

## CLINICAL LEGAL EDUCATION: WHERE NEXT? CLIENTS AS CO- PRODUCERS OF SYSTEM CHANGE

EDGAR S. CAHN & CHRISTINE GRAY\*

*From its inception, clinical legal education has been centrally concerned with two aims: imparting lawyering competencies and achieving social justice. But in achieving the former, a preoccupation with a rights-based approach that calls on students to provide legal services too often turns the clients into passive consumers, thereby unintentionally undermining a community-based advancement of justice. This essay explores the notion of “powers” as an essential complement to rights that calls on clinics to engage the strengths of client communities as partners, allies and co-workers in shared efforts to fight systemic injustice. Examining co-production as an action-oriented framework for actualizing a powers approach, the essay shows how new structures can facilitate client engagement, and calls for a new set of competencies that would place powers side by side with rights as essential components of effective legal practice.*

Clinical legal educators are *de facto* trustees of this nation’s commitment to “establish justice.” Yet, despite our best efforts, the world for which we are grooming prospective lawyers is becoming more unequal. Systematic efforts are ongoing to undermine, dismantle or abrogate decades of historic efforts that advanced justice, opportunity and equality.<sup>1</sup> On many fronts, justice appears to be receding rather than advancing.

Challenges such as these call on us to take a hard look at our approaches to securing justice. Today, clinical legal education programs focus primarily on imparting advocacy-related competencies to our students. Representation of clients (supervised by faculty) enables law students to acquire both the practical knowledge and the generic

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\* Ph.D., J.D. Distinguished Professor of Law, U.D.C. David A. Clarke School of Law; NO MORE THROW-AWAY PEOPLE: THE CO-PRODUCTION IMPERATIVE (2004).

Ph.D. Adjunct Professor of Law, U.D.C. David A. Clarke School of Law; THE TRIBAL MOMENT IN AMERICAN POLITICS: THE STRUGGLE FOR NATIVE AMERICAN SOVEREIGNTY (2013). We wish explicitly to express our indebtedness to our faculty colleagues, Andrew Ferguson, Adrian Gottshall, Phillip Lee, Hannah Lieberman, Faith Mullen for their substantive input and their kindly but rigorous editorial commentary.

<sup>1</sup> If a bill of particulars were needed for that indictment, we would cite efforts to dismantle Medicaid and Medicare, suppress voters’ rights, renew the War on Drugs, repopulate the prisons, eviscerate the Environmental Protection Agency, and decimate or immobilize Civil Rights enforcement offices. And more are underway.

competencies critical to the practice of law at the same time as it enables clients to assert rights and secure remedies provided by the legal system. Professors teach our students to ask: “How can I help you?” They focus on the client’s problems or needs.

Meanwhile, pursuant to their supervisor’s direction, the role that student-attorneys assign to clients tends to be limited. Clinics provide clients with an opportunity to present their problem in their own way coupled with leads to documentation. But once having supplied that necessary information, the client’s role falls away. Clients are relegated to the role of passive consumers; law students in the clinics are the providers.

Access to justice becomes a spectator sport for our clients. Typically law school clinics do not focus on making clients aware of the power they have or could have, individually and collectively. Clinical programs typically fail to enable clients to exercise their power to affect the changes that could have a system-wide impact on patterns of practice that perpetuate unacceptable disparities of treatment.

In this way, we submit that relegating the client to that consumer role unnecessarily and inadvertently circumscribes what we as retained counsel can do, the contribution clinical educators are able to make, and the forces for change that we might be able to set in motion. Moreover, the focus on the struggles and needs of an individual client may eclipse the extent to which each individual client’s situation can be symptomatic and illustrative of larger systemic issues. The provision of service in individual cases can pre-empt client engagement and community organizing and co-opt leadership thereby insulating unacceptable practices from effective political or legal pressure.

This essay contends that in certain contexts, service delivery undermines the exercise of power. It is time to re-examine our preoccupation with the provision of legal services that favor the assertion of rights over powers. This essay explores how we can teach our students approaches that enable clients to exercise powers as an active citizenry engaged in pursuit of social justice. That, in turn, calls for a restructuring of clinical legal education to enhance the capacity of our students to enlist and partner with the client and the client community, as a voice, a bank of knowledge and a source of energy for system change and social justice.

The exercise of powers by clients is essential. This essay examines the implications of invoking and actualizing the distinction between rights and powers in the context of clinical legal education. As highly trained professionals who are seeking to do right by our clients, this essay suggests it may be time to rethink our role, and, by doing so,

renew our sense of law as a calling.<sup>2</sup>

This essay draws upon the distinction between *rights* and *powers* advanced by Wesley Hohfeld. The thesis of this essay is that by adding a powers-based approach to the advocacy model that currently pervades many clinical legal education programs, we can more effectively advance the mission of legal clinics while also transcending the shortcomings of exclusive reliance on rights-based advocacy. We invoke Hohfeld's basic construct of powers to define the jurisprudential territory. Translating "powers" into actual practice for students can be advanced by delineating a set of operating principles that define what it would take to enlist the clients as active partners in advancing justice. The term "co-production" will be used to express the core idea that clients, far from being merely the consumers of lawyer expertise can and should be supported by lawyers to be the co-producers of desired outcomes. They would be engaged in defining, acting on, and achieving outcomes aided by lawyers; they would establish through their actions new relationships and obligations that would build community capacity or address some systemic problem.

First, however, the core features of the current rights-based approach to clinical legal education need to be contrasted with the alternative approach based on including powers as well. Part I introduces the concept of powers as enumerated by Wesley Hohfeld in 1917. Part II illustrates what adding powers can achieve with a fictional scenario. Part III invokes the work of Gerald López in his classic book, *Rebellious Lawyering*, to examine the limitations of clinical legal education's emphasis on service delivery, and makes the case for including powers to transcend the limits of "regnant lawyering." Part IV steps outside current clinical practice to introduce co-production as a road map and epistemology for incorporating powers as a fundamental feature of interaction with clients in clinical legal education. Part V urges that problem solving as a core lawyering skill should be expanded to include competencies that equip students to partner with their clients in the exercise of their powers. We propose that co-production provides both a framework and a methodology for expanding the exercise of powers. The conclusion returns us to the mission of social justice that inspires and undergirds so much of clinical legal education.

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<sup>2</sup> The American Bar Association's Preamble sets forth "A Lawyer's Responsibilities" when it declares that a lawyer is simultaneously "a representative of clients [or a neutral party] an officer of the legal system and a *public citizen having special responsibilities for the quality of justice.*" See MODEL CODE OF PROF'L CONDUCT pmb1. (AM. BAR. ASS'N 2017) (emphasis added).

## I. BRINGING POWERS INTO PLAY

A century has passed since Hohfeld established a jurisprudential framework that identified a basic distinction between rights and powers.<sup>3</sup> Rights, argued Hohfeld, are claims against another. Powers, in contrast, are defined as one's ability to alter legal relations. Thus, entering into a contract involves the exercise of a power that alters the relationship of the parties. So too one exercises a power when one creates an association, an organization or a legal entity that defines how people will relate to each other and what they might do jointly that exceeds in value or impact the total of what each could do individually. In each case, citizens simultaneously call upon and exercise a latent power that the law effectively grants them to further their own goals and objectives in relation to others.

Under Hohfeld's distinction, rights provide citizens with the ability to call upon specific aspects of the common, statutory, or constitutional law in defense of their legitimate interests as citizens. Powers, in contrast, represent citizens' ability under the law to proactively engage in shaping and reshaping their relations with others, in legally significant if not binding ways in furtherance of those same interests.

Rights can be considered as "defensive," powers as "proactive." Yet rights and powers do not relate symmetrically. The law positively defines rights, which may then be actively asserted as protection against intrusion and overreach by others. Powers are embedded in our notion of citizenship. They underlie and shape the specific, enumerated elements of causes of action provided by common, statutory or constitutional law. Citizens can commit by contract on an individual basis to help another citizen. Clients, as citizens, can commit to becoming a member of a client association or community organization that gains leverage from membership; or they can become part of a focused protest movement. They can organize to question authority or demand changes using the kinds of strategies articulated in *Rules for Radicals* by Saul Alinsky, a founder of community organizing.<sup>4</sup> Clients can engage in mass mobilization of the kinds documented by Frances Fox Piven and Richard Cloward that generates change because its disruptive impact so heightens awareness of intolerable disparities as to generate some form of accommodation and change in response.<sup>5</sup> They

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<sup>3</sup> We derive powers from the taxonomy of basic legal concepts that Professor Wesley Hohfeld developed a century ago. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1920) (originally 26 *YALE L. J.* 710 (1917)).

<sup>4</sup> Saul Alinsky is credited by many as a founder of community organizing. See SAUL ALINSKY, *RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS* (1971).

<sup>5</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977).

can insist upon participation as members of the work force needed to renew community, revive empathy, extend trust, create mutual support and revitalize grassroots democracy.

These powers may or may not be specified and enumerated in the law. However, they are deeply and historically embedded in the notion of citizenship, through the constitution, through norms that have been established and have evolved over several hundred years within Anglo-Saxon, European, and, more recently, American constitutional contexts. But while powers may be unattached to specific laws, their exercise results in actions intended to effect existing relationships in ways that can impinge upon or reshape obligations between the parties that are embedded in existing law.

Thus, for example, community groups responding to an RFP (Request For Proposals) or a NOFA (Notice of Fund Availability) are, in effect, offering to exercise a latent power—the power to assert standing, to access resources, to require a participatory role in programs administered on their behalf. A proposal submitted by a community group in response to an RFP may or may not be taken up by the funder. If the funder responds positively, that too represents the exercise of a power and the creation of a relationship in which both parties have additional residual powers they each can exercise.

When lawyers advocate on behalf of clients to protect their rights, clients have a very different role to play than when they exercise powers to reshape legal relations in pursuit of social justice. In the former situation, lawyers call on clients to supply initial facts. Beyond that, clients are relegated to a relatively passive role. When lawyers engage in helping clients exercise powers, clients are no longer passive consumers of services provided by others. Instead, the lawyers can proactively engage as allies of communities in which there are both systemic patterns of injustice, and opportunities to collaborate to address those patterns. Clients may become our partners in shaping remedies, in monitoring compliance with a court order, and even, in remedying the problems in their own communities.

A fictional scenario, using an all-too-common situation of a client facing eviction, will usefully illustrate how this difference might manifest in a clinical setting. As is common in the case of tenant eviction cases, the potential loss of housing will be one of several critical issues that the client faces. The scenario, with Naomi as client, will also provide the ground for further examination and analysis of what a shift to include powers as well as rights would imply for the structure and practice of clinical legal education.

## II. WHAT ADDING POWERS CAN ACHIEVE: A FICTIONAL SCENARIO

In this hypothetical case, Naomi comes to a clinic facing eviction from her apartment complex because of back-rent owed. She also faces job loss, having been late or obliged to leave work early because of calls from the school that her teenage son, Jonah, had become a discipline problem and now is truant. Jonah is below grade in reading and math, and teachers say he is out of control. Her childcare arrangements for her three-year-old have broken down because her grandmother, who has been looking after the child while she is at work, is sick and may have to be hospitalized. Naomi has brought the infant with her.

### *Model A: Present Practice, Focused on Service Delivery and Rights of the Client*

Under the current model of clinical legal education, a law school clinic would provide dedicated advocacy and representation for the presenting problem: the problem of eviction. The retainer will define the matter for which the clinic is undertaking to provide services and the scope of that representation. Because case law, statutes, and administrative regulations have established and defined a virtually nationwide implied warranty of habitability,<sup>6</sup> we will postulate for this hypothetical that Naomi's eviction can be prevented by development of a strategy that invokes enforcement of building codes, assertion of tenants' First Amendment rights to organize and protection against retaliatory evictions. The case will mobilize the clinic students under the oversight of the clinic professors and will likely take the law students several weeks of work, interviewing the client for a full picture of the situation, undertaking research, memo writing, appearances before hearing officers and representing Naomi in a court dedicated to landlord-tenant issues.

Supposing that the clinic was able to prevent eviction, the clinic can take credit for an important victory. Naomi experiences enormous relief. But in all other respects, she remains under acute stress and as vulnerable as before. A cluster of equally dire problems and situations surround and exacerbate that eviction problem. But given the typical retainer, the law students in the clinic will not have any obligatory role or mandatory responsibility regarding how to address those other is-

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<sup>6</sup> See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968); *Robinson v. Diamond Hous. Corp.* 267 A.2d 833 (D.C. 1970). An action for possession by a landlord for withholding of rent violations can be defeated if rent is being withheld in response to housing code violations and the eviction is deemed retaliatory.

sues. Jonah's problems remain. Suspension and even expulsion are disproportionately used to deal with students of color who present behavioral issues. The client's employment is precarious and she may still lack income to meet future rental obligations. Child-care arrangements are uncertain. The grandmother increasingly may need informal and formal support.

Perhaps even more serious than the individual circumstances of this client, however, will be the systemic issues involved. The landlord of the building that the client inhabits may be a slum-landlord, systematically taking advantage of the powerlessness of individual tenants, so that violations of health and safety codes abound and illegal evictions are common.<sup>7</sup> Naomi's son, Jonah, may be attending a school that routinely resorts to suspension, rather than applying remedial programs that have a proven track record of effectiveness. The availability of childcare for low income residents may be minimal to non-existent. With such systemic issues in place, Naomi will be one of a backlogged string of clients, all with similar urgent issues, all relating to the same systemic problems. The victory on behalf of Naomi is to be celebrated—but a serious consequence of this focus on individual clients and their needs is the likelihood that systemic issues may not be addressed.

### *Model B – Injecting Powers in Clinic Practice*

Now imagine the same case in a clinical program that also undertakes to enlist the client community that it serves by taking on a powers perspective. To do so, we would add two features to the fact situation that would organically grow out of a powers approach. We will explain these two features before returning to the hypothetical to explain how these features would transform the interaction between the clinic and the client and the collaboration's potential for doing justice.

#### *Feature #1: An Advisory Client Committee (ACC)*

To call on the community's capacity, the clinic will have established either a formal or informal vehicle. In this case, we will hypothesize an Advisory Client Committee (ACC) composed of community representatives (for individual clinics or for the clinic at large). Some members of the committee would be nominated by clinical faculty members; others would be recruited from the community at large. Membership and selection process, responsibilities and functions of

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<sup>7</sup> See MATTHEW DESMOND, *EVICTED* (2016) for a harrowing narrative description of situations generating a virtual epidemic of evictions.

the ACC would have been developed by a process of dialog with the clients and community leaders about the roles they might play to advance shared objectives.<sup>8</sup>

The ACC would face in two directions: facing the law school, it would articulate community needs and identify community assets, strengths and sources of energy; facing the community, it would act as a source of linkage, using local knowledge to provide on-the-ground information and to connect clients with local leaders and sources of support both within and outside of existing professional systems of support.

An ACC is a feature that law school clinics do not currently have.<sup>9</sup> We submit that clinical law programs should consider establishing such committees, either formally or informally, as a body composed of present and former clients, community associations and non-profits who see value in linking with the law school to explore ways to reciprocate for the legal services that they and their members have received.<sup>10</sup>

The ACC should be more than window-dressing. In the context of a powers approach to lawyering, the ACC can play a crucial connecting and informing role, and can be convened regularly to give advice and approval. Individual members can identify new areas where intervention is needed. In addition, they can provide a liaison to community-based groups, enhance grant proposals with strategic partner-

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<sup>8</sup> Both prerogatives and obligations of membership would need to be determined by a collaborative process. Activities might consist of projects, events, trainings, celebrations, study groups, organizing, mutual assistance, testifying and holding community inquests about critical concerns. Hopefully, the ACC would provide a vehicle for the emergence of successive generations of leaders who had earned respect and a following in the Council and in their own communities

Community advisory committees, while only advisory, can provide powerful sources of leverage. They have access to relatively unknown and inaccessible records. Their recommendations have standing. Disregard of their findings and recommendations can preclude funding. Thus, to secure funding authorized by the federal Juvenile Justice and Delinquency Prevention Act, every state must establish its own State Advisory Group to develop and implement juvenile justice plans. Juvenile Justice and Delinquency Prevention Act, 34 U.S.C.A. § 11132(d) (West through Pub. L. No. 1115-51). Professors directing clinical programs and clients who speak with special authenticity are ideal candidates for membership on such committees. Members of those committees can serve on an advisory task force or work group for the clinic.

<sup>9</sup> The present strategic plan of the UDC David A. Clarke School of Law provides for the creation of a Client Advisory Committee. Actual formation is under development.

<sup>10</sup> Alternatively, the clinic might partner with a neighborhood association, a faith-based organization or an NGO whose clientele or membership base would undertake to function as an auxiliary resource and voice. Membership would be voluntary, not obligatory—and would be represented as a strategy whereby the client could get assistance on matters other than those that the legal service clinic would be able to provide. Mutual support and jointly developed projects and procedures would maximize the synergy that comes from combining self-interest and shared interest.



ships, augment outreach efforts by the law school's admissions office, generate social media, conduct forums that both amplify needs of the client community and inform the community regarding the law school's contribution to advancing social justice and public well-being.

Clinical faculty know their most articulate clients, who are knowledgeable and resourceful sympathetic non-profit spokespersons, and which staff persons in which agencies might provide an informative and supportive voice. Some form of community input (that engages affected residents, agencies and non-profits) is important to enhance effectiveness, supply guidance, affirm contributions and even provide a voice that supports investments in the clinic and grant applications by the law school.

### *Feature # 2: A Community Service Exchange (CSE)*

In this scenario, we posit the existence of a Community Service Exchange (CSE)<sup>11</sup> which would be a community or neighborhood membership organization developed expressly so that residents who join can provide help and mutual support to each other and to which clients are referred by the clinic.<sup>12</sup> This second entity, the CSE, would be distinct from the ACC because it would be actually engaged in community-building initiatives and in the creation of social networks to which clients can be referred. As a grassroots organization, its mission, membership, gatherings, mobilization around issues, creation of

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<sup>11</sup> The Community Service Exchange may have chosen to use timebanking as a vehicle to promote helping acts between members and to initiate projects. Every time bank follows a few basic rules: Members earn time credits for helping others or volunteering in a community building project. All hours are equal in value. Members earn one time credit for each hour of work, regardless of whether that member provided a highly skilled professional service or simply drove another member to a doctor's appointment. Time credits are not for sale and cannot be converted into money. Members can spend time credits only on labor that builds community resources, furthers a charitable purpose, provides personal support, or remedies a social problem. When a member receives an hour of service, there may be a moral or social obligation to pay it back, but there is no legally enforceable obligation to do so. (The US Internal Revenue Service has ruled that because time banks are not commercial barter organizations, time credits do not count as taxable income.)

For members, an earned time credit has two distinct meanings: It embodies a kind of purchasing power, and it conveys a sense that one's work has value. The first is an extrinsic reward; the second is an intrinsic reward. Each transaction flows from a relationship, and such relationships create a spirit of trust that allows people to reweave the fabric of community. A currency that treats all hours as equal does more than simply provide an alternative to market price as a measure of value. It empowers people whom the market does not value and validates their contribution to society. Edgar S. Cahn & Christine Gray, *The Time Bank Solution*, 13 STAN. SOC. INNOVATION REV. 41 (2015).

<sup>12</sup> See generally Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133 (1994); Cahn & Gray, *supra* note 11. For a case study and analysis of one pioneering effort to engage clients, see Edgar S. Cahn & Sharon Lee Schwartz, *Let's Get Real: An Addendum*, 46 CLEARINGHOUSE REV. 451 (2013) and Sharon Lee Schwartz, *Partnering with Clients to Achieve Economic Justice and Full Enfranchisement*, 46 CLEARINGHOUSE REV. 443 (2013).

community events will need to be distinct from the deliberations and operation of the ACC.

In this hypothetical, the law school would have worked with the ACC to identify a group of individuals to become the initiating leadership of this CSE, and would have undertaken to provide a leadership training program with the aim of building capacity over time. As new members join, be they clients, community members or community organizations, the CSE leadership would then undertake an asset inventory of the kinds of volunteer services that members say they are willing to do for each other, for the community and to advance justice. The ACC for its part can draw on that inventory, calling on participating individuals and organizations to actively engage in helping other clients or to undertake community and client-based projects and initiatives.

As part of an outreach campaign, a representative of the ACC or a member of the CSE or a law student would have offered Naomi the opportunity to become a member of this CSE, since the CSE's main mission would be to generate mutual support between clients and members of the client community at large, including local associations and organizations.

### *The Difference Powers Can Make*<sup>13</sup>

Now, consider how the hypothetical case might be altered by the

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<sup>13</sup> A legal aid attorney in Roseburg, Oregon, Sharon Lee Schwartz, actually undertook to enlist clients as co-workers in a "pay-it-forward" system. A dedicated legal aid lawyer, Sharon had begun her career providing legal representation on a Dakota Sioux reservation for two years and then went on to provide legal services in a rural office of Legal Aid Services of Oregon (LASO) for sixteen years. She now is in private practice specializing in cases where alternative dispute resolution would be appropriate. In launching the timebank pay-it-forward system, she developed the following explanation of the benefits that could flow from a "pay -it-forward" system that enlisted the client and the community as co-workers. Sharon Lee wrote:

"The intent underlying the reframing of client from consumer to co-producer was to have a preventive and restorative impact on disparities that generate legal problems by Exchanges between members that address:

- *Food scarcity* by teaching skills and providing support for growing and preserving food;
- *Adequate shelter* by offering home repairs and teaching home maintenance skills;
- *Reliable transportation* by offering car repairs, rides, and delivery of needed items;
- *Health care* by providing caregiving services so patients can return home from the hospital sooner and respite for overburdened caregivers;
- *Education* by offering tutoring and lessons;
- *Independent living* for seniors and disabled people by providing support services such as rides to appointments and meal delivery;
- *Job readiness* by helping members maintain skills, learn new skills, network, and receive job coaching while they are unemployed;

ACC and the CSE.<sup>14</sup> Either during the intake process or in subsequent sessions, Naomi is informed about the CSE, learns how client members can volunteer, and receives an invitation to become a member.<sup>15</sup> Naomi learns that if she joins, and makes a future good faith commitment to help the ACC's efforts to support community action, she can get help that she needs from other members of the organiza-

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- *Access to justice* by increasing *pro bono* resources.
  - *Isolation/helplessness* by building social connections and recognizing skills.

Schwartz, *supra* note 12, at 448.

<sup>14</sup> This scenario was actualized for a period in Roseburg, Oregon as described by Sharon Lee Schwartz:

Clients report they will offer services such as transportation, car repair, help with errands, child care, cooking, sewing, housework, clerical support, making phone calls, tutoring, carpentry, masonry, home visits, caring for saltwater aquariums, and yard work. Among the services they are seeking are care repairs, transportation, child care, tutoring, help with finances, medical services, help with diet and nutrition, classes and entertainment, counseling and meditation.

*Id.* at 446.

<sup>15</sup> The CSE utilizes timebanking software to provide a “yellow pages” inventory of all that the members are willing to do, generates exchanges, records the exchanges and promotes community building events and initiatives. All hours contributed are of equal value. One hour equals one service credit. Timebanks have generated over three million hours of community exchanges and community service. In addition to individual exchanges, Timebanks enlist the capacity of members to advance mission, meet needs and address unacceptable disparities. See [www.timebanks.org](http://www.timebanks.org); [www.coreeconomy.com](http://www.coreeconomy.com)

The Client Council member lists ways in which clients have volunteered or could volunteer.

- provide respite to caregivers, support to foster families and kinship care networks
- receive training in the use of BenefitsCheckup software provided by the National Council on Aging
- help other community members obtain benefits such as food stamps, social security benefits and prescription drugs at weekend gatherings and potlucks sponsored by the Council
- alert clients to possible eligibility for Earned Income Tax Credits and referring them to programs providing assistance with income tax
- participate in a neighborhood watch programs, or expanding parental engagement in Headstart programs
- testify before local and state legislatures about the thousands of hours of community service and mutual help they were providing as a way of “giving back” in return for legal services received
- initiate additional timebank clusters as block captains or tenants groups to reduce vandalism, make developments safer, chase away the drug dealers and provide child care and mentoring for children whose mothers were working and support services that enabled seniors to avoid nursing home care
- partner with programs to feed the homeless, to provide after school tutoring, to provide rides for seniors to medical appointments
- receive referrals from local legislators whose constituents needed help in dealing with some agency
- provide stories and actual cases for study commissions and legislators wanting to know what programs were and were not working
- teach other clients how to enable their smart phones to access other members of the timebank to cope with unknown future emergencies, neighborhood issues, mobilize gatherings.

tion. All Naomi must do upon joining is attend an orientation and be guided by an existing member. That member will function as a mentor, helping Naomi to connect to various forms of help and support provided by either CSE members (both individual and affiliated organizational members).

In contrast to present practice, Naomi will now have access to additional resources provided by the CSE's members. These would enable her to access networks of support on the multiple fronts that she truly needs. Thus, on entering the clinic's office, there might be a babysitting and child care area staffed by client members of the Community Service Exchange.

Assuming that the CSE is fully up and running, with leadership and governance in place, the tasks that members of the CSE could take on that directly impact Naomi's situation include: (1) going back with Naomi to her apartment, identify housing code violations that they have been trained to spot and take photographs that the clinic can use; (2) helping Naomi fill out a Benefits Checkup one-stop application for all government benefits including Earned Income Tax Credit, Food Stamps;<sup>16</sup> (3) working with the client to see if her child is entitled to any special educational help including developing an Individualized Education Plan (IEP) for the middle-school-aged child; (4) talking with other tenants about conditions in their apartments; (5) finding out from neighboring tenants how threats of retaliation had stopped efforts to organize a tenants council; (6) providing informal support, shopping services and transportation for the grandparent; (7) identifying and helping to access reliable and affordable child care for the infant. Finally, when Naomi's family and work life are more supported and stabilized, she will be given options to pay back over time in any number of ways.<sup>17</sup> Naomi can also call upon her family, friends and neighbors to help pay back in ways that would also enable them to earn time credits that they could use.<sup>18</sup>

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<sup>16</sup> BenefitsCheckUp provided by the National Council On Aging generates a print-out list enabling people to learn about and access programs that can help them to secure food, utilities, medicine and more BenefitsCheckUp, [www.benefitscheckup.org](http://www.benefitscheckup.org)

<sup>17</sup> BenefitsCheckUp, <https://www.benefitscheckup.org>

<sup>18</sup> Sharon Lee Schwartz provided the following actual examples:

- One former client is helping a low income senior continue to live independently by doing yard work that the mother can no longer pay for or do. The senior earns time dollars by volunteering for an adult literacy program.
- Another client, a teenage mother who lives in a homeless shelter and attends high school, plans to earn money to buy a car. She joined the Time Exchange for help with child care while saving for the car. Another timebank member who has earned more time credits than she can spend offered to donate some of her credits to the young mother to help with child care.
- A third client volunteered for a children's camp and plans to spend her time earned on music lessons for her child.

This is one scenario of what it might mean to enlist the clients and the client community. It presumes that clients are more than the problem that brought them into the office. The premise is basic: clients and their families and other members of the community have the skills, capacities and potential to contribute significantly to create and maintain systems of informal support that will be crucial for ongoing stability.<sup>19</sup> By exercising powers, they also gain an organized capacity as a constituency for justice. To be able to provide that one client with so many forms of support, the community organization will have had to develop significant capacity for dealing with the systemic issues that confront her. Achieving that capacity means building strong leadership teams comprised of citizens who will be focused on chosen areas of systemic need in the community. Such an effort will also entail calling upon community groups, local authorities and funders to collaborate in creating the organizational infrastructure needed to inventory, mobilize, manage and deploy capacity that is currently untapped.

This raises the natural question: where and how will the resources be found to establish such an organization? For now, it is enough to state that clinics can play a major catalytic and supportive role if they complement the present emphasis on the delivery of legal services with its emphasis on rights with a new and complementary focus on powers.

### III. CLINICAL LEGAL EDUCATION – A CONFLICTED MANDATE?

Effective 2016, six units of experiential education are required for accreditation by the American Bar Association.<sup>20</sup> Thus, the acquisition of basic lawyering competence through experiential legal education has now attained an official standing in academia. Clinical legal education, of course, is not the only means for imparting experiential education in law; moot court and simulations are two others. Providing students the opportunity to work with clients who are facing real legal issues, however, means that clinical legal education proffers irreplaceable real-life lawyering experience. Students are called upon to

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- Another client, who took our trial skills class to represent herself against her batterer in a custody case and had a good result at trial, has agreed to speak to future clients about how to prepare to represent themselves in court. She is looking for car repairs and rides.

Schwartz, *supra* note 12, at 446.

<sup>19</sup> Some kind of organizational infrastructure (such as that provided by timebanking) is needed to inventory, mobilize, manage and deploy that untapped capacity and that a focus on exercising powers would mean that clinical legal service programs can function as a catalyst to create new support systems and new organizational vehicles to serve, to empower and to advance justice.

<sup>20</sup> American Bar Association, Accreditation Overview, [https://www.americanbar.org/groups/legal\\_education/accreditation.html](https://www.americanbar.org/groups/legal_education/accreditation.html).

apply the core elements of lawyering as the situation demands: interviewing the client, ascertaining the facts of the situation, researching and applying relevant case and statutory law, issue spotting, drawing up memos and briefs as needed, and where permitted, arguing the case in the applicable tribunal or court setting.

Students must apply these competencies in the same challenging circumstances, and facing the same kinds of frustrations, that professionals must daily deal with as part and parcel of practicing law. By providing experiential training, clinical legal education imparts an understanding of what it means to become an officer-of-the-court. That entails an appreciation that a career in law is more than a job; it is a calling. In addition to imparting competency, that advances a critical role and function that clinical legal programs have historically performed: addressing social justice issues that arise in the communities where they are situated.

Advancing social justice is for many law schools one of the primary, overarching functions of clinical legal education. As such, it is supported by several compelling rationales. First, cases that involve social justice issues offer a clearly mapped terrain for practicing the core elements of legal advocacy. Second, clinical legal education programs with strong social justice components attract students who seek to enter law “to make a difference” in the world. Third, they generate initiatives for funding from foundations seeking to tackle social issues that the clinics also engage in such as housing, juvenile justice, family law and supports, services for the elderly and disability law. Fourth, these cases bring the law schools face-to-face with their surrounding communities, raising law-school profiles, connecting them to the local legal community and establishing and reinforcing their reputation as they do the “good work” of lawyering.

For clinical legal education, teaching lawyering competency and providing access to justice form natural partners. The one reinforces the other. Yet there is an apparent paradox also in play, for, despite this natural pairing, clinical legal education programs routinely experience a competition in objectives and priorities between imparting basic lawyering competency on a case-by-case basis and advancing social justice that entails system change. This competition can play out as a kind of zero-sum game in allocating time, faculty, institutional resources and student hours to one or other of these two aims.

The reason for this apparently paradoxical competition goes to the heart of this essay. We argue that the competition is in large measure the result of limitations on the range of competencies that the ABA requires and that law schools seek to impart—and that the range of competencies is artificially constrained by the prevailing par-

adigm of what it means to seek justice as a lawyer.

To gain an understanding of this will require turning away for a moment from the context of clinical legal education to the wider context of the profession at large and to an examination of what Gerald López in his classic book, *Rebellious Lawyering*,<sup>21</sup> described as the “basic look” of what he termed “regnant lawyers,” who invoke the overriding paradigm of rights-based lawyering to achieve social justice.

### *The Limitations of A Service Delivery Emphasis*

López observed that “regnant lawyers” work within the overriding paradigm of advancing justice by delivering legal services. They operate from the belief that “subordination can be successfully fought if professionals, particularly lawyers, assume leadership in pro-active campaigns that sometimes ‘involve’ the subordinated.” For López, that belief was deeply problematic. In his powerful critique of regnant lawyering, López charged that lawyers as advocates value service over impact, connect only loosely with the real problems that subordinated communities face, understand those problems only diffusely, fail to understand how large groups can effectively respond to the status quo, cast themselves as leaders—thereby failing to support the native leadership of subordinated peoples—and, finally, fail to see how change in law factor into the daily life of those communities.

Calling for “the rebellious idea of lawyering against subordination,” López argued that lawyers would be far more effective if instead of seeing themselves as “honorable warriors” fighting to challenge injustice on behalf of others, they worked instead to promote self-help and lay-lawyering by subordinated populations. In place of using their legal knowledge to “stand for” the community, they should instead promote the capacity of communities by equipping them with effective tactics to attack systemic injustices. To do this, they must exercise competencies that go beyond those called upon by regnant lawyering: listening, mentoring, training, partnering and the offering up of expertise so that the communities they serve can effectively strategize and determine their own courses of action.

In sum, López was making the argument that the set of compe-

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<sup>21</sup> GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992). See also Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015); Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201 (2016); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008); Michael Grinthal, *Power with Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25 (2011); Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLIN. L. REV. 563 (2011).

tencies being applied by lawyers to achieve social justice are not up to the task. He asserts that while those competencies may be necessary, they are not sufficient—and because of that lack of sufficiency, lawyering that should be advancing justice instead impedes it, undermining rather than strengthening the capacity of communities to take on the fights that they must in order to secure the social justice they seek. Proponents of community-based and movement-related lawyering have put forward their own trenchant critiques of rights-based advocacy that echo López. They have also undertaken to generate actual examples of how that relationship of subordination can be altered.<sup>22</sup>

The charges made by López and others resonates powerfully with a more general critique of professionalized services in another field entirely. In a scathing critique of professionalized social work, John McKnight laid bare a fundamental pathology that he observed afflicting the helping professions: the relentless creation of a pattern of passive dependence upon professionals. He pointed out the large measure of self-interest—often, to be sure, unconscious self-interest, but self-interest nonetheless—that underlies the actions of professionals who seek on their face to provide help, but who in doing so, effectively deny agency to those who face difficulties in their lives. “In a modernized society where the major business is service,” McKnight observes:

[T]he political reality is that the central need is an adequate income for professional servicers and the economic growth they portend. The masks of love and care obscure this reality so that the public cannot recognize the professionalized interests that manufacture needs in order to rationalize a service economy. Removing the mask of love shows us the face of servicers who *need* income, and an economic system that *needs* growth.<sup>23</sup>

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<sup>22</sup> Sameer Ashar has framed the indictment in this way:

Poor people are not served well by the kinds of advocacy currently taught and reinforced in most law clinics. The canonical approaches to clinical legal education, which focus nearly exclusively on individual client empowerment, the transfer of a limited number of professional skills, and lawyer-led impact litigation and law reform, are not sufficient to sustain effective public interest practice in the current political moment. These approaches rely on a practice narrative that does not accurately portray the conditions poor people face or the resistance strategies that activist, organized groups deploy. At the margins of the field, a growing number of law school clinics and innovative legal advocacy organizations have played a key role in developing a new public interest practice. These lawyers and law students support and stimulate radical democratic resistance to market forces by developing litigation, legislative, and community education methods aimed at advancing collective mobilization.

Ashar, *Law Clinics and Collective Mobilization*, *supra* note 21.

<sup>23</sup> JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS* 40 (1995).



For a moment, therefore, let clinical law professors remove the mask of love in order to enumerate an uncomfortable truth about the process of rendering services. To be sure, our clients need our help to assert their rights. That is why they come to our clinics. They are typically disadvantaged, disenfranchised and disempowered. But, as López charged, we may unwittingly perpetuate the status of disempowerment by choosing a rights-based advocacy approach to shape the competencies that we call upon our students to master. Movement-related lawyering has put forward a trenchant critique of rights-based advocacy that fits well within the larger point about professional services made by John McKnight and others.

### *Regnant Lawyering in Clinical Legal Education*

Let us return now to what appears as a natural alignment for clinical legal education between teaching lawyering competencies and advancing social justice. With the *Rebellious Lawyering* critique by López in hand, it is now possible to see that in the great majority of cases, law schools are seeking to advance social justice through precisely the competencies that “regnant lawyering” calls for. Under the prevailing jurisprudential paradigm, clients have rights under the law and under the Constitution. When those rights are in one way or another violated, lawyers—and only lawyers—are qualified and equipped to make a compelling claim that those rights must be honored, by law. The lawyer (in this case, the law student) must therefore, under this paradigm, “stand in” for the client as the effective, competent advocate.

In law school as in the profession at large, and in just the way that López points to, the client becomes thereby relegated to the role of passive spectator. The client so relegated is never called upon to exercise capacities and strengths that might advance the cause of justice; indeed, the client most likely may not appreciate the extent to which he or she—or his or her community—actually has untapped capacities and strengths to exercise. Ironically, the provision of legal services can impede this self-recognition.

There is more. The provision of legal services with its emphasis on rights-based advocacy calls for specific competencies; but teaching those competencies, especially within the framework of the semester, the academic year and academic credits earned, may tend to preference some types of cases over others: individual clients over groups, for instance, and individual cases over systemic problems. The individual cases chosen will ideally call upon predictable issues that students can sink their teeth into as they acquire the competencies that relate to rights-based advocacy. Ideally, they will run their course from in-

take to resolution over one semester or one academic year. In this way, the social justice imperative to which clinical legal education has been committed can be constrained and trimmed to fit the overriding objective of teaching students those basic advocacy skills currently utilized in the practice of rights-based lawyering. This built-in institutional constraint can inadvertently undermine the catalytic potential of clinical legal education to effect real system change.

In spite of these constraints, individual clinical faculty members have taken on projects and initiatives that involve very different relationships with clients, with the community and with entire systems.<sup>24</sup> In doing so, they come up against the constraints implicitly imposed by the current emphasis on service delivery as the path to advancing justice. They may successfully find ways to incorporate additional skills, not spelled out by the ABA, and not strictly required by rights-based advocacy. But while these achievements point forward to new possibilities, they do not remove the ongoing and inherent competition between the aims of acquiring lawyering competencies and advancing social justice.

Thus, we are faced with a fundamental question: Should rights-based lawyering hold the dominating position that it currently does?

A cost-benefit analysis of the value on handling those cases that impart basic competencies would include: clients who (whether they win or lose) feel heard and valued; a reputation for being on the side of the “little guy”; funding from donors desiring to support the law school’s tackling of social issues; and fulfillment of the ABA’s requirement. Moreover, by imparting practical skill training, clinical legal education programs enhance law student marketability. But there can be a hidden price to be paid for the ways in which those objectives are advanced.

Larger social justice and system change issues may be “off-limits.” Locally, the problems tend to be relegated to specialized non-profits. In a period of massive and growing inequality that has remained intractable despite the extensive assertion of rights for individuals and in class action cases, advancing access to justice involves cases and projects that do not fit this logistical remit. Some just take too long. Some involve intractable systemic issues of social injustice that involve whole classes of clients within a locale. One example is the disparities in rates of arrest for marijuana use between black and white populations. Another is the overzealous use by certain schools of suspension and expulsion over other, proven approaches for deal-

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<sup>24</sup> See, e.g., Alicia Alvarez et al., *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Neighborhood Problem Solvers*, 23 CLIN. L. REV. 577 (2017).

ing with student truancy.<sup>25</sup> These may generate ideal individual cases but the assertion of rights in individual cases will not necessarily effect change in policy or practice.

In sum, teaching rights-based lawyering favors a certain type of case, a particular form of work lawyers can do. If we are to produce change, we must produce students equipped to work alongside the clients and the community, acting less as warriors than as catalysts, helping others to be the agents of change. Here is where Hohfeld's conception of powers becomes central. We are all aware of how we exercise powers in writing contracts, creating corporate entities, writing laws. But in the context of social justice we tend to be oblivious to the extent that we fail to focus on the potential ways in which the client might exercise powers and, thereby, transform the dynamics of power.

The next section delineates the core principles that can guide our efforts to enlist the client and the community as partners. The framework is explicitly grounded on a presumption: that the clients and the communities from which they come can function as co-producers of efforts that enhance well-being and reduce inequity. We have labeled that process as co-production, the process of enlisting clients as co-producers of justice.

#### IV. CO-PRODUCTION AS A FRAMEWORK FOR THE EXERCISE OF POWERS

We invoke “co-production” as providing a conceptual framework for introducing the exercise of powers to complement the provision of services with its emphasis on rights-based advocacy. Elinor Ostrom, Nobel Laureate in Economic Sciences, originally coined the term “coproduction” to describe initiatives where the citizens are enlisted as co-workers to produce a public service.<sup>26</sup> Examples she studied included citizen alert patrols to reduce crime, parent engagement in their children's education and resident engagement in the favelas of Rio de Janeiro to map and construct a sewer system. Independently, one of the authors of this paper, Edgar Cahn developed co-production,<sup>27</sup> to take what Alvin Toffler called the “prosumer” role—that is, a combination of producer and consumer—into the world of social

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<sup>25</sup> For a system change approach, see Cahn E, Nash K & Robbins C, “Public Notice Forums”: *Choosing Among Alternatives to Confront the Intent Requirement*, 44 CLEARINGHOUSE REV. 165 (2010); Cahn E, Nash K & Robbins C, *A Strategy for Dismantling Structural Racism in the Juvenile Delinquency System*, POVERTY & RACE, Mar./Apr. 2011, at 1.

<sup>26</sup> Elinor Ostrom, *Crossing the Great Divide: Coproduction, Synergy, and Development*, 24 WORLD DEV. 1073 (1996).

<sup>27</sup> TimeBanks USA, founded by Edgar Cahn, subsequently secured the trademark for “co-production”.

action, social enterprise and social justice in order to address critical public problems. It is a complementary remedy, not an exclusive one. Adding co-production provides an additional win-win strategy that enables our profession to function as architects of system change advancing social justice.<sup>28</sup>

Over the past decades, the authors jointly have synthesized the operational principles that we have seen drive co-production in specific contexts. We submit that in clinics, students can and should learn how to effectuate these or related principles as they enter into a fiduciary relationship with the clinic's clientele.

### *Principle 1. An Asset Perspective*

The first operational principle involves an asset perspective. That means getting students to appreciate that clients are more than their problems; that clients have the capacity to learn, to contribute, to be a force for justice. In specific contexts, that perspective can be and actually has been incorporated in the initial interview that shapes the retainer. Clients have capacities they may not realize as assets until they get a chance to use them in a CSE that operates a timebank.<sup>29</sup> One of the most valuable "capacities" that clients have is their capacity to learn, to disseminate and to function as lay advocates.

Example: The WorkPlace Project developed by Jennifer Gordon<sup>30</sup> exemplified that asset perspective. She started from the premise that those who came seeking help as clients were required to give something of themselves. There was a modest fee. But the basic pre-

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<sup>28</sup> In Wales, co-production has statutory standing. The Social Services & Wellbeing Act together with the mandatory Codes of Practice explicitly specify co-production as a fundamental, obligatory principle. Social Services and Well-being (Wales) Act 2014, (anaw 4); CODE OF PROF'L PRACTICE FOR SOC. CARE (SOC. CARE WALES 2017), available at <https://socialcare.wales/resources/code-of-professional-practice-for-social-care>.

<sup>29</sup> Examples illustrate what co-production can mean operationally:

- Teenage girls who thought they had no skills shampoo and curl the hair of older women whose arthritis makes it difficult for them to raise their hands above their shoulders.
- Men who have reached retirement age are part of a home repair crew that fixes leaky faucets, puts up curtain rods, fixes lamps and gets old toilets working properly.
- Just going to play cards or looking at old photos or reading books and newspapers for those with failing eyesight has ended long periods of isolation and depression
- Teenagers with strong backs and arms have used shovels and pitchforks to turn barren plots of winter-hardened soil into flower and vegetable beds for frail elders.
- Middle school children have brought computer literacy and e-mail to homebound seniors while others have created special days in nursing homes by bringing their pets to visit.
- Time Bank members have donated Time Dollars to a refugee program so that the newcomers who lacked driving licenses could get rides to work—and the newcomers in turn, have reciprocated with a Food Around the World fest

<sup>30</sup> Now a professor at Fordham Law School.

requisite to being accepted as a client meant taking a nine-week course in labor law, immigration law and organizing. Every would-be client learns that employers cannot withhold paychecks, are required to pay overtime, cannot threaten bodily harm and cannot fire someone in retaliation for demanding pay owed them. As members, they were taught how to represent themselves in hearings.

Most of the members were non-citizens. Without the vote, without money and isolated, they were disempowered persons. But by virtue of learning their rights and organizing and contributing time on picket lines, demonstrations and legislative hearings, they secured passage of the nation's toughest legislation protecting the right of workers to be paid what is their due. It raised penalties from 25% to 200% against employers who repeatedly do not pay their workers, and it makes repeat non-payment a felony rather than a misdemeanor. The Workplace Project has enlisted clients as more than lobbyists. It also has worked with clients to establish the first worker-owned landscaping cooperative. And collectively, those same clients have carried out an organizing campaign on street corners that has increased wages by more than 30%.

### *Principle 2. Redefining What We Value as Work*

Clinical programs tend to take client participation for granted, hoping at least that the client will show up for critical meetings and supply critical documentation. Sometimes that doesn't happen. But finding some way to record and value that participation can make a difference. The example below and further examples apply timebanking developed by one of the authors, Edgar Cahn. TimeBank members earn time credits for helping other TimeBank members and the community. They can use those Time Credits to get help in return. An hour of help earns one-time credit.

Example: CASA is a Latino immigration advocacy organization that represents clients who have not been paid wages or overtime they have earned. In 2006, for a two-year period CASA initiated a "pay-for-legal services" system with earned Time Credits.<sup>31</sup> *The Time Credits to make that payment could be earned by hours devoted to demonstrating in front of the home or business of employers who had not paid wages lawfully earned.* Time Credits could also be earned by devoting time to a variety of activities that advanced mission: studying English, coaching soccer, volunteering at church, translating, babysitting, learning how to become a lobbyist or working on their own cases. That "co-

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<sup>31</sup> Time Credits and Time Dollars will be used interchangeably. Time given to help another, strengthen an organization, or provide some agreed upon activity constitutes the unit of Exchange. All hours have equal value.

payment” produced results. The attorney noted:

In the past, we had a high attrition rate because we often couldn't find the client. With time dollars, the attrition rate has dropped remarkably. We've cut back on the number of cases we handle because we can be more selective. We take on the cases of people who want to work with us.<sup>32</sup>

Example: ArchCare, a medical health care system run in New York City by the Catholic Church operates a TimeBank system for those enrolled as patients. With over 1,600 members in its TimeBank it has generated over 58,000 hours of informal care, which would have a market value of over a million dollars. ArchCare built on an earlier, multi-year use of timebanking by the Visiting Nurse Service of New York. An impact evaluation that surveyed older TimeBank members found: 79% reported that the TimeBank membership gave them support they needed to be able to stay in their homes and community as they get older. 82% reported that the quality of their life increased since joining the TimeBank. 72% reported improvements in self-rated mental health. 48% reported improvements in self-rated physical health. 67% reported increased access to health and other community services. 93% saw the TimeBank as a place to obtain information about services in the community. 90% reported new friends and 71% reported they had contact with new friends at least once a week. 92% reported that since joining the TimeBank it is easier for them to ask for help.<sup>31</sup>

What implications might valuing client engagement have for clinical practice? Currently, after an intake interview, the client retains us as counsel by signing a formal retainer that creates a conventional lawyer-client relationship. The client then sits back, awaiting developments. Given the two examples above and in the hypothetical scenario presented earlier, clinical programs might effectively engage their clients and by doing so, generate impact, effect system change and fundamentally alter the way in which we now relegate the client to the status of passive beneficiary and consumer of our services.

### *Principle 3. Reciprocity*

Accepting a client can be a two-way street. As clients, they have reciprocal obligations that can involve more than simply showing up. The obligation can involve some form of community engagement, of outreach to others, of participation in processes that will bring about change.

Example: For a period in Roseburg, Oregon, the attorneys in a

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<sup>32</sup> The TimeBank initiative ended when the lawyer who had been the originating force for the organization's investment in timebanking went on to other employment.

Legal Services office invited the clients to pay-it-forward by helping others. Clients offered transportation, car repair, help with errands, child care, cooking, sewing, housework, clerical support, making phone calls, tutoring, carpentry, masonry, home visits caring for saltwater aquariums, and yard work.

#### *Principle 4. Interdependence and Community Building*

We tend to treat each client as an individual, respecting their right to confidentiality. But our clients can constitute and be engaged as a community of interest, a collective voice and a collective force for change. Mutual support provided by informal or formal networks provides resilience and staying power. Systematizing interdependence can generate a sense of community and membership that empowers. It also has major cost saving implications for eldercare if it can defer or avoid institutionalized care in a nursing home.<sup>33</sup>

Example: In Washington DC, the DC Consortium of Legal Service Providers conducted a Community Listening Project<sup>34</sup> that sought, by holding focus groups and conducting an extensive survey with outreach in the community, to learn about the challenges low-income DC residents face and the barriers that prevent them from overcoming poverty. Their report combined with a study being undertaken by the Access to Justice Commission on unmet legal needs provides critical information for legal aid providers to make difficult decisions regarding representation and the allocation of scarce resources. The report issued by the Consortium on those listening sessions also highlighted the strengths of the community.

#### *Principle 5. Mutual Accountability and Respect*

We need to create feedback loops, to know whether what we are doing had the impact we hoped for and how we might have greater impact. Authentic respect requires listening to voices that are otherwise unheard and that sometimes tell us things we do not like to hear.

Example: The D.C. School of Law (predecessor of the UDC

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<sup>33</sup> In Lehigh Valley, Pennsylvania, a collection of community providers including timebank members undertook to reduce health care spending by using what they called a community approach to treating patients. They instituted a hospital discharge program that utilized timebanking to significantly enhance recovery and reduce re-hospitalization. Over a six-month period, super-utilizers reduced their emergency room visits to 63 from 238 before the study. The drop in in-patient hospital stays was even more dramatic 64 down from 155. The total number of days spent in the hospital was reduced to 338 days, down from 687 resulting in a savings of \$773,500 by an effort that enlist both patient engagement and the community support provided by the Lehigh Valley Super Utilizer Partnership.

<sup>34</sup> FAITH MULLEN, THE D.C. CONSORTIUM OF LEGAL SERVICES PROVIDERS, THE COMMUNITY LISTENING PROJECT (2016).

School of Law) prevailed on the Superior Court to establish the Time Dollar Youth Court.<sup>35</sup> The youth court functioned as the court-sanctioned vehicle to divert first-time non-violent youth offenders away from the juvenile justice system. Youth offender were sentenced by peers to community service that would lead to enhanced self-esteem, leadership abilities and youth empowerment. The community service placements led to an opportunity to earn Time Dollars for continuing service beyond the hours of obligatory community sentence imposed by the teen jury. The sentence would frequently include weeks of jury duty. Peer juries came to be composed primarily of former offenders serving as jurors who had been sentenced to jury duty as part of the sanction imposed by the teen jury that heard their case.

When those Youth Court jurors were convened in a charrette,<sup>36</sup> they expressed a desire to do more than handle individual cases. Co-production went to another level. They were offered an opportunity to exercise their power to constitute and serve on a Youth Court Grand Jury drawn from the pool of Youth Court jurors. They were informed that Grand Juries are convened to investigate a problem, indict wrongdoers and come up with recommendations. Fourteen Youth Court jurors volunteered to come every other Saturday. They chose to investigate what the system did and did not do to reduce drug use by teens.

After six months of Youth Court Grand Jury hearings conducted on alternative Saturdays, the Youth Court Grand Jury issued its findings and recommendations in a report, entitled *Speaking Truth to Power* at a packed public hearing. Their findings impacted both policy and practice. Specifically, they found that the District government did not listen to or value the input of youth, that youth came to school high on drugs and were ignored if they did not act up, and that individual schools only response to drug use was suspension or expulsion. No help or referral for treatment was provided. They recommended that the District government (1) use programs proven to be effective in other jurisdictions, (2) provide more after-school activities, (3) launch a hot line for teens with drug and related problems, (4) develop a Twelve Step program modified for teens, (5) train and certify teens as drug prevention counselors and (6) provide programs specifically designed to involve and help teens with drug problems. In re-

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<sup>35</sup> Youth courts are peer-run courts where youth sentence their peers for delinquent and status offenses and other problem behaviors. These programs provide positive alternative sanctions for first-time offenders by providing a peer-driven sentencing mechanism, which allows young people to take responsibility, to be held accountable, and to make restitution.

<sup>36</sup> A charrette—a process developed in urban planning—was conducted to engage youth in designing a more effective juvenile justice system.



sponse, the District government shifted \$2 million to community-based programs for teens and appointed teens to various advisory boards shaping proposals and programs related to substance abuse and delinquency.<sup>37</sup>

## V. EXPANDING THE DEFINITION OF PROBLEM-SOLVING COMPETENCY

One primary function of law clinics is to impart lawyering competencies. Problem solving is one of the primary lawyering skills as specified by the American Bar Association. As a competency, it includes more than simply identifying and diagnosing the legal issues in the problem presented by the client. It also entails generating alternative solutions and strategies. We submit that law school initiatives to impart problem solving competency should be expanded. Students should learn ways they might help enable clients to exercise their own powers as co-producers of desired outcomes.

To enlist clients as co-producers, these basic questions must be explored: What assets and capacities does the client have that can be helpful?; How might those assets be put to use so as to advance a desired objective?; How might such efforts generate incentives to sus-

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<sup>37</sup> Other client and community driven initiatives deserve notice:

*Project Hope:* In Sbrante Park, Oakland, violence had flared up as long time Black residents coped resentfully with an influx of newly arrived Hispanic neighbors. Knowing of the research on collective efficacy, the Alameda County Department of Public Health funded a previously all-Black church to become the home of the Sbrante Park timebank program with both an Hispanic and an African American coordinator making matches between the need and supply of services. Because May Day had historically been a day dominated by gang recruitment and mobilization, youth at the local high school created their own May Day anti-violence celebration as an alternative. After two years, a rigorous evaluation designed to measure changes in the collective efficacy of that community found a significant decrease in violence coupled with an increase in trust and sense of control. Residents reported that they felt Sbrante Park was now a safe place to live, that there was less drug use, less drug dealing and less violence and that they had been involved in building community. In effect, African Americans and Hispanics together were reclaiming *habitat*.

*Homecomers Academy:* More than 2,000 ex-offenders return to Washington D.C. each year. Within three years, seventy percent return to prison. Ex-offenders chose to explore with the authors how they might reduce the recidivism. First, they chose to characterize themselves as Homecomers, not “ex-cons.” Next, they wanted to redefine themselves as “students” so they undertook to create their own Academy enrolling on a journey of learning and community to create their own Academy enrolling on a journey of learning and community service. Finally, they developed their own Mind, Body, Spirit curriculum. The “Spirit” portion of the syllabus entailed a personal commitment to reduce violence in their home neighborhoods by providing “safe passage” to enabling children to get to and return safely from school when the passage meant traversing gang territory lines. They also stationed themselves at Metro stops where muggings occurred claiming they had antenna that others lacked—and the muggings went down.

tain the effort?; How might the use of those powers engender interdependence yielding a multiplier effect so that outcomes would be greater than the sum of its parts?; How might the exercise of those powers provide feedback that would increase accountability, provide a continuing corrective and yield new possibilities?

So framed, co-production for those in clinical legal education entails an ongoing inquiry about how best to put powers into play. The promotion of client co-production needs to be framed as enhancing the problem-solving skill required of lawyers. Mastering problem-solving entails teaching students ways that clients can exercise their powers to advance social justice.

In lawyering, this process is not limited to minority and disenfranchised clients. The necessity of engaging clients as partners in realizing their objectives applies throughout legal practice. Law firms, in-house corporate counsel, solo practitioners all enlist their clients as co-producers of desired outcomes. Consequently, a law school's investment in the creation of community-based social justice initiatives simultaneously constitutes an investment in skill-related pedagogy. Co-production, undertaken as a process, expands the range of possible remedies that clinical programs can generate. It can lead to partnerships with other departments and disciplines. Identifying evidence-based outcomes can lead to additional funding for new initiatives.<sup>38</sup>

We submit that co-production, achieved by identifying, engaging and activating clients' powers, can and should be elevated to the status of an essential strategy to be incorporated in implementing problem solving as a primary lawyering skill. If so, then clinicians need to find ways and resources to impart and document implementation of that competence through actual cases and projects. That has consequences for what cases are taken, what resources are made available to the clinic and what is being taught.

First, clinicians need to identify, create or support ways to enlist our clients as co-producers of justice. That means developing strategies by which clients (individuals and community-based groups) become not only consumers of clinical legal services but also co-teachers of our students and coworkers in advancing justice.

Second, teaching students how to enable clients to become co-producers means that students would need to learn about alternative

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<sup>38</sup> We have seen clinics generate significant advances in multiple fields: child development, juvenile justice, reentry and eldercare. The UDC David A. Clarke School of Law sponsored Public Notice Hearings in Pennsylvania that both documented the racial disparity of present school expulsion and showcased the availability of less costly alternatives that effectively reduce that disparity. After that formal hearing put the system on such notice, a return to past practice would satisfy the intent requirement for judicial intervention to address previously non-justiciable remedy disparities.

remedial strategies and innovations that engage clients and that clients can demand. For decades, evaluation research has identified innovations that have been designated evidence-based so that they are reliable.<sup>39</sup> In every domain, technology now offers ways of connecting and ways of shaping behavior. Ideally, courses in remedy will need to be augmented to incorporate how co-production can be implemented.

Third, the exercise of a power via co-production necessarily heightens awareness of the role and importance that systems play in securing change. It follows that clinical programs should inject a modicum of systems thinking to highlight both the ways in which systems resist change and the leverage points by which change can be accomplished.<sup>40</sup>

We submit that the future of clinical legal education can be enhanced and sustained by introducing co-production as advancing lawyering competency to produce system change.

#### CONCLUSION

Clinical legal education gained traction by asking: What competencies does a practicing lawyer really need? Then it asked: “How does a law school discharge its obligation to impart those competencies?” This essay contends that the core problem-solving competencies be augmented to include the use of powers to generate system change in order to advance social justice. Facilitating co-production that engages clients is at the heart of such a competency.

Just as in health care, physicians are charged with increasing awareness of the social determinants of health, we, as stewards of the legal system need to develop a heightened awareness of the “social determinants of justice.” Our clients and the communities from which they come can continuously educate us to what those social determinants mean and how they impact our sense of injustice.

As stewards of a legal system honed by centuries of trial and error, we also carry an obligation. When law school clinics choose an area of specialization, introducing systems analysis and co-production can provide students with a perspective that has important ethical as well as career implications. Our graduates will volunteer on bar committees and civic task forces. They will seek employment on commis-

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<sup>39</sup> Given the rate at which advances in professional practice are available, perhaps we need to revisit *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) where Judge Learned Hand explored whether the standard of reasonable care and due diligence included use of new technology.

<sup>40</sup> See, e.g., DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 166–86 (Diana Wright ed., 2008); LÉON DE CALUWÉ & HANS VERMAAK, LEARNING TO CHANGE: A GUIDE FOR ORGANIZATION CHANGE AGENTS (2003).

sions, as legislative staff, as agency personnel, as law clerks and as employees of agencies and organizations. Time and again, at the UDC David A. Clarke School of Law, we have seen instances where students' exposure to the co-production framework and engagement in system change enabled them to secure public interest jobs with resident associations, government agencies, law school clinical faculty legislators and non-profit organizations.

Clinical legal education can and should hone the capacity of future generations of lawyers functioning both as advocates and as social architects.<sup>41</sup> A large and growing body of literature<sup>42</sup> and case studies provide tools for analyzing organizational change, systems and system dynamics.<sup>43</sup> We need to examine our syllabus, our pedagogy, our educational objectives to see whether the way in which we have designed and operate the clinic actually "walks the talk." We should do more than train students to function in a system that currently is incapable of providing remedy and preventing injustice on the scale needed and at an affordable cost.

"We must be the change we want to see in the world." If we adopt Gandhi's admonition, it means we must begin a process of self-examination that recommits clinical legal education to mission. We must continue to impart lawyering competencies and deliver service

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<sup>41</sup> Clinical legal educators, to the best of our knowledge, have not created business plans for the Virtual Law Firm that will enable law school graduates to pay off their debts and live comfortably by meeting the vast unmet need for legal counsel. Theoretically the increased volume made possible by automation could more than offset any loss of revenue that stems from foreseeable price adjustments for transactions that are manifestly computer generated. We can anticipate the proliferation of battles over the "unauthorized practice of law".

When asking: Where Next? Clinical legal educators could provide leadership in convening exploration of alternative payment arrangements and fee structures. One model might draw upon the experience of Legal Shield where payment of monthly premiums provides unlimited legal counseling and below market rates for document drafting and litigation. It seems possible that new *pro bono* and *low bono* variations might emerge where premiums could be paid in two currencies: dollars and Time Dollars earned in activities that promote well-being, community safety and educational opportunity. A second model might build upon co-op economics and Habitat for Humanity. In different ways, each treat contributed labor as integral to financial viability and mission. Time Banking might provide the medium of Exchange necessary to secure discounts and subsidy just as Veterans Benefits now confer discounts, favorable mortgage rates and access to special health care based on national service.

<sup>42</sup> See CALUWÉ & VERMAAK, *supra* note 41. Their analysis enumerates them in this way: Political (driven by power structure, coalitions and interests); Blueprints (outcomes and objectives meticulously scoped out in detail, planned and managed); Incentivized (designing rewards and sanctions to generate specific actions and outcomes); Learning (utilizing education and training to change how situations are perceived and addressed); and Creative (to invite innovative practice) existing issues). *Id.* at 39–72.

<sup>43</sup> See, e.g., *Seven Lessons for Leaders in Systems Change*, CTR. FOR ECOLITERACY (Mar. 10, 2011), <https://www.ecoliteracy.org/article/seven-lessons-leaders-systems-change>.

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by the assertion of rights. But we must also create a community-based constituency for sustaining that work. To do so, we must develop those competencies that enable our clients and their communities to exercise powers and join with us as partners and co-producers in advancing justice.

