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COMMENTARY

RESISTING THE THEORY/PRACTICE DIVIDE:
WHY THE “THEORY SCHOOL”
IS AMBITIOUS ABOUT PRACTICE*Heather K. Gerken**

Debates about how to educate law students have long rotated around a familiar axis — the theory/practice divide.¹ Commentators and bar associations routinely rebuke legal education for being too theoretically oriented.² A recent iteration of that debate has centered on the credit

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¹ The roots of this debate are reflected in the history of legal education itself. For centuries, lawyers were trained largely through the apprenticeship model. See Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 126 (1976); Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI. KENT L. REV. 429, 438–39 (1981). Eventually classrooms increasingly became an arena in which lawyers were trained. See Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICKINSON L. REV. 551, 552 (2018).

² Within the American Bar Association (ABA), the tradition at least dates back to 1913. See Joy, *supra* note 1, at 559–60. An early proponent of the notion that clinics were the right way to train lawyers for practice was William Rowe. See, e.g., William V. Rowe, *Legal Clinics and Better Trained Lawyers — A Necessity*, 11 ILL. L. REV. 591, 599 (1917). Within decades, he was joined by such luminaries as Judge Jerome Frank and Professor Karl Llewellyn. Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1316 (1947); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 917 (1933); Joy, *supra* note 1, at 562. Substantial financial support came later through the Ford Foundation, see Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 941–42 (1997), and later the Department of Education, see Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 20 (2000). Students seem to have provided some of the early push for establishing clinics. For instance, students at the University of Pennsylvania and Harvard Law School started opportunities for law practice entirely on their own. See Margaret Center Klingelsmith, *History of the Department of Law, in THE PROCEEDINGS AT THE DEDICATION OF THE NEW BUILDING OF THE DEPARTMENT OF LAW* 213, 231 (George Erasmus Nitzsche ed. 1901); Note, *The Harvard Legal Aid Bureau*, 27 HARV. L. REV. 161, 161–62 (1913).

hours that must be devoted to experiential learning.³ That disagreement was a stand-in for a long-standing debate about the role of clinical education in law schools.

The problem with framing these debates around the theory/practice divide is that we reinforce the very categories we ought to resist. This frame rests on too narrow-gauged an understanding of lawyering. It excuses us from being sufficiently ambitious about practice and theory, and it prevents us from seeing the connections between the two.⁴ There are deep continuities between what is taught in the classroom and the finest values of the profession.

The case for clinical work can and should rest on the same broad-gauged aspirations. Both classroom and clinical teaching should be oriented around a broad vision of what a law school can be. At its best, a J.D. should be a thinking degree. Law school should prepare students not just to practice, but to problem-solve; not just to litigate, but to lead. A legal education should supply graduates with sharp analytics, institutional judgment, and a wide range of literacies. Law school should be a time to luxuriate in ideas, learn for learning's own sake, and experiment with professional paths. And any argument for experiential or theoretical work ought to resist the theory/practice divide rather than leverage it.

I recognize that a Commentary endorsing clinical work on these grounds will be greeted with skepticism in some quarters. There will be some who doubt that clinical work can possibly measure up to the ideals I outlined above. And others will wonder what the Dean of Yale Law School could have to say about the importance of practice. In order to allay those doubts, Part I begins by explaining how Yale, often known as “the theory school,” has developed one of the most ambitious clinical programs in the country and thereby generated a distinctive blend of practice and theory.

Part II turns to a defense of my central claim — that any argument for experiential or theoretical work ought to rest on a capacious view of legal education and eschew the tired theory/practice divide. Indeed, I'll

³ The ABA recently imposed a six-credit “experiential” requirement on law schools. *See* AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, EXPLANATION OF CHANGES 7 (2014), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201408_explanation_changes.pdf [<https://perma.cc/K438-629J>]. But it declined a forceful request to mandate fifteen credits by the Clinical Legal Education Association, among others. *See* CLINICAL LEGAL EDUC. ASS'N, CLINICAL LEGAL EDUCATION ASSOCIATION (CLEA) COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES (2013), <http://www.cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf> [<https://perma.cc/VP3L-9NC5>].

⁴ Below I describe the theory/practice divide as the “dominant” frame for these debates. Needless to say, there is a long tradition of resisting the theory/practice divide, including within my own law school. *See, e.g., infra* p. 142.

make what might seem like a counterintuitive claim — that Yale’s strong intellectual culture made it fertile ground for robust clinical teaching — even as I resist the notion that the claim should be counterintuitive.

Part III closes by addressing whether the pedagogical model I describe here can be reproduced elsewhere. Acknowledging the costs associated with maintaining a curriculum that is ambitious about practice and theory, I will suggest that globalization and technology will change broad-gauged pedagogy from a luxury into a necessity.

Before turning to these arguments, it is worth noting that this Commentary is focused on pedagogy. There are deep questions embedded within this topic, including issues that must be addressed by any institution that wields power in society.⁵ Moreover, law schools don’t just train lawyers; they also generate ideas. We write scholarship and debate ideas for independent aims, not to mention the sheer joy of it. So, too, a commitment to service is an ideal of our profession and important in its own right. My argument, however, is simply confined to what law schools teach and why.

I. THE AMBITION OF YALE’S CLINICS

Some readers may be rolling their eyes at the idea of the Dean of Yale Law School writing about the importance of clinical education and the need to be ambitious about practice. You’ve heard the jokes. “Anything X School can do, Yale can do meta.” “The only course taught at Yale is Law and Me.” And trust me, you don’t want to know how many Yale grads it takes to change a lightbulb.

There is no question that ideas are the coin of the realm at Yale. We have a strong humanities tradition, many of our faculty are trained in other disciplines, and we are not shy about hiring scholars without J.D.s. Our classes are highly conceptual and sometimes quirky. We seek students and faculty who are intellectually curious, wide-ranging, and eclectic. Scholarly excellence and boundary-defying scholarship are so central to our self-definition that when I became dean, one of the first questions one of our practicing alumni asked me was whether I was going to “keep Yale weird.” As I discuss in more detail below,⁶ those intellectual commitments are a central part of what it means to be ambitious about practice. But if you subscribe to the dominant view of the theory/

⁵ See Samuel Moyn, *Law Schools Are Bad for Democracy*, CHRON. HIGHER EDUC. (Dec. 16, 2018), <https://www.chronicle.com/article/Law-Schools-Are-Bad-for/245334> [<https://perma.cc/EQX6-XBDG>]. Those questions are too large for a proper discussion here. Here I confine myself to a narrower question — pedagogy — which even those critical of the role that clinics play in the profession concede is appropriate. *Id.*

⁶ *Infra* pp. 143–45.

practice divide,⁷ you should also know how ambitious and wide-ranging Yale's clinical program has become. I begin here with a fairly granular description in order to ground the broader claims that follow.

A. Nationwide Injunctions, Cutting-edge Litigation, and Policy Change

Yale clinics' recent achievements reflect how seriously Yale treats clinical work. A handful of students and faculty helped win three nationwide injunctions in thirteen months.⁸ In a victory one judge termed "seismic,"⁹ one clinic overturned decades of precedent so that disabled veterans could bring class actions. It's now serving as lead counsel in two nationwide class actions on behalf of Iraq and Afghanistan veterans with PTSD.¹⁰ Another clinic created the first community bank in New Haven.¹¹

One of our clinics was the first to uncover evidence of genocide in Myanmar.¹² Another represents a bipartisan set of former cabinet

⁷ Having made the transition from practice to the academy, I should emphasize that I once shared this view. See *infra* p. 147. I was wrong.

⁸ See *Yale Law School Clinics Secure Third Nationwide Injunction*, YALE L. SCH. (Feb. 14, 2018), <https://law.yale.edu/yls-today/news/yale-law-school-clinics-secure-third-nationwide-injunction> [<https://perma.cc/YP89-TCDX>].

⁹ *Monk v. Wilkie*, 30 Vet. App. 167, 184 (2018) (Davis, C.J., concurring).

¹⁰ See *Federal Court Approves Nationwide Class Action by Army Veterans with PTSD*, YALE L. SCH. (Dec. 22, 2018), <https://law.yale.edu/yls-today/news/federal-court-approves-nationwide-class-action-army-veterans-ptsd> [<https://perma.cc/M9PB-AWP9>]; *Federal Court Approves Nationwide Class Action for Veterans with PTSD*, YALE L. SCH. (Nov. 16, 2018), <https://law.yale.edu/yls-today/news/federal-court-approves-nationwide-class-action-veterans-ptsd> [<https://perma.cc/VY8T-ST5F>]. It is also doing cutting-edge work on sexual assault and inadequate health care within the military. See *Veterans Clinic Sues Military for Sexual Assault Records*, YALE L. SCH. (Dec. 13, 2017), <https://law.yale.edu/yls-today/news/veterans-clinic-sues-military-sexual-assault-records> [<https://perma.cc/W6GM-SVGG>].

¹¹ See *Start Community Bank*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/ludwig-center-community-economic-development/start-community-bank> [<https://perma.cc/393T-FF8X>]. The same clinic also negotiated a giant real-estate deal to bring a Stop & Shop supermarket — and regular access to affordable fresh food — to poor neighborhoods in New Haven. See *CED Clinic Helps Broker Important New Haven Lease*, YALE L. SCH. (Mar. 12, 2018), <https://law.yale.edu/yls-today/news/ced-clinic-helps-broker-important-new-haven-lease> [<https://perma.cc/HVH7-CWTU>]. Last year, the clinic helped launch a free legal-services clearinghouse for local farmers and small businesses. See *Yale Law School Clinics Help Launch Legal Food Hub*, YALE L. SCH. (Mar. 19, 2018), <https://law.yale.edu/yls-today/news/yale-law-school-clinics-help-launch-legal-food-hub> [<https://perma.cc/LP5D-C3EP>].

¹² *Clinic Study Finds Evidence of Genocide in Myanmar*, YALE L. SCH. (Oct. 29, 2015), <https://law.yale.edu/yls-today/news/clinic-study-finds-evidence-genocide-myanmar> [<https://perma.cc/EE2D-DK72>]. Cf. Nicholas Kristof, Opinion, *Myanmar's Peace Prize Winner and Crimes Against Humanity*, N.Y. TIMES (Jan. 9, 2016), <https://nyti.ms/1OiUUpl> [<https://perma.cc/7FZM-B7GW>] (citing Yale study). The clinic also drafted the commentary to the Oslo Principles that an Expert Group on Global Climate Change Obligations used to ground states' obligations to mitigate climate change in international human rights law. Antonio Benjamin et al., *Commentary on Oslo Principles on Global Climate Change Obligations*, GLOBAL JUST. PROGRAM (March 1, 2015), <https://globaljustice.yale.edu/sites/default/files/files/Oslo%20Principles%20Commentary.pdf>

members, ambassadors, and CIA directors challenging the misuse of executive power.¹³ It is also challenging prison gerrymandering and the federal government's preparation for the 2020 Census.¹⁴

One clinic helped Connecticut transform its parole practices to become a model for the rest of the country.¹⁵ Still another is representing a group of journalists suing the President for using his enforcement powers to retaliate against journalists.¹⁶ The docket for my own clinic has included work on the first nationwide injunction against the President's sanctuary-city order, a cutting-edge suit on climate change,¹⁷ a multimillion-dollar case against the lead-paint industry,¹⁸ and a consumer-protection case that made the cover of

[<https://perma.cc/L64E-F4PG>]. These Principles were instrumental in a landmark Dutch case, Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda), that was the first in the world to find a government derelict of constitutional duties to steward the climate. Cf. SANITA VAN WYK, THE IMPACT OF CLIMATE CHANGE LAW ON THE PRINCIPLE OF STATE SOVEREIGNTY OVER NATURAL RESOURCES 328 (2017) ("The importance of the Oslo Principles . . . has been showcased in the Urgenda case."); Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 525, 536 (2018) ("The Urgenda case is one of the first major court-directed steps in [the Oslo Principles'] direction."). Here in Connecticut, the same clinic helped push forward juvenile justice and sentencing reform.

¹³ *Rule of Law Clinic Files National Security Amicus Brief and Declaration*, YALE L. SCH. (Feb. 22, 2017), <https://law.yale.edu/yls-today/news/rule-law-clinic-files-national-security-amicus-brief-and-declaration> [<https://perma.cc/Z3CY-H25V>].

¹⁴ *Rule of Law Clinic Files Suit Over Census Preparations*, YALE L. SCH. (Mar. 28, 2018), <https://law.yale.edu/yls-today/news/rule-law-clinic-files-suit-over-census-preparations> [<https://perma.cc/ZR5X-YNU2>]; *ROLC, NAACP Sue Connecticut Over Prison Gerrymandering*, YALE L. SCH. (June 28, 2018), <https://law.yale.edu/yls-today/news/rolc-naacp-sue-connecticut-over-prison-gerrymandering> [<https://perma.cc/7U6Y-B4PR>].

¹⁵ The students in the clinic convinced the Board of Pardons and Paroles to start holding preliminary hearings in parole revocation cases, liberalize its attorney appointment standards, tighten deadlines for the review of evidence against detained parolees, and begin using mechanisms that provide for the early release of detained parolees. At the request of state leaders, the students have also trained parole hearing examiners and created a pilot project to increase the availability of counsel. E-mail from Fiona Doherty, Clinical Professor of Law, Yale Law School Criminal Justice Clinic, to author (Feb. 7, 2019, 10:47 AM EST) (on file with author). Cf. ASLI BASHIR ET AL., PAROLE REVOCATION IN CONNECTICUT (2017); *Frontline: Life on Parole* (PBS television broadcast July 18, 2017), <https://www.pbs.org/wgbh/frontline/film/life-on-parole/> [<https://perma.cc/8CA9-U4B4>]. For an overview of these issues, see generally Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013).

¹⁶ *MFIA Clinic Involved in First Amendment Lawsuit Against President Trump*, YALE L. SCH. (Oct. 16, 2018), <https://law.yale.edu/yls-today/news/mfia-clinic-involved-first-amendment-lawsuit-against-president-trump> [<https://perma.cc/UYF4-MVJL>]. This clinic plays such an important role in promoting government transparency that it regularly convenes and trains journalists and other clinics to engage in this work.

¹⁷ *SFALP Case Sues Top Fossil Fuel Producers Over Climate Change Costs*, YALE L. SCH. (Sept. 22, 2017), <https://law.yale.edu/yls-today/news/sfalp-case-sues-top-fossil-fuel-producers-over-climate-change-costs> [<https://perma.cc/G2XJ-68YA>].

¹⁸ *Supreme Court Turns Away Lead Paint Companies in Major Win for SFALP*, YALE L. SCH. (Oct. 26, 2018), <https://law.yale.edu/yls-today/news/supreme-court-turns-away-lead-paint-companies-major-win-sfalp> [<https://perma.cc/Z4VP-6HGT>].

BusinessWeek.¹⁹ Moreover, nearly all of our clinics represent individual clients in countless matters that don't make headlines but can change lives and transform students.

Clinics have become part of the warp and woof of the Law School. About eighty percent of our students take a clinic,²⁰ and fifty percent take two. To the best of our knowledge, we offer more clinical slots per student than any school in the country, and our thirty clinics do an astonishing range of work.²¹ Our students regularly engage in state and national legislative efforts, policy analysis, transactional work, public education, and democratic organizing. While some clinics still fit within the grand tradition of legal-service work pushed forward by the Ford Foundation,²² many of our clinics engage in structural-reform litigation, and our centers and clinics have become important policy hubs within the University.

B. Immersive, Long-Term Projects

Because Yale is one of the rare schools that allows students to enroll in a clinic for five semesters, starting in the spring of their first year, our clinics can support immersive, long-term projects.²³ Students can take on work that is more challenging and sophisticated than is typically possible in a one-semester model, where students must leave the clinic shortly after they've gotten up to speed on an issue.²⁴ Multi-semester work can also allow students to forge deeper relationships with organizations and community leaders, which allows them to undertake the sort of grassroots-oriented, bottom-up legal strategies that some commentators urge all lawyers to pursue.²⁵

¹⁹ *Herrera's Suit Against Credit Card Arbitrator Featured in Cover Story of Current BusinessWeek*, CITY ATT'Y OF SAN FRANCISCO (June 6, 2008), <https://www.sfcityattorney.org/2008/06/06/herreras-suit-against-credit-card-arbitrator-featured-in-cover-story-of-current-businessweek/> [<https://perma.cc/6ZRZ-BV33>].

²⁰ *Clinical and Experiential Learning*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning> [<https://perma.cc/PUE3-SNPC>].

²¹ *Our Clinics*, YALE L. SCH., <https://law.yale.edu/clinics/our-clinics> [<https://perma.cc/UCD8-DRX6>]; see also Mike Stetz, *Best Schools for Practical Training*, PRELAW, Spring 2018, at 34, 36.

²² Blaze, *supra* note 2.

²³ Cf. Michael J. Wishnie, *The First-Year Clinic: Forty Years of First-Year Students Representing Clients*, in THE NEW 1L: FIRST-YEAR LAWYERING WITH CLIENTS 93, 99–101 (Eduardo R.C. Capulong et al. eds., 2015); Robert A. Solomon, *The Clinical Experience: A Case Analysis*, 22 SETON HALL L. REV. 1250 (1992); Stephen Wizner & Dennis Curtis, "Here's What We Do": Some Notes About Clinical Legal Education, 29 CLEV. ST. L. REV. 673, 682 (1980). For a survey of the longitudinal work in other clinics, see *supra* notes 10–19.

²⁴ Cf. Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451, 453–54, 454 n.7 (2009).

²⁵ Cf. Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201 (2016); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008).

For instance, students in our Worker & Immigrant Rights Advocacy Clinic (WIRAC) generated headlines with the crucial work they did in winning the first nationwide injunction against the Trump Administration's travel ban.²⁶ But their work in this area has been wide-ranging and focused on the long game. The clinic has represented a national DREAMer organization, United We Dream, for almost a decade, drafting legislation and supporting congressional advocacy. At the same time, students filed and argued a suit that prevented the cancellation of the Deferred Action for Childhood Arrivals (DACA) program, winning another nationwide injunction.²⁷ The clinic helped reunite two children torn from their families under President Trump's family-separations policy, garnering the first constitutional victory on behalf of children²⁸ with a new litigating strategy that has sparked similar suits across the country.²⁹ It has also been quietly working on a test case that has important implications for the ongoing litigation over family separation.³⁰ In addition, the clinic represented two grassroots organizations in pushing forward the "Elm City Resident Card," the first general-purpose government ID issued without regard to immigration status. That effort sparked a national movement that has brought government-issued IDs to millions of undocumented people across the country.³¹

Traditional legal services work is pursued with just as much ambition and creativity. Consider our criminal justice clinics. Students recently helped free a man who had spent seventeen years in prison and faced another fifty years for a crime he did not commit.³² Drawing a

²⁶ *Challenging the Refugee and Travel Ban*, YALE L. SCH. (Feb. 1, 2017), <https://law.yale.edu/yls-today/news/challenging-refugee-and-travel-ban> [<https://perma.cc/R9WC-2BBF>].

²⁷ *WIRAC Wins Nationwide Injunction Halting DACA Termination*, YALE L. SCH. (Feb. 13, 2018), <https://law.yale.edu/yls-today/news/wirac-wins-nationwide-injunction-halting-daca-termination> [<https://perma.cc/9AB8-PSCD>].

²⁸ *WIRAC Mobilizes to Reunite Families*, YALE L. SCH. (July 23, 2018), <https://law.yale.edu/yls-today/news/wirac-mobilizes-reunite-families> [<https://perma.cc/HP6R-GZHC>].

²⁹ WIRAC's suit rested on the trauma inflicted on children. It also included disability claims that allow for more powerful remedies than the constitutional claims that other organizations have been litigating.

³⁰ The suit would enable lawyers in family-separation cases to bring suit for substantial monetary damages against the Trump Administration in locations throughout the country, not just in border states.

³¹ When ICE engaged in a retaliatory raid shortly after the Elm City ID was created, the clinic not only defended those seized by ICE, but also successfully sued the federal government and individual ICE agents who conducted the raid, settling for \$350,000 and immigration relief for the individual arrestees. *Landmark Settlement in New Haven Immigration Raid Case a Victory for YLS Worker & Immigrant Rights Clinic Students*, YALE L. SCH. (Feb. 15, 2012), <https://law.yale.edu/yls-today/news/landmark-settlement-new-haven-immigration-raid-case-victory-yls-worker-immigrant-rights-clinic> [<https://perma.cc/5DXF-5JQ9>]. As a result, this unique blend of offensive and defensive immigration work is sometimes called the "Connecticut model." See also Paul Bass, *A City to Model*, NEW HAVEN INDEP. (Oct. 19, 2005, 9:00 PM), https://www.newhavenindependent.org/index.php/archives/entry/a_city_to_model/ [<https://perma.cc/L293-6FLT>].

³² *Righting a Wrongful Conviction*, YALE L. SCH. (June 7, 2018), <https://law.yale.edu/yls-today/news/righting-wrongful-conviction> [<https://perma.cc/EA33-MVKY>].

lesson from death-penalty litigation, students are also introducing evidence of trauma into their noncapital defense work. Thus far, the evidence suggests that this practice has a powerful effect on sentencing practices.

We place enormous faith in our students. Our clinics eschew the law-firm model, where students do research and the professor takes the lead. Instead, consistent with best practices,³³ students argue cases, question witnesses, negotiate settlements and deals, testify before legislatures and agencies, draft legislation and reports, manage communications, and set strategy. Rather than restrict our students to simulation work, we regularly trust our students, even our 1Ls, in complex and challenging practice situations from the get-go.³⁴

Perhaps the most dramatic example in recent years occurred during the travel ban litigation. The night the first travel ban was put in place, our faculty trusted our students to do the bulk of drafting necessary to file a nationwide class action on behalf of the many individuals caught up in the travel ban's unconstitutional sweep. The students pulled an all-nighter to prepare the filing by early morning and helped win a nationwide injunction the next evening. Our students would have argued the case itself had there been enough time to get them to New York for the argument. And in the hours between the initial filing Saturday morning and the entry of the injunction that evening, rather than sleep, the students drafted template habeas petitions for the many lawyers streaming into airports across the country. Those templates were passed from laptop to laptop, iPhone to iPhone to assist those in need. Late that evening, a 1L — just weeks into his second semester — called John F. Kennedy International Airport's air traffic control tower and persuaded it to pull back a plane that was taxiing for takeoff.

The faith we place in our students has regularly been vindicated. For example, given the importance of the DACA challenge, there was some discomfort last year when our students argued the case side-by-side with the Attorney General of New York. The result was a nationwide injunction. In our criminal justice clinic, students are in the courtroom representing clients just a few weeks into the semester. They've amassed a remarkable victory rate.³⁵ In my own clinic, 1Ls have pitched ideas to the San Francisco City Attorney himself and had them greenlit on the spot.

³³ See Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 498–99 (2013).

³⁴ See Wishnie, *supra* note 23, at 104–08.

³⁵ Each semester, the students succeed in getting every charge dismissed in a large percentage of cases. E-mail from Fiona Doherty, Clinical Professor of Law, Yale Law Sch. Criminal Justice Clinic, to author (July 9, 2018, 3:47 PM EST) (on file with author).

C. *The Convergence of Theory and Practice*

Those who take the dominant view of the theory/practice divide might be surprised to learn that our clinical program does not stand separate and apart from the rest of our teaching program. To the contrary, clinical work has become so embedded in our pedagogy that a large number of the so-called “podium faculty” aren’t just teaching from the podium. More than a dozen of the nonclinical faculty (including two of our last three deans) run clinics. When one adds in the experiential work being done through our centers, that number grows to just under half of the nonclinical faculty.³⁶ One of the country’s finest analytic philosophers represents documentary filmmakers.³⁷ A prize-winning sociologist is working for criminal defendants in New York.³⁸ The psychologist who helped pioneer legitimacy theory is regularly advising police departments on community policing.³⁹

Meanwhile, our tenure-track and tenured clinicians have become increasingly engaged in scholarly work,⁴⁰ with one winning the Pulitzer Prize in nonfiction for the book he wrote as a clinician.⁴¹ Because skills training takes place in real time, seminar time in clinics can be devoted to reflecting on history, theory, and other relevant scholarship.⁴² In addition, faculty on both sides of the aisle regularly share their expertise with one another and even embark on joint projects⁴³ and joint teaching.

³⁶ For instance, the Solomon Center for Health Law & Policy, directed by Professor Abbe Gluck, has been a pioneer in developing medical-legal partnerships, which provide holistic care to those in need by offering both health and legal services through a single site. The Liman Center, directed by Professor Judith Resnik, has been at the forefront of criminal justice work. And the Collaboration for Research Integrity and Transparency, spearheaded by Professors Amy Kapczynski and Gregg Gonsalves, has litigated a number of important cases to promote public access to safety and efficacy data on drugs.

³⁷ *Scott J. Shapiro*, YALE L. SCH., <https://law.yale.edu/scott-j-shapiro> [<https://perma.cc/4H8Z-ZBRU>].

³⁸ *Associate Professor Kohler-Hausmann Wins Case Involving N.Y. Parole Board*, YALE L. SCH. (Apr. 29, 2016), <https://law.yale.edu/yls-today/news/associate-professor-kohler-hausmann-wins-case-involving-ny-parole-board> [<https://perma.cc/K7E2-JEZ4>]. Professor Issa Kohler-Hausmann’s work was profiled by the *New York Times* editorial board. Editorial, *New York Forgets Its Juvenile Lifers*, N.Y. TIMES (Mar. 24, 2018), <https://nyti.ms/2DREndg> [<https://perma.cc/D3AU-X35C>].

³⁹ *Tom R. Tyler*, YALE L. SCH., <https://law.yale.edu/tom-r-tyler> [<https://perma.cc/Y3RN-633V>].

⁴⁰ Indeed, at least one of our clinical faculty’s work was inspired by an article she wrote. See Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 44 (2013).

⁴¹ *Professor James Forman Wins 2018 Pulitzer Prize*, YALE L. SCH. (Apr. 16, 2018), <https://law.yale.edu/yls-today/news/professor-james-forman-wins-2018-pulitzer-prize> [<https://perma.cc/DGB5-C22P>].

⁴² The practice is true of many of the best clinics. See, e.g., Ruthy Lowenstein Lazar, *Interdisciplinary Clinical Education — On Empowerment, Women, and a Unique Clinical Model*, 23 CLINICAL L. REV. 429, 433 (2016) (“[T]he clinics serve as a bridge between theory and practice in class discussion, research conducted in the clinics and the application of theoretical and critical insights in the work of the clinic.”).

⁴³ For instance, Professor Gideon Yaffe, a philosopher, is working with Professor Miriam Gohara, a clinician, on a joint project regarding criminal responsibility. Similarly, Professor Kapczynski worked in partnership with our immigration clinic to challenge a quarantine of Connecticut residents during the 2014 Ebola crisis.

Our students have embraced this model, as is made clear by the extraordinarily high percentage of students who do clinical work. And because clinics are not segmented in a stand-alone semester or treated as a 3L capstone, students are constantly moving back and forth between the clinic and the classroom.

* * *

Excellent clinical work is hardly confined to Yale. Yale's clinics are part of an ecosystem of strong programs across the country, including Stanford's Supreme Court Litigation Clinic, Georgetown's Juvenile Justice Clinic, the Temple Social Justice Lawyering Clinic, CUNY's Immigrant and Non-Citizen Rights Clinic, UC-Irvine's Immigrant Rights Clinic, Buffalo's Community Justice Clinic, and Texas's Civil Rights Clinic, to name just a few.

Nonetheless, the fact that the "theory school" does so much on the practice front might strike many as a surprise. After all, if the stereotypes hold true, you would assume that Yale, with its theoretically minded faculty, would be the place least likely to develop a robust clinical program. You might be even more surprised to learn that this program emerged organically, well in advance of the credit requirement imposed by the ABA, and that much of its growth was driven by our *nonclinical* faculty. While all of this may seem surprising, it shouldn't be, as I explain in Part II.

II. CLINICAL AND CLASSROOM TEACHING SHOULD REST ON THE SAME BROAD-GAUGED ASPIRATIONS ABOUT LAWYERING

The dominant frame for debating legal education's future mistakenly pits practice against theory and reflects too narrow an understanding of what it means to be a lawyer. The frame prevents schools from being ambitious enough about theory *and* practice. And it leads law schools to train students for their first job but not their last.

At its best, a J.D. is a thinking degree, a problem-solving degree, a leadership degree. Lawyering is a job that requires an enormous number of skills and literacies. You must possess a supple mind and sound judgment. You need to have institutional sense and sharp analytics. You must be literate and numerate. You must be able to distill an unruly, messy set of materials into a coherent form. You must question everything, especially your own priors. You must possess enough critical distance to evaluate a situation but enough human empathy to understand it. Your education must be rigorous enough to breed humility rather than hubris.⁴⁴

⁴⁴ Thanks to Marc Allen for observing that a great education makes one humble.

The qualities that make for a great lawyer are also the qualities that make for a great academic: Skepticism. Peripheral vision. The ability to think conceptually and tell a story with integrity. Care with sources. A commitment to meeting one's opponent's strongest arguments rather than dismissing his weakest. The ability to question one's own principles while imaginatively and sympathetically reconstructing the commitments of the other side. A true scholar follows her idea wherever it leads. So, too, the day you really become a lawyer is the day you realize that the law doesn't — and shouldn't — match everything you believe.

If you take this broad-gauged view of lawyering, it's clear that the theory/practice rubric leads us to undersell both sides of the equation. On the one hand, those pushing for more experiential learning often fail to acknowledge the deep continuities between what is taught in the classroom and the finest values of the profession. We should expect law professors to be theoretically oriented and methodologically eclectic. We should hope that our curricula share the best features of a liberal arts education. Work in the classroom should be as much about the ought as the is. Theory must be central to our pedagogy. Law school should be a time for students to luxuriate in ideas, to test their principles, and to think critically about the law and the profession.

What makes teaching in law schools so special is that the values I describe above as means to a pedagogical end are also ends unto themselves. Academic institutions are dedicated to debate, disagreement, and delighting in difference. We talk about ideas for the sheer joy of it and cultivate scholarly habits of mind for their own sake. We are fortunate that our academic commitments align so closely with our pedagogical aims.

The case for clinical work ought to rest on the same broad-gauged, aspirational arguments that have always undergirded teaching in the classroom.⁴⁵ Proponents of clinical work shouldn't invoke the theory/practice divide; they should resist it.

Perhaps understandably, when those who favor experiential work try to identify what's missing from the conventional classroom, they naturally focus on the more mechanical aspects of practice. Those skills are the easiest to name and the ones most clearly absent from traditional classroom teaching. But a narrowly focused skills-based argument undersells what clinics ought to be teaching. The work in clinics should be as challenging and engaging as what takes place inside the classroom. Clinical work, too, should be a source of intellectual challenge, professional satisfaction, and personal joy.

At Yale, for example, the sophistication and complexity of the work in our clinics has made an enormous difference in winning faculty and student buy-in. It is not hard to imagine why deep learning and genuine

⁴⁵ See, e.g., Gerald P. López, *Transform — Don't Just Tinker With — Legal Education (Part II)*, 24 CLINICAL L. REV. 247, 331–45 (2018).

engagement would come from, say, mapping out a strategy for enabling veterans to bring class actions, figuring out how to bring disability claims on behalf of children separated from their parents, bringing a cutting-edge administrative law suit, or changing the way criminal defense lawyers deal with evidence of trauma. It's not surprising that so many of my nonclinical colleagues either run a clinic or want to do so. But it's reassuring to know that so many of my academic colleagues find satisfaction in the professional work for which we prepare our students.

In clinics, students learn to work in teams and to imagine themselves in someone else's shoes.⁴⁶ They test abstract ideals in nonideal conditions. They try different lawyering roles on for size, winnow their career goals, and broaden their professional ambitions. The docket allows students to develop lawyerly judgment, wrestle with real-world challenges, and encounter law in all of its complexities. Students feel what it's like to be the only lawyer someone has.⁴⁷

Students also learn to serve. Their class schedules thus reflect a larger aim of the profession by embedding service to others within the day-to-day life of the lawyer.

At their best, clinics can provide opportunities to reflect on the deep normative and ethical questions raised when one inhabits any powerful institution or profession.⁴⁸ Students witness firsthand the human dimensions of power disparities, bureaucratic abuse, and political neglect. Even if such issues did not emerge organically in the clinic, one of the touchstones of clinical training is to address these larger questions even as the clinic pursues individual cases.⁴⁹ Students can apply what they learned in the classroom to the clinics and bring back what they learned in the clinics to the classroom.

If you take this capacious view of practice, you can see why Yale's strong intellectual culture made it fertile ground for a robust clinical

⁴⁶ For a description of the role clinics play in developing cross-cultural understanding, see Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 47, 47 (Kimberly Holt Barrett & William H. George eds., 2005).

⁴⁷ With a hat tip to Professor Harold Koh, whose father taught him that "theory without practice is as lifeless as practice without theory is thoughtless." E-mail from Harold Koh, Professor of Law, Yale Law Sch., to author (Jan. 29, 2019) (on file with author); see also Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 1008 (2004).

⁴⁸ See, e.g., Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 *J. LEGAL PROF.* 353, 364-65 (2012); Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 *ANTIOCH L.J.* 287, 288 (1986); Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 *WASH. U. J.L. & POL'Y* 11, 40 (2013).

⁴⁹ See generally Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 *CLINICAL L. REV.* 775 (2017).

program. A narrow skills-based defense of clinical work would never fly with my colleagues, and such arguments have not been part of the conversation during the time I've been on the faculty. Our ambitious and intelligent nonclinical faculty have been quick to recognize the ambition and intelligence in the work being done by our clinical colleagues. The fact that so many nonclinical faculty and students have found clinical work to be intellectually challenging has mattered, too. As I noted above,⁵⁰ it's rare when the growth in clinics is driven in large part by nonclinicians.

Counterintuitively, it may also have helped that our clinical program developed without a mandate behind it. The impulse to legislate one's way to one's goal is entirely understandable. It's easy to imagine why so many thought it was important for the ABA to signal the importance of practice, perhaps even to nudge recalcitrant schools to change.

But as any law professor can tell you, real change often requires more than a top-down mandate. I always tell my students that rights are like families — they are built, not born.⁵¹ The same is often true of institutional commitments. Those who supported experiential work at Yale had to do the hard work of persuading the faculty on the merits.

So, too, because students were not required to take clinics to fulfill a graduation requirement, the clinics had to offer work that measured up to the intellectual challenges and delights that students found inside our conventional classrooms. It was surely more difficult to push the program forward in the absence of the ABA's six-unit mandate. But the absence of a mandate at Yale ensured that the program grew organically.

Deans are a sunny lot by profession, and I don't want to be unduly sunny or take undue credit. The clinical program I describe here was built before I became dean, much of it under the leadership of my predecessor, Dean Robert Post, who presided over much of the clinics' growth and created a deputy dean position for experiential learning. And none of these changes is uncontroversial. In recent years, our faculty has had intense conversations about the balance between clinical and classroom work, and we have many questions left to answer about the clinical program's scope and structure. It's hard for me to imagine that we will ever strike the perfect balance, let alone agree on what that balance is. We have had, and will continue to have, fierce debates about the right way to train our students. And with good reason.

⁵⁰ *Supra* p. 142.

⁵¹ See HEATHER K. GERKEN, SECOND-ORDER DIVERSITY: DECENTRALIZATION'S EGALITARIAN POSSIBILITIES (Danielle Allen & Rohini Somanathan eds., forthcoming 2019).

III. LOOKING TO THE FUTURE — THE NECESSITY OF AMBITIOUS PEDAGOGY AND TRAINING LAWYERS-WRIT-LARGE

During my first faculty meeting at Yale, one of my colleagues insisted there was no distinction — none — between practice and theory. Having come from the world of practice, I'll confess that I wondered what I'd gotten myself into.

What I'd gotten myself into was . . . a tradition. As Dean Tony Kronman — as eclectic and theoretically oriented a scholar as you will find — told some of our students upon their arrival:

[Yale Law School] is devoted to the endless task of building a bridge between the worlds of thought and action, a bridge capable of carrying traffic in both directions. . . . No law school has a stronger tradition of adventuresomeness in the realm of theory, and none a stronger tradition of encouraging the active use of law to reform the world. This is not a paradox or a symptom of division within the School. It is an expression of the School's perennial insistence on the interdependence of action and thought, and on the responsibility of lawyers to find the path that joins them. The deepest faith of the Yale Law School is the faith that this path exists, and its oldest and most powerful tradition . . . is the tradition of searching together to find it.⁵²

It would be easy to dismiss this tradition as one for well-funded schools only. I don't want to understate the importance of financial support even for a moment. Clinics are resource-intensive. Clinical faculty teach a small number of students, and the costs associated with clinical work are higher than those associated with reserving a classroom and turning on the lights. Needless to say, a program like ours requires not just financial capital, but certain forms of human capital: students and faculty capable of recognizing — and building upon — the deep continuities between practice and theory.⁵³

While a program that is ambitious about practice and theory may seem like a luxury, it may become a necessity in the not-so-distant future. Few doubt that globalization and technology will fundamentally alter the profession. It is possible, even probable, that a fair percentage of conventional practice work will disappear or change.

But we should not conflate change with obsolescence. The skill sets and intellectual habits that law schools should be teaching their students will never become irrelevant. Far from it. A broad-gauged, ambitious lawyering program provides students with skills that will allow them to follow *many* paths, including ones that are well outside the bounds of traditional practice. If law schools are to remain relevant in the long

⁵² ANTHONY T. KRONMAN, DEAN ANTHONY KRONMAN'S WELCOMING ADDRESS, 1997, at 8 (1997).

⁵³ Thanks to Judge Calabresi for emphasizing this point.

run, schools must prepare their students to lead no matter what their nominal profession.

In some ways, that vision of the future is continuous with Yale's past. At Yale, our alumni have long followed many paths, taking leadership roles in many sectors of society. Our alumni are Hollywood agents and *New York Times* reporters. They produce documentaries and build environmentally friendly cars. They found intellectual movements, nonprofits, and companies. They head federal agencies and hedge funds. They are bankers, union organizers, and university presidents.

Yale has sometimes been teased about the eclecticism of its alumni, but I'm willing to bet that in the long run this distinctive tradition will be seen as a feature, not a bug. These unconventional graduates may not be lawyers in a conventional sense, but they are lawyers-writ-large. They are deploying the intellectual and professional skills acquired in law school to jobs that fall outside the conventional bounds of the profession.

As the profession is reshaped by the economic and technological forces that loom large on the horizon, we should all think hard about the importance of producing both lawyers and lawyers-writ-large. Some members of our profession will engage in traditional legal practice. Others will set off in a different direction. The key is that the broad-gauged training that enables Yale's own graduates to thrive in so many fields is the same training that makes for great lawyering in the most conventional settings. Whether our graduates follow unconventional paths or work at the core of practice, they will all need to be lawyers-writ-large.

Law schools won't be able to train lawyers-writ-large, however, if the profession accepts the theory/practice divide and casts lawyering in unduly narrow terms. That narrow mindset prevents us from training great lawyers no matter what path they choose. The profession's aim should be to resist the theory/practice divide, to hew to the best part of our traditions even as we adapt to change, and to train both lawyers and lawyers-writ-large. Both classroom and clinical work ought to reflect these grand ambitions.