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Pedagogy in a Poor People's Court: The First Year of a Child Support Clinic

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PEDAGOGY IN A POOR PEOPLE'S COURT: THE FIRST YEAR OF A CHILD SUPPORT CLINIC

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In the fall of 1986, I began teaching a newly created child support enforcement clinic at Brooklyn Law School. The impetus for its establishment was a proposal by the federal Office of Child Support Enforcement (OCSE) to test law school clinics as a model for providing representation to custodial parents seeking to obtain and enforce orders of support. This resulted in a contract between OCSE and three area law schools: Brooklyn, Fordham, and Pace.

Child support has been the focus of significant legislation at both the federal and state levels in the past four years. It is also receiving increased attention as a worthwhile subject for legal education. The ABA Child Support Project recently conducted a survey of 175 law schools. Eighty-two indicated that their clinical programs handle child support cases in some manner.[1] The ABA National Legal Resource Center for Child Advocacy and Protection is currently developing a model curriculum for use in child support clinics nationwide.[2]

The purpose of this article is to describe one model for a child support clinic and to outline some of its benefits and disadvantages. A clinic of this type provides a rich educational experience for students by adding a real-life, practical perspective to their academic study of family law and professional responsibility. They learn from their relationships with clients, from exposure to the workings of the lower courts and related bureaucracies, and from analyzing policy and legislation in the context of work in which they are actually engaged.

Support cases are a good vehicle for clinical education because they are of short duration and require the mastery of a relatively limited amount of substantive law. As a result, students can become reasonably competent in the course of the year. They are able to obtain good results for their clients, which is both professionally and personally satisfying. There are, however, problems with this type of clinic, arising from two factors: the limitation of the subject matter to support and paternity and the size of the caseload.

I. BACKGROUND

In 1984, Congress passed the Child Support Enforcement Amendments[3] to address a serious national problem: the failure of large numbers of non-custodial

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1. ABA CHILD SUPPORT PROJECT, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, NATIONAL PROFILE OF LAW SCHOOL CLINICS 4 (1988).

2. Letter from Margaret Campbell Haynes, Director of the ABA Child Support Project, to author (undated, 1988).

3. The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, amend Title IV-D of the Social Security Act, which is the Child Support Enforement Act (codified at 42 U.S.C. §651-67 (Supp. 1988)). Final regulations implementing the 1984 amendments were published in 50 Fed. Reg. 19,608-658 (codified at 45 C.F.R. Parts 301-05 and 307). In order to comply with the federal statutes,

parents to support their children adequately.[4] The amounts of support awarded by courts provided only a fraction of the normal costs of raising children[5] and the awards were largely unpaid and unenforced.[6] Despite the existence of numerous remedies on the books, judges consistently refused to apply them: arrears were routinely cancelled; threats of enforcement, such as by wage garnishment, sequestration of assets, and imprisonment for contempt, were rarely carried out; and long delays in resolving the cases were rampant. As a result, the burden of child support often devolved on the government in the form of welfare.

One of the frequently cited barriers to the establishment and collection of support orders is the inability of large numbers of women[7] to afford counsel.[8] The continuing reluctance of the courts to apply vigorously the remedies available, coupled with widespread ignorance on the part of judges of the requirements of the new child support legislation, make the assistance of counsel essential.[9]

In response to this need, the 1984 Child Support Amendments required that the local offices of child support enforcement expand their services[10] to all custodial parents who requested assistance.[11] In anticipation of greatly increased requests for legal services by non-welfare recipients,[12] the federal OCSE developed its proposal for clinical representation in conjunction with the New York State and New York City agencies. The New York City OCSE then contracted with the law schools to establish child support clinics.

Some of the goals outlined in the federal OCSE proposal were:

1. to broaden the population of custodial parents served by the agencies, in compliance with the mandate of the 1984 Amendments;

New York State enacted the N.Y.S. Support Enforcement Act of 1985, L. 1985, Ch. 809, and the N.Y.S. Support Enforcement Act of 1986, L. 1986, Ch. 392 (codified as amended in scattered sections of the FAM. CT. ACT, the DOM. REL. LAW, and the SOC. SERV. LAW, (McKinney 1987)), and is continuing to review and revise the law in this area.

4. "Congress' motive for entering the domestic relations field was a fiscal one. The costs to the Aid to Families with Dependent Children (AFDC) program, resulting from absent parents' failure to support their children, were staggering." Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 F.L.R. 3051 (1984).

5. *See generally*, ESPENSHADE, INVESTING IN CHILDREN (1984). Although Espenshade is widely cited as an authority on the cost of child-rearing, his estimates have been criticized as too conservative. *See* L. WEITZMAN, THE DIVORCE REVOLUTION, 270-71, 277 (1985).

6. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 141, CHILD SUPPORT AND ALIMONY: 1983 (July 1985).

7. Rather than refer to "custodial" or "non-custodial" parents, I deliberately chose to substitute women and men, both because our clients so far are all women and because single mothers as a group face different problems than single fathers: they are, as a rule, more disadvantaged economically and often suffer the additional consequences of gender bias in the law and the courts. *See* REPORT OF THE NEW YORK TASK FORCE, *infra* note 8.

8. L. WEITZMAN, *supra* note 5 at 287-92; REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 137-38 (March 31, 1986), *reprinted in* 15 FORDHAM URB. L. J. 1 (1986).

9. The fact that many non-custodial parents are also unable to afford counsel and have legitimate interests which may not be protected without legal representation is not addressed by any of the new legislation.

10. These services were previously available primarily to welfare recipients; one of the services is legal representation in paternity and support matters. 42 U.S.C. §654(6) (1988).

11. 42 U.S.C. §654(6) (1988).

12. More than 59,000 support or paternity petitions were filed in 1985 in the New York City family courts by non-welfare petitioners, most of whom appeared pro se. Hill, Technical Advisor, U.S.D.H.H.S. Family Support Administration, Proposal to Provide Legal Services to Non-Welfare Clients (1986) (unpublished proposal).

2. to enhance the status of family law within the legal profession by creating awareness and interest among law students in this area;

3. to improve the level of practice by training new lawyers to perform at a high level of competence in support and paternity matters; and

4. to develop a model for representation of this clientele for use nationwide.[13]

While the goals of the government for this program are consistent with the law school's interest in providing a high quality clinical experience for its students, the school's focus is on pedagogical goals. The educational objectives for the child support clinic can be roughly divided into four categories: 1) skills training (interviewing, counseling, case planning, drafting of pleadings and motions, discovery, negotiation, and basic trial skills), 2) education in the substantive law of support and in family court procedure (which includes a fair amount of general civil procedure), 3) examination of various ethical issues arising from the cases, and 4) consideration of policy questions in the area of child support.

II. DESIGN OF THE CLINIC

The clinic represents custodial parents who do not receive Aid to Families with Dependent Children[14] (AFDC) in paternity and support actions in family court. The cases include: proceedings to establish paternity, initial support proceedings, proceedings to modify and enforce orders of support entered in either divorce judgments or prior family court orders, and contempt proceedings. Most cases are heard by hearing examiners,[15] who have the same power as judges except they lack the authority to incarcerate respondents upon findings of willful violation.

Most of our clients are referred to us by the New York City OCSE. We have also received numerous referrals from legal aid and legal services offices, women's groups, private attorneys, and by word of mouth. Other than the requirement that the clients not be recipients of AFDC, the only financial criteria for clinic representation is that they be unable to obtain private counsel.

We accept all cases referred within our geographic area regardless of pedagogical merit. The contract for the first year did not allow the clinic to reject any cases "unless in the judgment of this Contractor, and consistent with the Contractor's professional obligation, the Contractor could not provide effective representation to the referred client."[16]

The clinic is a year-long course (with a separate seven-week summer session) which awards three credits per semester for field work and two for its seminar component. There were eight students enrolled in the clinic during the 1987-88 academic year and two during the summer.

13. Hill, *supra* note 12.

14. AFDC clients are represented by the N.Y.C. Department of Social Service Office of Legal Affairs.

15. N.Y. FAM. CT. ACT §439 (McKinney 1987).

16. Contract between the City of New York, Department of Social Services of the Human Resources Administration, and Brooklyn Law School Legal Services Corp. (August 6, 1987). The contract for the 1988-89 academic year provides that the clinic will handle between 100 and 200 cases, again subject to the requirements of professional responsibility.

Students are responsible for all aspects of the cases:[17] initial interviews, counseling, drafting and filing of pleadings, supervising service of process, discovery, motion practice, negotiation, trials, and preparing or responding to objections.[18]

The seminar component of the clinic covers the relevant substantive and procedural law, although students are encouraged to learn a fair amount in these areas on their own. In fact, they often do this of necessity because their case work requires knowledge of various topics before they can be covered in class. The primary focus of the seminars is on skills training, which is taught by a combination of readings, discussions, role-playing and simulations. In addition, policy and ethical issues are considered, often by means of case rounds. Last year the seminar concluded with a simulated paternity trial before a family court judge.

III. CLIENT AUTONOMY IN A CLINICAL SETTING

The subject matter of our cases involves the student-lawyer in the intimate details of clients' lives: their relationships with men, how they raise their children, how they spend their money. This raises a host of issues of a kind which are usually handled subconsciously, if at all, in the private practice of family law. These issues must be explored in a variety of ways. Student-lawyers should learn to recognize their own biases and how they affect interviewing and counseling of clients (as well as their approaches to negotiation and trial, where the effect of bias is probably more subtle, but no less important). They should also be engaged in a critical examination of the court system and the lawyering role.

Neither a traditional classroom course nor a simulation workshop seems to raise such issues in a sufficiently real or concrete way to cause students to grapple with them in a seriously self-conscious and introspective manner. For instance, when ethical issues were raised in class during a general discussion, or even when they were intentionally built into a simulation exercise, the students tended to give pat answers, drawn from their course on professional responsibility. Our study of interviewing and counseling issues was similar.

There was a dramatic difference in students' response when we discusssed one of our actual cases. In one instance, a client consulted us about bringing a paternity case against the father of her child. She was extremely reluctant to do so because she hoped it would be unnecessary. She believed that he would inform his wife about her and the baby, would get a divorce and marry her. This belief was met with great skepticism by the entire class, all of whom thought that she should be disabused of her romantic (or masochistic) notions and encouraged to file suit.

Suddenly the notions of client-centered counseling and client autonomy, which had been so readily assented to in the abstract[19] became the complex and thorny

17. Our student practice order, issued by the New York Supreme Court, Appellate Division, Second Department, permits second and third year students to practice under the supervision (in the case of court appearances, in the presence) of clinic faculty.

18. Although hearing examiners' orders are "final," there is an appeal process within the family court. Objections to orders and the rebuttals thereto are reviewed by family court judges. Orders cannot be stayed during the pendency of an objection. N.Y. FAM. CT. ACT §439(e) (McKinney 1987).

19. At the time, we were reading D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) and making frequent reference to the Model Code of Professional Responsibility.

issues that they are. The student representing this client had to consider whether the advice she was giving had anything to do with the law or was merely an imposition of her views of how life should be lived. She had to think about relationships between men and women and whether her desire to urge her client to proceed was an effort to empower another woman to take control and act in her own best interest, or perhaps was an effort to be the controlling expert.

Child support cases necessarily raise questions about the adversary system and traditional approaches to negotiation. Our clients are involved in on-going relationships with their "adversaries" and often have the goal of preserving or improving their relationships and their children's relationships with fathers. A "winner-take-all" approach to the cases is often in direct conflict with those goals. On the other hand, some clients have the opposite goal of eliminating the man from their lives, which presents other complex questions about the lawyer's role in relation to the client, her adversary, and the court. So far, I have only been able to raise the issues and to challenge the students to think about received notions about the legal system, but clinical practice can and should provoke an explicit examination of the adversary system and the lawyer's role within it.

The ideal of a client-centered approach to practice is sometimes contradicted by the design of the clinic itself. Our contract with OCSE limits our representation to paternity and support matters; our student practice orders limit us to the family court[20] which means we cannot handle custody, visitation, domestic violence, marital dissolution matters, or property disputes. Thus, our approach to our clients' problems is sometimes dictated by what we can do for them in the context of the clinic rather than by what would best serve their needs. This can result in fragmented or incomplete service. We handle the support aspect of a larger family law matter, then the clients proceed pro se, hire another attorney, or forego legal resolution of the remaining issues. In most of our cases this is not a problem. But occasionally, these conditions artificially limit representation. As a result, students are only exposed to pieces of a much larger picture and are, therefore, deprived of the opportunity to learn how child support integrates with other aspects of family law practice.

For instance, one of our clients had an immediate need for financial relief and so sought our assistance in obtaining an order of support, although her ultimate goal was to obtain a divorce. Her husband's lawyer was interested in resolving all of his client's legal problems and argued that it made no sense, in either personal or legal terms, to separate the support issue from the larger case. Because some of the other issues involved financial responsibility for the repair of a rental unit in the marital residence and for other debts, his argument was particularly persuasive. Pursuing support alone in this case would have negatively affected our client's negotiating stance, delayed the ultimate resolution of the larger matter, and resulted in the inefficiency of multiple proceedings. On my advice, our client retained private counsel. In other instances, it is the custody and visitation arrangements which have an impact on both the need for support and the ability to pay, but those issues cannot be addressed in a program limited to child support.

20. In New York State, divorces are heard in Supreme Court, which is the lowest court of general jurisdiction. All other issues relating to the family are heard in the Family Court, which has no jurisdiction, for instance, over distribution of property, absent a referral from the Supreme Court.

Another requirement of our contract is that all clients receive their support payments through the Support Collection Unit (SCU), [21] a branch of OCSE, regardless of the client's wishes. There are benefits to receiving payments through SCU: an independent record of payments is maintained, thereby avoiding credibility conflicts in future enforcement actions. There are also automatic enforcement tools available, such as computer-generated income executions and tax refund interceptions, which can eliminate the necessity of court proceedings for enforcement of orders. Some clients, however, prefer to receive payments directly, for reasons having to do with their relationships with the obligors. Others are reluctant to have a continuing relationship with a government bureaucracy for a variety of reasons. One of these is the nature of the bureaucracy. There is always some delay in transmitting payments resulting from processing and recordkeeping requirements. In some instances this delay is compounded by inefficiency and error (computer and human). These problems result in either the students' spending an inordinate amount of time untangling the red tape or in client frustration. Obviously, delay in receiving payments causes serious financial hardship for many clients.

As a teacher, I want to instill in my students the importance of client autonomy. This idea is contradicted by the nature of our practice. Because our clients cannot afford private counsel, they come to the clinic. They must make the choice between representation under the conditions imposed by the contract and no representation at all.

IV. PRACTICE IN FAMILY COURT

Clinic students, having spent a year or two studying the legal system in its ideal form, have certain unrealistic expectations of what court will be like. Moreover, students' need to gain mastery over the intricacies of the law has often left them with little opportunity or inclination to take a critical approach to the process. Time spent representing real clients under real caseload pressures can provide students with a more realistic view of the legal process. Such an experience can also be used pedagogically to help students learn to deal critically with a less than ideal system, without becoming cynical.

Representing clients in family court brings the students into direct contact with how the law is experienced by ordinary people. Family court is overwhelmingly a poor people's court, which is reflected in both the substance and process of practice there. The Brooklyn Family Court[22] has the heaviest caseload in the city and a physical plant designed to accommodate approximately one-half the number of judges who now sit there. Many of the courtrooms are makeshift, the waiting rooms are usually overflowing, and the court personnel are overworked and besieged from all sides; the result is a crowded, dirty, noisy, and often hostile environment, in which getting through the calendar is the highest priority.

21. This requirement is imposed by OCSE for fiscal reasons. State child support enforcement programs receive financial incentives from the federal government based on the total amount of support collected in each fiscal year. 42 U.S.C. §658 (1988).

22. New York City is composed of five counties, each of which has its own courts.

All cases are calendared to be heard at 9:00 a.m., which means that significant numbers of people must wait all day to be heard. Much of their time can be spent standing in line to file a petition, to copy records, to inquire about lost court files or cases omitted from the calendar, to obtain records of support payments made through the Support Collection Unit, and to get copies of orders entered in their cases.

Like most lower courts, the Brooklyn Family Court often operates in an informal and less-than-lawful manner. The students have to concentrate less on the proper formula for getting documents into evidence than on trying to force the court to provide basic due process.

With the exception of those who are entitled to court-appointed counsel because of the nature of their cases,[23] most litigants in family court appear pro se. Approximately seventy percent of the respondents in cases handled by the clinic were unrepresented. This not only was disadvantageous to the respondent, but also presented problems for clinical education. There is limited value in learning how to negotiate with and try cases against unrepresented litigants. The students would learn more about evidence and trial techniques if they had more exposure to lawyers on the other side. The experience, however, requires students to confront some of the ethical issues that arise in practice in a poor people's court.

One of our cases presented an opportunity to consider how unrepresented litigants fare in family court. It simultaneously raised an ethical issue which generated a lively, heated and serious debate. We represented a client in an action to enforce a support order. The respondent was unrepresented. We were before the hearing examiner on another matter, and when it was concluded, she asked us what our next case was about. We explained the nature of our application briefly, then the hearing examiner proceeded to decide the case, off the record, and without the respondent being called into the courtroom. Only after having worked out the somewhat complicated procedural, or mechanical, aspects of this case did the hearing examiner call in the respondent. After obtaining the respondent's waiver of counsel, the hearing examiner in effect cross-examined him and then informed him of her decision. Although it was virtually an open and shut case[24] and the outcome would probably have been the same if the respondent had had a lawyer and a trial, clearly the whole proceeding was improper.

We and our clients had been the target of this hearing examiner's abusive and arbitrary behavior in the past and we knew we would appear before her frequently. How should we react when similar behavior benefited our client? The discussion in seminar, in contrast with our earlier discussions of hypotheticals, did not end with the citation of the rule against ex parte communications, but began there. The debate continued and expanded to include a number of topics relating to the potential conflicts between a lawyer's obligation to represent her client zeal-

23. N.Y. FAM. CT. ACT §262 (McKinney 1983) governs the assignment of counsel for indigent people in family court proceedings. Disputed paternity and contempt proceedings are the only instances in which appointed counsel is available to the respondent in the cases handled by the clinic.

24. The court had jurisdiction, the respondent had been served with the original order of support, he had the ability to pay, and he had not paid.

ously, and her duty to maintain the integrity of the profession (or more broadly, to work for a more just social order). No consensus was reached.

Simply learning to manipulate the existing system for the benefit of one's client leaves that system intact. Furthermore, the dissonance between a student's ideas of what constitutes a fair and just legal order and the realities of practice in an environment that deviates drastically from the ideal, can quickly lead to cynicism and burn-out. This is especially true if the student has no well-thought-out theory of her role nor a conceptual framework within which to analyze the problems.

The clinic experience underscored for students the gravity of the unavailability of counsel to a large segment of society. They were often tempted to hand out fliers about the clinic and to recruit clients in the court's waiting rooms, but we already had more than enough cases.

Actually, one of the drawbacks of the clinic in the first year was the size of its caseload. The agency with which we contract, OCSE, is charged with providing representation to all custodial parents who request services and is of necessity interested in having the clinic serve the greatest possible number of clients. In the first year, the clinic handled approximately 150 cases, about forty of which did not involve court appearances.[25] As a result of a slow start-up of the program, the number of referrals was manageable in the first semester. It was overwhelming in the second semester and we began the summer with forty pending cases which required immediate and on-going work. The effort to provide high quality representation to such a large number of clients left insufficient time for the pursuit of other educational goals.

There are, however, some benefits to be derived from a relatively large case load. It is useful for students to think about and be involved in providing services to a needy population. It gives immediacy to the profession's responsibility to find solutions to the problem of inadequate access to the legal system for the poor. Furthermore, most students will ultimately work in settings in which there is too much to be done and too little time in which to do it. The clinic can begin to teach them how to set priorities, manage their time, and deal with the stress inherent in the practice of law. It may help them develop techniques to avoid burn-out. Finally, there is a danger that if students are exposed only to a handful of "interesting" cases selected for their pedagogical merit alone, they may receive a negative message about handling "ordinary" ones.

V. CLINICAL INSTRUCTION IN PUBLIC POLICY

Law is often taught in a vacuum, divorced from the underlying social, economic, and political context from which it arises. A clinical course, alone, obviously cannot remedy this situation, but clinical practice can be the springboard for the exploration of the policy behind various laws.

Late in the first semester, I returned in class to subjects that had been covered

25. The primary reason that a case would not result in court proceedings was that our client did not pursue the action: because she reconciled with the father, could not locate him, reached an informal settlement which she chose not to have incorporated into a court order, or because of circumstances which she did not disclose to us.

in our earliest treatment of the substantive law: Who is (should be) responsible for child support? What are (should be) the elements of support? What is an appropriate or fair order of support? After only a few months of close contact with single mothers, the students' understanding of the issues involved had deepened considerably. The fact that the law governing support had undergone major revision in recent years[26] and that the state legislature was considering a bill to create a formula for support was an added stimulus to policy discussion.

The proposed state statute[27] was an excellent teaching tool. The students analyzed competing versions of the bill, compared them with model statutes, then applied the various formulas and guidelines for support to their real cases, and compared the outcome with what had actually happened in court.

There are important policy considerations underlying the debate about this proposed legislation: what does it cost to raise children; should custodial parents be required to work, and if so, when; what is the fairest way of treating income; to what extent should the government be responsible for assuring a decent standard of living for children; how should subsequent families be treated; what effect will support orders have on major life decisions such as participation in the work force or formation of new families; what will the effect on the courts be of the proposed legislation and to what extent should that be a consideration? The students' involvement with real clients enabled them to grasp fully the implications of the proposals and to understand the debate.

VI. CONCLUSION

The clinic has been quite successful in meeting its educational and contractual goals. The clinic is providing a valuable service to a previously unrepresented client population. While a law school clinic cannot represent every needy client, it can provide a model for the profession in fulfilling the duty imposed by the Code of Professional Responsibility to make legal services fully available. This benefits both the clients we are able to represent and the students, who receive a vivid illustration of the basis for the Code's mandate.

The fragmented representation of clients that sometimes results from the clinic's limited focus on child support raises questions about the wisdom of creating a clinic of this sort. If a program is entirely funded by sources that will only pay for representation in specialized cases, or that place conditions on how cases are handled, the clients may not be adequately served and there may be a negative impact on the students' education. Although the Brooklyn Law School Clinic has not experienced great difficulty with fragmented representation, other schools should consider this problem when setting up a clinical program.

A number of students chose to work in the area of family law upon graduation. For these students, the clinic was clearly beneficial. It gave them some expertise in the substantive and procedural law. They also acquired the survival skills needed to represent people in the bargain basement atmosphere that predominates

26. The Child Support Enforcement Amendments of 1984 and their progeny, *supra* note 3.

27. The proposed legislation would have amended scattered sections of the New York Domestic Relations Law, Family Court Act, and Social Services Law by establishing a detailed statutory formula for determining levels of support in all actions involving child support.

in the lower courts. For those students who choose other areas of practice, the clinic was equally valuable. It provided them with a solid foundation in the traditional skills necessary for high quality representation of clients: interviewing, counseling, fact investigation, case planning, discovery, negotiation, and trial techniques.

Instruction in skills is an essential element of clinical education and is the main attraction of a clinic for most students. We can and should, however, use the opportunities presented by the cases to pursue other pedagogical goals. Experiential learning allows students to integrate the mastery of skills with the exploration of policy and ethics. Representation of real clients deepens students' critical evaluation of the goals and methods of the legal system. It greatly enhances their understanding and ability to confront the personal and ethical conflicts that are inherent in the practice of law.