

# The New 1L



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*First-Year Lawyering with Clients*

Edited by

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## Preface

*Give the pupils something to do, not something to learn; and the doing is of such a nature as to demand thinking; learning naturally results.*

—John Dewey

John Dewey wrote those words a hundred years ago, and yet legal education failed to respond. Ten years ago, this book would not have been published. Now legal educators eagerly seek the insights and tools that populate this book. This is a sign of just how much our conception of legal education has changed. What educational theorists have been telling us is finally taking hold. Of course, such an approach to legal education is not new: it has already been implemented and theorized by clinicians. The book you are about to read taps into those insights and techniques from some of the world's most experienced and thoughtful legal educators.

The authors of the chapters of this book are experts in the field of experiential education. They seek to create opportunities for students to have real client experiences in first-year classrooms where outcomes are uncertain, where students must cope with facts and understand that they will need more facts to decide how to proceed, and where the law that they study may offer knowledge to interpret and perhaps help resolve the situation but can also create its own distortions. Students gain the critical insight that the context of the dispute matters in its trajectory. Through using real legal work and clients, students learn the need for precise legal analysis as well as the importance of emotional intelligence, managing relationships among clients, other students, and the teacher. Students also learn something that is never taught in the first year but that will determine whether they are successful in their chosen careers: the necessity of understanding what the client wants and how to make decisions to further that result.

Proponents of legal education divorced from real experience have often said that students learn how to think like lawyers in law school, and learn how to

be lawyers after they leave law school and begin practicing. Traditional law school classrooms—in their substantive focus and in their teaching practices—privilege knowledge of formal law and skill at manipulating it over other forms of knowledge and skills. Clinicians understand a critical insight from John Dewey that belies this approach to learning how to practice: *We do not learn from experience ... we learn from reflecting on experience.* The demands of legal work often make such reflection virtually impossible. It is therefore critical that we teach students how to reflect and learn from experience while they are in law school. This intentional reflection on experiences through the clinical method, which can be accomplished through various formats, introduces a dimension into the classroom that encourages and values students' own understanding of the learning we are seeking for them to accomplish. Students critically reflect on assumptions, engaging in discourse about contested meanings, taking action on an insight, and then critically assessing the result. Students begin to think about law in action: how the sterile law they are studying actually plays out in practice. We help them see that it is critical to understand law in context and that understanding the particular context goes well beyond mastering the formal legal materials or the legal principles and policies that the law purports to embody.

Legal education that conveys and produces a view of law as flat and untextured prevents law students from seeing law's real consequences. Perhaps due to unspoken norms, the situations in the factual part of appellate opinions rarely evoke a shocked response—or at least a public expression of shock in the classroom. An instance of physical injury or a human tragedy becomes primarily material for doctrinal analysis. Students distance themselves from the feelings and suffering of others, avoiding emotional engagement with clients and their causes. This dynamic can create the feeling that the people affected by the formal law are imaginary, existing solely as tools for understanding issues related to the formal law. Emotion, pain, impact on relationships or the ability to participate in the world gets removed from the discussion. Injecting real clients and problems into the classroom offers one way to counteract the mechanisms by which students get detached from the human impact of the appellate decisions that constitute so much of the formal law.

By engaging in clinical method in the first year, students begin to understand that they are the creators of knowledge: that what look like irrefutable facts mean very different things when we ground them in context. A part of the lawyer's job is to take those facts, understand and reframe them, and then communicate that contextualized understanding to the fact finder. Critical thinking implicates interweaving the stories of people's lives with the facts of

a case, and with law that provides rules for maneuvering through decisions in a case. The construction of knowledge is often the product of conflict. John Dewey notes, “Conflict is the gadfly of thought. It stirs us to observation and memory. It instigates invention. It shocks us out of sheep-like passivity, and sets us noting and contriving . . . conflict is the *sine qua non* of reflection and ingenuity.” By engaging with real problems in different ways in different classrooms, students may start to see that the apparently straightforward facts in appellate opinions, stories of what happened that are so plainly stated in the cases they are reading, may not be so straightforward or plain. Reality is complex. Injecting reality into the classroom brings that lesson home.

The first year’s emphasis on abstract thinking about decontextualized rules has particular consequences for students’ understanding of professional ethics. The traditional classroom can have the effect of detaching the student from the values that have animated his or her life up to law school. Without a grounding in more than personal opinion, the student’s sense of ethical decision-making—critical to the lawyer—can be undermined. The authors recognize the power of clinical method in engaging students in ethical decision-making. Grappling with real problems has the potential to prepare students to appreciate the complexity of practice, to explore the tensions between their own sense of ethics and ethics as understood in the legal profession, to use their practice as lawyers to further how they understand justice, and to reflect on the ambiguities in and limitations of their role as lawyers in these situations. At the same time the authors recognize the ethical issues that arise when using real cases with first-year students. The educational approaches analyzed and described in this book do not serve as a substitute for the rigorous experience of actually representing clients in clinics. It is clear that this early engagement in clinical method can be managed ethically, to benefit the client and the student, and serve as an important foundation as the students move through their six semesters of law school.

The authors also offer us their views on the significance of this change in legal education. Perhaps the most important impact is the effect this might have on law students’ conceptions of themselves as agents of change. Traditional classrooms can reinforce the ideological view that law is neutral in the creation of oppressive social orders. We know that our students will exercise power in their relationships with clients, courts, and the community. This focus on formal knowledge and an objective stance can have the effect of training students to believe that they have little power to push for justice in our society. Traditional legal education can neutralize a student’s critical faculties and reinforce a receptive mode. Students get few ways to think about how law

changes or how lawyers can be effective agents of change—students see primarily doctrinal change, seemingly produced through judges in their appellate decisions. If a student enters the school with ideas of justice and definitions of “good,” the traditional legal education process will detach his or her initial intuitions from the cases taught in class; it will remove the primary sense of justice from the classroom dynamic. Injecting real problems, conflicts, and clients in the first year reconnects students with what motivates so many of them to come to law school: the chance to make a difference. Suddenly the law becomes a means toward that end, re-energizing the learning process.

By incorporating clinical method into the first year, we can help to form lawyers who understand that knowledge is constructed, who are capable of identifying and challenging assumptions, who can identify how context has influenced those assumptions, and who are motivated to imagine and explore alternatives. Understanding different sorts of contexts will prompt our students to recognize roles they may play in working toward legal solutions to injustices. Students will leave our classes having a sense of personal obligation to confront injustice when they see it as an essential component of their professional identity.

Discussions of the challenges and requirements to change legal education often are tinged with exhaustion and futility. How can such a transformation take place? How do we change something that has been inviolate for so many years? How does one make change in a profession deeply grounded in stare decisis? This book is an antidote to that fatigue. Indeed, it should leave us all hopeful. Once again, Dewey is instructive: *The path of least resistance and least trouble is a mental rut already made. It takes troublesome work to undertake the alteration of old beliefs.* The authors have engaged in that “troublesome work.” This book provides us a path and shows us how such momentous change is, in fact, doable. I, for one, am happy to feel the sense of futility lift, now filled with a profound sense of appreciation.

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