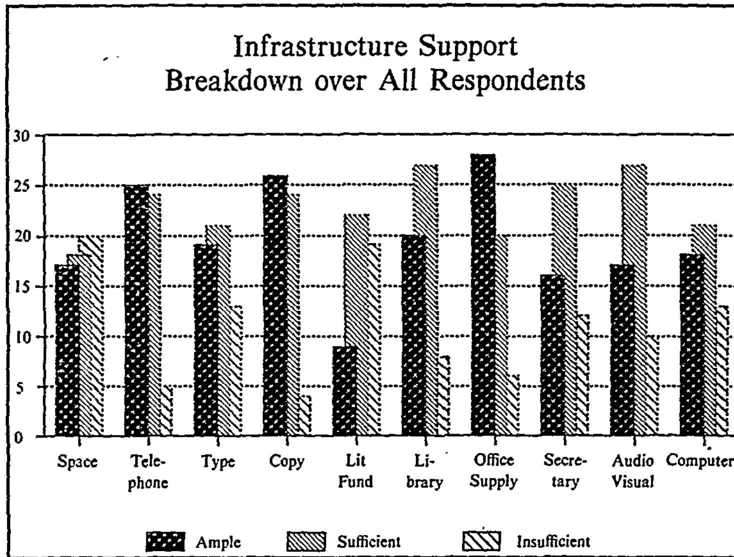

Figure 18

III. FACULTY STATUS

In 1933, Jerome Frank saw the attitude of conventional faculty as a potential impediment to the adoption of a clinical curriculum.[63] He was concerned that faculty without a solid grounding in practice would perceive the demand for teaching additional lawyering skills beyond appellate case analysis as a threat. This concern is not surprising given Langdell's express rejection of practitioner expertise as a basis for law teaching competence.[64] A concern about faculty attitudes still exists, although not to the degree implied by the title to Meltsner and Schrag's early article, *Report From a CLEPR Colony*.[65]

---

63. Frank, *supra* note 4, at 909, 914-15.

64. "What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in trial or argument of cases, not experience, in short, in using the law, but experience in learning law." R. STEVENS, *supra* note 3, at 38 (citing J. SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 37 (1978)).

65. Meltsner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976) (describing their adoption and subsequent revisions of the clinical legal program at Columbia University School of Law).

A. *Clinicians' Perceptions*

The first set of substantive questions in the survey dealt with the challenges facing in-house clinics.[66] Six possible areas of challenge were identified and the respondents were told to check as many as were applicable to them. Thus, there are more responses (126), than schools reporting (57).

Figure 19 sets forth the most frequent responses. The top two responses were lack of money and lack of faculty support.[67] Following were lack of stable money and lack of student support. Lack of administrative support was not seen as a major problem.

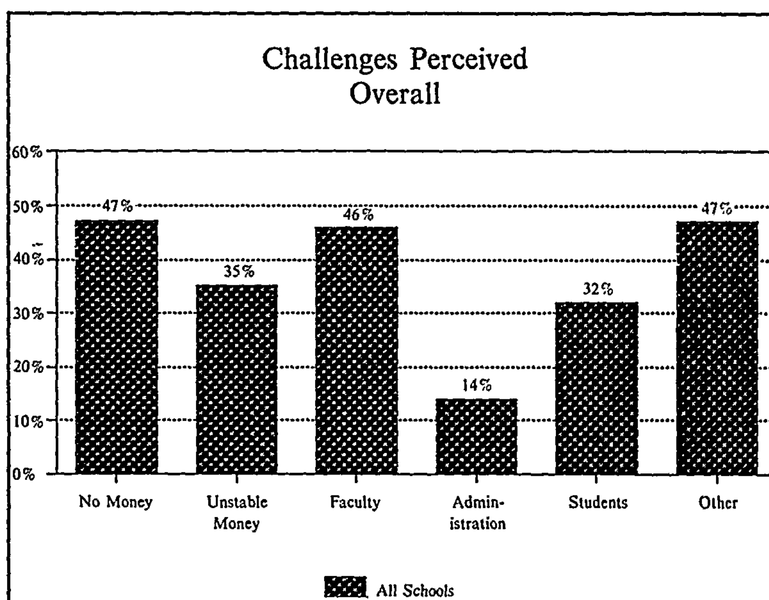

Figure 19

66. No useful data was obtained on this issue from schools lacking in-house clinics. While a few schools responded, most of the schools in this category ceased answering the questionnaire at the point that they reported that they had no in-house clinics.

67. The "other" category concerning problems with other faculty and with status also received a high number of responses.

It appears safe to conclude that the reporting pattern is not random.[68] Schools with in-house clinics do see money, faculty, and "other" problems with faculty and status as their major challenges. Figure 20 lays out the challenges making up the "other" category. Problems with other faculty and time demands imposed by seeking improved status far outweigh any other problem reported here. Schools do not vary significantly by either size or funding source on this issue.[69]

The nature of the challenges presented by this faculty attitude are numerous. Some clinicians ascribe to this attitude the lack of student support for clinics.[70] Also, lack of tenured status makes retaining qualified clinicians more difficult. Finally, the attitude of other faculty translates into diminished clinician participation in law school governance.

68. The chi-square result for this data on challenges is 13.14. In this particular test there are five degrees of freedom. Therefore, at the 95% confidence level a minimum chi-square of 11.07 would be required to convince a statistician that the result here was not random. The reading does not, however, meet the 99% confidence level. For five degrees of freedom, the minimum chi-square at this level would have to be 15.09.

69. It seems useful to attempt to determine whether these reports vary with the size of the school. As discussed in Part A of Section I, small schools are defined as those having student bodies of less than 600 members, medium schools had between 600 and 1000 students, and large schools had more than 1000 students. Did small schools see problems differently from large ones? Statistically, the answer appears to be no. The chi-square for this data is 3.09. At ten degrees of freedom this is well below the minimum reading at the 95% confidence level of 18.31. Therefore, although the data does show some fluctuations among groups, these differences are likely to be the result of chance rather than any real difference associated with school size.

Similarly, when responses are differentiated between public and private schools, the differences in the data do not rise to the level of significance. Private schools are more likely to view unstable money and "other" problems as their greatest problems, while public schools are most challenged by the absence of money. Both types of schools rate lack of faculty support high on their list of challenges. Is this apparent pattern statistically significant? The chi-square result here is 3.19; well below the minimum required even at the 95% confidence level. With five degrees of freedom, the minima are 11.07 at the 95% level and 15.09 at the 99% level. Thus, although there are differences in the responses of public and private schools, these differences can be explained by chance and cannot be viewed as statistically significant.

70. Thirty percent of clinicians at schools experiencing no decline in student demand nevertheless believed that the attitude of other faculty served to discourage student participation.

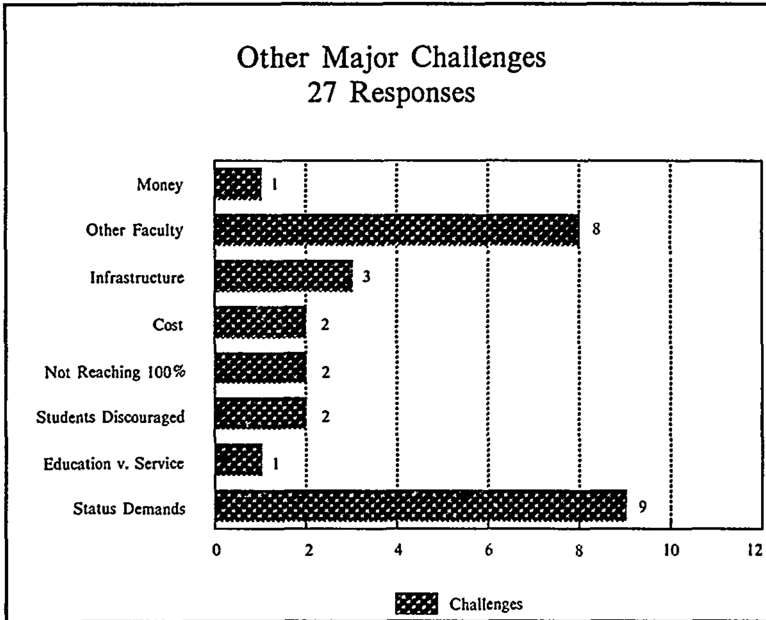

Figure 20

Clinicians believe they are excluded from full participation in their schools. Figure 21 shows that all tenured faculty and 22% of non-tenured but law school funded faculty view themselves as having full faculty status. Other clinicians do not see themselves as falling into that category.[71] This lack of governance participation denies clinical programs the stability which would accompany a wholehearted commitment to clinicians as full faculty members.

71. "Full faculty status" was not defined in the survey because I felt that it might mean different things at different schools. Therefore, this is a measure of clinicians' own sense of involvement in their institutions, rather than of any particular attributes.

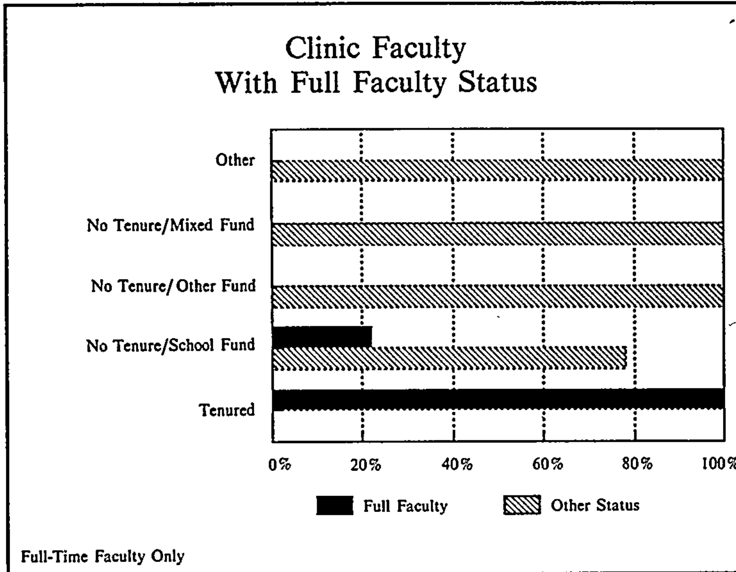

Figure 21

B. *Qualifications*

It does not appear that the attitude of other faculty can be grounded rationally in the current hiring criteria, promotional standards, or experience levels of their clinical faculty.[72] Figure 22 shows the hiring criteria employed by all schools responding to relevant questions in the survey. The majority of respondents require that their clinicians either meet the same criteria as the rest of their faculty, or meet those criteria

---

72. It may be that standards have changed on these issues in response to Standard 405(e). *See infra* notes 74-80 and accompanying text. It may also be that schools which have not yet come to grips with these issues (a large proportion of the schools sampled), have not done so because they misdoubt the quality of their current faculty. A comparison of experience levels, qualifications, and salary levels would be extremely useful here.

and have additional practice experience. At least twenty-seven of the thirty-two responding schools which have established hiring standards require at least the same standards for their clinicians as they demand for their other faculty. A few schools also require previous clinical teaching experience. The remainder of the schools report that their hiring criteria are under review.

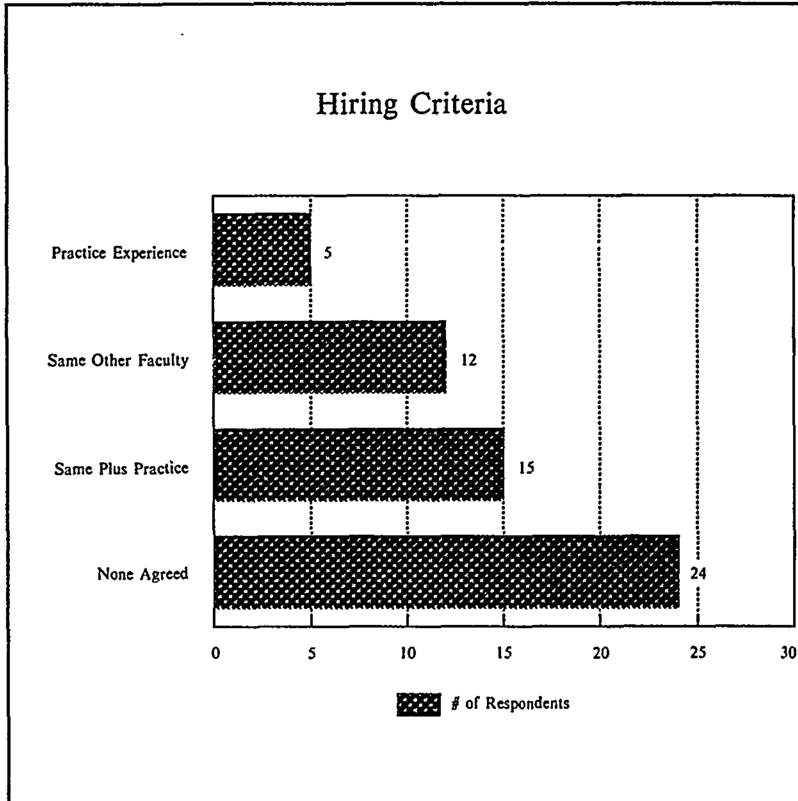

Figure 22

Promotion standards are set forth in Figure 23. The majority of the responding schools (17) indicate that their promotion criteria for clinicians are the same as those for other faculty. Thirteen schools report that standards do not exist or were under development. Sixteen schools report standards which made some adjustment for clinical workloads. The most common adjustment was some alteration in the publication requirement.

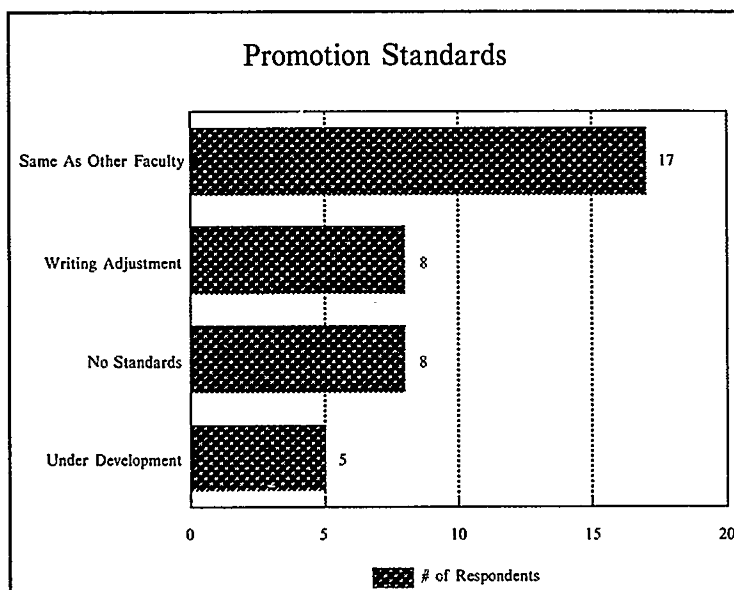

Figure 23

Figure 24 displays the average experience in legal education of the clinicians reported on in this survey. In comparing these data to experience levels of nonclinicians, it is important to note that the ABA collects data based upon graduation from law school, while the data used in this survey was based upon the commencement of law teaching. Since most clinicians have some practice experience between graduation and teaching, five years of experience has a different meaning in the two surveys.

Two points are interesting. First, it is evident that tenure is the major force in retaining experienced teachers. Tenured faculty average eleven years experience as opposed to five years for non-tenured but law school funded faculty. Secondly, it is clear that non-law school funded positions do not retain people as well as positions which have at least some law school funding.

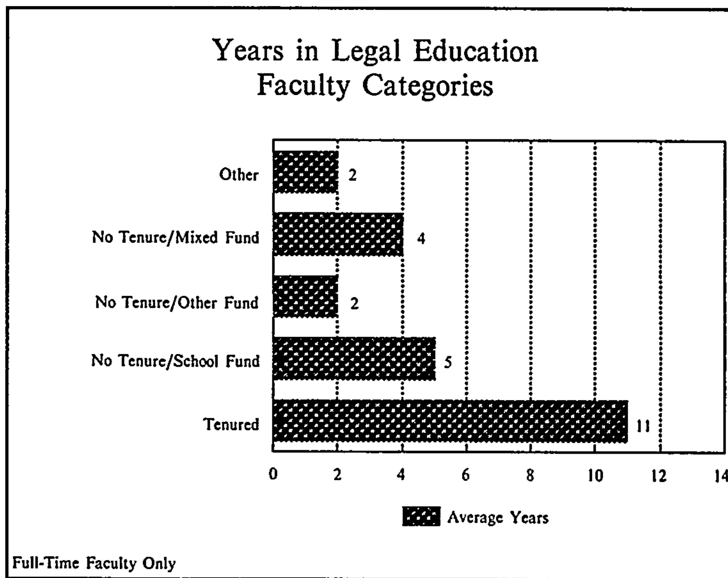

Figure 24

There are two major categories into which the schools surveyed fall with respect to the qualifications of their clinical faculty. The first category is comprised of schools that have set the same or higher standards for their clinicians as for other faculty members and the second category consists of schools that have not made up their minds.

C. *Workload*

Clinician teaching loads remain high in comparison to those of other faculty. The push toward integration of clinicians fostered by Standard 405(e) will almost certainly mean that time will be taken away from clinical teaching to make room for scholarly activities. The average number of months per year teaching in the clinic remain high in comparison with other law school faculty. Figure 25 shows that even tenured clinical faculty average ten months of teaching rather than the nine expected of other faculty. Non-tenured clinic teachers are expected to teach even more, averaging about eleven months per year.

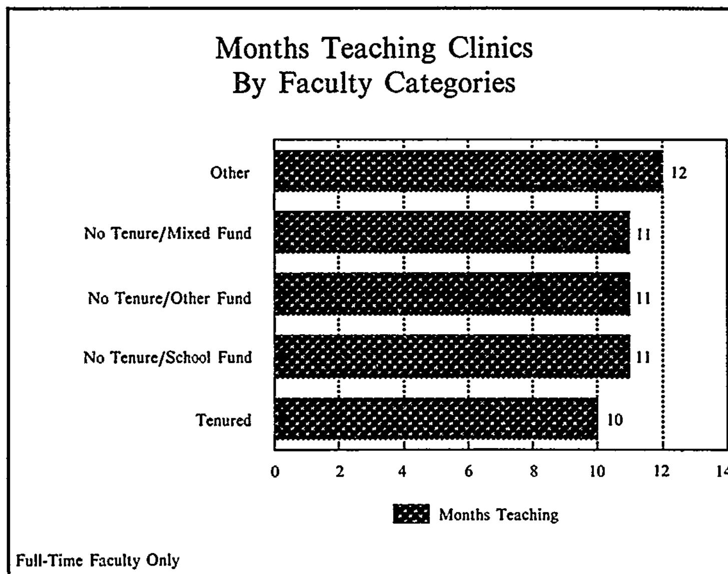

Figure 25

During those months of teaching, clinicians spend varying amounts of time actually teaching in the clinic. Figure 26 shows that non-tenured faculty funded by external grants spend 93% of their teaching time in the clinic, and only 7% in nonclinical courses. Non-tenured faculty whose salaries are paid by the law school average 89% of their teaching time in the clinic. Tenured faculty on the other hand, spend only 64% of their time on clinic teaching and devote 36% of their time to other courses.[73] It appears therefore, that the adjustments that the schools surveyed have made in the workload of clinicians have come at the expense of clinical teaching time.

Using the data on student workloads,[74] it is possible to conclude that the average clinician with a group of average students ultimately will be responsible for fifty-two client cases in addition to his or her other duties of classroom teaching.

73. This tendency for tenured or tenure-track clinicians to spend significant time outside the clinic appears to be one of long standing. The CLEPR SURVEY, *supra* note 16, at Table 6 found the same condition in existence between 1974 and 1979. The average for such faculty was then 54% of time spent teaching in clinics.

74. The average number of open cases for all clinic students in the survey was 6.18. Criminal clinics averaged 11.95 open cases, while civil clinics averaged 5.51.

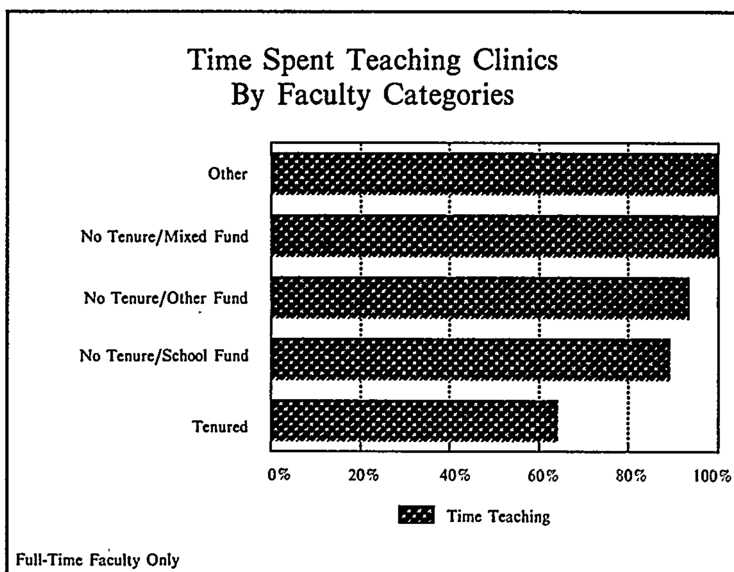

Figure 26

D. *Effect of Standard 405(e)*

The pattern which emerges from the data in Parts A through C above is disturbing.[75] A majority of clinicians surveyed rate the attitude of other faculty toward their work as the major challenge posed by their job. They do not consider themselves as having full faculty status within their institutions. Both hiring and promotion criteria for significant numbers of these clinicians are either unclear or are the focus of dispute within their institutions. Schools have difficulty retaining skilled clinicians under these circumstances.

In response to these conditions, in 1984 the ABA House of Delegates amended its Standards for Approval of Law Schools to add Standard 405(e) which provides:

> The law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time

75. It is, however, not new. *See* CLEPR SURVEY, *supra* note 16, in which the disparity of clinicians' status from that of other law school teachers is continually noted.

> perquisites reasonably similar to those provided other full-time faculty members by Standards 401, 402(b), 403 and 405. The law school should require these faculty members to meet standards and obligations reasonably similar to those required of full-time faculty members by Standards 401, 402(b), 403 and 405.[76]

The results of this survey tell us some things about the progress made by schools in conforming to Standard 405(e).[77]

---

76. *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 405(e) (1988). Standard 401 requires law school faculty members to possess a high degree of competence. Standard 402(b) defines a full-time faculty member as someone who devotes substantially all of his or her working time to teaching and legal scholarship. Standard 403 places on full-time faculty members the major burden of teaching and responsibility for participation in the law school's governance. Standard 405 requires law schools to establish and maintain conditions adequate to attract and retain a competent faculty. These conditions include sufficient compensation, reasonable opportunity for leaves of absence, reasonable secretarial and clerical assistance, establishment of academic policies, and security of position. *Id.*

77. This standard has been subject to three interpretations since it was promulgated. Interpretation 1 of Standard 405(e) provides that:

> A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track, a full-time faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure as a faculty member in a professional skills program. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the professional skills program.
>
> A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a professional skills program may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. During the initial long term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the professional skills program. *Id.*

Interpretation 2 of the standard states that:

> In determining if the members of the full-time faculty of a professional skills program meet standards and obligations reasonably similar to those provided for other full-time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of faculty members in the professional skills program. Each school should develop criteria for retention, promotion and security of employment of full-time faculty members in its professional skills program. *Id.*

Interpretation 3 of the standard makes clear that it "does not preclude a limited number of fixed, short-term appointments in a professional skills program predominantly staffed by full-time faculty members within the meaning of this Standard, or in an experimental program of limited duration." *Id.*

E. *Clinicians' View of the Effect of Standard 405(e)*

The survey polled respondents on the effect of Standard 405(e) at their schools and their estimate of the future effect of that standard. Clear patterns emerge from the responses which are unlikely to be the product of chance.[78] Slightly less than half of the clinicians surveyed report that Standard 405(e) is presently having an effect at their school. Those clinicians reporting an effect state that the effect of Standard 405(e) was largely to increase clinicians' security, or at least alert other faculty to this issue.

In the schools reporting no present effect, 30% of the clinicians were already protected by some type of long-term employment agreement while in 40% of these schools, Standard 405(e) had no effect because it was being disregarded. Thus, in terms of present effect, a majority of clinicians (in excess of 60%) report either no need for increased protection or some progress toward long-term security. Furthermore, clinicians see more good news ahead, predicting that most schools will move toward implementation of the standards. Figure 27 shows that those schools presently experiencing an effect from the rule are helped more frequently by that effect rather than injured by it. Those schools projecting a future effect also expect that effect to be primarily beneficial.

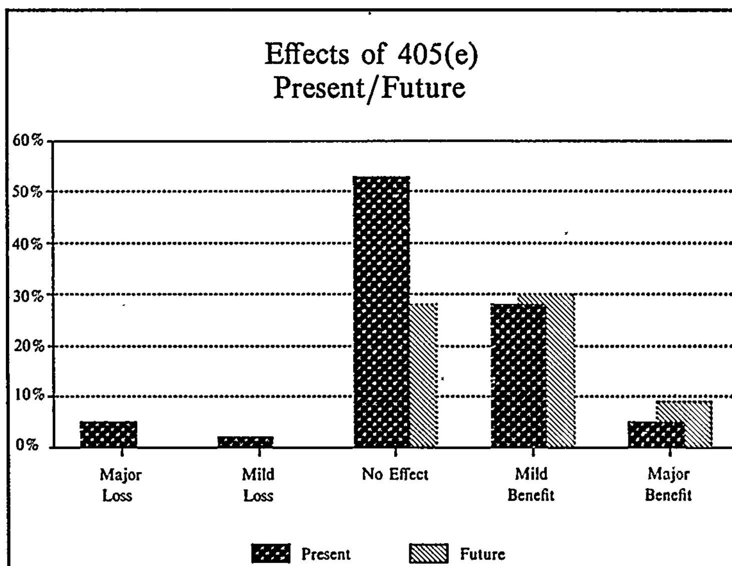

Figure 27

78. The chi-square for the present effect of Standard 405(e) is 55.44; far beyond the 99% confidence level at four degrees of freedom of 13.28. The chi-square for the future effect is 37. This is also above the minimum required of 13.28.

These patterns of present and future effects are not statistically different from each other.[79] Although the differences are not statistically significant, one feature is interesting. Even among those schools reporting a present adverse effect (generally forced competition of current clinicians for newly-created protected positions), no school projected a serious adverse effect of the standard in the future.

Examination of Figure 28 throws some interesting light on the breakdown of schools which report no present effect. Slightly over 30% of such schools claim there is no effect at present because their clinical faculty is already protected in some way. Approximately 40% indicate that a present effect is not evident because Standard 405(e) is not a factor at their school or is being disregarded by their faculty. The range of effects is set forth in Figure 29.

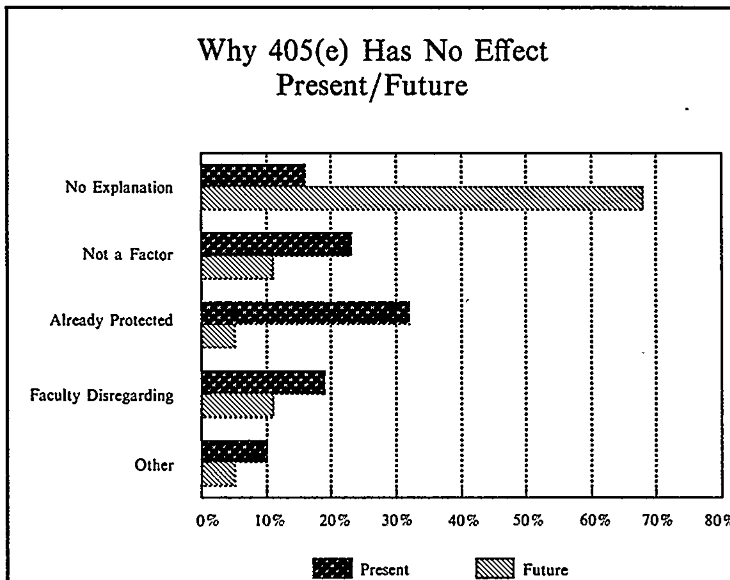

Figure 28

79. The multi-variant chi-square for this table is 5.79. With four degrees of freedom, the 95% confidence level minimum is 9.49. Therefore, the apparent difference between present and future assessment is likely to be the product of chance.

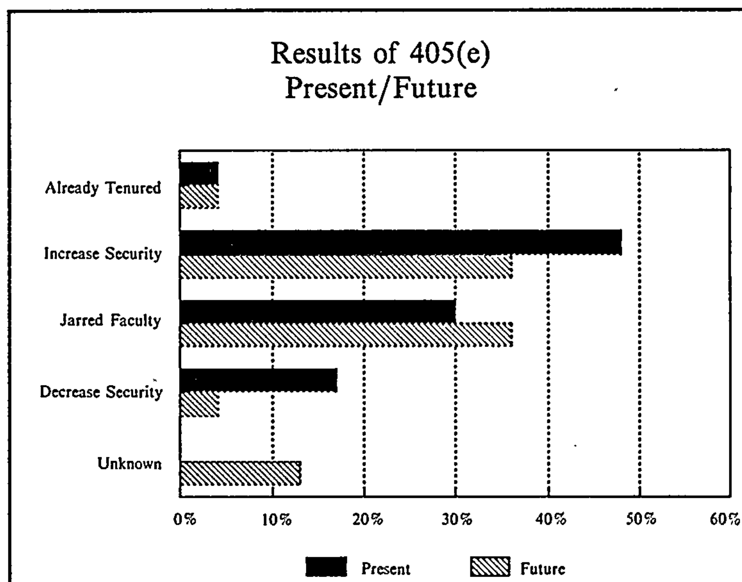

Figure 29

Seeking associations between school size and present effects of Standard 405(e), we conclude that a statistically significant relationship does exist.[80] Figure 30 shows the present response to the rule by school size. Many more small schools do not report a present effect. Medium-sized schools show high benefits from the rule, but also report the highest number of detrimental reactions. Large schools demonstrate the broadest range of responses, although many of them cluster under no effect.

80. The chi-square for this table is 19.55. With eight degrees of freedom, the minimum level at the 95% confidence level is 15.51 and at the 99% confidence level the reading is 20.09.

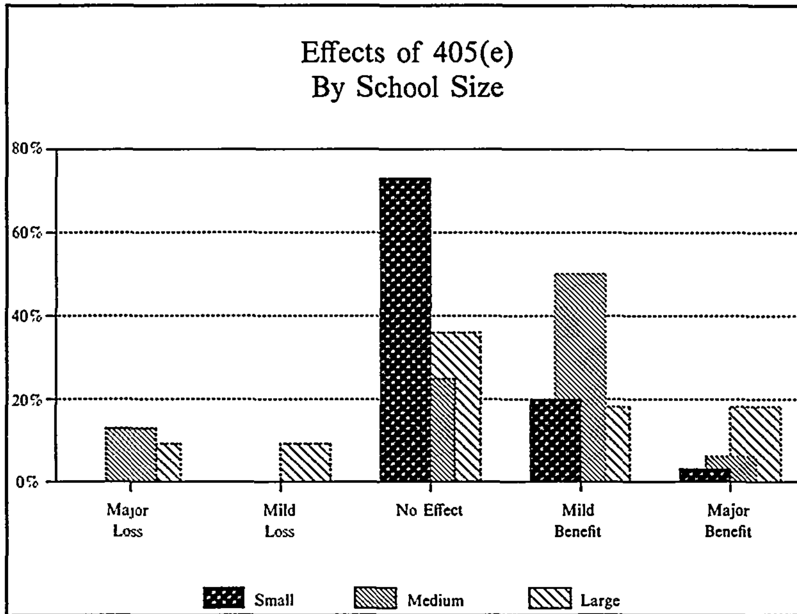

Figure 30

Public and private schools, on the other hand, do not demonstrate a statistical difference in result.[81] Figure 31 shows that more public schools report no present effect, while private schools show a more beneficial result. However, this could be the product of random chance. On the other hand, a statistically significant difference in *future* projection based on school size or funding source does not exist.[82]

81. The chi-square value is 5.51, which is below the level required at the 95% confidence level.

82. The chi-square for the distribution on school size is 2.91, well below that required for significance. With eight degrees of freedom, the chi-square would have to be 15.51 to reach the 95% confidence level threshold. Private schools do not differ significantly from public schools in their estimates of future effect. The chi-square is .75. At four degrees of freedom it would need to be 9.49 to demonstrate relationship at the 95% confidence level. Public schools are more likely to predict a beneficial effect, while private schools are marginally more likely to project no effect. The differences, however, are not significant.

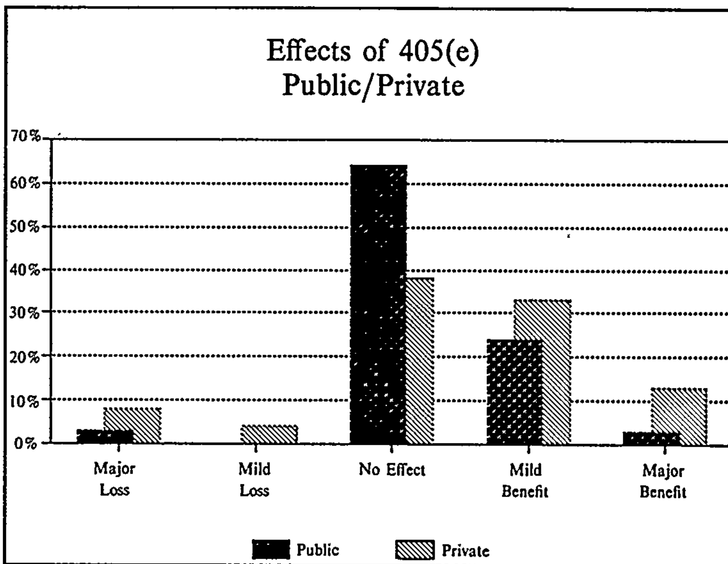

Figure 31

Clinicians in this survey see Standard 405(e) as providing a measure of long-term status, which they view as beneficial to them. Even though many clinicians currently are not experiencing this effect, they are optimistic about the future under Standard 405(e). Only one clinician in the survey saw the trade-off of clinic teaching time as being an unacceptable price to pay for this status improvement.

IV. LIMITS ON CLINICAL OPPORTUNITIES

Cost has always been cited as the reason for limited availability of clinical opportunities. While the components of clinic costs have remained fairly constant as measured by the survey, the costs of other forms of law school education seem to have increased, so that the disparity is not as marked as it once was. Even with the cost disparity, clinical education offers pedagogical advantages which justify its expansion. Also, other changes in law school curriculum might make some reduction in the disparity of cost possible.

A. *Current Capacity*

As Figure 32 demonstrates, clinical space is limited at most schools. Of the fifty-five schools which responded to the question, twenty (36%) reported that there was room for less than 20% of their student body in the clinic; nineteen (35%) reported that up to 40% of their students could be accommodated in the clinic; and fifteen (27%) reported that they could

offer a clinical experience to up to 100% of their students. Two schools offer all students some type of clinical experience.[83] On average, clinics can accommodate approximately 30% of the student body of their institutions.

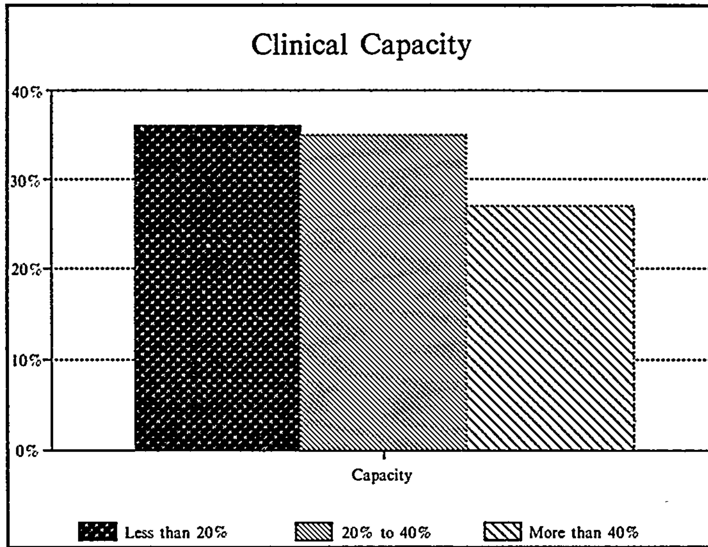

Figure 32

B. *Cost Inhibitions*

The inhibition of live-client, in-house clinic growth has always been seen as a result of cost, particularly the cost of maintaining high student/faculty ratios required to operate a clinic. Funding is certainly identified by clinicians as a continuing problem.[84]

There is some indication that the relative cost disparity between live-client, in-house clinics and other forms of legal education has diminished significantly in the last decade. In the 1970s, Frank K. Walwer and Peter deL Swords conducted a major study of cost issues in legal education.[85]

83. One additional school reported that 100% of its students were eligible for clinics, but the context of the answer leads me to conclude that it could not in fact accommodate 100%.

84. *See supra* pp. 266-67 & Figure 19.

85. The original study, funded by CLEPR, was published in 1974. P. DEL SWORDS & F. WALWER, THE COSTS AND RESOURCES OF LEGAL EDUCATION: A STUDY IN THE MANAGEMENT OF EDUCATIONAL RESOURCES (1974). Peter deL Swords also reported on the findings of that study for clinical education in deL Swords, *Including Clinical Education in the Law School Budget*, in CLINICAL EDUCATION, *supra* note 33, at 309.

Portions of that study were annexed to the *Guidelines for Clinical Legal Education* published by the ABA.[86] In that study, Walwer and deL Swords identified three phenomena which affect relative costs of clinics: the growth of other small class offerings by law schools,[87] the decline in student/faculty ratios,[88] and the low salaries of clinicians.[89] Substantial changes have occurred in two of these three areas since the report was issued.

There has been a precipitous rise in other types of teacher intensive instruction in law schools within the last decade and a half. Walwer and deL Swords note that any type of teacher intensive instruction is more costly than the large class format and approaches the live-client clinic in cost.[90] Figure 33 shows data on class size over this time period. The average class size for 1974-1975 and 1984-1986 are taken from a survey conducted by William B. Powers for the ABA's Office of the Consultant on Legal Education.[91] Powers found a drop in average class size from 41.45 to 31.65 between the periods surveyed.[92] Table 1 compares the Gee/Jackson and Powers surveys.[93]

---

86. Walwer and deL Swords acted as consultants to the AALS-ABA Committee on Guidelines for Clinical Legal Education and updated some of their data in 1977. Their report was published in GUIDELINES REPORT, *supra* note 24, at 133.

87. *Id.* at 177.

88. *Id.* at 144, 146.

89. *Id.* at 136-37.

90. *Id.* at 173-75.

91. *See* W. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA (1987). This study in turn built on a survey conducted in 1975, the results of which were published in two monographs: E. GEE & D. JACKSON, BREAD AND BUTTER? ELECTIVES IN AMERICAN LEGAL EDUCATION (1975); E. GEE & D. JACKSON, FOLLOWING THE LEADER: THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975). The Gee/Jackson survey was funded by CLEPR and the results were published by that organization. This survey included returns on the question of class size from 68 of the then 157 ABA-approved law schools. The Powers survey included returns from 164 of the 175 law schools approved by the ABA in 1986.

92. The Powers survey found that:

> [t]he most striking feature of [the data] . . . is the sharp decrease in average class size over the past ten years. The average class size for all categories combined has decreased from 41.45 students to 31.65 students: a 23.6% drop. The average class size of twenty-six of the thirty-three categories decreased from 1974-75 to 1984-86. Moreover, only one category showed an average class size of over fifty students in 1984-86: Evidence and Proof of Fact.

See W. POWERS, *supra* note 91, at 67.

93. *Id.* at 66.

Table 1

CATEGORY	1984-86	1974-75	%Change
Evidence & Proof of Fact	56.47	87.63	-35.6
Remedies	49.23	61.81	-20.4
State Law, Practices & Procedures	46.01	76.71	-40.0
Commercial Law, Debtor-Creditor	45.80	68.52	-33.2
Basic Property Concepts, Real Estate & Fin.	45.18	50.67	-10.8
Family Law	44.29	57.39	-22.8
Estates, Trusts & Future Interests	43.08	66.07	-34.8
Business & Finance	41.88	56.40	-25.7
Federal Practice & Procedure	36.36	51.41	-29.3
Legal Profession, Ethics & Legal Education	36.09	53.72	-32.8
Civil Justice, Jurisdiction & Procedure	36.08	65.24	-44.7
Administrative & Constitutional Law	33.08	44.47	-25.6
Taxation	32.62	54.48	-40.1
Criminal Justice: Law, Process & Procedure	32.36	47.98	-32.6
Land Resources Policy & Planning	31.89	36.34	-12.2
Torts & Compensation for Injuries	31.63	40.59	-22.1
Patent, Copyright & Trademark	30.60	27.17	12.6
Miscellaneous	26.74	27.28	-2.0
Regulation of Business & Industry	26.56	45.99	-42.2
Labor-Management Relations	26.15	37.63	-30.5
State & Local Government Law	25.71	22.04	16.6
Contractual Obligations	24.65	21.64	13.9
Admiralty	24.51	30.16	-18.7
Juvenile Law & Process	24.20	23.51	2.9
Legislation & Legislative Process	24.06	26.17	-8.1
Interdisciplinary & Allied Skills	24.00	28.23	-15.0
International, Foreign & Comparative	23.96	22.43	6.8
Discrimination & the Law	23.55	19.71	19.5
Legal Theory, Philosophy & History	23.50	22.59	4.0
Natural Resources & the Environment	22.87	26.71	-14.4
Law and Social Issues	20.85	23.84	-12.5
Professional Skills, Training & Functions	20.16	23.61	-14.6
Applied Legal Education (externships & etc.)	10.44	19.66	-46.9
Average Class Size for all Categories	31.65	41.45	-23.6

A review of current course offerings sheds some light on these data. It reveals that all schools offer trial advocacy.[94] Excluding trial advocacy, basic legal writing, and moot court (which are offered by virtually all schools), schools offer an average of 3.66 other simulation courses (e.g.,interviewing, counseling, negotiation, etc.).[95]

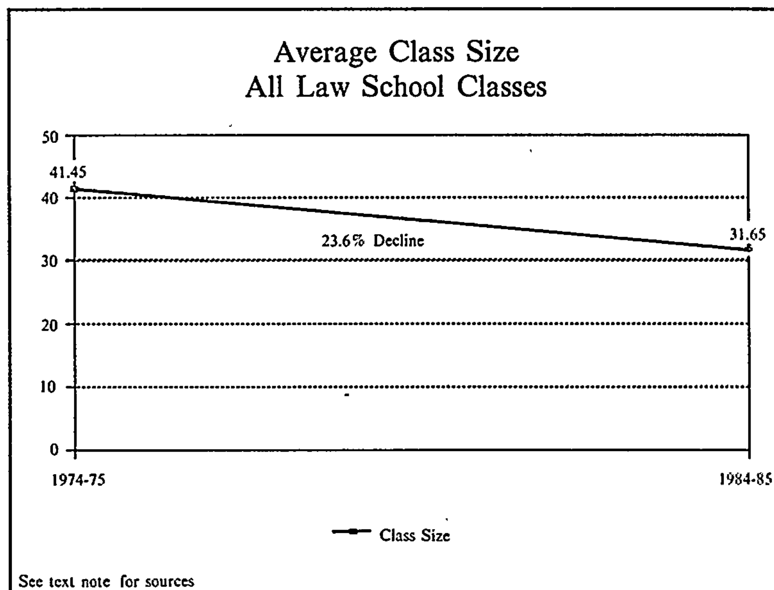

Figure 33

94. *See* W. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA, PART II, PROFESSIONAL SKILLS COURSES 10 (1987). These data were drawn from the same survey described in the first wave of the study in W. POWERS, *supra* note 91. In fact, 313 such courses were reported in the survey, indicating that many of the 164 reporting schools offer more than one trial advocacy course. This data is congruent with the clinical survey reported in this paper. It is to be expected, given the ABA mandate, that trial advocacy courses are offered at every school.

95. W. POWERS, *supra* note 94, at 11-15. This average should be treated with care. No attempt has been made to adjust for school size and, therefore, the average may not be representative of schools generally. This report, however, is consistent with data from the clinical study in which 58% of reporting schools showed that a simulation course in interviewing was offered; 68% reported a counseling course; 70% noted a negotiation course; 60% reported their schools offered alternate dispute resolution; 30% reported specialized discovery courses; and 44% disclosed that advanced drafting courses were offered.

Perhaps most striking is the fact that each school lists an average of seventeen seminars in their catalogues for 1987.[96] The ABA standards urge schools to offer both skills and seminar courses. Standard 302(a)(ii) requires "at least one rigorous writing experience."[97] Standard 302(a)(iii) requires schools to "offer instruction in professional skills."[98]

At the same time that class size is dropping, student/faculty ratios show a similar, but not so precipitous decline. At the time of the Walwer/deL Swords study, the average student/faculty ratio in law schools was 27:1.[99] This explains why clinics are an anomaly in their low ratios. This ratio declined to 23:1 in 1987-1988.[100] This drop reflects the ABA/AALS policy recommendations to member schools.[101] Thus, while clinics frequently remain the most teacher-intensive form of instruction in law schools, other forms of legal education are reducing class sizes to approach or meet typical clinical patterns.

Finally, Walwer and deL Swords point out that clinical faculty were paid on average $4000 less than the then prevailing average faculty salary of $30,594.[102] Unlike the other phenomena noted by Walwer and deL Swords, this disparity has not been altered significantly since their study was done. The ABA questionnaire data for 1986-1987 shows an average median annual salary for all faculty of $53,200. The survey also shows an average median salary of $44,696 for full-time clinicians with faculty voting rights.[103]

---

96. Data for this figure comes from LAWLINE, the computerized database described in *supra* note 22. A total of 2991 seminar courses are contained in that database, which contains catalogue information from 176 schools. Again, care should be taken with such averages which are not adjusted for school size. Since catalogue listings tend to lag behind actual offerings, this data should be viewed as somewhat behind the current situation.

97. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 302(a)(ii) (1988).

98. *Id.* Standard 302(a)(iii).

99. This high student/faculty ratio, far out of line with that in graduate education generally, was widely seen in 1980 as the enemy of any curricular development in law schools. *See* PROFESSIONAL EDUCATION, *supra* note 49, at 95-97; *see also* P. DEL SWORDS & F. WALWER, *supra* note 85, at 15.

100. *See* Kramer, *supra* note 42, at 664.

101. *See* PROFESSIONAL EDUCATION, *supra* note 49, at 96 n.4.

102. *See* GUIDELINES REPORT, *supra* note 24, at 136.

103. For all faculty data, see memorandum from ABA Section of Legal Education and Admissions to the Bar to Deans of ABA-Approved Law Schools (February 3, 1987) (on file at the *New York Law School Law Review* office). For clinicians' salary data, see memorandum from ABA Section of Legal Education and Admissions to the Bar to Deans of ABA-Approved Law Schools (March 30, 1987) (on file at the *New York Law School Law Review* office). Seventy-eight percent of reporting schools showed an all teacher median above the median for their clinicians. Fifty-seven percent of those showed a disparity of more than $10,000 in that median.

Walwer and deL Swords attribute the salary disparity to the relative youth of clinicians.[104] While the ABA did not collect experience data[105] for the clinicians covered by their survey, it is interesting to note that the group they identified, clinicians with full faculty participation rights, in this study averaged eleven years of experience in legal education.[106] No data has been discovered regarding the average number of years since law school graduation for all law teachers, but clinicians of the type included in this figure are no longer likely to be markedly younger than many law school faculty.[107]

Thus, with the decrease in student/faculty ratios, the increase in other teacher-intensive courses, and the apparent consistency of salary differentials, it is almost certain that the disparity of clinical costs from those of other forms of legal education have diminished. Also, in some institutions, live-client, in-house clinics may no longer be the most expensive courses being offered. It is interesting to note that expenditures for clinics as a percentage of overall law school budgets actually fell from 1977-1978 to 1987-1988, from 4.5 to 3.1.[108]

C. *Curricular Reform*

Despite the fact that the costs of other methods of legal teaching have risen,[109] live-client, in-house clinics probably are still more expensive than most other teaching methodologies. Is this extra cost justified and is it necessary? These two questions will be addressed separately.

First, does the live-client, in-house clinic offer anything which cannot be replicated by other teaching methods? After all, we teach legal analysis through simulation, why not additional skills as well?[110] There are three reasons which suggest that live-client, in-house clinics are unique:

104. *See* GUIDELINES REPORT, *supra* note 24, at 136.

105. It would be useful to be able to make a direct comparison here. Also, some redrafting of the questionnaire to insure that only live-client, in-house clinicians were included in the sample would greatly increase the strength of the conclusions which may be drawn.

106. *See supra* pp. 269-72.

107. It is also significant that our survey asked only for experience in law teaching, while the ABA asks for years since law graduation. If, as seems likely, clinicians typically have more years of practice experience than do other faculty, the salary disparity may be even greater. *See supra* pp. 271-72.

108. Kramer, *supra* note 42, at 661, 666. This decrease occurred despite the fact that overall expenditures on clinics have increased. *Id.* It reveals that this increase has not kept pace with other increases in legal education during the same period.

109. *See id* at 666.

110. *But see infra* note 124 for the defects of trying to teach even legal analysis in a purely simulated context.

pedagogical effectiveness, epistemological integrity, and content appropriateness. All three concerns are tied up with the issue of role identification.[111]

I will first address pedagogical effectiveness. There is documented attrition in law student interest over the course of the three years of legal education.[112] If we are to enable students to really learn *all* lawyering skills, legal analysis included, then we must include them in the process.

Live-client clinics require this interaction as no other form of education does.[113] Students enter into the work of lawyering, moving from the spectator to the actor role. If anyone doubts the impact of such a move, let me share an anecdote. I took my first class of clinic students on a tour of the district courthouse in Sommerville, Massachusetts during their first week in the clinic. The court was not in session when we entered the main courtroom. In the courtroom, a physical bar separates the well of the court from the public section. Intending to show the students the position of the various court personnel, I moved past the swinging gate and held it open for students to follow me. They stopped. Nervous laughter ran through the group. The simple act of crossing into the legal forum frightened them. I finally talked them across, but they clearly saw it as a rite of passage. They were taking on an awesome responsibility and they knew it. Since that day, I have made it a practice, whenever possible, to take students to the courtroom before their first case. The reactions are invariably the same.

That type of personal identification brings with it a heightened need to learn. Students no longer seek knowledge solely to please the teacher or for some other external goal. They want to learn because their entire self-image in the profession they have chosen requires learning. This is a powerful pedagogical tool.[114]

Secondly, the "stuff" of real case lawyering is infinitely more complex than any simulation possibly can be. Epistemological theorists have reached general agreement that knowing must take this complexity into account.[115] We cannot be said truly to understand anything until we understand it in context and in complexity. On this point another anecdote. Last spring at the meeting of the Clinical Law section of the

---

111. *See* Bellow, *supra* note 33, at 380-86.

112. *See* PROFESSIONAL EDUCATION, *supra* note 49, at 38-39. "The aggregates from the six schools [measured in a survey on student interest] showed a sharp decline after the first semester and a continuing decline through the balance of the law school years on the time and energy invested by students." *Id.*

113. *See* Meltsner & Schrag, *supra* note 65, at 608 (contrasting learning in complex simulations with that which occurs in live-client clinics).

114. *See* J. BRUNER, *supra* note 29, at 87-92.

115. *See supra* note 29.

AALS, there was a panel on the insights offered to clinicians on critical legal studies, feminist jurisprudence, and law and economics. As a vehicle for that discussion, the panelists from those disciplines were provided with a simplified fact pattern of a case frequently used for clinical simulations. One of the panelists observed that "of course" students in clinics could not be expected to know so many facts, approximately one page and a half, about a real case. A shudder went through the room as the clinicians tried to envision a student dealing with a real client and knowing so little.

Very often students in clinics and other courses ask me for a hard and fast rule for reaching a decision. Always in such cases, if I am to give an answer more satisfactory than "it depends," we are driven into a detailed analysis of the extrajudicial facts, the systematic values of the forum, the norms of the community, the options open to opponents of our client's interests and many other factors. Data exists on all of these issues in the live-client clinic case; they do not and cannot exist in the simulated or hypothetical instance.[116] If we are to provide our students a means of acquiring skills, we must teach them the nuances that only real experience can provide.

Finally, the live-client situation offers the content-appropriate context in which to teach reflective decision making.[117] Law schools present a picture of the law as exterior and outcome-controlling. Students expect initiative to come from the legal system or from the professor. Many lawyers carry this expectation into practice, fitting themselves uncritically into the norms of behavior in their legal communities. We need, however, to develop critical decision-making skills.

Live-client clinics are the place to do this teaching. As noted previously, they provide the complexity necessary for that development. They also provide the impetus for students to engage in this undertaking. Student role identification drives them to seek answers to the question: what should I do next? In this context even the simplest issue—when should I file the complaint—makes possible the exploration of options, consequences, and the burden of decisional responsibility. The need to have a precise answer and to act on that answer greatly enhances the chance of retention of the decisional methodology.

Therefore, live-client, in-house clinics provide an educational methodology which is irreplaceable in the teaching of self-conscious and self-confident practitioners. Does that mean that the current requirements of clinics, particularly their student/faculty ratios, are immutable? While I believe it is likely that low ratios will remain necessary, it is possible

---

116. *See* Meltsner & Schrag, *supra* note 65, at 596, 605. The more complex the simulation, the less the problem of factual incompleteness. That problem does not totally disappear in any simulation.

117. *See* Bellow, *supra* note 33, at 394-95.

that alterations in the rest of the law school curriculum could prepare students better for their clinical experience and might, in the long run, have an impact on these ratios.

Previous suggestions for keeping the cost of clinics down and thereby expanding availability have centered almost entirely on increasing the student/faculty ratio.[118] Nevertheless, student/faculty ratios within clinics seem to have held relatively constant at somewhere between 8:1 to 10:1.[119] The suggestion that clinicians teach other courses as a means of increasing their overall student/faculty ratio, seems to have been adopted for tenured clinicians.[120]

One suspects that the answer to the question of whether this ratio can be raised depends upon what one must or wants to teach in the clinical program. Clinics currently seek to teach lawyering skills, analytical processes, ethics, substantive law, and law office management.[121] In addition, many clinicians believe they are teaching "remedial" law school, i.e., material which they believe students should have learned before, or worse, helping students to unlearn things that they have previously learned.[122] Which, if any, of these tasks could be moved to another point in the curriculum and what impact might such a move have on the teaching load of clinicians?

It should be possible to separate the major burden of substantive law and basic lawyering skills training from the clinic. Clinicians now teach these issues heavily in their classroom components, and these components do not look markedly different from substantive law and simulation

---

118. Twenty to one was suggested in *Including Clinical Education in the Law School Budget* by Peter deL Swords. deL Swords, *supra* note 85, at 344. Walwer and deL Swords suggested 12:1 with the requirement that clinicians teach an additional large section course. GUIDELINES REPORT, *supra* note 24, at 180-81.

119. *See supra* p. 254; GUIDELINES REPORT, *supra* note 24, at 82.

120. *See supra* pp. 273-74.

121. *See supra* pp. 247-50.

122. The term "remedial" law school comes from Gary Bellow in his essay on teaching law teachers. Bellow, *supra* note 33, at 400. He describes the phenomenon as follows:

> Law study is inevitably an examination of the elephant by the blind man; the sense of the whole is forever elusive and beyond our grasp. We may examine particular tasks or eschew a task-oriented approach entirely. We may bring to law study the most speculative social theory or the most empirically-oriented forms of statistical evidence. We must do so, however, in a curriculum whose current categories of rules, institutional arrangements, and modes of thought may be inadequate to the particular role contexts with which we wish to work. This is the source of the frequent complaint of clinical teachers that they are engaged in "remedial" education. The relationship and interaction of clinical teaching to the entire curriculum experience is a problem with which we will have to more adequately deal.

Id.

courses being taught to nonclinic students.[123] Such a change would lose the powerful learning incentives detailed previously. These incentives are the needs of real clients and the students' anxieties about real world role performance. Many clinicians are disappointed with the results of pure simulation in teaching law students.[124] Perhaps some compromise is possible. Even if clinic prerequisites could not supplant the teaching of these materials in the clinic entirely, it should be possible to save time in the clinic if students start with a basic knowledge of the law and skills which they will have to apply. Both class time and time in individual supervised sessions might be saved. Currently, about 20% of clinics have prerequisite requirements. Seven schools require trial advocacy as a prerequisite and two schools require other skills courses. Two schools require ethics and five require some other traditional course, most typically evidence.[125] This strategy for diminishing clinic workload has not been widely tried. As long as these conditions prevail, clinicians will be asked to bear the brunt of not only the polishing of skills, but also the rough sanding of teaching those skills in the first place.

One of the first exponents of the clinical method was Judge Jerome Frank in his 1933 article, *Why Not a Clinical Lawyer-School?*[126] Judge Frank's thesis, in tune with the legal realism of his time, and sounding not dissimilar to the indeterminacy hypothesis of the critical legal studies movement of today, was that the law school's emphasis on appellate opinions taught students many wrong things about the law.[127] He argued

---

123. *See supra* pp. 247-50.

124. This observation is based on my experience with simulation teaching methods both in training practitioners and in teaching law students. The same materials and techniques produce different results. Practitioners, aware of the real world consequences of their lack of skill, are eager for any insight that this teaching mode can offer them. They have a constant reference point in reality. Students in purely simulated classes tend to treat these courses as merely another law school class. They lack the reality reference or rather their reality is in using their student survival strategies (please the teacher rather than take personal responsibility for learning). Clinic students tend to more closely approximate practitioners because they generally can see the real world payoff of their simulation exercises. Other clinicians report the same observations.

125. Some schools have more than one prerequisite. Hence 14 reports from 12 schools.

126. Frank, *supra* note 4.

127. Frank contended that:

> [f]or the law student to learn whatever can be learned of (1) the means of guessing what courts will decide; and (2) of how to induce courts to decide the way his clients want them to decide, he must observe carefully what actually goes on in courtrooms and law offices. As noted above, the opinions of upper courts conceal or fail to disclose many of the most important factors which lead to decisions. The "hunches" that produce many judicial decisions, and the numerous stimuli that cause verdicts to be rendered by juries cannot be discovered in the printed opinions of upper courts. For, as noted above, the judicial opinion is not only *ex post facto* with reference to the decision. It is a *censored exposition*,

that cases are not, in fact, decided on the basis articulated in appellate opinions, but rather upon the skills of the advocates in marshalling facts and arguing in a manner likely to be persuasive to the factfinder.[128] These skills are the very skills which we have already seen that attorneys identify as having been missing from their law school curricula.[129] Judge Frank contended that any lawyer attempting to predict and order his or her client's affairs must understand these realities.[130] Therefore, he advocated the true case method which would involve the use of whole case records and not simply appellate opinions.[131] He urged early and regular exposure of law students to courts in operation.[132] Judge Frank also proposed what we now understand as clinical legal education as the final step in a student's law school career.[133] He did not think much of simulated skills training,[134] but we have come a long way in our sophistication in structuring such teaching.[135]

Is it possible to provide our students with a better model of how the law really works before they arrive in the clinic? If we could do so, we could save time in making them more confident players in, and more astute observers of, the legal process. They would not have to learn for the first time that the responsibility for their clients' success rests with them and with their skills in fact development and advocacy. They at least would have a better sense of the procedural system in which they would

---

> written by a judge, of what induced him to arrive at a decision which he has already reached. The conventions prevent the judges from reporting many of the influences that induce their decisions. To study those eviscerated judicial expositions as the principal bases of forecasts of future judicial action is to delude oneself. The lawyer will go wrong who believes that, (in advising a client, drafting an instrument, trying a case, or arguing before a court), he can rely on the so-called reasons found in or spelled out of opinions to guide him in guessing what courts will hereafter decide. To do so is far more unwise than it would be for a botanist to assume that plants are merely what appears above the ground, or for an anatomist to content himself with scrutinizing the outside of the body.

Id. at 911-12 (footnotes omitted).

128. Frank, *supra* note 4, at 911-13.

129. *See supra* notes 48-50 and accompanying text.

130. *See* Frank, *supra* note 4, at 911.

131. *Id.* at 916.

132. *Id.*

133. *Id.* at 917-20.

134. *Id.* at 916-17. Among his reservations are those expressed by live-client clinicians. *See supra* note 124.

135. *See supra* note 31.

have to operate.[136]

Judge Frank's ideas for the nonclinic curriculum have recently been getting serious, if belated, consideration. The movement toward "integration" of skills components into the early curriculum is such an idea. Progress is being made at a number of schools in letting students see the client-centered work of a lawyer, even in the first year.[137] Another hopeful sign is the use of full file materials drawn from actual cases, as in the *Buffalo Creek Disaster* materials being used in a number of civil procedure classes[138] or the development of complex introductory level simulations.[139]

V. CONCLUSION

Despite doubts still evident on the part of conventional faculty about the notion of live-client clinics and the respectability of clinicians, those clinics have maintained or enlarged their beachhead within the law schools. They have done so because there is a clear need, seen by law students and lawyers alike, for what they have to teach. Clinics provide a vehicle uniquely capable of effectively teaching fact development, persuasion, and decision making. They are no longer widely different from other types of law teaching in their costs and in some of their methodology. I would like to think that the rest of legal education is beginning to see the need to catch up.

---

136. Any clinician can tell stories of students who did not realize that they had a responsibility to serve process. One of my colleagues tells of a third year student who expressed confidence that the jury at the level of a court of appeals would undo the wrong done below.

137. *See generally The ABA's National Conference on Professional Skills and Legal Education, Albuquerque, New Mexico*, October 15-18, 1987, 19 N.M.L. REV. 1 (1989).

138. *See* Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378 (1987).

139. *See* M. BERGER, J. MITCHELL & R. CLARK, TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (1989); P. Schrag, Civil Procedure: A Simulation Supplement (unpublished manuscript).