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Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education

Alfred C. Aman, Jr.

These remarks were made at a Cornell alumni luncheon held on April 15, 1986, at the Plaza Hotel in Rochester, New York.

I want to talk about an important issue in legal education today: the role of clinical education in the law school curriculum. I hope to shed some light on that issue by looking at another professional school model—not the medical school model, which is the usual approach, but the music school model. I want to reflect on my experiences as a student at the Eastman School of Music and my recent conversations with Robert Freeman, the director of the Eastman School, and members of the Eastman faculty. In so doing, I want to suggest some parallels between musical and legal education that may enable us to see clinical legal education in a different light.

The Clinical-Theoretical Debate

Any discussion of clinical legal education today inevitably generates questions that go to the very heart of what we are about. Just what is a law school? Is it a graduate school, or is it a professional school? Are we interested primarily in legal theory and techniques, or should we also be responsible for the practical application of those theories and techniques? If our curriculum does include a clinical component, does it further a broad-based liberal arts approach to legal education or does it undercut it? Moreover, how should we treat the clinicians themselves? Should they have tenure? Should we expect them to write the kinds of theoretical articles that are traditionally the bill of fare of law reviews, or should their work be more pragmatic? Indeed, if clinical teachers are carrying a substantial caseload, should they be expected to write in a genre other than the legal briefs and memorandums that any busy law practice generates? Do they need additional time to reflect on, and then write about, their practical experiences? Perhaps clinicians are and should be different from traditional law

professors. Is it perhaps the difference in their pedagogical approaches to law that adds strength to a law school curriculum, not their similarities to “traditional teachers”?

The nature and overall cost of clinical education raise important issues of resource allocation as well. Clinical teaching takes a great deal of time and effort. It is labor intensive and does not lend itself easily to the paper-chase model of legal education—one professor teaching 150 to 200 “terrified” students. Clinical teaching is expensive not only from an institutional point of view but from a personal point of view as well. Because it is time-consuming, it limits the instructor’s opportunity to be a reflective scholar.

From the student perspective clinical education fuels a different controversy. There is, in the view of many students and faculty alike, something called “the third-year malaise.” Our students learn how to play the Socratic game well in the first year. Thereafter they want a change; they want to begin to apply their skills in new and challenging ways. Their level of motivation rises considerably when at last they can perform in professional contexts. Many students find that there are a number of factors relevant to success in law practice that a blue-book examination cannot test. Students who have been apathetic about law school often come alive in a clinical setting.

Those different perspectives on clinical legal education have generated a lively debate among professors in the law school world. Those who emphasize the graduate school aspects of legal education may fear that clinical programs might undermine the liberal arts basis of the curriculum, while those who emphasize the professional school aspect of law argue that we have an obligation to expose students to the kinds of skills they will need to be effective lawyers. While most faculty members believe that graduate and professional school goals are not mutually exclusive, issues concerning the form, content, and extent of clinical courses in the law school curriculum continue to raise important differences of opinion that are often difficult to resolve.



Mnemosyne (mother of the Muses) and her sweet-voiced daughter, Kalliope

The Musical Model

To help gain insight into clinical legal education, legal educators have often looked to medical schools for guidance. I think that is because medical schools employ the clinical method of teaching so effectively. But aside from that, law as a subject and medicine as a subject have little in common. Law is grounded largely in the humanities, medicine in the sciences. I do not doubt that there is much to be learned from the medical school model,¹ but I propose to posit a different model or, perhaps, a different simile. Legal education is more like musical education than medical education, and the professional music conservatory can be a source of insight into the ongoing debates surrounding clinical legal education.

Music is tied closely to the humanities and, perhaps more than nonmusicians might think, requires not only musical talent but a high degree of analytical and intellectual ability. Understanding the structure of music, its historical roots, and its creative possibilities has many similarities to studying law. Moreover, though this is neither the time nor the place to argue this point, I will nonetheless assert that just as it may come as a surprise to nonmusicians to realize how much of an intellectual structure exists in music, it may be equally surprising to some to realize that there is more emotion involved in law than might first meet the eye. I am not talking about the kind of emotion that a masterful trial lawyer can arouse as he or she succeeds in moving a jury to tears on behalf of a client. I am talking about the kind of sensitivity, feeling, and intuition that goes into what we call legal creativity. How does a lawyer decide how to phrase an issue? How does a lawyer decide which arguments to prefer over others? How does a lawyer decide which strategy to follow or how best to present a particular kind of case to certain judges? Just as none of us is born full grown, legal disputes, especially those on the frontiers of the law, rarely present themselves in a tidy fashion, ready to fit snugly into some pre-existing legal pigeonhole. Creativity and judgment as well as technique come into play as a first-class lawyer goes about his or her tasks.

One of the insights that I took away from my recent conversations with members of the composition department at the Eastman School was that they recognize not only the importance of technique, but the need they have as educators to foster, to encourage, and, yes, even to teach creativity and its handmaiden, judgment. I think that same need to foster, encourage, and teach creativity exists in the law school setting as well. To explain that statement, let me make my comparisons between legal and musical education more specific. In the process I must be a bit autobiographical.

As an undergraduate at the University of Rochester, I spent a good deal of time at the Eastman School of Music. I was not a music major, but the study of music was one of my primary interests. Long before entering college, I began studying drums, piano, and arranging. I toyed with the idea of pursuing music as a career, and that, among other reasons, was why I never considered going anywhere but to the University of Rochester. The Eastman School opened up a world that existed no place else, and it gave me a chance to pursue the aspects of music I cared most about—jazz, percussion, and arranging. When I finally decided (much to the relief of my parents) to go to law school, it may have seemed like a dramatic shift in intellectual focus and one that would take me in a very different educational direc-

tion. It was not. And to the extent anyone can be intellectually prepared for the rigors of law school, I believe that I was. What any serious musician learns early on is the value of technique, the need to master your instrument. That does not happen overnight. As John Gardner has said, “Mastery is not something that strikes in an instant, like a thunderbolt, but it is a gathering power that moves through time, like weather.”² It takes years of intense work—scales, arpeggios, and exercises. No one expects that kind of playing to be music. It is as unappealing to listen to as a jackhammer, but it is necessary for a true command of one’s instrument. Of course feeling and musicality are what all serious players strive for, but they know that without at least a modicum of technique they are doomed to waste their finest feelings on the wrong notes. Discipline, mastery of one’s instrument, and a knowledge of the effort that goes into a first-rate musical performance precede the ability to perform and create with the facility of a real artist.

For me much of law school, the first year in particular, was very similar to music school. We were learning techniques—the technique of reading a case and the technique of reading statutes and engaging in legal reasoning and legal discourse. Classrooms were just big practice rooms where we could learn our analytical skills and to read much more carefully than ever before. I was not necessarily looking for great moral or political revelations, not because I did not think they were important, but because I was, to use the musicians’ vernacular, developing my “chops.”

But though every music student knows that technique is but a means to a creative end, there is a tendency in the law school setting for students, usually unconsciously, to begin to treat technique as an end in itself. It is difficult to have the imagination necessary to convert the classroom hypotheticals and cases—the scales and exercises—into actual performances. Moreover, there is a tendency for students to take on the role of senior partner—or law professor—when confronted with classroom exercises. They can easily become too detached and critical, pointing out what this or that court did wrong or why this argument or that argument won’t fly. Much of our analytical technique building is based on the ability to be critical and to spot the flaws in one’s own and in another’s argument. That is all well and good, but it can have a tendency to inhibit constructive creativity—the ability to posit one’s own solutions to a problem. I sometimes think that we do a better job of training law students to play the role of the senior partner than preparing them to be the laboring oars that most young lawyers will have to be. By “laboring oars” I do not mean

they will be engaged solely in the mundane tasks of lawyering, but the creative ones as well. And those require a constructive legal approach and creative, positive energy if they are to succeed.

The ability to create takes imagination, and the ability to choose among various approaches requires judgment. Can one teach creativity? Can one teach judgment? I believe so. And it is in achieving those pedagogical goals that clinical education combined with a first-rate technical and theoretical education can be of enormous value. To explain how those crucial skills—creativity and judgment—can be fostered in a clinical setting, let me describe a class I took at the Eastman School nearly twenty years ago. As a law teacher, I have often reflected on that class, and I continue to draw on it as a source of pedagogical inspiration.

The course, taught by Ray Wright and Manny Albam, involved jazz arranging and composition. Our goal was to write and arrange music for various-sized groups—small combos, big bands, and big bands supplemented by string sections and orchestral sounds such as french horns and oboes. The course lasted three weeks, and it culminated in a concert at Eastman Theater called the Arranger’s Holiday Concert. Everyone involved in the course, including our teachers, Ray and Manny, wrote for that show.

Our classes consisted of analysis of famous arrangers—their styles and their use of the band, orchestra, or combo. The focus of the course, however, was our own arrangements. They were played by a first-rate band almost as soon as we finished them (and sometimes, it seemed, before). Classes were then devoted to an analysis of what each of us had done. We listened to the tapes with our scores spread out before us. Ray or Manny would stop the tapes to comment on both the good and bad aspects of an arrangement. They were critical and constructive. They taught us not only what and how something seemed to work, but, more importantly, they taught us how to learn from our mistakes. That is the beginning of wisdom. Learning that something doesn’t work the way you thought it would is one thing, but learning how to learn from the experience is judgment. That is why wisdom and experience do not correlate with one another unless you know how to reflect on the good and bad of what you have done. There was something enormously stimulating about the process. We were analyzing our own work, trying to see how it fit or didn’t fit with other, broader approaches to similar musical problems. At the same time we were not just students but creators of music as well. We were not passive receptors of knowledge or critique; we were putting our very selves down on paper.



Professor Alfred Aman rehearsing with his modern jazz group, *The Greenhouse Effect*

Nor were our teachers just critics and sources of information and knowledge. They were performers as well. Since they were helping us to write for the concert and also were writing their own arrangements, they were directly engaged in the creative enterprise. We all had to perform. We had a common enterprise, and we pooled our talents and energy to achieve a common end.

The educational value and stimulation of that course have stayed with me for these twenty years, and I think that there are some insights that we can learn from that approach that are applicable to the law school setting. First, there is enormous learning value in the teacher's being viewed not only as a critic but as a performer as well. If nothing else, seeing an experienced professional *in the act of creation* can convince a student how much work is involved. But it also teaches in more-subtle ways. In music and in law there are many approaches to problems, and seeing how experienced professionals solve them can give the perceptive student insight into how one goes about such creative tasks. Moreover, when both student and teacher are involved in a common enterprise, the barrier between student and teacher is sharply diminished. There is a creative spontaneity that that kind of atmosphere can encourage. We are all creators; we are all engaged in similar tasks. That does not mean that student and teacher are equals in knowledge or experience, but it does mean that we are *all* professionals. The equal footing implies equal responsibility. And what one senses in such a setting is the *responsibility* that being a

professional entails. I have often thought that at some point in law school we have to begin to move students from the reflective and analytic, but often receptive and passive, role to a more active professional role. They too are young creators of law, not just learners.

Second, the emphasis in class and in our final product was on imagination, judgment, and the need to exercise those talents and skills within a strict time frame. We had a show to write. On August 4 we knew there would be two thousand or more people in Eastman Theater because we told them that we would give them something worth listening to.

In the legal setting, performance pressure translates into greater emphasis on the creation of an argument, not just a critique of an appellate court opinion or the argument made by losing counsel. But that creativity goes further than an off-the-top-of-the-head answer to a question posed in class that, in effect, asks, *What would you do?*

Let me mention a course I recently supervised called the Death Penalty Seminar. We took on a real case in which the death penalty had been imposed. The Georgia Supreme Court had turned down the defendant's appeal. Five students and I prepared and filed a petition for certiorari with the U.S. Supreme Court. The case was difficult—there is little room these days for success in this area of the law—but the students had to face firsthand both the difficulty and exhilaration of creating legal arguments out of a record several thousand pages long. They soon learned that claims that an argument won't fly, and the critical detachment that keeps us from going down the wrong path, did not help when it came to creating an argument that would work. Our essential task was one of creation, not just criticism. That takes imagination, and, in my view, a different, more positive kind of mental energy. I believe that students need more opportunities like that, and that is what a vibrant and active clinical program can provide.

Finally, as I reflect on those classes with Ray Wright, I am reminded of a metaphor that I think we should strive to incorporate in our legal education efforts. Students should be seen and treated as aspiring artists, not technicians. A first-rate lawyer is an artist. He or she has the technique necessary to handle the easy cases and answer the basic questions but also the creativity and judgment to put form and shape into an amorphous set of facts that do not neatly fit a ready-made legal pigeonhole. Knowing the questions to ask to formulate the appropriate issue is not *just* a technical skill. It is a creative, imaginative task. As artists, students will be expected to have the technique of their craft well in hand, but the goal is not technique for technique's sake.

We need to inspire an appreciation of the creative role of law and a sense of what it means to mix vision with skill, and wisdom with action. To do that takes theory and technique, but it also requires an opportunity to try one's hand at actual lawyering. We need our own arranger holiday concerts in law school so that aspiring young lawyers can experience the need for the artistry necessary to produce first-class work and so that they can see how the exercises, scales, and arpeggios of the classroom are converted into an actual performance in the courtroom or at the negotiating table. That is what clinical education can do and is doing at Cornell. In short, teaching theory and technique alone is not enough. The application of techniques and theories in live situations fosters the imagination and judgment that are essential to first-class lawyering. It can enable us to teach that, in the words of the immortal tune by Duke Ellington, "It don't mean a thing if it ain't got that swing."



Alfred C. Aman, Jr., teaches Administrative Law, Constitutional Law, and Energy, Natural Resources, and Telecommunications Law.

1. See, for example, Roger Cramton's excellent paper "Medical and Legal Education: Learning from Each Other," *Health Affairs* (fall 1986).

2. John Gardner, *The Art of Fiction* (A. Knopf, 1983).